

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 23247/2019

DATE: 22-05-2025

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

DATE :22 MAY 2025

SIGNATURE

10 In the matter between

UMZINYATHI DISTRICT MUNICIPALITY

Plaintiff

and

FUSION GUARANTEES (PTY) LTD

Defendant

J U D G M E N T

DE SOUZA-SPAGNOLETTI, AJ:

1.

20 This matter centres around a Performance Guarantee issued by the defendant in favour of the plaintiff, as found on CaseLines at section 1 page 15. It is noted that the Guarantee as issued by the defendant, cites the plaintiff as the employer and Soundrite Construction and Plant Hire as the contractor. The works described in the Guarantee, are

stated to be works under contract T2015-03 with the description of the works describing construction of a raw water steel pipeline from the Gaywood area to the Greyton Water Works. The dispute itself hinges around the defendant's liability or otherwise under the Performance Guarantee with material questions to be answered as to whether the plaintiff has complied with what is necessary to call up payment on the Guarantee.

2.

10 Although, and while not specifically pleaded, there is alleged non-compliance of the plaintiff with paragraph 4 of the Guarantee which has been raised in the defendant's heads of argument in addition to the alleged non-compliance with paragraph 5 of the Guarantee. Plaintiff contends that it has complied with all that is required under the Guarantee while defendant contends that it is not liable. The parties at commencement of the trial agreed that there are various issues that are not in dispute and which are set out in paragraph 3 of the 2023 practice note found at
20 CaseLines, section 6, item 2. There is also a further practice note found in section 11 of CaseLines. The Court was advised that the parties had scrapped this particular practice notice at commencement of the trial.

3.

Liability under these performance guarantees is no stranger

to this Court with courts having come across them repeatedly and there is definitely, ample authority in relation thereto. Both parties did a good job of articulating the important principles relevant to this matter, this both in the heads of argument and in the list of authorities that were provided. The Court is appreciative of these efforts.

4.

While not all strictly relevant to these proceedings, the Court was given the opportunity to peruse all the case law
10 that was placed before it. The Court was also afforded the opportunity of perusing the very recent Supreme Court of Appeal judgment of *Set Square Developments (Pty) Limited V Power Guarantees and Vahva Construction* which was handed down recently on the 20th of May 2025. It is in consideration of all of the above that this judgment is delivered.

5.

The Court will start by dealing with the issues which were found not to be in dispute and as stated previously, most of
20 which was set out in the practice note of 2023 and in paragraph 3. The Court will read these into the judgment as follows. Paragraph 3 of the practice note states that:

3. The issues not in dispute are the following,

3.1 The citation of the parties;

3.2 The total value of the contract awarded by the

plaintiff to the Soundrite Construction and Plant Hire, being R43 556 513.60;

3.3 That an allowance for the contingency of 10 percent amounting to R4 356 651.36, an escalation of eight percent amounting to R3 485 312.09 to be added to the total value of the contract referred to above at the discretion of the plaintiff;

10 3.4 That annexure B to the plaintiff's summons is indeed a copy of the Performance Guarantee with Guarantee number FUS501583JHB, issued by the defendant to Soundrite Construction and Plant Hire pursuant to the conclusion of the agreement between the plaintiff and Soundrite.

3.5 The plaintiff has presented an original of the aforesaid Performance Guarantee at the defendant's attorney's offices for inspection;

20 3.6 That Annexure E1 to the plaintiff's summons is indeed a copy of the first written demand by the plaintiff to the defendant for payment in terms of paragraph 5 of the aforesaid Performance Guarantee dated 6 June 2015.

3.7 That no payment or undertaking to pay was made by the defendant to the plaintiff in terms of the aforesaid Performance Guarantee.

3.8 That the defendant's liability in terms of the Performance Guarantee is autonomous from the underlying contract, and that the defendant's obligation to make payment is to be construed strictly in terms of the Performance Guarantee.

6.

In addition to these issues which were not in dispute, the parties agreed on further common cause facts or issues
10 which were not in dispute and which were added.

7.

Firstly, there was no admission by the defendant that the plaintiff cancelled the contract with Soundrite and concluded a new contract with the joint venture.

8.

Secondly, it was admitted by the defendant that the first letter of demand, being Annexure E1 to plaintiff particulars of claim was in fact delivered to the defendants.

9.

20 Lastly, that there was a certificate of completion issued to the joint venture, found at Annexure Plea1 to defendant's plea. Plaintiff did not dispute that the certificate of completion is what it purports to be.

10.

Plaintiff closed its case without leading any evidence,

relying instead on the various admitted or common cause facts, and the balance of documentation. The plaintiff contended that it was entitled to judgment on this basis.

11.

The defendant, subsequent to initially noting its intention to apply for absolution from the instance, changed its mind and instead also closed its case without leading any evidence when the hearing resumed on the 22nd of May 2025.

10

12.

The issues in dispute, on listening to the parties and on perusal of the heads of argument and all the papers in the matter, crystallise somewhat and there were issues of law which were required to be determined.

13.

20

The Court will start by noting there to be two distinct trigger events to payment becoming due and payable under the Guarantee. The first is set out in paragraph 4 of the Guarantee, and the second is set out in paragraph 5. It is patently clear to this Court that these two paragraphs operate independently of each other and in the case before this Court, it is very clear that the events triggering liability of the defendant as claimed by the plaintiff are based on those set out in paragraph 5 of the Guarantee.

14.

Nowhere in the Guarantee is it stated, nor is it implied that these two paragraphs are connected in any way or that the requirements set out in the one paragraph are dependent upon compliance with that set out in the other.

In this regard the defendant's contention that the plaintiff failed to comply with paragraph 4 of the guarantee, does not figure in the Court's judgment. The plaintiff was simply not obligated to comply with paragraph 4 in the face of compliance with paragraph 5. Paragraph 5 cannot be
10 considered to be "additional compliance" necessary over and above that which is set out in paragraph 4. Compliance with paragraph 5 of itself triggers liability under the Guarantee. It should also be noted that non-compliance with paragraph 4 as a defence is not specifically pleaded.

15.

The final payment certificate and the issues raised in relation thereto, again do not find application here. It pertains to a contract which in no way falls within the
20 ambit or operation of the particular Guarantee which forms the basis of the dispute before Court. The Guarantee before Court, and this will be stated more than once in this judgment, is autonomous and exists completely independently.

16.

It is noted, and I think I noted it before, that the parties provided constructive and helpful authority in this matter all of which has been considered in the formulation of this judgment.

17.

The Court is going to start with the first issue, relating to whether the plaintiff is obliged to prove a cancellation of the contract with Soundrite. The Court would like to read the requirements of paragraph 5 of the Performance
10 Guarantee into the record, and these state the following:

“Subject to the guarantor’s maximum liability referred to in 1, the Guarantor undertakes to pay the employer the guaranteed sum of the full outstanding balance upon receipt of a first written demand from the employer to the Guarantor at the Guarantor’s physical address calling up this Performance Guarantee, such demands stating that:

5.1 The Contract has been terminated due to the Contractor’s default and that this Performance
20 Guarantee is called up in terms of 5; or

5.2 A provisional or final sequestration or liquidation order has been granted against the Contractor and that the Performance Guarantee is called up in terms of 5; and

5.3 The aforesaid written demand is accompanied

by a copy of the notice of determination and or
the provisional final sequestration order, and/or
the provisional liquidation order.”

18.

It is clear that paragraph 5.2 in relation to this Guarantee
does not find application in the matter before Court. The
Court again emphasises the principle of autonomy in that it
is important in the context of these Guarantees, with the
10 case law being amply clear and with both parties making
reference thereto.

19.

The Guarantee operates independently from any underlying
contracts. To suggest that the contract was not cancelled
as alleged by the defendant, is to the Court’s mind, by
necessity to claim fraud on the part of the plaintiff. The
plaintiff has, in compliance with paragraph 5 of the
Guarantee, confirmed cancellation of the contract on the
basis of default of the contractor. Further, a certificate of
20 completion which is to be found on CaseLines at section 9,
item 32 would to the mind of this Court, make it abundantly
clear that the contract was indeed cancelled as the work in
question, which is described similarly in this certificate, was
performed by a different contractor, namely Cerimele-
Mantombana joint venture. The certificate refers to a
different contract number, that being T2017-11. The

reasonable, rational conclusion that the Court can reach, bearing in mind the fact that the different contract referred to therein describes the same work as that described under contract T2015-03 for which the Performance Guarantee was issued - the only conclusion the Court can reach in this regard is that the certificate of completion relates to another contract and in relation to work performed by another contractor. This is supportive of the contention by the plaintiff that the contract was indeed cancelled. This is
10 now stated for the sake of completeness, that the Court again must reinforce the recognition of the autonomy of the Guarantee itself, and the Guarantee itself does not require proof of cancellation.

20.

To the Court's mind, the defendant's scope to dispute the cancellation would be limited to a claim of fraud on the part of the plaintiff, fraud which is most certainly not pleaded and at the request of clarification by this Court, the defendant confirmed is not claimed. The Court cannot take
20 the inquiry any further in relation to this.

21.

Moving on to the next issue in need of address or in need of finding, is whether the defendant was released from liability when the completion certificate was issued or whether this can result in defendant escaping liability on this

Performance Guarantee. Defendant contends that the Completion Certificate issued to another contractor, confirming completion of work performed under a different contract, releases it from liability. The Court has already noted that the Completion Certificate pertains to a contract number T2017-11, a different contract to that which the Performance Guarantee in question pertains to. In this regard, it is somewhat mischievous of the defendant to then suggest that the one can have a bearing on the other. The

10 Court simply cannot accept this to be the case.

22.

If one was to follow this trail of thought through to its conclusion, it would mean that any employer constrained to cancel a contract due to the default of a contractor, and who then subsequently employs an alternative contractor to complete the uncompleted work, would be precluded from claiming on a Performance Guarantee based on the defaulting contractor. The Court can find no logic in this train of thought. It flies in the face of the very purpose of a

20 Performance Guarantee and what it seeks to achieve. In any situation where a contractor defaults and the slack is then picked up by another contractor at a later stage, the employer would then be unable to call up performance or should I say call up payment on a Performance Guarantee. The Court cannot accept such notion and finds that the

Completion Certificate as uploaded to CaseLines has no bearing on the defendant's liability under this Guarantee in question.

23.

In relation to the issue of the Performance Guarantee being returned to the defendants, the Court finds that there is sufficient compliance on the part of the plaintiff to satisfy what is required in order for it to call up payment on the Guarantee. In this regard the Plaintiff did two things.

10 Firstly, it tendered return of the Guarantee and secondly, it returned the Guarantee to the defendant's offices for inspection or the defendants attorneys for inspection. While tender of return of the Guarantee may not satisfy the requirements under paragraph 5, presentation by the plaintiff of the Guarantee at the offices of the defendant or defendants attorneys most certainly constituted a return. The defendant was already placed in possession of a copy of the document, and it was returned to its offices albeit for inspection. The Court on considering the papers in the

20 matter, the heads of argument by the parties, and the arguments presented, finds that such return satisfies what is required under paragraph 9 of the Guarantee, and what is required for payment under the Guarantee.

24.

The next issue, relating to the contract value as mentioned in paragraph 40 of the defendants' heads of argument needs to be addressed by this Court. The Court again reinforces that the Performance Guarantee operates independently of the underlying contracts. This Court is not
10 placed to delve into the underlying contract. It is constrained to determine defendant's liability based on the Guarantee, independently. Again, argument that the Guarantee refers to a different contract or work cannot be sustained. The works referred to in the Guarantee relate to contract T2015-03. It is pertinent to note, and the Court does note, that the letter of award found under the pleadings section 001 on CaseLines as item 3, being Annexure A1, similarly states the contract number to be T2015-03, and lists the same work as follows,

20 "Construction of a 10 kilometre long 450 by 450 millilitre diameter, raw water steel pipeline from Gaywood area to Greytown Water Works."

25.

There can be absolutely no confusion or doubt that the award and the work contracted is the same contract for

which the Guarantee was issued. The Court simply cannot be placed to delve into what may or may not have transpired or agreed to result in the Guarantee sum under the Guarantee being different to that set out on the award.

26.

The Court cannot find support for the defendant's contention that there is any uncertainty or ambiguity in this matter. The Court further cannot find on the basis of any defences or contentions put forward by the defendant that it
10 is not liable under this Guarantee.

27.

In relation to costs, the Court notes the issue for decision in this matter, or the issues for decision in this matter are not new, nor are they overwhelming complicated with these types of performance guarantees having come before the Court repeatedly. The Court does not go so far as to suggest that senior counsel was misplaced. The contentions of the Court are reflected in the award made for costs.

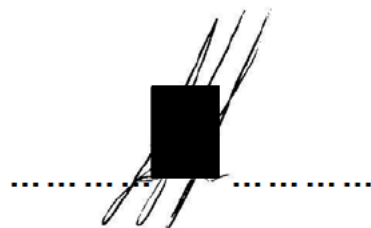
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28.

After careful consideration of the heads of argument and the arguments put forward by both plaintiff and defendant, after consideration of the case law and after perusal of the documentation that has been made available to this Court, the Court makes the following order,

- 1 The defendant shall pay to the plaintiff the amount of R5 140 848.61, such payment to be made within 7 days of delivery of the original Performance Guarantee to the defendant.
- 2 Interest is payable on the aforesaid amount to be calculated at a rate of 10.25 percent per annum *a tempore morae* to the date of payment.
- 3 The defendant shall pay the costs of suit on scale B,
10 save for those relating to the use of senior counsel which shall be payable on scale C.

That concludes the judgment of this Court.



DE SOUZA-SPAGNOLETTI, AJ

JUDGE OF THE HIGH COURT

SIGNATURE DATE: 12 JUNE 2025