



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 2035/2020

(1) REPORTABLE: <u>NO</u>	
(2) OF INTEREST TO OTHER JUDGES: <u>NO</u>	
(3) REVISED: <u>NO</u>	
 SIGNATURE	3 August 2023 DATE

In the matter between:

GUARDRISK INSURANCE COMPANY LIMITED

Applicant

and

BUCK, NICHOLAS JOHN AND OTHERS

First to Tenth Respondents

JUDGMENT

FORD, AJ

Introduction

- [1] The facts in this matter are largely common cause. The applicant seeks judgment against the respondents, jointly and severally, the one paying the other to be absolved, for:

1.1. Payment in the amount of R8 760 333.81 (Eight million seven hundred and sixty thousand three hundred and thirty-three rand eighty-one cents), plus interest thereon at the rate of 12.5% per annum, compounded monthly in advance from 13 July 2019 until date of final payment.

1.2. Costs of suit.

[2] The applicant is, for reasons set out below, no longer proceeding against the ninth respondent.

The applicant's version

[3] On or about 1 December 2017 and at Midrand, Probuild Construction Group (Pty) Ltd ("Probuild"), executed a Deed of Indemnity in favour of the applicant. Contemporaneously with the execution of the Deed of Indemnity, the first to tenth respondents executed, in favour of the applicant, Deeds of Suretyship incorporating an indemnity.

[4] The material terms of the Deed of Indemnity executed by Probuild, and the Deeds of Suretyship and indemnity, executed by the respondents are in all material respects identical, and provide as follows:

4.1. Probuild and the respondents, as indemnifiers, indemnified and held the applicant harmless from and against all and any claims, losses, demands, liabilities, costs and expenses of whatsoever nature, including legal costs as between attorney and client, which the applicant may at any time sustain or incur by reason or in consequence, of having executed or thereafter executing any guarantee on behalf of or at the request of Probuild together with interest thereon at the prime overdraft rate of Absa Bank of South Africa Limited, plus 2% (two percent);

- 4.2. Probuild and the respondents further undertook and agreed to pay the applicant any sum or sums of money which the applicant may be called upon to pay under any guarantee, whether or not the applicant may at such stage have made such payment, and whether or not Probuild and the respondents admit the validity of such claims against the applicant under the guarantee;
- 4.3. in any settlement or claim against the applicant, the vouchers or other evidence showing payment by the applicant or statements in regard thereto, certified by the applicant's company secretary or a director of the applicant (whose authority shall not be necessary to prove) of any loss, damage, payment or expense, shall be *prima facie* evidence against Probuild and the respondents of the fact, and of the amount of or other liability to the applicant, shall be sufficient for purposes of obtaining provisional sentence against Probuild and the respondents;
- 4.4. Probuild and the respondents' liability to the applicant shall be unlimited;
- 4.5. the applicant shall be entitled without reference to any of the respondents or Probuild, and without in any way affecting Probuild or the respondents' liability in terms of the indemnities, to consent to any arrangements between the applicant, the creditors (the beneficiaries under the guarantee), or any other party in whose favour the guarantee was issued, at the instance and request of Probuild, and to make any arrangements or compound with creditors, Probuild or any such other contractor or to release Probuild or any other person from any liability to the applicant;
- 4.6. Probuild and the respondents' obligations and liability in terms of the indemnity, shall continue to remain in full force and effect as a continuing covering security until such time that the applicant is entirely and finally released and discharged from all its obligations, contingent or otherwise, under any guarantees;

- 4.7. the applicant shall be entitled to:
- 4.7.1. waive or abandon in whole or in part any right of contribution it may have or acquire against any surety or co-guarantor or any other person or company;
 - 4.7.2. release or absolve any real or personal security;
 - 4.7.3. grant extensions of time or any other indulgences;
 - 4.7.4. enter into compromises and/or to accept settlements;
 - 4.7.5. without affecting Probuild and the respondents' obligations in terms of the indemnities and despite any such waiver or abandonment, the applicant shall be entitled to require from Probuild and the respondents or any of them to repay or pay the applicant any amounts which the applicant may be called upon to pay, or any loss it may suffer or incur as a result of having executed any guarantee at the request of Probuild;
- 4.8. In the event of Probuild and the respondents, breaching or failing to observe any of the obligations or undertakings incumbent upon Probuild and the respondents, the applicant would be entitled to demand, sue for, and recover from Probuild and the respondents payment of the full amount of its actual or contingent liability under all the guarantees then outstanding, and at the discretion of the applicant enforce any security which it holds. Any money so received shall be held in pledge until the applicant is finally released and discharged from all liability, contingent or otherwise under the guarantees, or applied any payment or reduction of any actual liability existing or subsequently arising.
- 4.9. Probuild and the respondents selected as their chosen *domicilium citandi et executandi* the addresses as stipulated in paragraphs 7 to 16 of the applicant's founding affidavit;
- 4.10. the terms of the indemnities are to be construed in accordance with the laws of the Republic of South Africa; and

- 4.11. Probuild and the respondents consented to the jurisdiction of the Gauteng Local Division, Johannesburg, in respect of any matter or dispute arising from the indemnities.
- [5] Probuild and the respondents accordingly acted as co-indemnifiers when executing the Indemnities.
- [6] Probuild was placed in liquidation by virtue of an order granted by this court on 21 August 2019 under case number 26993/2019.
- [7] On or about 6 December 2017 and at Johannesburg, the applicant, issued guarantee number CG/17/03489 in favour of Lanseria Airport 1993 (Pty) Ltd ("Lanseria"), on behalf of the Cebekhulu Probuild Joint Venture (JV).
- [8] On or about 24 June 2019, and at Johannesburg, the applicant received a demand for payment from Lanseria, demanding payment of an amount of R8 396 851.36 (Eight million three-hundred and ninety-six thousand eight hundred and fifty-one rand and thirty-six cents) in accordance with clause 3.0 of the Guarantee.
- [9] Thereafter, on or about 2 July 2019, and at Johannesburg, the applicant received a demand from Lanseria demanding payment of an amount of R363 482.45 (Three hundred and sixty-three thousand, four hundred and eighty-two rand, forty-five cents).
- [10] On or about and during 2 August 2019, the applicant, through its attorneys of record, demanded from the respondents payment of the amount of R8 396 851.36 (Eight million three-hundred and ninety-six thousand, eight hundred and fifty-one rand and thirty-six cents).
- [11] The respondents have failed and/or refused and/or neglected to repay such amounts owing to the applicant and as per the indemnity finding themselves in breach of same.

The respondent's version

[12] The respondents take issue with the applicant's version as set out below. The defences raised by the respondents can, for convenience sake, be categorised as follows:

- 12.1. Non-compliance with the performance guarantee;
- 12.2. Applicant's locus standi in respect of legal action instituted against the ninth respondent; and
- 12.3. The non-joinder of Probuild.

Non-compliance with the performance guarantee

[13] The respondents submit that "*payment certificate 24*" was issued to the joint venture on 16 May 2019, this is evident from paragraph 17.2 of the applicant's supplementary affidavit. The joint venture, accordingly, had 21 calendar days to make payment, which would be 6 June 2019. The employer's principal agent (Delta) then purportedly sent a first written demand to the joint venture on 6 June 2019 (annexure SAO to the supplementary affidavit) in terms of clause 3.1 of the performance guarantee.

[14] The respondents submit that the employer's principal agent was not entitled to issue the purported first written demand to the joint venture on 6 June 2019 as the joint venture had until 6 June 2019 to make payment. The purported first written demand was, according to the respondents, sent prematurely and does not comply with the provisions of clause 3.1 of the performance guarantee. As a result, the applicant was therefore under no obligation to make payment to the employer (Lanseria) in terms of the performance guarantee and should not have done so. It held that there was subsequently, no basis upon which the applicant can claim payment from any of the respondents for the payment of R8, 396 851.36 that the applicant paid to Lanseria.

- [15] The respondents submit further that “*payment certificate 25*” was issued to the joint venture on 3 June 2019. The joint venture had 21 calendar days to make payment, which fell on 24 June 2019. The employer’s principal agent (Delta) then purportedly sent an additional written demand to the joint venture on 24 June 2019 in terms of clause 3.1 of the performance guarantee. Delta was however not entitled to issue the purported written demand to the joint venture on 24 June 2019 as the joint venture had until 24 June 2019 to make payment of certificate 25.
- [16] The purported written demand was, according to the respondents, sent prematurely and does not comply with the provisions of clause 3.1 of the performance guarantee. As a result, the applicant was therefore under no obligation to make payment to the employer (Lanseria) in terms of the performance guarantee and should not have done so. The respondents submit that there is subsequently no basis upon which the applicant can claim payment from any of the respondents for payment of the amount of R363 482.45 that the applicant consequently paid to Lanseria.

Applicant’s locus standi in respect of legal action instituted against the ninth respondent

- [17] The respondents contend that the applicant sold its alleged claim against the ninth respondent in full during 2019 to Imbhizo Holdings (Pty) Ltd Reg No: 2015/398073/07 (“Imbhizo”). Further that the ninth respondent was in business rescue during that period. It submits that an agreement was reached between the applicant, the ninth respondent (in business rescue) and Imbhizo, in terms of which the applicant sold their alleged claim of R8, 760 333.81 to Imbhizo for payment in the amount of R28 909.00¹.
- [18] The abovementioned correspondence also confirms that the applicant received payment of the full purchase price for the sale of its claim against the ninth respondent. Consequently, the proof of payment, so it was contended, meant that

¹ See correspondence between the applicant, the applicants attorney and the business rescue practitioner of the ninth respondent is attached to the answering affidavit as annexure “AA1”.

the applicant no longer possessed any claims against the ninth respondent².

The non-joinder of Probuild

- [19] The respondents aver that Probuild concluded a deed of indemnity with the applicant, same is attached to the founding affidavit as annexure "FA2". Further that various allegations are made against Probuild in the applicant's founding affidavit. It is accordingly contended that, Probuild has a direct and substantial interest in the subject matter of the application, which interest may be affected prejudicially by a judgment of this court.
- [20] For the reasons set out above, the respondents submit that the applicant should have included Probuild as a respondent, in order to allow Probuild an opportunity to defend the applicant's claims.

Applicant's response to the respondent's submissions

- [21] The applicant in turn contends, in so far as the issue of *locus standi* to institute proceedings against the ninth respondent is concerned, that it is apparent from the email communications attached to the answering affidavit, that it did not sell its claim against the ninth respondent. It is submitted that the applicant proved its claim against the ninth respondent and in terms of the business rescue plan, the applicant received its pro rata dividends from the proceeds of the adopted plan. Further that, it was a term of the business rescue plan that the purchaser would purchase the shares in the ninth respondent but in return, and after payment of the pro rata dividends, the remaining balance of the claim would be ceded to the purchaser.
- [22] The applicant accordingly transferred its right to the ninth respondent and does not proceed against the ninth respondent.

² See Annexure "AA2" attached to the answering affidavit

- [23] As to the non-joinder issue raised by the respondents, the applicant contends that Probuild was finally liquidated on 21 August 2019 and that it does not seek any relief against Probuild. The applicant, so it was argued, seeks a monetary judgment against the respondents based on the terms of the Deed of Indemnity and the respective Deed of Suretyship and Indemnity.
- [24] It was further contended that Probuild has no interest in the relief sought, and as such it was not incumbent upon the applicant to cite Probuild as a party.
- [25] In relation to the issue pertaining to payment certificates 24 and 25, the applicant contends that it received two demands from Lanseria, which is not denied by the respondents. Instead, the respondents take issue with the fact that the demands were non-compliant. The applicant avers that non-compliance is a species of validity, and that the indemnities expressly provide that the respondents are liable to pay the amount whether or not they admit validity of the claims against the applicant under the guarantee.

Analysis

- [26] The principal disputes raised by the respondents against the applicant's claim, are the non-joinder of Probuild, the applicant's *locus standi* to proceed against the ninth respondent, and the non-compliance with the performance guarantee.

The non-joinder issue

- [27] The test for joinder or non-joinder is firmly established in our law, namely, that a party sought to be joined in the proceedings must have a direct and substantial interest in the matter. The test was set out in *Klaasen and Another v Van der Merwe N.O and Others*³, in the following terms:

³ 2016 ZACC 17 at para 45

The test for joinder is that a party must have a direct and substantial legal interest that may be affected prejudicially by the judgment of the court in the proceedings concerned. In ITAC, the CC confirmed the test and said that a party seeking joinder must have a direct and substantial interest in the subject matter. The court held that the overriding consideration is whether it is in the best interest of justice for a party to intervene in litigation.

[28] In *Morgan v Salisbury*⁴ the court held that the question of joinder does not depend on the nature of the subject matter but upon how and the extent to which the court order may affect the interests of the said party. It further held that the fact that a party has an interest in the outcome of litigation does not warrant joinder.

[29] In *Morgan*, De Villiers JA stated:

The position may therefore be broadly stated to be that by South African practice the only cases in which a defendant has been allowed to demand a joinder as of right are the cases of joint owners, joint contractors and partners, in all of which cases there exists a joint financial or proprietary interest, but that in other cases a defendant, as a general rule, has not been allowed to demand such joinder. Now it is not necessary or advisable to formulate here any general statement as to the principles on which the practice, hitherto so narrowly confined, ought to be based in future, or as to the directions (if any) it ought to be extended or enlarged⁵.

[30] The learned authors, Erasmus *et al*, opine as follows with regard to the issue in question:

The question of joinder should surely not depend on the nature of the subject-matter of the suit, as some of the head-notes I have referred to would seem to imply, but – whether the suit relates to a will, an aqueduct, a partnership, or anything else – on the manner in which, and the extent to which, the Court's order may affect the interests of third parties.

[31] A party raising the issue of non-joinder must do more than simply allege that one or other party has a substantial interest in a matter, albeit partly true. It must also

⁴ 1935 AD 167 at 17

⁵ Ibid *Morgan v Salisbury* 1935 AD at 17

set out how and the extent to which a court order may affect a party's interests. The fact that a party has an interest in the outcome of litigation does not, on its own, warrant joinder.

[32] It is not in dispute that Probuild was placed in liquidation by virtue of an order granted by this court on 21 August 2019 under case number 26993/2019. I have considered the relief sought by the applicant, namely a monetary judgment against the respondents based on the terms of the Deed of Indemnity, and the respective Deed of Suretyship and Indemnity. No relief is sought against Probuild. In the circumstances, I am not persuaded that there was a need to join Probuild, nor did the respondents lead any evidence to show how Probuild would adversely be affected by an order as sought by the applicant.

[33] In the premises, the non-joinder issue raised by the respondents must fail.

Applicant's locus standi to proceed against the ninth respondent

[34] The applicant contends in so far as the issue of *locus standi* to institute proceedings against the ninth respondent is concerned, that it did not sell its claim against the ninth respondent, but that it proved its claim against the ninth respondent. Further that, in terms of the business rescue plan, the applicant received its pro rata dividends from the proceeds of the adopted plan. It submitted further that it was a term of the business rescue plan, that the purchaser would purchase the shares in the ninth respondent but in return, and after payment of the pro rata dividends, the remaining balance of the claim would be ceded to the purchaser.

[35] It seems to me, at least, that the real issue is not so much *locus standi*, but whether the applicant is to be held liable for costs for effectively withdrawing its action against the ninth respondent. Our Rules set out the procedure to be followed when a party withdraws its action against another party. This is what the allegations in respect of the ninth respondent essentially boils down to. In this regard I can only

conclude that the issue is not properly before me for determination.

Non-compliance with the performance guarantee

- [36] The respondents do not deny that Probuild gave consent to the applicant to issue the guarantee on behalf of the joint venture. They also do not deny that Probuild took full responsibility for the guarantee should there be a call under the guarantee. The respondents simply took the point that the applicant has failed to prove that Probuild has expressly and in writing, taken full responsibility for the guarantee should there be a call on the guarantee.
- [37] It appears from the consent letter, that Probuild gave consent to the applicant to issue the guarantee for the joint venture, and Probuild took full responsibility for the guarantee – should there be a call under the guarantee.
- [38] In terms of the Deed of Indemnity, Probuild undertook to indemnify the applicant and to hold it harmless from and against all claims, liabilities, costs, expenses, damages and/or losses of whatsoever nature sustained or incurred by the applicant, under or by reason or in consequence of having executed or procured any guarantee or guarantees. In order to give effect to the indemnity Probuild undertook to pay to the applicant immediately, on first written demand any sum or sums of money which the applicant may be called upon to pay under the guarantees, whether or not the applicant at such date shall have made such payment, and whether or not Probuild admits the validity of such claim against the applicant under the guarantees.
- [39] In terms of the Deed of Indemnity and suretyship, the respondents bound themselves as sureties for and co-principal debtor, jointly and severally with Probuild, *in solidum* for the due payment by Probuild to the applicant, of all and any amounts which Probuild may be liable for. The respondents also undertook to indemnify the applicant and to hold the applicant harmless from and against all and

any claims of whatsoever nature, including legal costs as between attorney and client which the applicant may at any time sustain, or incur by reason or in consequence of having executed any guarantee on behalf of Probuild. The respondents also agreed to pay to the applicant on demand any sum or sums of money which the applicant may be called upon to pay under any guarantee, whether or not the applicant had made such payment, and whether or not Probuild, the contractor or all the respondents admit the validity of such claim against the applicant under the guarantee.

[40] The respondents did not pay the amount to the applicant (as demanded) and accordingly during January 2020, the applicant instituted legal proceedings against the respondents.

[41] On 4 March 2020, the respondents delivered a Rule 6(5)(d)(iii) notice, in terms of which it was contended that the applicant had failed to establish a cause of action on the following two grounds:

41.1. firstly, and with reference to the definition of a guarantee provided in clause 1.2 of the Probuild Indemnity, the respondents contended that the applicant did not allege that Probuild issued a written request for the applicant to issue the Lanseria guarantee. All that the applicant was to secure, was the due performance and discharge of the obligations of the Cebekhulu Probuild JV. It was accordingly contended that there was no link between the Lanseria guarantee and indemnity, and in consequence thereof the respondent would not be liable under the deed of suretyship;

41.2. secondly, the respondents contended that the Lanseria demands were non-compliant with the guarantee in that they did not include a copy of the first written demand contemplated in clause 3.1 of the guarantee, and it did not include a copy of the payment certificate contemplated in clause 3.3 of the guarantee. The respondents accordingly contended that they were not obliged to indemnify the applicant for payments it was not

required to make, or was not properly called upon to pay terms of the guarantee.

[42] In response thereto, during May 2020, the applicant brought an application in which it sought leave from this court to deliver a supplementary affidavit in order to circumvent the complaints raised by the respondents. The respondent did not oppose that application, and on 20 September 2020, the court granted the applicant leave to file a supplementary affidavit.

[43] In the supplementary affidavit, the applicant dealt, in my view, comprehensively with the complaints raised by the respondents, and did so, in the following manner:

43.1. It provided a sequence of communications exchanged between the applicant and Probuild's intermediary, and between the intermediary and Probuild's representative (namely the fifth respondent). This communication resulted in Probuild (represented by the fifth respondent) in sending a letter to the applicant, which letter reads as follows:

"I, Petrus van Rensburg, give consent on behalf of Probuild Construction Group for Guardrisk to issue the guarantee (Lanseria Airport) for Cebekhulu Probuild JV on our Guarantee facility. We take full responsibility for the guarantee should [there] be a call on the guarantee."⁶

43.2. secondly, and with reference to the Lanseria demands, the applicant provided copies of the underlying documentation, including the first written demand to the contractor, the respective interim payment certificates and copies of the first written demand which were transmitted to the applicant.⁷

[44] It was correctly contended by the applicant, that on the basis of the contents of the supplementary affidavit, the complaints raised by the respondents were adequately addressed. Not only did Probuild request the applicant to issue the

⁶ CaseLines 011-89

⁷ CaseLines 011-77 to 82

guarantee, but it did so in writing, it consented to the issuance of the guarantee and took full responsibility for the guarantee should there be call on the guarantee. The applicant also demonstrated that the demand under the guarantee was compliant.

[45] When a performance bond⁸ is concluded, it exists independently from the relationship between the employer (in this instance Lanseria) and the contractor (in this instance the Joint Venture). The bank or the insurance company has an obligation to pay in terms of the guarantee, and whatever disputes emanate between the parties, (the employer and the contractor) are of no consequence to the bank⁹.

[46] In *Guardrisk Insurance Company Ltd v Kentz (Pty) Ltd*¹⁰ the court dealt with the principle of independence (or the autonomous principle) as follows:

The terms of the guarantees are clear. They create an obligation on the part of the guarantor (Guardrisk) to pay Kentz (the employer) on the happening of a specific event. It was recorded in the guarantees that notwithstanding the reference to the construction contract, the liability of the bank as principal is absolute and unconditional and should not be construed to create an accessory or collateral obligation. The guarantees go further and specifically state that the bank may not delay making payment in terms of the guarantees by reason of the dispute between the contractor and the employer. The purpose of the guarantees was to protect Kentz in the event that Brokrew could not perform its obligations in terms of the construction contract.

[47] I agree with the applicant, that the Indemnity and the Deed of Suretyship are equivalent to a performance bond. Where a guarantee has been issued at the written request of the contractor, the employer has demanded payment under the guarantee and the applicant has demanded payment under the indemnity, and the Deed of Suretyship (and indemnity), the respondents are obliged to pay the

⁸ Also known as on-demand guarantee/bond

⁹ *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others* 2010 (2) 86 (SCA) at para 20

¹⁰ [2013] ZACSA 182, para 13

amount to the applicant whether or not they admit the validity of the claim¹¹.

[48] In summary, the applicant has demonstrated that Probuild executed the Deed of Indemnity, and that the respondents executed the respective Deeds of Suretyship and Indemnity. Probuild requested, in writing, the applicant to issue the Lanseria guarantee, and it expressly took responsibility for any claim under the guarantee. Lanseria demanded payment under the guarantee (which demands were compliant), and the applicant demanded payment from the respondents. Even, as correctly contended by the applicant, if Lanseria's demand was for any reason deficient, the respondent was still obliged to pay the amount to the applicant, that is whether or not the respondents admit the validity of the demand.

[49] In the result, I make the following order:

ORDER

1. The first to tenth respondents (excluding the ninth respondent), jointly and severally, the one paying the other to be absolved, is ordered to pay the applicant:
 - 1.1. payment in the amount of R8, 731 430.71 (Eight million, seven hundred and thirty-one thousand, four hundred and thirty rand, seventy-one cents);
 - 1.2. interest on the amount of R8, 731 430.71 (Eight million, seven hundred and thirty-one thousand, four hundred and thirty rand, seventy-one cents) at a rate equal to prime overdraft rate of ABSA Bank Ltd, plus 2% being 12.5% from 2 August 2013 to date of final payment.
2. The first to tenth respondents (excluding the ninth respondent), are ordered to pay the costs of the application on a scale as between attorney and client.

¹¹ *Aegis Insurance Co (Pty) Ltd v Smith & another* (unreported case number; 12380/89: CPD) at p.10-11 *Molebatsi v Aegis Insurance Co Ltd* (unreported case number: AD4/92; the then Supreme Court of Bophuthatswana) at page 7, par 13; *Lombard Insurance Company (Ltd) Pty v Stewart & Others* (unreported case number: 15923/15; date delivered 11 October 2016; KwaZulu-Natal Division, Pietermaritzburg) at [22] - [23] [2016 JDR 1912 (KZP)]



Acting Judge of the High Court
Gauteng Division of the High Court,
Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 3 August 2023 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 3 August 2023

Date of hearing: 24 April 2023
Date of judgment: 3 August 2023

Appearances:

For the applicant: Adv. A.N. Kruger
Instructed by: Moll Quibell & Associates

For the respondents: Adv. Bester
Instructed by: Van Der Wath Attorneys