

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **NO**

Date: **26 August 2025** Signature: _____

Case no. **37332/2018**

In the matter between:

DEVELOPMENT BANK OF SOUTHERN AFRICA

PLAINTIFF

And

FUSION GUARANTEES (PTY) LTD

1ST DEFENDANT

REITY TRADING ENTERPRISES CC

2ND DEFENDANT

Coram: Dlamini J

Date of hearing: 10 April 2025

Delivered: 26 August 2025 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines*, and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 in 26 August 2025

JUDGMENT

DLAMINI J

Introduction

[1] In this matter, the plaintiff, the Development Bank of SA ("DBSA"), instituted action against Fusion Guarantee, the first defendant ("Fusion"), and Reity Trading, the second defendant, claiming payment of R3 370 640.74, from the first defendant, based on the performance guarantee issued by the first defendant, and a sum of R 12 237 633. 67 from the second defendant. The second defendant has not entered an appearance to defend. The plaintiff seeks a default judgment against the second defendant.

Background

[2] The common cause facts are as follows:-

[3] On 18 July 2014, the plaintiff awarded a contract (the Contract) to a joint venture between the second defendant and an entity called Phumi HD Construction CC ('the Contractor') for the demolition and additions of the new

administration block, dining and nutrition center, computer room and related works at the New Waban Senior Secondary School, in Libode, Eastern Cape.

- [4] In terms of the aforementioned Contract, the Contractor was required to secure a performance guarantee on behalf of the Contractor in favor of the plaintiff. The Contract consisted of the following:-

- 4.1 The Agreement, Contract Data, and the Special Conditions of Contract.
- 4.2 The General Conditions of Contract, the JBCC Series 2000 Principal Building Agreement (Edition 4.1 of March 2005) (the JBCC).

- [5] It seems that the Contractor was able to secure a fixed guarantee from the first defendant in favour of the DBSA as security for the second defendant's due fulfillment of the Contract.

- [6] The plaintiff states that the Contractor provided a fixed guarantee in terms of Clause 14 of the Contract, issued by Fusion as security for the due fulfillment of the Contract.

- [7] It appears that the Contractor struggled with the timely completion of the scope of the Works. Consequently, the plaintiff extended the completion date to 6 August 2015. Despite this extension, the Contractor failed to meet the revised practical completion date of 6 August 2015; therefore, the plaintiff cancelled the Contract on 10 October 2015.

- [8] After the cancellation of the Contract, DBSA issued a new tender and appointed a new service provider to complete the project.

- [9] According to the plaintiff, on the date of cancellation of the Contract, DBSA avers that it had already paid the Contractor an amount of R15,079,071.00 in the form of interim payments. The balance of the contract value was R18,827,336.47. DBSA had withheld an amount of R762,852.90 as retention in terms of the Contract. The contract value of the replacement contract to complete the Works was R31,627,823.04. The plaintiff states that it thus

suffered damages of R12,237,633.67, being the difference between the replacement contract value of R31,627,823.04 and the available amount of R19,390,189.37.

- [10] The first defendant opposes the action. Fusion Guarantee claims it never issued the guarantee to the second defendant; therefore, it is not liable to the plaintiff.
- [11] During the trial, the plaintiff called several witnesses to testify on its behalf. Fusion called its managing director, Mrs. Becker, to testify and support its case.

Mr. Opolot

- [12] The witness testified that he was appointed by LDM Consulting, a company designated by the plaintiff as the principal agent on the Project. He was responsible for engaging with the Contractor and issuing interim payment certificates. One of his tasks was to ensure that the Contractor obtained a guarantee equal to 10 percent of the contract sum before commencing the Works.
- [13] He testified that he initially had difficulty obtaining the guarantee from the Contractor. However, days later, he received the guarantee from the Contractor. He noted that the guarantee had an expiration date, which, he said, was not supposed to be included. He stated that he then engaged Fusion to remove the expiry date from the guarantee. He mentioned that he later received the amended copy of the guarantee directly from Fusion, incorporating the necessary amendments. He subsequently handed the amended copy to DBSA.
- [14] Mr.Opolot advised that, despite being afforded an extension to complete the Works, the Contractor failed to complete the project by the extended practical

completion date. The contract was then canceled, and DBSA appointed another contractor who ultimately completed the Works.

Mr. Maome

[15] DBSA's legal advisor, Mr. Maome, testified that he was responsible for initiating and drafting the Contract and was also present when the contract was signed by both the DBSA and the Contractor. He testified that the Contractor handed him a copy of the Guarantee. He conceded that he never had sight of the original Guarantee.

[16] In summary, the plaintiff's witnesses mainly appeared as fair and credible witnesses. They provided reliable evidence regarding the events leading up to the signing of the contract, as well as its subsequent cancellation. In my view, nothing significant came out of the cross-examination of the plaintiff's witnesses.

[17] The plaintiff then closed its case.

[18] The defendant called Ms. Ilse Becker (Ms. Backer) to testify on its behalf.

Ms. Becker

[19] Ms. Becker, the general manager of Fusion, testified about the nature and business of Fusion in the financial and construction industries. She explained the company's involvement in the insurance industry. She testified at length about the events leading up to the issuance, signing, and handing over of the copy of the Guarantee to the Contractor and DBSA. She does not dispute that there was an engagement between the Contractor and Fusion wherein the Contractor sought a Guarantee relating to the construction contract between DBSA and the Contractor.

[20] She confirmed that the Guarantee was issued, signed, and embossed after the Contractor had paid a sum of R 97 000.00 to Fusion; however, she

speculates that a possibility exists that the original was retained by Fusion because the collateral had not been paid in full by the Contractor.

[21] Under cross-examination, Backer conceded that she was not aware that the original Guarantee was never handed over to the Contractor. She admitted that she did not know who cancelled the Guarantee and when the Guarantee was cancelled.

[22] Overall, Mrs. Backer did not appear to be a credible witness. Her evidence was, for the most part, misleading and clearly insufficient. For instance, it seems most unlikely that, although she authorized and signed the Guarantee, she testified that she was initially unaware that the original Guarantee was never handed over but was, for unknown reasons, kept at Fusion's office. Additionally, she states that as the manager, she is unsure who canceled the Guarantee and for what reasons. Significantly, and more concerning, she does not know when the Guarantee was canceled.

[23] The first defendant then closed its case.

Issue for determination

[24] Two issues arise in determining this matter. The first is whether the guarantee was issued at all. The second is whether the plaintiff may rely on the guarantee that was not issued.

Was the guarantee issued?

[25] The focus in this regard is whether the plaintiff's rights and obligations between the guarantor and the beneficiary can arise at all in the absence of the issuing or delivery of the original guarantee document.

[26] The parties hold divergent and conflicting views on how the issues that stand to be determined should be answered.

- [27] According to DBSA, the determination of this issue turns primarily on Fusion's version that it did not release the original Guarantee, which is evidenced by its possession of the original Guarantee with a "cancelled" stamp on the Guarantee.
- [28] Fusion argues that the determination of the issue under consideration is a matter of law. According to Fusion, for a Guarantee to establish rights and obligations between the guarantor and beneficiary, the document must be issued and delivered to the beneficiary. Absent delivery of the original document by the guarantor to the beneficiary, so the submission goes, no transfer of the property rights in and to the document is effected.
- [29] Fusion avers that the delivery of the original document is required for the constitution of an agreement between itself and the plaintiff. According to the first defendant, guarantees are concluded by means of a formal, embossed original document delivered to the contractor who then submits it to the employer, i.e, DBSA.
- [30] Furthermore, Fusion argues that the issue concerns delivery. This means that, so the argument goes, it denotes a document that must be possessed before the party referred to therein to be obligated to act in a certain way. That absent possession, the contractor has no right, and by implication, the plaintiff also has no right. Therefore, Fusion submits that there is no evidence that the plaintiff acquired any rights without receiving the original document.
- [31] I disagree with Fusion's argument in this regard. This is because it is common cause that the document is a copy of the original. This means that the document itself, the signatures thereon, Fusion's emblem, and embossment are not in dispute. Therefore, the only issue for determination is whether, based on the probabilities, the Guarantee was issued by Fusion?.
- [32] The techniques generally employed by our courts in resolving factual disputes of this nature are trite and are set out by the SCA in ***Stellenbosch Farmers'***

Winery Group Ltd and Another v Martell et Cie and Others.¹ In order to determine the disputed issue and come to a conclusion, the Court must make a finding on (a) the credibility of the various factual witnesses, (b) their reliability, and (c) the probabilities. Finally, in light of its assessment of (a), (b), and (c), the Court must determine whether the applicant has succeeded in discharging its onus.

[33] The proper test is not whether a witness is truthful or reliable in all that he says but whether, on a balance of probabilities, the essential features of the story that he tells are true. See. **R v Kristusamy.**² **Santam BPK v Biddulp.**³

[34] The provision and requirement of the guarantee is contained in clause 10 of the contract "*The Tenderer shall deliver the security in terms of clause 14 of the JVCC within the period stated in the Contract Data and he shall, immediately after receiving a completed copy of this Agreement, including the Shedule of Deviations (if any) , contact the Employer's agent (whose details are given in the Contract Data) to arrange the delivery of any bonds, guarantees, proof of insurance and any other documentation to be provided in terms of the Conditions of Contract indentified in the Contact Data, within 14 days of the date on which this Agreement comes into effect. Failure to fulfil any of these obligations in accordance with those terms shall constitute a repudiation of this agreement.*"

[35] DBSA submits that this court must consider the following objective facts. That apart from the fact that the Guarantee is a copy, there appears to be no dispute that it was signed, stamped, and embossed on the same day that the Contractor made payment of R97,000.00 to Fusion, in respect of an invoice relating to the Guarantee. That Fusion signed the Guarantee. Fusion emailed the aforementioned Guarantee to the Contractor, who then forwarded a copy of the Guarantee to DBSA. That, the Guarantee emailed by Fusion to the Contractor did not have the "cancelled stamp" on it. The first time Fusion disputed the Guarantee was after summons was issued.

¹ 2003 (1) SA 11 CSA at 5

² 1945 AD at 556

³ 2004 (5) SA 586

- [36] DBSA asserts that, when it made a call on the Guarantee, Fusion did not raise the issue of cancellation of the Guarantee.
- [37] The plaintiff argues that it is no coincidence that the Guarantee was prepared, signed, stamped, embossed, and sent to the Contractor on the same day the Contractor paid R97 000.00 to Fusion.
- [38] DBSA asserts that Fusion's defense that the Guarantee was never issued based on the existence of the "cancelled" stamp should be rejected. This, the plaintiff argues, is because Ms. Becker does not know who placed the "cancelled" stamp on the Guarantee, when it was placed, or why it was placed. Therefore, the plaintiff insists, there is no evidence that the Guarantee was cancelled after it was emailed to the Contractor.
- [39] The plaintiff submits that in assessing the probabilities, the only conclusion that can be drawn is that the Guarantee was not cancelled as Fusion contends. According to the plaintiff, the probability exists that the Contractor never collected the original Guarantee because it did not need the Guarantee once the site was handed over, and payments were made after the DBSA received a copy of the Guarantee.
- [40] DBSA contends that the evidence of its witnesses regarding the Guarantee and how they came into possession of the Guarantee was not disputed by Fusion, and that it is evident the Contractor received the Guarantee from Fusion. Consequently, DBSA argues that this court should hold that it has discharged its duty of proving that the Guarantee had been issued by Fusion in favour of DBSA.
- [41] The first defendant argues that both the prescribed Guarantee and the prepared Guarantee require the plaintiff to possess the original. That the original must be submitted when a claim is made, and that the rights created by the Guarantee are inextricably linked to possessing the original document. Fusion insists that the Guarantee boldly stipulates, " *Please note that a claim*

under this guarantee will only be honored on submission of the original guarantee document, which bears the Fusion embossed seal."

- [42] Fusion's main contention is that it did not issue the original document referred to by the plaintiff as the Guarantee, and as such, no agreement between the DBSA and Fusion was established.
- [43] Having regard to the pleadings and evidence presented in this court. The probabilities suggest that Fusion issued the guarantee. This is because the Contractor was fully aware that delivery of the Guarantee was a material and essential requirement of the agreement, and the Contractor would not have been allowed to commence with the Works unless or until it had provided the Guarantee. The timeline of events clearly shows that the Contractor did approach Fusion to secure the Guarantee.
- [44] The indisputable evidence placed before this court clearly indicates that the Contractor approached Fusion to secure the Guarantee. The evidence presented to this court indicates that the Contractor paid Fusion a sum of R97,000.00 on 11 July 2014. Soon after the Contractor made this payment, Fusion prepared the Guarantee on the same day, and both Mrs. Becker and Mr. Phillips duly signed it. Fusion does not dispute that the Guarantee was prepared, signed, stamped, and embossed on the day Phumi made the above payment to Fusion.
- [45] It is undisputed that on the same day Fusion signed the guarantee, a copy was sent to the Contractor and DBSA.
- [46] A sensible and reasonable conclusion is that Fusion handed over the Guarantee to the Contractor, who then passed it over to the DBSA and/or the Engineer. An unreasonable conclusion would be that the Guarantee simply grew legs and walked out of the Fusion offices and found its way to the Contractor and DBSA offices.

- [47] In my view, at this stage, the question of whether the Guarantee was an original or a copy is of no moment. This is because Fusion, at the time, knew that it had handed the Contractor a copy and kept the original for reasons only known to it. Fusion cannot, on the one hand, issue a Guarantee, hand a copy to the Contractor and DBSA, and at the same time keep the original, while demanding that DBSA produce the original it kept in its offices without their knowledge.
- [48] Furthermore, Fusion cannot rely on the submission that the Pumi did not fulfill the suspensive conditions; therefore, there is no valid agreement between Pumi and Fusion, and by extension, no agreement between Fusion and the Joint Venture, nor between Fusion and the DBSA.
- [49] This is because Fusion prepared the guarantee and handed a copy thereof to Pumi, who then gave the same to DBSA. No legal duty was placed upon DBSA to verify whether Fusion and Phumi had fulfilled all their suspensive conditions. By all accounts, Fusion does not deny that it issued and handed a copy to Phumi.
- [50] Additionally, Mrs. Becker did not dispute that Fusion prepared the Guarantee. She conceded that, for all intents and purposes, barring the fact that it is a copy, the document is essentially a duplicate of the original.
- [51] Significantly, while Fusion was aware that it had sent a copy of the Guarantee to DBSA, Fusion does not explain why it retained the original after handing the copy to the Contractor and DBSA. Strangely, Fusion does not know who canceled the Guarantee; importantly, Fusion does not explain why it canceled the Guarantee. Fusion admits that it never notified DBSA or the Contractor about the cancellation of the Guarantee.
- [52] Fusion does not inform us when it canceled the Guarantee. This leaves room for speculation that the Guarantee was only canceled after the summons was issued by the plaintiff. I am satisfied that it is probable that DBSA believed that the Engineer was in possession of the original, and on the other hand, the Engineer believed that DBSA had the original.

- [53] In my view, once Fusion had canceled the Guarantee, Fusion had a legal duty to advise DBSA that it had now canceled the guarantee for whatever reason. This is because, first, once notified of the cancellation, the DBSA would have been able to request the Contractor to provide alternative Guarantees or cancel the agreement. This Fusion failed to do.
- [54] Fusion is in my view, estopped from relying on its own misrepresentation that it had issued the Guarantee, whilst the Guarantee was lying in its safe and later on unilaterally canceled by Fusion.
- [55] In light of all the circumstances alluded to above, the probabilities indicate that Fusion issued the Guarantee to the Contractor and DBSA. Consequently, it is the finding of this court that Fusion issued the Guarantee

Whether DBSA May Rely on a Guarantee Not Issued

- [56] DBSA argued that it was not a requirement of the Guarantee that the original document had to be produced for payment to be made. That the note cannot be interpreted as absolving the first defendant from liability under the Guarantee. The plaintiff maintains that, once this court determines that the Guarantee was issued, then in that event, Fusion is liable to DBSA.
- [57] For these propositions, DBSA seeks reliance on the following decisions: ***GLMB Joint Venture V Constantia Insurance Co Ltd⁴ Bakubung Platinum Mine (Pty) Ltd v Keletshepile Trading Enterprises CC and Others⁵, and Millennium Aluminum and Glass Services CC v Group Five Consulting (Pty) Ltd⁶***
- [58] Fusion contends that in this case, it was an express term of the Guarantee that it required the original to be submitted before payment could be made,

⁴ (2012/17774) [2014] ZAGP JHC 440 4

⁵ (560/2016) [2016] ZANWHC 54 (15 December 2016)

⁶ 693/2021)[2022] ZASCA 180 (14 December 2022)

and therefore, the use of a copy was precluded by the Guarantee. As a result, Fusion insists that the plaintiff's reliance on the aforementioned case law is irrelevant.

- [59] DBSA, reliance on the aforementioned case law is misplaced, this is because the facts therein are materially different from those in the present case. I have already made a finding and held that the Guarantee was issued by the first defendant. It follows, therefore, as it should, that the copy of the Guarantee is deemed to be the original Guarantee.

The Guarantee

- [60] DBSA argues that the guarantee lapses on the date of the last Certificate of Completion of Works, not on the date of cancellation. The plaintiff insists that Fusion is liable under the Guarantee for the guaranteed amount, both during the subsistence of the construction Contract and after cancellation, subject to the proviso that the plaintiff has a right of recovery against the Contractor in terms of Clause 33.0 of the Contract.

- [61] The plaintiff avers that clause 33.0 is not confined to recovery during the subsistence of the contract. In sum, DBSA insists that the contract between itself and the Contractor was validly concluded. That, significantly, Ms Backer testified that the letter of acceptance by the DBSA to the Contractor was used to prepare the Guarantee.

- [62] Therefore, DBSA concludes that it has a right of recovery against the Contractor in the sum of R 6 366 994.93 in terms of clause 33.0, made up as follows: R 12 237 633.67, less

R2 500 000 (claim for additional bulk earthworks)

Less; R 3 370 640 .74 (value of the Gaurantee)

Accordingly, Fusion is liable to DBSA in the sum R 3 370 640.74, which is the value of the Guarantee.

[63] For this proposition, the plaintiff relies on the decision ***Granbuild (Pty) Ltd v Minister of Transport and Public Works, Western Cape***⁷ (5021/2015) [2015] ZAWHCH 83 (5 June 2015)

[64] Fusion denies that it is liable to the plaintiff in terms of the Guarantee on the basis that it insists it never issued and delivered the Guarantee to DBSA

[65] It is apposite to have regard to the relevant parts of the Guarantee, which will assist with the determination of this dispute. Clause 2 stipulates as follows;

"The Guarantor hereby renounces the benefits of the exception non numeratae pecunia; non causa; debiti; excussionis et divisionis; and all other exceptions which could be pleaded against the enforcement of this guarantee, with the meaning and effect whereof I declare myself to be conversant, and undertake to pay the Employer the amount guaranteed, during the period when the claim was received by the Guarantor, on receipt of a written demand from the Employer, or his delegated official, to do so and which demand the Employer, or his delegated official, may make if the Employer has a right of recovery against the contractor in term of clause 33.0 of the contract".

[66] The principles of interpretation find application in this matter. These principles were eloquently settled in ***Endumeni***⁸. There, the court emphasized that the process of interpretation is a unitary and objective exercise that gives due regard to the text, context, and purpose of the document or instrument being interpreted. Further, a sensible meaning is to be preferred to the one that leads to insensible or unbusinesslike results

[67] In my view, the Guarantee is self-explanatory; a sensible interpretation is that Fusion is liable to DBSA in the sum of R 3 370 640.74.

⁷ 5021/2015) [2015] ZAWHCH 83 (5 June 2015)

⁸ (920/2010) [2012] ZASCA 13

- [68] Subject to the right of recovery in terms of clause 33.0. This clause has been eloquently explained by the court in **Granbulid** as follows: "[53]... *That the guarantee should be construed consistently with this machinery is important for the practical implementation of the guarantee and for the protection of the rights of the employer and guarantor. If one were to hold that "right of recovery" in the guarantee refers not to the existence of a payment certificate entitling the employer to recover a certified amount but to the notional underlying contractual right to which a certificate is intended to give effect, the guarantor would only be obliged to pay if the underlying contractual right were established. Put differently, the contractor would be entitled, even where there has been a certificate, to go into the underlying merits. A guarantee on those terms would be conceivable but unbusinesslike, at least from the perspective of the employer and guarantor, who are the immediate parties to the guarantee.*"
- [69] This means, therefore, that the right of recovery is simply not the existence of the right to claim damages for breach of contract. What is rather intended in clause 33.0 is the payment certificate as issued by the principal agent.
- [70] Having regard to all the circumstances alluded to above, the plaintiff has established and is entitled to the order that it seeks.
- [71] Default judgment is granted against the second defendant.

COSTS

- [72] That trite principle of our law is that costs must follow suit. I find no reason not to make an order that costs must follow the event. Having regard to the quantum of the claim and the issues raised in the matter, I am of the view that costs must be awarded to the plaintiff on the party and party scale C.
- [73] I therefore make the following order.

ORDER

1. The first defendant is ordered to pay the plaintiff the sum of R3 370 640.74, plus interest at the prescribed rate from the date of demand, being 14 October 2014, to date of payment.
2. Costs of suit on Scale C.
3. The second defendant is ordered to pay the plaintiff the sum of R6 366 994.93, plus interest at the prescribed rate of interest from the date of issue of the summons until payment in full.
4. Costs of suit on Scale C.

A handwritten signature in black ink, appearing to be 'Dlamini J', is written over a solid black rectangular redaction box. The signature is fluid and cursive.

DLAMINI J
Judge of the High Court
Gauteng Division, Johannesburg

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