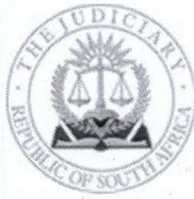
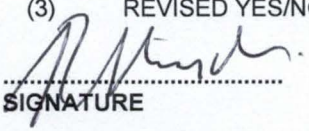
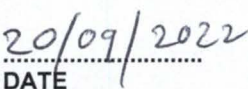


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 20/4174

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED YES/NO
	
SIGNATURE	
	
DATE	

In the matter between:

DBT TECHNOLOGIES (PTY) LTD

Applicant

and

LOMBARD INSURANCE COMPANY LIMITED

First Respondent

**TUBULAR CONSTRUCTION PROJECTS
(PTY) LTD**

Second Respondent

and

**TUBULAR TECHNICAL CONSTRUCTION
(PTY) LTD**

First Third Party

**TUBULAR ELECTRICAL AND INSTRUMENTATION
(PTY) LTD**

Second Third Party

TUBULAR PLANT HIRE (PTY) LTD

Third Party

TUBULAR PROPERTY INVESTMENTS (PTY) LTD

Fourth Third Party

TUBULAR STRUCTURAL ENGINEERING (PTY) LTD

Fifth Third Party

TUBULAR HOLDINGS (PTY) LTD

Sixth Third Party

JORGE ALEXANDRE DA COSTA BONIFACIO

Seventh Third Party

SERGIO RUI DA CAST A BONIFACIO

Eighth Third Party

CARLOS ALBERTO TEIXEIRA DE MELO

Ninth Third Party

ANTONIO JOSE DA COSTA TRINDADE

Tenth Third Party

JUDGMENT

STRYDOM J

- [1] The first respondent, hereinafter referred to as "Lombard" was sued by the applicant, hereinafter referred to as "DBT", for the amount of R128,375,851.20 based on a performance security demand guarantee ("the Guarantee") issued by Lombard on behalf of Tubular Construction Projects (Pty) Ltd, the second respondent, hereinafter referred to as "TCP", in favour of DBT. These proceedings will be referred to as the "main application".
- [2] On the strength of that claim, Lombard instituted third party proceedings, hereinafter referred to as the "third party proceedings", against 10 third parties. For purposes of a decision in this matter, the only relevant third parties are the seventh and eighth third parties, hereinafter referred to as "the Third Parties". A demand for payment was made by DBT against Lombard which was settled. Lombard seeks an order for payment against the Third Parties on the strength of an indemnity and suretyship signed by them on 7 June 2019, ("the Indemnity").

- [3] It should be mentioned that the ninth and tenth third parties entered an appearance to defend and filed an application for rescission of judgment which was previously granted by this court against them in the amount of R100 million. When this matter was heard there was no appearance for the ninth and tenth third parties and consequently the rescission application should be dismissed with costs and the previous order of this court in this regard would remain intact.
- [4] Initially, Lombard opposed DBT's claim for payment of R128,375,851.20 pursuant to the Guarantee. In Lombard's answering affidavit in the main claim it was alleged that the payment was not due to DBT as the demand was fraudulently made. This alleged fraud pertains to taking-over certificates which were not issued, but deemed to be issued, which would have reduced the exposure and liability of TPC and ultimately Lombard in terms of the guarantee. Despite this reduced amount which was owing, DBT sued for the full amount denying that taking-over certificates were issued. For purposes of deciding this application for either an order holding the Third Parties liable in terms of the Indemnity or to refer the matter for trial as was prayed for by the Third Parties, the court does not have to make a finding on the alleged fraud but will refer to what Lombard stated in its answering affidavit in the main application in this regard.

"18. It is Lombard's position that the demand could not have been made with the honest belief that the Applicant is entitled to be paid the full amount of the Guarantee and, if asked the question in the witness box, Mr D'Hondt would reasonably have to concede that proposition. If this is not admitted by the Applicant then a material dispute of fact exists on the issue of whether or not demand was made fraudulently."

- [5] It was admitted by Lombard that it must meet its undertaking to DBT, but it was stated that in the event that DBT has committed a fraud in making the demand, Lombard is excused from making payment of the amount demanded. On that basis, it was prayed in the answering affidavit that DBT's application be dismissed with costs.
- [6] Lombard, to protect itself against an adverse order against it pertaining to its liability towards DBT, despite its denial of being liable, used the Rule 13 procedure to join the Third Parties. In its founding affidavit in terms of its Rule 13(1)(a) application to join the Third Parties it was stated as follows:
- "18. In the event that the above Honourable Court upholds the applicant's claim, then Lombard alleges that it is entitled to an indemnification from the third parties on the basis of the allegations set out below."
- [7] Reference was then made to the Indemnity which was signed by the Third Parties on or about 7 June 2019 in favour of Lombard. This Indemnity was attached to the papers marked "TP11".
- [8] A few days before the matter was to be heard on 1 February 2021, the litigation between Lombard and DBT was settled and Lombard agreed to pay DBT R100 million pursuant to the Guarantee. This constituted an about-turn by Lombard who previously opposed the main application. Lombard provided reasons for its decision in its replying affidavit. These reasons *inter alia* included the fact that TCP went into liquidation. This is the party who alleged the fraud committed by DBT. Lombard was advised that there was a considerable risk, based on the express wording of the Guarantee, that it may fail to prove the fraud

for which it contended. To limit its own exposure it decided that it was in its own commercial interest to settle the claim and pay the settlement figure to DBT.

- [9] Up to that stage the Third Parties had not filed their own answering affidavits in the third party proceedings and were in fact relying on Lombard to defend the claim of DBT, which defence if successful, would have exonerated them. After the settlement and payment to DBT and upon a realisation that Lombard was not going to assist them any further, the Third Parties indicated to the court during the hearing on 1 February 2021 that they wanted to file an answering affidavit. This affidavit was approximately seven months out of time and the Third Parties were ordered to bring a condonation application. The condonation application was brought and at the hearing of this matter on 7 September 2022, the court granted the condonation for the late filing of the answering affidavit of the Third Parties in the third party proceedings.
- [10] In this answering affidavit, filed on behalf of the Third Parties, they disputed their liability in terms of the Indemnity on various grounds and simultaneously brought a counter application wherein condonation was sought for the late filing of the answering affidavit, rectification of the terms of the Indemnity, a defence of estoppel, prejudice and that the third parties were released by Lombard. It was contended that some of these issues could not be decided on the papers and that the court should refer the matter to trial. As the court already granted condonation, nothing further needs to be said in this regard.
- [11] The aim of the rectification claim is to include in the Indemnity terms to the effect that liability in terms of the Indemnity will not arise if such claim stems from fraudulent conduct or if settlement is reached between the insurance company

(Lombard) and any party in respect of any fraudulent claim. The court will deal in more detail with this claim later in this judgment.

[12] Lombard, for the first time, had the opportunity to deal with the counter application which included the application for rectification of the Indemnity, in its replying affidavit. Before the answering affidavit of the Third Parties was served with the counter application, there was no indication whatsoever that rectification would be claimed or put up as a defence against the third party notices.

[13] What the factual background has shown so far is that after the Third Parties were notified and joined in these proceedings, on the basis of the possibility of an adverse finding being made against Lombard in favour of DBT, Lombard was seeking an indemnity against the Third Parties. Before the court pronounced on the claim made by DBT in terms of the Guarantee, the matter was settled between DBT and Lombard. On 1 February 2021 the settlement was made an order of court. After this, on or about 22 February 2021, the Third Parties filed their answering affidavit and counterclaim. This was followed by a replying affidavit from Lombard now setting out the Third Parties' liability in terms of the Indemnities, no longer on the allegation that their liability is dependent on an adverse finding against Lombard in the main application, but on the changed factual basis that the claim between DBT and Lombard was settled.

[14] The alternative assertion of the settlement in the replying affidavit caused counsel for the Third Parties to argue that Lombard made out a new cause of action in its replying affidavit. This, so it was argued, should on its own, move this court to refer the matter to trial. The Third Parties want to pursue their defences against Lombard relying on the Indemnity, on the basis that Lombard

should not have paid or settled a fraudulent claim. The Third Parties want to prove that DBT's claim pursuant to the Guarantee was fraudulently made.

[15] The first issue for decision is whether a new case was made out in the replying affidavit of Lombard, and if so, what order should be made.

[16] In the third party notice dated 14 May 2020, Lombard sought an indemnification from the Third Parties to the extent set out in an annexure to the notice and on the grounds set out in the founding affidavit attached thereto. In this attachment, an order was sought that the Third Parties are declared to be liable, jointly and severally, to Lombard in the amount of R128,375,851.20, together with interest and costs.

[17] In the founding affidavit, it was stated that in the event that the court upholds DBT's claim, then Lombard alleges that it is entitled to an indemnification from the Third Parties. In the affidavit, the legal basis for the claim against the Third Parties is set out and reliance is placed on the Indemnity which the Third Parties provided on 7 June 2019 covering claims made against Lombard. The terms of the Indemnity were stated and at paragraph 48 of the affidavit it was stated as follows:

"In consequence of the Deed of Indemnity and in the event that Lombard is ordered to pay any amount to the plaintiff, Lombard is entitled to payment of the same amount from the seventh, eighth, ninth and tenth third parties."

[18] It was argued on behalf of the Third Parties that they were brought before court on the allegation that their liability will only arise once a court ordered Lombard to pay DBT the amount guaranteed. The settlement, so the argument went,

placed the Third Parties in an invidious position as they could no longer, in these proceedings, advance the defence of a fraudulent demand.

- [19] In my view, the cause of action against the Third Parties remained their liability in terms of the Indemnity and the fact that the trigger event for payment changed from a court finding liability in terms of the Guarantee to a settlement reached between the parties to the Guarantee makes no difference. It will obviously depend on the terms of the Indemnity under which conditions payment can be demanded but it does not change the cause of action which remained liability pursuant to the terms of the Indemnity. Circumstances changed after the settlement and Lombard was entitled to deal with the changed circumstances in its replying affidavit.
- [20] The matter should not on the strength of this changed circumstance be referred to trial affording the Third Parties to pursue their fraudulent demand defences. The two parties to the alleged fraud are no longer parties in the main application. DBT's claim was settled and the settlement was made an order of court. TCP went into liquidation.
- [21] Consequently, the settlement had no impact on the liability of the third parties in terms of the Indemnity. In my view, the fact that Lombard previously opposed payment and now relies on payment that it made in terms of the settlement does not assist the Third Parties to refer the matter to trial.
- [22] Apart from the request to refer the matter to trial on the basis set out hereinabove, the Third Parties raised defences of estoppel, of prejudice, of release and rectification. These defences will be dealt with separately below. First the court will consider the liability of the Third Parties without reference to these defences.

Apart from the rectification claim, the defences were more aimed at the applicability of the Indemnity and whether Lombard could place reliance on it.

[23] Clause 10 of the Indemnity determines that the contract can be enforced according to its tenor, that is, as an indemnity or as a suretyship.

[24] In this matter, Lombard relied on the indemnity provisions of the Indemnity.

[25] In terms of this written Indemnity, Lombard agreed to furnish a guarantee for the due performance by TCP of its obligations under a construction contract and the Third Parties agreed, over and above binding themselves as sureties, to indemnify Lombard against any claim, loss, demand, liability, cost, or expenditure that it might incur as a result of issuing the Guarantee.

[26] The Guarantee was issued as long back as 8 September 2009 securing the obligations of TCP in relation to the contract concluded between it and DBT.

[27] In terms of the Guarantee, Lombard undertook to pay an amount of R128,375,851.20 upon receiving written demand from DBT. On 13 January 2020, DBT demanded payment in terms of the Guarantee and on 15 January 2020, Lombard caused a demand to be made on the third parties in terms of the Indemnity.

[28] The Third Parties in terms of the Indemnity agreed in express terms to the following:

28.1 They would indemnify Lombard and hold it harmless against *“all and any claims, losses, demands, liabilities, costs and expenses of whatsoever*

nature, including legal costs as between attorney and client which it may at any time sustain or incur” (clause 2 of the Indemnity).

28.2 They undertook and agreed to pay Lombard on demand any sum which Lombard had been called upon to pay under the Guarantee, irrespective of whether Lombard had already made that payment and irrespective of whether they admitted the validity of the claim against Lombard under the Guarantee (clause 3 of the Indemnity).

28.3 Lombard was entitled, without reference to the third parties and without affecting their liability under the Indemnity to consent to any arrangement between the creditors, the grantors and/or the contractors and to make any arrangements or compound with the creditors, the guarantors and or/contractors. (clause 6 of the Indemnity)

[29] It is common cause that demand was made by DBT pursuant to the Guarantee and that would have triggered liability in terms of the Indemnity unless their defences are upheld.

[30] The Third Parties deny liability on one or more of the following grounds:

30.1 The Third Parties contend that the demand by DBT that was made on Lombard under the Guarantee was fraudulent and, therefore, Lombard was not liable to pay any amount under the Guarantee and this would mean that the Third Parties should then not be liable to pay any amount to Lombard. On behalf of Lombard, in heads of argument this defence was referred to as “*the fraud defence*”. The court will also use this description as well as the further descriptions referred to by Lombard.

- 30.2 The Third Parties also contend that by virtue of a misrepresentation by Lombard, which resulted in them acting to their detriment, Lombard should be estopped from relying on the Indemnity (*"the estoppel defence"*).
- 30.3 It is further contended by the Third Parties that by settling the matter with DBT, Lombard acted in a manner that prejudiced the Third Parties and, therefore, they are to be released from their surety obligations (*"the prejudice defence"*).
- 30.4 It is further contended that Lombard released the Third Parties expressly and in writing from their obligations under the Indemnity (*"the written release defence"*).
- 30.5 As already indicated, the Third Parties alleged that the Indemnity did not reflect the common intention that existed between the Third Parties and Lombard at the time the contract was concluded and, consequently, the Indemnity falls to be rectified in a manner that will have the effect of excluding Lombard's claim against the Third Parties (*"the rectification defence"*).
- 30.6 It was further argued on behalf of the Third Parties that these defences raised led to factual disputes not capable of decision on the papers and for this reason the Third Parties requested this court to refer the matter to trial. The issues on which a dispute of fact is claimed to exist arises from these defences and particularly in relation to the alleged fraudulent demand.

The fraud defence

[31] The Third Parties contend that when DBT demanded payment from Lombard under the Guarantee it acted fraudulently because it knew that it was not entitled to be paid any amount under the Guarantee.

[32] In my view, this defence flies in the face of the express terms of the Indemnity, more particularly in that the Third Parties agreed to indemnify Lombard even if Lombard do not admit the validity of the claim by DBT against Lombard under the Guarantee. The fact that Lombard previously pursued a defence on the basis of a fraudulent demand, this does not mean that Lombard could not have changed its mind on this and could not settle DBT's claim as it in fact did. Consequently, this fraud defence is not a defence against the liability of the Third Parties in terms of the Indemnity.

[33] In this regard it should be borne in mind that distinct contractual relationships are at play in this matter. The Guarantee existed between DBT and Lombard and the Indemnity existed between Lombard and the Third Parties. The two contracts give rise to separate legal relationships and DBT is not a party to the Indemnity contract between Lombard and the Third Parties. The fraud that is relied upon by the Third Parties is the alleged fraud of DBT. There is no assertion by the Third Parties that Lombard, in and of itself, is guilty of any fraudulent conduct, nor is it alleged that Lombard colluded with DBT in committing the alleged fraud on itself.

[34] The situation would possibly have been different if the fraud was established before demand was made or where the terms of the Guarantee were fraudulently altered by the contractor, for instance, by amending the guarantee amount or

expiry date. A mere allegation of fraud, which was in any event contested by DBT, could never prevent payment in terms of the Guarantee. The purpose of a Guarantee is to secure payment when there is non-performance of a contract or when a dispute arises pertaining to performance. Payment will be made in terms of the Guarantee whilst the dispute can be adjudicated between the parties involved thereafter. Payment in terms of the Guarantee is on written demand which event took place. (See *Coface South Africa Insurance Co Limited v East London Own Haven t/a Own Haven Housing Association* 2014 (2) SA 382 (SCA)) In this matter, with reference to English authorities, the court found that performance guarantees are virtually promissory notes payable on demand. Only in cases where fraud was established or the fraud was obvious to the knowledge of the guarantor, payment of demand will not be made.

- [35] In respect of the fraud exception it was held in *Guardrisk Insurance Company Limited & Others v Kenz* [2013] ZASCA 182 at paragraphs [10] to [17] that it was not expected of the guarantor faced with a valid demand in respect of a performance guarantee to investigate the contractual position between the beneficiary and the debtor. Accordingly, there was no duty on Lombard to investigate the allegations of fraud and to make its independent evaluation and determination on such allegations. It was submitted on behalf of Lombard that disputes and allegations of fraud as was made by TCP are common-place in contracts of this nature. The allegations of fraud were not as such that fraud was established or that it could be found that Lombard coerced in fraudulent behaviour. The fraud exception is not applicable in this case.

[36] Moreover, the Indemnity in this case stands on its own feet and contains its own terms which bind the parties to the Indemnity. To this extent, it is different from payment claimed pursuant to a suretyship which will, depending on its terms, only become payable if the principle debt is established.

[37] On behalf of Lombard, reference was made to *Wessels: Law of Contract* at para 112 where the following was stated by the learned author:

“It is a general rule of our law that if the fraud which induces a contract does not proceed from one of the parties, but from an independent third person, it will have no effect upon the contract. The fraud must be the fraud of one of the parties or of a third party acting in collusion with, or as the agent of, one of the parties.”

[38] The court was further referred to the decision of Navsa JA in *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others* 2010 (2) SA 86 (SCA) cited as authority for the *autonomy principle* in the Law of Guarantees, namely, that the guarantee contract is independent from the underlying construction contracts.

[39] This case is on all fours with the present matter and even the wording of the indemnity contract in that matter was the same as the one in the present matter. The case also concerned a claim by Lombard to be indemnified having paid out an amount under the Guarantee that had been issued by it.

[40] In this matter, Navsa JA found as follows:

“[21] In the present case Lombard undertook to pay the Academy upon Landmark being placed in liquidation. Lombard, it is accepted, did not collude in the fraud. There was no obligation on it to investigate the propriety of the claim. The trigger event in respect of which it granted the guarantee had occurred and demand was properly made.

[22] The same applies to the undertaking by the three respondents. They undertook to indemnify Lombard in the event that it paid a claim based on the guarantee provided by it. That event occurred and the respondents were thus likewise liable.”

[41] In *casu*, a demand was also made on Lombard under the Guarantee and Lombard immediately thereafter demanded payment from the Third Parties under the Indemnity. In my view, the mere fact that Lombard at some stage pursued the fraudulent defence against DBT does not change the situation. As stated it could have changed its mind on this issue and could have decided, as it did, despite allegations of fraud, to settle the matter. This it could do in terms of the Indemnity. Moreover, the Indemnity specifically provided that Lombard did not have to accept validity of the claim and could settle claims without effecting the liability of the Third Parties to it.

[42] Consequently, the fraud defence is defeated by express terms of the Indemnity and as already found by this court, the matter should not be referred to trial on the strength of the allegations of fraud. The fraud allegations do not create a factual dispute pertaining to the liability of Third Parties towards Lombard in terms of the Indemnity.

The estoppel defence

[43] The Third Parties allege that Lombard represented to them that the Indemnity furnished by them in 2019, and on which Lombard now relies, would not operate retrospectively and would not secure Lombard’s obligations under the 2009 Guarantee for which it now seeks an indemnity.

[44] Before dealing with the other requirements for successful reliance on an estoppel defence, the first question to be considered was whether there was such a representation and if not, that would mean the end of this defence.

[45] The Third Parties rely on an email dated 14 July 2015 wherein Mr Duffin of Lombard, wrote to Mr Hugh Wood, the TCP's insurance broker, as follows:

"We have discussed the matter internally and advised that in order for us to issue the requested Guarantees we would require the shareholders of the Tubular main board to sign personal surety. These personal sureties will only apply to new guarantees issued and not to the guarantees currently in place."

[46] On the papers before this court sufficient context is provided to make a finding that the contents of this email had no bearing on the Guarantee issued by Lombard during 2009. The reference to "*the requested guarantees*" was a reference to the request that was made on 6 July 2015 for Lombard to issue a Performance Guarantee and Advance Payment Guarantee on behalf of Tubular Electrical & Instrumentation (Pty) Ltd in relation to a project for Assmang (Pty) Ltd. In other words, the requested guarantees concerned a different contractor and a different project and a representation was made in relation thereto. This finding is further supported by a series of emails between Mr Duffin and Mr Wood. These emails make it clear that there was a request to issue further guarantees, for a different project, but that it was subject to the shareholders signing personal surety for the guarantees. Mr Wood replied that the Tubular main board shareholders would not sign the requested personal sureties. This was followed by the email which was quoted above. This email occurred within a specific context and concerned two specific guarantees unrelated to the current matter. The court can safely conclude that the statement by Mr Duffin was not made

generally and did not apply across the board to all suretyships. This conclusion is further buttressed by a further reply from Mr Wood to Mr Duffin in which he tendered the personal suretyships of various individuals, but which did not include either of the third parties and asked whether Lombard would be prepared to issue the two guarantees on the basis of the tendered securities.

[47] On 16 July 2015, Mr Duffin confirmed that Lombard would issue the two guarantees on the strength of securities suggested by Mr Wood and then concluded by saying –

“Please note that all future guarantees will be considered on a case by case basis”.

[48] This was then followed by an email from Mr Wood on 12 August 2015 requesting Lombard to “shelve the Guarantees for Assmang” as a bank was going to issue those guarantees.

[49] Thus, the statement of Mr Duffin that suretyships would not apply to existing guarantees applied to two specific guarantees which were never issued. The statement did not apply to suretyships not yet in existence and accordingly, did not apply to the suretyship and Indemnity signed on 7 June 2019.

[50] This conclusion is further supported by the context in which the Indemnity of 7 June 2019 was signed by the Third Parties. Leading up to the signing, Mr Wood was, in an email dated 22 May 2019 sent by Mr Peter Suremann of Lombard, advised as follows:

“As discussed: (i) while we still have the R128m Guarantee issued in favour of DBT, we are not amenable to limiting personal suretyships; (ii) ... Once the Kusile issue have gone away, we can review our position again. We trust

that you understand. If Tubular is in agreement with the facility review dated 27 February 2019, please let us have their acceptance thereof, then we will get the new securities in place.”

- [51] Further correspondence was exchanged to secure a facility to cover the issuance of guarantees to the extent of R250m.
- [52] The express terms of the facility letter signed by the eighth third party stipulated that the personal suretyships of the Third Parties were required to secure the Deed of Indemnity signed by the first third party in 2007 and, in terms of which, the Guarantee was issued on 8 September 2009.
- [53] Thus, the existence of the Guarantee of R128m was specifically recorded in the correspondence and Lombard stated expressly that for so long as the Guarantee remained extant it would not consider limiting any personal suretyships. There is, accordingly, no merit in the Third Parties’ defence that they are not liable in terms of the Indemnity for the relevant Guarantee.
- [54] In coming to this conclusion, the court was cognisant of the fact that it should apply the *Plascon-Evans* rule in coming to findings on affidavit. The version proffered on behalf of the Third Parties is far-fetched and untenable and could be rejected outright meaning that there is no need to refer this issue to trial.
- [55] The undisputed facts do not support the alleged representation relied upon by the Third Parties to the effect that the indemnity would not apply to guarantees that were already in existence when the indemnity was signed retrospectively.
- [56] Without representation there is no scope for the operation of a doctrine of estoppel and this defence should fail.

The prejudice defence

[57] The Third Parties contended that when Lombard settled the matter with DBT for R100m instead of R128,375,851.20, Lombard acted to their prejudice and consequently they are to be released from their suretyship obligations.

[58] The court already found that in terms of the Indemnity, Lombard was entitled to settle the claim of DBT. Moreover the court is not dealing with a suretyship but rather with an Indemnity which provides that the claim can be settled. The settlement did not breach the Indemnity. Prejudice can only be caused if a contract is breached and not if a party to the contract acted within the bounds of such contract. (see: *Absa Bank Ltd v Davidson* 2000 (1) SA 1117 (A) at para 19).

[59] Consequently, the defence based on the claim of prejudice resulting from settlement of the main application with DBT is not a defence which can succeed in the hands of the Third Parties.

The written release defence

[60] The Third Parties claim that Lombard released them from their indemnity "*in relation to any liability or exposure arising after 23 April 2020*". Such a release was in fact provided in writing.

[61] It is contended that the Third Parties' liability or exposure in this matter arose on a date after 23 April 2020, to wit on 5 May 2020, being the date when the third party notices were issued and that they cannot be held liable to indemnify Lombard for the payment which was made.

[62] I am in agreement with the submission on behalf of Lombard that the liability of the Third Parties did not arise on 5 May 2020 but rather that it arose on 15 January 2020 when Lombard demanded payment from them in an amount of R128,375,851.20.

[63] The Third Parties undertook, in terms of clause 3 of the Indemnity, to pay Lombard "*on demand*". It follows that Lombard's cause of action against them was complete, and their liability arose when demand was made. The subsequent Third Party notice constituted the enforcement of the cause of action that already crystallised. This defence should fail.

The rectification defence

[64] It is the Third Parties' case that the indemnity does not accurately record the true and common continuing intention of the parties and a claim for rectification is sought. The extent of the rectification is detailed and need not be stated in any detail, save to allude to its general envisaged impact. The rectification pertained to limit the limitation of the Third Parties' liability to future guarantees and not to operate retrospectively and, further, would not arise if such claims stem from a fraudulent conduct or settlement reached between the insurance company and any party in respect of any fraudulent claim.

[65] Part of the claim for rectification is premised on the 2015 alleged agreement that suretyships signed after that date would not operate retrospectively. The court already dealt with that defence and found it to be untenable and far-fetched. Accordingly, the court is of the view that the rectification as far as this issue is concerned should not be referred to trial. In my view the intended rectification

should not be ordered as it would not reflect a common continuing intention of the parties to insert this proviso into the indemnity.

[66] It is well established in our case law that there is only one exception recognised which would excuse a guarantor to avoid payment in terms of an on-demand bond and that is where the demand is fraudulent. For this reason, it was not necessary to insert such a term in the Indemnity and it cannot be found that it was the common continuing intention of the parties to do so.

[67] This would mean that had the demand of DBT been fraudulent, then Lombard would have been entitled to refuse payment in the limited circumstances referred to hereinbefore. There was no reason why this fraud exception would have been articulated in the Indemnity, more so considering that the parties to the Indemnity were prepared to sign the standard form of Indemnity used by Lombard.

[68] This court does not accept that it was the common intention of the parties when the Indemnity was signed that payment in terms of the Guarantee would not be made on the mere allegation of fraud. The same applies to render the Indemnity unenforceable if the amount claimed by DBT was settled at a lower amount. There is no evidence that these issues were discussed let alone that Lombard agreed thereto but as a result of common mistake left these terms, limiting the ambit of the Indemnity, out of the written document. The version of the Third Parties on rectification is untenable and far-fetched and there is no need for the matter to be referred to trial. In my view, the rectification is sought by the Third Parties to amend the terms of the Indemnity to create a defence for the Third Parties to avoid the consequences of Indemnity as it stands.

[69] Even if the rectification is granted in the terms which the Third Parties counterclaim for, this would not prevent them from being liable. The rectified Indemnity would not prevent a payment on a demand that is alleged to be fraudulent. Lombard will not be excused from honouring a demand because it is alleged to be fraudulent.

[70] The defence of rectification can be dismissed on the papers before this court.

[71] Lombard has proven that the Third Parties are liable to it in terms of the Indemnity. Lombard asked for payment of the amount of R100 000 000.00 being the amount it paid to DBT in terms of a settlement.

[72] Save for the condonation application for the late filing of the answering affidavit, the counterapplication of the Third Parties should be dismissed with costs.

[73] Costs should follow the result and the Indemnity provides for costs on the attorney and client scale.

[74] The following order is made:

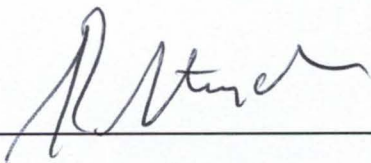
74.1 The Seventh and Eight Third Parties are declared to be liable, jointly and severally, the one paying the other to be absolved, to the First Respondent in the amount of R100 000 000.00 together with interest thereon at the rate of 2% above the prime overdraft rate charged by ABSA Bank from time to time, calculated from date of demand being 15 January 2020 to date of payment.

74.2 Save for the condonation application for the late filing of the answering affidavit of the Seventh and Eight Third Parties which was already granted

by the court, the counterapplication of the Seventh and Eight Third Parties is dismissed.

74.3 The Seventh and Eight Third parties are jointly and severally, the one paying the other to be absolved, to pay the costs of the First Respondent on the scale as between attorney and client, such costs to include the cost of two counsel where employed.

74.4 The rescission application of the Ninth and Tenth Third Parties is dismissed with costs.



RÉAN STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

Date of Hearing: 07 September 2022

Date of Judgment: 20 September 2022

APPEARANCES

On behalf of the Applicant: Adv. C. Mc Aslin

On behalf of the Respondent: Adv. E.J Ferreira SC (for the 7th and 8th Respondents)