REPUBLIC OF SOUTH AFRICA

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

CASE NO: 24233/18

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

19/10/2018 .... DATE

.... SIGNATURE

In the matter between:

TEICHMANN STRUCTURES (PTY) LTD	**1ST APPLICANT**
and	
HOLLARD INSURANCE COMPANY LTD	**1ST RESPONDENT**
ELB ENGINEERING SERVICES (PTY) LTD	**2ND RESPONDENT**

J U D G M E N T

CARRIM AJ:

1. In this matter, the Applicant brought an urgent application seeking an order interdicting the First Respondent from making payments to the Second Respondent in terms of a Performance Guarantee and an Advance Payment Guarantee issued by the First Respondent in favour of the Second Respondent and compelling the Second Respondent to deliver to the Applicant the original Performance Guarantee and costs against the Second Respondent.

2. The application was heard by Dippenaar AJ on 10 July 2018. Interim relief was granted by her in respect of the Advanced Payment Guarantee (APG)[1] but refused in respect of the Performance Guarantee.[2] Pending the final determination of the application, the First Respondent ("Hollard") was restrained from making payment to the Second Respondent. The application for final relief was postponed to 10 September 2018 and the matter was argued before me on that day.

3. At the outset, the Applicant submitted that it no longer persisted with an order for final relief and applied instead for the matter to be referred to oral evidence for the determination of two main issues –

3.1. Was the Advance Payment Guarantee numbered EFP/EBGSP/00133725#1 issued to secure the Applicant's obligation to

[1] Prayer 2(b) of the Notice of Motion
[2] Prayer 2(a) of the Notice of Motion

repay the advance payment of R16 246 006.66 only or was it issued akin to a Performance Guarantee in order to secure the Applicant's obligations generally? and

3.2. Was the demand by the Second Respondent on 22 June 2018 for payment under the aforementioned guarantee fraudulent?

4. The Second Respondent ("ELB")[3] opposed the request for referral to oral evidence on the basis that the applicant ought to have foreseen the factual dispute when it first launched the application.

Background facts

5. On 29 March 2017, the Applicant and ELB entered into a contract for the construction of civil works on the Gamsberg Zinc Concentrator Project ("the works") under Project Number PG0024-00044 ("the contract"). ELB was the main contractor in terms of the contract it had with Black Mountain Mining (Pty) Ltd ("Black Mountain") and the Applicant was ELB's sub-contractor.

6. The terms of the contract were mainly regulated by the Federation International des Ingenieurs-Conseils (FIDIC)[4] conditions of contract for

[3] I will refer to the second respondent as ELB interchangeably
[4] Federation International des Ingenieurs-Conseils

Construction Building and Engineering Works Designed by the Employer, 1999 ("the Red Book").

7. The Applicant required advance payments in order to commence work and was given the following advance payments over the duration of the contract-

   7.1. An early advance of R 8 690 128.90 on 1 June 2017;

   7.2. An amount of R16 244 820.53 which was paid directly to the suppliers of the Applicant by ELB; and

   7.3. An amount of R12 000 000.00 which ELB had advanced to the Applicant at the request of Black Mountain because the Applicant had approached Black Mountain directly. Black Mountain paid the money over to ELB who in turn advanced it to the Applicant on 8 August 2017.

8. The Applicant provided a Performance Guarantee in the amount of R8 890 128.90[5] (being10% of the contract price), a first APG in the amount of R8 690 128.90[6] and a second APG of R16 246 006.66.[7]

9. The Performance Guarantee is no longer a subject of these proceedings, relief thereon being denied by Dippenaar AJ. The first APG has since

[5] Clause 4.2 of the contract
[6] Clause 14.2 of the contract
[7] As agreed between the parties

expired and is also not the subject of these proceedings. Only the second APG remains the subject of these proceedings.

10. It was anticipated that the contract would commence on 31 March 2017 and the time of completion was estimated as 30 November 2017. It seems that the Applicant only commenced work on site on 12 May 2017.

11. Mr Thomas Siebert ("Siebert") was appointed as Engineer, whose duties included the certification of payment. Siebert happened to be an employee of ELB.

12. A process of payment was established whereby an application for payment by the Applicant was made and an Interim Payment Application, referred to by the parties as Interim Payment Certificate ("IPC") was prepared, which required two sets of signatures from each party. The first set of signatories consisted of a signatory from each side, from people who were seemingly closer to the works, for example, the engineer on behalf of ELB and the site agent on behalf of Teichmann. The second set also required a signatory from each side, presumably from people authorised to sign off on final payment.

13. The project did not progress as initially anticipated and timelines were pushed out. Labour and Supplier disputes seem to have impacted on

progress at various times. While milestones were not being achieved on time by the Applicant, payments were also not being made by the Second Respondent timeously.[8]

14. It was common cause that the APG is an unconditional guarantee and that Hollard would be obliged to satisfy the ELB's claim provided it complied with the requirements of the guarantee itself. Guarantees such as these are considered to be irrevocable letters of credit, their essential feature being a contractual obligation on the part of the bank (Hollard in this case) to pay the beneficiary (ELB in this case), an obligation which is wholly independent of the underlying contract.[9] The guarantee is often written as a letter of undertaking or irrevocable credit, addressed to the beneficiary or the Favouree (see annexure "NOM B"). All that is required for payment is a demand by the claimant.[10] These types of "on-demand" guarantees are commonly found in construction projects, precisely to secure either the performance obligations of the contractor or advance payments made to them and which might not have been recouped by the employer. They are seen as protective measures for employers/beneficiaries against the default of the contractor of its obligations under a contract. The only basis on which

[8] See the many various emails annexed to the papers but as an example see email in "SRA6" from Graham Comins to Waldemar Hulscher dated 12 September 2017 and the threads below.
[9] See *Lombard Insurance Co v Landmark Holdings (Pty) Ltd* 2010 (2) SA 86 (SCA)
[10] See *Min of Transport and Public Works, Western Cape & Another v Zanbuild Construction (Pty) Ltd & Another* 2011 (5) SA 528 (SCA)

a guarantor (issuing bank) can withhold honouring its irrevocable undertaking is if the claim by the Favouree was fraudulent.

The issues

15. The Applicant's case in essence is that ELB has recouped the entire advance payments made to it that were specifically secured by the guarantee. The Applicant concedes that an amount of R2 129 876.62 is outstanding but alleges that this amount is not secured by the APG and is related to the R12 000 000.00 loan which was a "*transaction entirely separate from the building contract*". [11]

16. Hence a distinction is drawn by the Applicant between secured and unsecured advance payments. In its view, only those amounts that were secured by the guarantee *specifically* could be claimed by ELB. Given that the amount of R2 129 876.62 was related to the unsecured advance of R12 000 000.00 this had to be recouped or claimed in another way and not under the guarantee.

17. As to the terms of the unsecured R12 000 000.00 loan, it was alleged that "*there were no specific terms for that loan other than the fact that the parties*

[11] Para 36 FA

agreed that it would of course be repaid through the certification process and through the Final Account if necessary."[12]

18. The Second Respondent's case was that the Applicant owed approximately R25 000 000.00 of advance payments that had not been recouped. All advance payments made to the Applicant were loans to be recouped over the duration of the contract and were treated the same by the parties in their interactions, which included the R12 000 000.00. Furthermore, the wording in clause 2 of the APG allows ELB to claim for "*any loss or damage caused to or would be caused to you (ELB) by reason of default(s) on the part of the Party in discharging any of its obligation under the said contract and specifying the amount to the Guarantor*". The Applicant had accepted this wording at the time the guarantee had been issued and it was now a binding agreement between Hollard and ELB.

19. The Applicant further alleged that it had cancelled the contract on 26 April 2018 and that its liability falls to be determined as of that date, and that when the Second Respondent made the claim on the APG on 22 June 2018, it was aware that the Applicant had already terminated the contract. ELB disputed this, submitting that the Applicant had at one stage indicated its intention to cancel the contract but that did not occur.

---

[12] FA para 38

Assessment

20.In my view this case turns on a very narrow issue. The Applicant has conceded that there is an amount outstanding in its founding affidavit. The central plank of the Applicant's case is that the outstanding amount of R2 129 876.62 did not form part of the secured advance payments made to it by ELB. In my view if the Applicant is unsuccessful in showing this there would be no need for me to pronounce on the interpretation of clause 2 of the APG or for that matter whether the contract had been cancelled or not.

21.In relation to the interpretation debate the Applicant argued that if clause 2 was found to cover all advance payments it would seek a rectification of the contract because that was not what it had intended. However, such relief is not available to the Applicant in these proceedings because as Mr Burman on behalf of ELB pointed out, the Applicant was not a party to the contract between Hollard and ELB.[13] I return to the cancellation dispute later.

22. The Applicant relied primarily on two documents for its case that all secured advances had been recouped, namely IPC 13 dated 25 May 2018[14] and an email from Mr De Waal ("De Waal"),[15] dated 18 June 2018.

[13].See the discussion above about the nature of the APG
[14] "FA9"
[15] "FA10"

23.IPC 13 lists Advance Payments made to the Applicant in the amount of R36 934 949.43 then reflects an amount of R 34 805 072.81 in the line item "REPAYMENT OF ADANCE PAYMENT". The balance owing to the Applicant of R114 320.29 is reflected in the bottom line "NET AMOUNT PAYABLE THIS CERTIFICATE".

24.In its founding affidavit, the Applicant reproduced the sentence in the email which read: "*ELB acknowledges that the advance payments have been recovered under the recent amendments and payment certificates and there is no need to extend these*" ("the sentence") as support for its the conclusion that all the secured advance payments had been recouped and therefore there was no need to extend the validity of the guarantees.[16] There was a further issue about Applicant's failure to extend the APG which I find unnecessary to deal with in detail.

25.The two documents read together are relied upon by the Applicant as support for its version that the claim on the APG was fraudulent because the Second Respondent *itself* had confirmed to it that all advance payments had been recouped (IPC 13) and there was no need to extend the validity of the guarantee.

[16] FA para 40.

26.However, De Waal on behalf of the Second Respondent alleges that IPC 13 was really a suggestion, in essence a proposed payment plan in the event that the parties agreed to certain amendments to the contract. This is evident from De Waal's email, the parties at that stage were engaged in negotiations regarding the amendments. The Applicant ultimately did not accept the amendments and therefore IPC 13 was not implemented. Accordingly, the advance payments stated therein were not recouped.

27.In relation to the R12 000 000.00 loan, De Waal explains that this was advanced to the Applicant at the request of Black Mountain because the Applicant had approached Black Mountain directly. Black Mountain paid the money into ELB's account and ELB then paid this onto the Applicant. (Annexures "AA3.1" and "AA3.2"). He alleges that it was agreed that this advance would be paid back to Black Mountain by way of monthly deductions of R2 000 000.00 each from payments otherwise due to the Applicant. The first three deductions from amounts due did not take place because of the Applicant's financial constraints but subsequent ones had been. To date, the Second Respondent has recouped R10 000 000.00 from the Applicant, with R2 000 000.00 still outstanding. (Annexures "AA4" – "AA7"). While the R12 000 000.00 was to be "repaid" by way of monthly deductions, it was treated as an advance payment to the Applicant to be recouped under the contract and not outside of it. To date the advance payments of R8 690 128.90 and R16 246 006.66, in which the R2 000 000.00 is included, have not been repaid or recouped.

28. A closer reading of De Waal's email of 18 June 2018, is warranted to understand its context.

29. In the email De Waal first summarises the progress in the discussions and then says "*Teichmann's claims through the agreed process has made significant progress to the point where the* *<u>agreed portions can now be incorporated in amendments</u>* (my emphasis) *and in the final account*". He then goes on to say "*ELB's claims are next up for discussion*". All of this clearly indicates that the parties were engaged in an agreed process to resolve matters (in order to arrive at the Final Account) but confirms they are still in *discussions* about how to do this.

30. The paragraphs that immediately precede and succeed the sentence relied upon by the Applicant are critical to understanding its full context. The paragraph starts with the words:

> "*Given the progress that Paul and I (with help from the team) have made with the above I would suggest the following:*
>
> *That ELB compile and present its claims followed by a meeting with the key players to agree a method of addressing these...Naturally this is still*

dependent on the outcome of Warren's extended brief which should be imminent.

[ELB acknowledges that the advance payments have been recovered under the recent amendments and payment certificates and there is no need to extend these.][17] *After receipt of your agreement and verification that the amendments have been signed by all, ELB will return the originals for cancellation.*"

31. The sentence, relied so heavily on by the Applicant, read in context does not lend support to the Applicant's version that De Waal had provided an unconditional confirmation that all advance payments (of any type) had been recovered. On the contrary it confirms ELB's version that the parties were engaged in discussions and De Waal had put forward a suggested plan of action provided that the Applicant agreed to the amendments.

32. It is common cause that the Applicant did not agree to the amendments so there could be no recovery of the advance payments.

33. The Applicant was challenged by the Second Respondent to provide proof that IPC 13 had been implemented. A reconciliation was eventually provided in the Applicant's Supplementary Replying Affidavit deposed to by

[17] The sentence relied upon by the Applicant

Mr Roland Ramphal ("Ramphal"), at page 673 ("SRA7") which shows a column headed "Payment Applications" and another entitled "Payments Received".

34. The explanation provided by Ramphal at paragraphs 148.3 and 148.4 is as follows-

34.1. SRA7 is a reconciliation of the amounts paid to the Applicant for this project measured against amounts certified due to be paid by the Applicant;

34.2. The reconciliation records the Applicant having been paid the sum of R128 827 184.59 as against the invoiced amount of R128 359 655.95, a slight <u>overpayment</u> of R467 528.64;

34.3. Due to the haphazard manner in which the Second Respondent made payments it was difficult to reconcile actual payments against payment certificates, but that the reconciliation "*conclusively demonstrates that IPC 13 having been implemented by the Second Respondent after it was issued by the engineer*".

35. However, there are a number of anomalies in SRA7. The first is that IPC 13, which was only signed on 27 April 2018, has been included under Payment Applications but the last actual payment date is recorded as 23 April 2018, a payment made *prior* to IPC 13 being generated or signed. A further anomaly

in SRA7 is the figure of the first advance payment which is recorded as R9 906 746.95. This figure in earlier documents was put at R8 690 128.90. The entire exercise employed in SRA7 seems to have been designed to correspond ultimately with IPC 13 because the statement "*corresponds with certificate #13 TTD*" is found underneath a column with the amount of R114 069.63, an amount similar to that in IPC 13 in the line item "Net Amount Payable This Certificate". This amount is not reflected in the Actual Payments column.

36. Ramphal does not state who did the reconciliation, when it was done and whether it was audited. Neither does he provide any explanation for the anomalies. No proof of payments in the form of EFT's or bank statements, which could easily have been obtained, were attached to the affidavit. A belated explanation of the method employed in SRA7 was provided by Counsel from the bar but was unhelpful in explaining these anomalies.

37. In my view, SRA7 does not provide any proof of the implementation of IPC 13.

38. Moreover, the documents in the record tend to suggest that notwithstanding the specific repayment arrangement regarding the R12 000 000.00, all amounts advanced to the Applicant were treated in the same manner by both

parties namely as advance payments to be recouped by way of work done or deductions. As can be seen, each interim payment applicant, the line items "Repayment of Advance Payments" are listed merely as that, without any distinction being made whether these were against secure or unsecured advances (see Annexures AA4 – AA7). If the distinction, as sought by the Applicant, was intended by both parties one would have expected to see recoupments recorded against the specific advance types. Indeed, IPC13 itself which is so heavily relied upon by the Applicant makes no such distinction. There are only the globular figures of "Advance Payments" and "Repayment of Advance Payment".

39. Critically, the Applicant eventually conceded that it had arrived at the outstanding amount of R 2 129 876. 62 by *merely subtracting* R34 805 072.81 from the figure of R36 934 949.43 reflected on IPC 13 and as discussed above IPC 13 makes no distinction between so called secured and unsecured advances. Even if I was to accept for argument's sake that there was an agreement between the parties to treat the R12 000 000.00 differently, and that a distinction ought to be drawn between secured and unsecured amounts, IPC 13 and De Waal's email do not support the Applicant's case in any way whatsoever that the outstanding amount was related to the unsecured R12 000 000.00.

40.The Applicant's further concessions that this outstanding amount "*would of course ultimately be repaid through the certification process and through the Final Account if necessary*" [18] and that the "*amount can be amortised against further measured work and /or set off against retention being held by the Second Respondent*" is further support for the inference that the outstanding amount was part of the contract and not "outside of the building contract" as initially alleged.[19]

41.As far as the cancellation of the contract is concerned the papers filed in the matter including those relied upon by the Applicant do not support its own contention that the contract was cancelled on 27 April 2018. IPC 13, which was the most critical document for the Applicant in support of its version is signed on 27 April 2018 and contemplates a completion date of 25 May 2018. De Waal confirms that the Applicant did threaten to cancel the contract at some stage but had not done so. In paragraph 104[20] all the claims submitted by the Applicant, attached as annexures AA9 - AA16, are set out by De Waal, showing that all are dated after 26 April 2018 and therefore were all done in accordance with the contract. According to De Waal, at the time of his sworn statement, the Applicant was still on site and continued to perform in terms of the contract. But as I indicated earlier this issue does not

[18] Founding Affidavit
[19] Para 152
[20] AA

take the matter any further because the Applicant has failed to show that the amount outstanding is <u>not</u> secured by the APG.

Conclusion

42. In order to succeed in its final relief, the Applicant had to show that ELB was seeking to lodge a fraudulent claim with Hollard.

43. The Applicant conceded that the amount of R 2 129 876. 62 was outstanding but sought to make the case that this was related to an unsecured R12 000 000.00 advance payment and not to the APG.

44. The documents in the record tend to support the Second Respondent's version that all advance payments were treated the same without distinction between secured and unsecured.

45. Even if I were to accept for argument's sake that the R12 000 000.00 loan was to be treated differently the Applicant has not been able to provide any evidence to support its own version that the outstanding amount of R 2 129 876. 62 was related to the unsecured loan of R12 000 000.00 and therefore not secured by the APG. On the contrary the Applicant's concession that it arrived at this figure by simply subtracting an amount of R 34 805 072.81 in

the line item "REPAYMENT OF ADANCE PAYMENT" of IPC 13 from a globular figure of R36 934 949.43 of advance payments tends to support ELB's version. IPC 13 makes no distinction between secured and unsecured advances so there is no basis for the Applicant to draw the inference that the difference between the two figures was part of the so called "unsecured" advance payment.

46. The Applicant's reliance on De Waal's email and the sentence "*ELB acknowledges that the advance payments have been recovered under the recent amendments and payment certificates and there is no need to extend these*" when read in context does not support the conclusion that all advances secured by the APG had been recovered. This recovery was conditional on the Applicant agreeing to certain amendments which agreement did not take place.

47. On the basis of *Plascon- Evans*,[21] the application must be dismissed.

48. The Applicant has requested that the matter be referred to oral evidence and has suggested that only three witnesses be called namely Gibbs, Ramphal and De Waal.

[21] *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

49.It is trite that motion proceedings unless concerned with interim relief are all about the resolution of legal issues based on common cause facts. Unless the circumstances are unusual they cannot be used to resolve factual disputes. If the dispute relates to the veracity of the affidavit of one or more deponents, a court may order one or more of them to appear for cross-examination. Alternatively, if the dispute falls within a narrow range then the issues may be referred to oral evidence. [22]

50.However, the mere fact that a dispute of fact has arisen does not entitle a party to have the matter referred to oral evidence. A court must be satisfied that there is a reasonable prospect that oral evidence will disturb the probabilities as they appear from the papers. In circumstances where the Applicant ought reasonably to have foreseen a dispute of fact, the application may be dismissed.[23]

51.I accept that in order to obtain urgent interim relief the Applicant had to come by way of application proceedings. However, it is clear that the Applicant reasonably ought to have foreseen a dispute of fact when it selectively relied on IPC 13 and one sentence in De Waal's email, which when read in context demonstrates a far wider discussion between the parties

---

[22] Harms *Civil Procedure in the Superior Courts* B 64

[23] *Transnet Limited v Erf 152927 Cape Town (Pty) Ltd & others* (798/2010) [2011] ZASCA 148 (26 September 2011)

than a mere confirmation that the secure advance payments had been recovered.

52. More significantly, and despite the voluminous exchange of papers, the Applicant has failed to show the essential issue alleged by it namely that ELB was fraudulent in making a claim on the APG. It has not been able to show that the outstanding monies (which it concedes are outstanding) are not secured by the APG (or unsecured on its own version). In fact the very documents that the Applicant seeks to rely on in support of its case tend to support ELB's version. I cannot see how cross-examination of the three deponents is likely to take this matter any further.

53. There is of course the remaining dispute about the magnitude, as opposed to the nature, of the outstanding money but that is not in essence the subject matter of these proceedings. It bears emphasis that in these proceedings the Applicant sought to demonstrate fraud on the part of ELB in relation to a guarantee between Hollard and ELB. The Applicant's case was not that monies were not outstanding but that these were not secured by the APG. It has failed to show this. In order to determine the exact amount outstanding the Applicant is not without a remedy against ELB and could still refer the matter to arbitration as provided for in the contract.

54.In the circumstances I make the following order-

54.1The Application is dismissed with costs, such costs to include the costs of two counsels.

Y Carrim
Acting Judge of the High Court: Gauteng Local Division

For the Applicant:	CE Watt-Pringle SC
	CJ McAslin
Instructed By:	Cox Yeats c/o Hogan Lovells (SA) Inc
For the First Respondent:	BW Burman SC
	S Tshikila
Instructed By:	Bowman Gilfillan Inc