

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

Case No: 2024-027389

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
16/4/2026	
DATE	SIGNATURE

In the matter between:

THE HOLLARD INSURANCE COMPANY LIMITED
(Registration Number: 1952/003004/06)

Applicant

And

KUYANDA COMMODITIES 34 CC

First Respondent

(Registration Number: 2001/086230/23)

DEVLAND CASH AND CARRY (PTY) LTD

Second Respondent

(Registration Number: 1997/003371/07)

METCASH TRADING AFRICA (PTY) LTD

Third Respondent

(Registration Number: 2003/018184/07)

ANE WESTERN CAPE (PTY) LTD

Fourth Respondent

(Registration Number: 2012/010583/07)

BARAKAAT PROPERTY INVESTMENTS (PTY) LTD

Fifth Respondent

(Registration Number: 1990/003251/07)

SHIRAZ GATHOO

Sixth Respondent

(Identity Number: 6[...])

MAHOMED GATHOO

Seventh
Respondent

(Identity Number: 5[...])

PIETER BLIGNAUT DIEDRICKS

Eighth Respondent

(Identity Number: 6[...])

BAFANA MOK (PTY) LTD

Ninth Respondent

(Registration Number: 2015/274570/07)

WINKELHAAK VERSPREDIERS CC

Tenth Respondent

(Registration Number: 2000/018892/23)

JUDGMENT

WENTZEL -THOMPSON J

Introduction

- [1] This is an opposed application in which the applicant, The Hollard Insurance Company Limited ("Hollard"), seeks payment of the sum of R39,715,973.84 from the respondents jointly and severally. The claim is founded upon a deed of indemnity, and deeds of suretyship and indemnity, executed in favour of Hollard in connection with three demand guarantees issued by Hollard on behalf of the First Respondent, Kuyanda Commodities 34 CC ("Kuyanda").
- [2] By the time this matter came before me, Hollard had elected to pursue the application only against the Second to Seventh Respondents (collectively referred to as "the Sureties"), on the basis that these respondents had not filed answering affidavits and as such, the matter was unopposed. Hollard had agreed to postpone the application insofar as it related to the First and Tenth Respondents, Kuyanda and Winkelhaak Versprediers CC ("Winkelhaak") that have raised a substantive defence to the principal debt. Judgment had previously been granted by default against the Eighth Respondent, Mr Pieter Blignaut Diedricks ("Diedricks") and the Ninth Respondent, Bafana Mok (Pty) Ltd ("Bafana") on 12 July 2024.
- [3] The sureties oppose the application - and specifically oppose Hollard's attempt to proceed piecemeal against them in the absence of the principal debtor (Kuyanda). They seek a postponement to enable all issues to be ventilated holistically, or in the alternative, to prevent the court from granting judgment against the sureties while the principal debtor's liability remains contested and unresolved.
- [4] The central question before this court is whether it is procedurally and legally competent for Hollard to obtain judgment against the Sureties while:

- a. Kuyanda (the principal debtor and indemnifier) has filed an answering affidavit raising substantive defences, including the alleged invalidity of the deed of indemnity;
- b. Hollard has expressly elected not to proceed against Kuyanda at this hearing;
- c. the principal debt - that is, the existence and enforceability of the underlying indemnity obligation - is directly contested; and
- d. the Sureties' liability is, by its very nature, dependent upon and accessory to the principal obligation.

[5] For the reasons set out below, I find that Hollard's attempt to proceed piecemeal against the Sureties alone, while the principal debtor's liability is deferred and disputed, is unsound and must fail. In my view it is in the interests of justice that the matter is to be postponed to enable all issues in respect of all respondents to be adjudicated together.

The parties

- [6] The applicant, Hollard, is a major insurance company that carries on business as an insurer and acts as a guarantor in issuing demand guarantees on behalf of its clients.
- [7] Kuyanda is a close corporation which was at all material times engaged in the business of trading in petroleum and related products. Kuyanda was the principal client of Hollard in respect of the three demand guarantees that form the subject of this application. Although business rescue proceedings in respect of Kuyanda Winkelhaak have been launched, these have not yet been finalised and there is no court order placing these entities into business rescue.
- [8] The Sureties are Devland Cash and Carry (Pty) Ltd ("Devland"), Metcash Trading Africa (Pty) Ltd (Metcash"), Ane Western Cape (Pty) Ltd ("Ane Western"), Barakaat Property Investments (Pty) Ltd ("Barakaat"), Shiraz Gathoo ("Shiraz") and Mahomed Gathoo ("Mahomed").

Background facts

- [9] On or about 15 September 2022, Kuyanda, acting through Diedricks, who held a 50% member's interest in Kuyanda at the time, executed a Deed of Indemnity in favour of Hollard. The deed obliged Kuyanda to indemnify Hollard against all claims, losses, liabilities and expenses arising from any guarantees issued by Hollard on behalf of Kuyanda, and to pay Hollard on first written demand any sum called upon under such guarantees, whether or not Kuyanda admitted the validity of the underlying claim.
- [10] On or about 19 October 2022, the Sureties each executed Deeds of Suretyship and Indemnity in favour of Hollard, binding themselves jointly and severally as sureties and co-principal debtors with Kuyanda for any amounts which Kuyanda may owe to Hollard under the Deed of Indemnity.
- [11] On various dates between October 2022 and March 2023, Hollard issued three demand guarantees on behalf of Kuyanda:
- a. Guarantee No. EFP/EBGS P/000199792, in favour of Engen Petroleum Ltd ("Engen"), in the amount of R26,000,000.00, dated 25 October 2022;
 - b. Guarantee No. EFP/EBGS P/000204194, in favour of Moov Fuels (Pty) Ltd ("Moov Fuels"), in the amount of R4,000,000.00, dated 20 February 2023; and
 - c. Guarantee No. EFP/EBGS P/000205014, in favour of Q4 Fuel (Pty) Ltd ("Q4 Fuel"), in the amount of R10,000,000.00, dated 15 March 2023.
- [12] On 25 August 2023, Hollard received a written demand from Moov Fuels under Guarantee No. EFP/EBGS P/000204194 for payment of R3,715,973.84. In compliance with its obligations under the demand guarantee, Hollard made payment of that amount on or about 4 September 2023. Demands were also received under the Engen and Q4 Fuel guarantees for their full face values.
- [13] Hollard thereafter transmitted letters of demand to each of the respondents on 8 November 2023 and again on 27 February 2024. The respondents failed to make payment. Hollard launched this application on or about 8 March 2024.

[14] On 12 July 2024, default judgment was granted against Diedricks and Bafana by Bokaka AJ.

[15] On or about 20 October 2024, Kuanda and Winkelhaak delivered an answering affidavit in opposition to the application. This was after Mr Nicolaas Johannes de Wet (“de Wet”), and his sister, Ms Maria Cathrina Oriani-Ambrosini (“Ambrosini”) had acquired their brother, Diederick’s members interest in Kuyanda and Winkelhaak providing them with a 100% interest in these entities.

[16] In their answering affidavit (deposed to by de Wet) Kuyanda and Winkelhaak raise substantive defences going to the root of Hollard’s claim, including principally that Diedricks lacked the authority to execute the Deed of Indemnity and the Deed of Suretyship on behalf of Kuyanda and Winkelhaak because he held only a 50% member’s interest and was accordingly unable to pass a resolution without their concurrence as the co-members in terms of section 46 of the Close Corporations Act 69 of 1984 (“the CC Act”).

[17] The Sureties did not deliver separate answering affidavits. Their position, as set out in Shiraz’s replying affidavit in the postponement application is that they aligned themselves with the defence of the Kuanda from the outset and regarded the filing of a separate answering affidavit as unnecessary. This was on the basis that they were entitled to rely on all the affidavits before the court - including those of the Kuanda and Bafana.

[18] The Sureties additionally raise the following independent defences:

- a. The underlying debt of Kuyanda to Hollard is tainted by fraud arising from the fraudulent conduct of Diedricks, who allegedly acted without authority and for his own benefit, engineering fictitious liabilities and depleting the assets of the Winkelhaak-Bafana Group. This group of companies sell wholesale diesel to farmers in rural areas.
- b. The demand guarantees were called up under circumstances known to Hollard to be fraudulent, and Hollard was expressly warned by the Sureties not to make payment, yet proceeded regardless;

- c. It is a triable issue whether Hollard's knowledge of the alleged fraud, and its decision to pay despite being warned, releases the sureties from their suretyship obligations; and
- d. There is no valid principal debt owing by Kuyanda to Hollard if the Deed of Indemnity executed by Diedricks is void for lack of authority, and accordingly the suretyship obligations, being accessory, must also fall away.
- e. The indemnifying provisions in the Deed of Suretyships are contra bonus mores and unenforceable.

[19] Hollard's replying affidavit raises, *inter alia*, the following contentions in response:

- a. Kuyanda and Winkelhaak's answering affidavit was delivered 66 days out of time, without any application for condonation, and should therefore not be received by the court;
- b. Even if the condonation point is not upheld, the doctrine of ostensible authority entitles Hollard to enforce the Deed of Indemnity against Kuyanda, regardless of the alleged lack of actual authority of Diedricks, by virtue of section 54(2) of the CC Act;
- c. The fraud exception to demand guarantees is narrow and confined to fraud in the document itself;
- d. The Deeds of Suretyship make it clear that the Sureties all additionally bound themselves to indemnify Hollard.
- e. Since the Sureties did not file answering affidavits, they are barred from now doing so and the court is entitled to grant judgment against them on the papers filed by Hollard.

The condonation issue

[20] Before turning to the substantive question of piecemeal litigation, it is appropriate to deal briefly with the condonation issue. Hollard contends that the

answering affidavit of the Kuyanda and Winkelhaak is out of time and that the court need not have regard to it in the absence of a formal condonation application.

- [21] It is common cause, however, that on 30 January 2026, Hollard's attorneys sent an email to the attorneys for Kuyanda and Winkelhaak in the following terms:

"We confirm receipt of your client's answering affidavit. We shall gladly grant condonation, provided that your heads of argument and practice note are filed timeously in due course."

- [22] This communication constitutes an unequivocal agreement by Hollard to condone the late filing. Hollard cannot, having consented to condonation in terms of its own correspondence, subsequently resile from that agreement and submit to this court that the answering affidavit is not properly before the court. The maxim *venire contra factum proprium* applies with full force: a party who has made an unambiguous representation on which another party has acted is not permitted to resile from that representation where it would be unconscionable to do so.

- [23] Accordingly, the answering affidavit of the Kuyanda and Winkelhaak is properly before this court and falls to be considered in its entirety.

The failure of the sureties to file answering affidavits

- [24] It is common cause that the sureties did not file separate answering affidavits. In terms of Rule 6(5)(d)(ii) of the Uniform Rules of Court, a respondent who fails to file an answering affidavit is not ordinarily precluded from appearing at the hearing and addressing argument to the court, but may generally not adduce facts not contained in the founding papers.

- [25] However, the position is more nuanced where - as here - answering affidavits filed by co-respondents in the same proceedings raise defences that are directly relevant and available to a non-filing respondent. It is well-established that a court is entitled to have regard to all the papers before it in a matter,

regardless of by whom those papers were filed, in determining whether the applicant has established the right to the relief it seeks.

[26] Furthermore, Rule 6(7) of the Uniform Rules of Court provides that any party to application proceedings may rely on all papers before the court. The sureties are entitled, as a matter of law, to align themselves with and rely upon the defences set out in the answering affidavit of Kuyanda and Winkelhaak. The proposition advanced by Hollard - that the court must simply ignore the defence raised by Kuyanda and Winkelhaak in adjudicating the claim against the sureties - is legally incorrect and contrary to the foundational principle that a court should have regard to all the material before it. This of course is in the interests of justice.

The core issue - piecemeal litigation

[27] The primary question in this application is whether Hollard may on sound legal principle obtain judgment against the Sureties while deliberately deferring and avoiding the adjudication of its claim against the principal debtor, Kuyanda, whose liability is directly contested.

[28] The accessory nature of suretyship is a foundational principle of South African law. A suretyship is an accessory obligation - it is conditional upon the existence and enforceability of a valid principal obligation between the creditor and the principal debtor. This principle was most recently confirmed by the Supreme Court of Appeal in *Liberty Group Limited v Illman*,¹ where Makgoka JA held:

“Given a suretyship’s accessorial nature, the liability of a surety is tied to that of the principal debtor. If the claim against the principal debtor became prescribed or ceased to exist, the claim against the surety likewise became prescribed or otherwise ceased to exist.”

[29] The corollary of this principle is of particular significance in the present case: Where the validity and enforceability of the principal obligation are in dispute - and where the resolution of that dispute may directly extinguish the accessory

¹ *Liberty Group Limited v Illman* (1334/2018) [2020] ZASCA 38.

suretyship obligation - a court should be slow to adjudicate the claim against the sureties in isolation from the principal debtor's liability.

[30] In the present matter:

- a. Kuyanda, the principal indemnifier, has filed a comprehensive answering affidavit raising the defence that the Deed of Indemnity is void *ab initio* because Diedricks lacked the authority to bind Kuyanda in terms of section 46 of the CC Act.
- b. If the Deed of Indemnity is void - whether for lack of authority, or for any other reason that emerges from the evidence - there is no valid principal obligation, and the accessory suretyship obligations of the sureties must fall away correspondingly. As confirmed in *Shabangu v Land and Agricultural Development Bank of South Africa*,² the invalidity of a principal agreement can render an accessory suretyship agreement unenforceable.
- c. Hollard has deliberately elected not to proceed against the Kuyanda at this hearing, creating a situation where the court is asked to adjudicate the accessory obligation while the principal obligation remains unadjudicated and in active dispute.
- d. The Sureties have expressly stated - in the replying affidavit to the postponement application - that they align themselves with the Kuyanda's defence and regard the question of the validity of the principal indemnity obligation as central to their own liability.

[31] The mischief of the approach adopted by Hollard is apparent: If this court were to grant judgment against the Sureties, and a different court were thereafter to find that the Deed of Indemnity is void for lack of authority, the Sureties would have had judgment entered against them in respect of an obligation that is subsequently found never to have validly existed. This is precisely the type of inconsistent, fragmented, and potentially irreconcilable outcome that the courts must guard against: see *Minmetals Logistics Zhejiang Co Ltd v The Owners*

² *Shabangu v Land and Agricultural Development Bank of South Africa* 2020 (1) SA 305 (CC).

and Others,³ where the Supreme Court of Appeal held that courts must guard against “*conflicting results, a multiplicity of actions, possible conflicting orders, incompatible outcomes and potential prejudice.*”

[32] The sureties also correctly point out, in their replying affidavit, that a surety may raise any defence that the principal debtor is entitled to raise against the creditor, unless the surety has waived that right. There is nothing in the Deeds of Suretyship to suggest that the Sureties waived the right to rely on defences available to Kuyanda as principal debtor. Accordingly, the Sureties are entitled as a matter of law to rely on the defence raised by Kuyanda - namely, the alleged invalidity of the underlying deed of indemnity.

[33] But that is not the end of the matter as the Sureties also bound themselves as indemnifiers of the principal debt.

The separate indemnities

[34] Hollard points out that the Sureties’ argument that their obligations are by their very nature accessory to the principal obligation and thus are inextricably tied to the enforceability of that obligation is irrelevant as in the Deeds of Suretyship they undertook obligations as indemnifiers and sureties.

[35] Clause 3 of the Deed of Suretyships expressly states that:

“We undertake and agree to pay to the Insurance Company on demand any sum or sums of money which the Insurance Company may be called upon to pay under any Guarantee whether or not the Insurance Company shall, at such date, have made such payment and whether or not the Guarantor, Contractor/s or me/us admit the validity of such claims against the Insurance Company under the Guarantee.”

[36] Clause 10 of the Deed of Suretyships provides:

“This Deed of Suretyship and Indemnity shall be enforceable against me/us in accordance with the tenor thereof, whether as an indemnity or otherwise, notwithstanding that the Indemnity may in any way be invalid or unenforceable against the Guarantor.”

[37] Clause 11 of the Deed of Suretyships further state that:

³ *Minmetals Logistics Zhejiang Co Ltd v The Owners and Others* [2024] ZASCA 129 at para [8].

“Should this Deed of Suretyship and Indemnity for any reason be unenforceable against me/us or any of us, or not be signed by all the persons hereinafter named, it shall nevertheless be and remain of full force and effect against the other or others of us, being signatories thereto.”

[38] The Deed of Suretyships therefore unequivocally states that the Sureties are liable to the applicant whether or not they admit the validity of the claim, whether or not the Deed of Suretyship is enforceable against the Guarantor (being Kuyanda). Moreover, the Indemnity (signed by Kuanda) is enforceable whether or not all persons named in it have signed the Indemnity. The same principle applies to the Suretyships.

[39] An indemnity surety is not accessory but an independent promise to be liable for the principal debt.

[40] Hollard thus argues that no purpose is served by hearing the case against the Sureties together with that against the principal debtor as it in any event has an independent right against the Sureties as indemnifiers.

[41] Although this appears to be an irrefutable argument, there may be possible answers to it.

[42] The first is that in *Fedbond Nominees (Pty) Ltd v Meier*,⁴ a case referred to me by Hollard, it is stated that in the case of an indemnity suretyship, there is an obligation to first seek to recover against the principal debtor and this applies even if the principal debtor were insolvent and there would be no point in seeking to recover from it. This means that should Hollard wish to rely on the indemnity obligations in the suretyship, it would also be incumbent upon it to first seek to recover from the principal debtor making the current application against the Sureties and indemnifiers premature.

[43] It may be arguable that in renouncing the benefits of excussion, the Sureties did so *qua sureties* and not as indemnifiers.

[44] The second is an argument raised by the Sureties, namely that the cause of action against them is predicated on the basis that they are sureties and not

⁴ *Fedbond Nominees (Pty) Ltd v Meier* 2008 (1) SA 458 (C)

indemnifiers and to rely now on the fact that they are indemnifiers impermissibly introduces a new cause of action.

[45] However, it must be said that very document upon which the cause of action against them is based expressly provides that they are both sureties and indemnifiers.

[46] Perhaps the strongest argument raised by the Sureties is that the clauses in the Deeds of Suretyship providing that the Sureties are both sureties and independent indemnifiers is *contra bonos mores*.

[47] In support of this argument, the Sureties referred me to the recent decision of Meyer JA in the Supreme Court of Appeal in *Tourvest Holdings (Pty) Ltd v Murti*⁵. Meyer on behalf of an unanimous court set out the principles where terms of a contract are found to be *contra bonos mores* and accordingly unenforceable, with reference to the case law thus:

“[68] South African law does not have overarching legislation that specifies whether contractual provisions are acceptable, reasonable or enforceable. The Constitution, which precludes reliance on provisions which are not in the interests of justice, unreasonable or *contra bonos mores* (against good morals) and the provisions of the CPA, bear on the issue.

[69] In *Afrox Healthcare Bpk v Strydom*, this Court held:
‘A contract term that is so unfair that it is contrary to public policy is unenforceable in law. . .

.
The fact that exclusion clauses may be enforced in principle does not mean, of course, that a particular exclusion clause cannot be declared by a court to be contrary to public policy and therefore unenforceable. The best-known example of a case in which this in fact happened is perhaps . . . where a contract term that excluded liability for fraud was declared contrary to public policy and therefore invalid. The criterion that applies to exclusion clauses does not differ, however, from that which applies to other contract terms alleged to be invalid due to considerations of public policy. The question is always whether the enforcement of the relevant exclusion clause or other contractual clause, due to either extreme unfairness or other policy considerations, is contrary to the community’s interests. (Citations omitted.)

⁵ *Tourvest Holdings (Pty) Ltd v Murti* (806/2024) [2026] ZASCA 8 (27 January 2026)

[70] In *First National Bank of SA limited v Rosenblum and Another*, Marais JA cautioned that:

‘ . . . Thus, even where an exclusionary clause is couched in language sufficiently wide to be capable of excluding liability for a negligent failure to fulfil a contractual obligation or for a negligent act or omission, it will not be regarded as doing so if there is another realistic and not fanciful basis of potential liability to which the clause could apply and so have a field of meaningful.

... [T]he task is one of interpretation of the particular clause . . . and the answer must be found in the language of the clause read in the context of the agreement as a whole in its commercial setting . . . against the background of the common law and . . . with due regard to any possible constitutional implication.’

[71] In *Barkhuizen, Ngcobo J* stressed that any contractual term that is opposed to the values enshrined in the Constitution would be against public policy and therefore unenforceable. He stated:

‘While it is necessary to recognise the doctrine of pacta sunt servanda, courts should be able to decline the enforcement of a time limitation clause if it would result in unfairness or would be unreasonable. This approach requires a person in the applicant’s position to demonstrate that in the particular circumstances it would be unfair to insist on compliance with the clause. It ensures that courts, as the Supreme Court of Appeal put it:

“employ [the Constitution and] its values to achieve a balance that strikes down the unacceptable excesses of “freedom of contract”, while seeking to permit individuals the dignity and autonomy of regulating their own lives.”

[72] Analysing the above approach, Mupangavanhu writes that:

‘This leaves room for the doctrine of pacta sunt servanda to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have assented to the inclusion of such clauses. . . The same applies to exemption clauses: courts should not enforce such clauses if it would be unreasonable and unjust to do so.’¹

[73] *Whether the disclaimers were contra bonos mores has enjoyed little attention in the appeal. Had it been the determinative issue I would have been inclined to finding any disclaimer for liability, where Drifters had expressly promoted their tours to allow participants to alight from their seats and move towards the lockers while the truck was in motion, to be contrary to public policy and mores, unfair and unenforceable. The appeal would be dismissed also for that reason.”*

[48] Although this was said in the context of disclaimers for personal injury, it applies equally to clauses in a contract that are regarded as *contra bonos mores*. The Sureties placed reliance on this judgment and suggested that they

would argue in the main application or trial that the separate indemnifying clauses should not be enforced.

[49] However, it must be borne in mind that this argument was rejected in *Lombard Insurance Company v Stewart*.⁶ There it was held:

“The guarantee renders the undertaking made by Cyclone an equivalent of the on demand guarantees” discussed earlier. Lombard was called upon to pay under its guarantee. That is the event which triggered Lombard’s right to deliver a demand to Cyclone. Cyclone was then obliged to pay, and for the sake of clarity clause 3 records that payment would be due even if Cyclone did not admit the validity of the claim against Lombard.

I accordingly conclude that cyclone became obliged to meet Lombard claim against it whether or not Lombard would have been entitled to resist the claim made by Umgeni Eater upon the basis that it was in fact not ancilliary to an underlying principal debt then owed by Cyclone to Umgeni Water under the construction contract concluded between the parties.

...

On the plain wording of the written undertaking provided by Mr Stewart, he bound himself not only a surety, but also as an indemnifier of Lombard in much the same way as the Cyclone. In both the answering affidavit and an argument the complaint was advanced that the provision for an indemnity brings about that the document incorporate both principal and accessory obligations, which is unfair (and indeed in the answering affidavit it is said to be unconstitutional, without any explanation for that contention), and therefore unenforceable. However it is not stated in the answering affidavit that Mr Stewart, a civil engineer who proclaimed his understanding of these matters, was misled in any respect as regards to the content of the undertaking which he signed.

In my view his undertaking is enforceable and given my findings regarding the liability of Cyclone, it is enforceable whether Mr Stewart is regarded as Cyclone surety or Lombard’s indemnifier. This is made clear in clause 7 (a) of the document which reads as follows: “This deed shall be enforceable against me/us in accordance with a tenor thereof, whether as an indemnity or otherwise, not standing that the indemnity may in any way being valid or unenforceable against [Cyclone]”.⁷

⁶ *Lombard Insurance Company v Stewart* 2016 JDR 1912 (KZP); see also *Guardrisk Insurance Company Limited v Buck and Others* (2035/2020) [2024] ZAGPJHC 284 (7 March 2024) dealt with below

⁷ Paras 22-24 and 32 to 33

[50] I will also be referring to *Guardrisk Insurance Company Limited v Buck and Others*⁸ in dealing with Demand Guarantees in which the Supreme Court of Appeal recently also rejected the notion that such clauses are contra bonus mores, unconscionable or unconstitutional.

[51] I thus do not believe that this argument has much prospect of success but will nevertheless afford the Sureties the opportunity to argue it at the hearing of the matter in due course on the strength of the recent comments made in the Supreme Court of Appeal in *Tourvest*.

The fraud issues raised

[52] The sureties have raised, as an independent defence, allegations of fraud in relation to the underlying transactions. Specifically, they allege that:

- a. The demand guarantees were called up on the basis of obligations that were, to Hollard's knowledge, tainted by fraud - being fictitious fuel transactions engineered by Diedricks to enrich himself at the expense of the Winkelhaak/Bafana group and its members;
- b. The sureties expressly warned Hollard not to make payment under the guarantees, and Hollard chose to pay regardless; and
- c. Hollard's decision to pay under such circumstances - with knowledge of the alleged fraud - constitutes conduct that ought to disentitle it from recovering under the suretyships.

[53] Hollard argues that this argument falls to be rejected out of hand as it misconstrues the fundamental basis of and principles applicable to Demand Guarantees.

The legal implications of an on-demand guarantee

[54] An on-demand guarantee, unlike a conditional guarantee, requires no allegation of liability on the part of the contractor in terms of the underlying contract. All that is required for payment is a demand by the claimant, stated to

⁸ Cited in footnote 6

be on the basis of the event specified in the bond, often referred to as “the trigger event.” This does not require proof that there was in fact an actual breach.⁹

[55] The Guarantee embodies an independent, autonomous contract between Hollard and the petrol/diesel companies rendering the underlying contractual arrangement with the principal debtor irrelevant to the petrol companies’ demands for payment.¹⁰

[56] The guarantor’s obligation to pay on demand arises if the provisions of the guarantee are met. The status or merit of the underlying debt as between the beneficiary/contract employer and the principal debtor are of no consequence to the guarantor’s obligation under the guarantee, or to the beneficiary’s corresponding right to receive performance on the terms of the guarantee.¹¹

- a. In *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association*¹² according to the headnote to the reported judgment:

“The majority in Dormell ‘diverged from earlier SCA decisions which likened the autonomous nature of a bank’s obligations under construction guarantees to those under letters of credit, in that such obligations were ‘wholly independent from the underlying contract’, and that the only basis . . . (to) escape liability (was) proof of fraud on the part of the beneficiary’.

A number of recent SCA decisions indicated a preference for the approach of the minority in Dormell, where it was succinctly stated that, in the absence of allegations of fraud, ‘(w)hatever disputes there were or might have been between (the

⁹ *Minister of Transport and Public Works, WC v Zanbuild Construction (Pty) 2011 (5) SA 528 (SCA).* at [13]; *Lombard Insurance v Landmark Holdings (Pty) Ltd & others 2010 (2) SA 86 SCA* at [19] and [20].

¹⁰ *Compass Insurance Company Ltd v Hospitality Hotel Developments (Pty) Ltd 2012 (2) SA 537 SCA* at [9] and [14]-[15].

¹¹ *Guardrisk Insurance Company Ltd v Kentz (Pty) Ltd 2013 JDR 2727 SCA* at [27], [28] and [29]

¹² *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association 2014 (2) SA 382 (SCA)*

parties) were irrelevant to the (bank's) obligation to perform in terms of the construction guarantee'."

[57] The liability to pay and the corresponding right to receive payment arise solely from the occurrence of a specified event.

The fraud exception

[58] In *Loomcraft Fabrics CC v Nedbank Ltd & another*¹³ the Court affirmed the requirements for success under the fraud exception as follows:

- a. That *material misrepresentations* of fact were made by the beneficiary to the guarantor, upon which it knew the guarantor would rely, and which the beneficiary knew were *untrue*.
- b. Mere error, misunderstanding or oversight, however unreasonable, would not amount to fraud. Nor is it enough to show that the beneficiary's contentions (in the present instance, Sasol's opinion that Aveng was in breach of the Contract) were incorrect. A party must go further and show that the beneficiary knew it to be incorrect, and it must show the contention was advanced in bad faith.

[59] In *Guardrisk Insurance Company Ltd v Kentz (Pty) Ltd*¹⁴, the Supreme Court of Appeal (SCA), quoting from *Loomcraft*, explained the position in our law as follows:

"[17] It would be useful to briefly consider the legal position in relation to the fraud exception. It is trite that where a beneficiary who makes a call on a guarantee does so with knowledge that it is not entitled to payment, our courts will step in to protect the bank and decline enforcement of the guarantee in question. This fraud exception falls within a narrow compass and applies where:

' ... the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of

¹³ *Loomcraft Fabrics CC v Nedbank Ltd & another* 1996 (1) SA 812 (A) at 822G - 823C

¹⁴ *Guardrisk Insurance Company Ltd v Kentz (Pty) Ltd* 2013 JDR 2727 (SCA)

fact that to his (the seller's) knowledge are untrue.' (emphasis added)

[60] Accordingly, Theron JA (writing for the Court) went on to state:

"[20] Guardrisk contended that the demands under the guarantees were fraudulent as Kentz had not given Brokrew adequate notice within which to remedy the breaches alleged by it. It was argued that Kentz had elected not to rely on its right to summarily terminate the construction contract. Instead, and in terms of the letter dated 24 February 2010, it gave Brokrew seven days written notice to remedy its alleged breaches, when it was, in terms of clause 15.2(d) 13 of the contract, obliged to provide 28 days written notice to Brokrew. Furthermore, so the argument went, Kentz had failed to comply with the provisions of clause 2.5 14 of the construction contract in that it had not given notice to Brokrew of the clause it intended to rely upon and the amount that was to be paid to it in terms of clause 2.5. For these reasons, it was contended that the termination of the contract by Kentz was premature and unlawful."

[61] The Court nevertheless found that Kentz as beneficiary was entitled to payment under the performance guarantee in issue in that matter, concluding as follows:

"22. In my view, Guardrisk has not established the fraud exception. In fact, what it has sought to do is to have this court determine the rights and obligations of the parties in relation to the construction agreement, which on the authorities, this court is precluded from deciding. [Our emphasis.] The finding by the high court that the appellants had not discharged the onus resting on them to establish fraud on the part of Kentz cannot be faulted. I agree with the reasoning of the High Court that:

'The evidence before court clearly demonstrates that Kentz held the view that it was entitled to lawfully pursue its claims under the guarantees. The mere fact that it pressed its claims knowing that Brokrew held a contrary view about the cancellation with which it disagreed is not fraudulent.'

[62] In this respect, Hollard made reference to *Guardrisk Insurance Company Limited v Buck and Others*¹⁵ where it was said:

"In Guardrisk Insurance Company Ltd v Kentz (Pty) Ltd the court dealt with the principle of independence (or the autonomous principle) as follows: The terms of the guarantees are clear. They create an obligation on the part of the guarantor (Guardrisk) to pay Kentz (the employer) on the happening of a specific event. It was recorded in the guarantees that notwithstanding the

¹⁵ *Guardrisk Insurance Company Limited v Buck and Others* (2035/2020) [2024] ZAGPJHC 284 (7 March 2024).

reference to the construction contract, the liability of the bank as principle is absolute and unconditional and should not be construed to create an accessory or collateral obligation. The guarantees go further and specifically state that the bank may not delay making payment in terms of the guarantees by reason of the dispute between the contractor and the employer. The purpose of the guarantees was to protect Kentz in the event that Brokrew could not performance obligations in terms of the construction contract. I agree with the applicant that the indemnity and the deed of suretyship are equivalent to a performance fund where a guarantee has been issued at the written request of the contractor, the employer has demanded payment under the guarantee and the applicant has demanded payment under the indemnity, and the deed of suretyship (and indemnity), the respondents are obliged to pay the amount to the applicant whether or not they admit the validity of the claim.

In summary, the applicant has demonstrated that Probuild executed the deed of indemnity, and that the respondent executed the respective deeds of suretyship and indemnity. Probuild requested, in writing the applicant to issue the Lanseria guarantee, and it expressed they took responsibility for any claim under the guarantee. Lanseria demanded payment under the guarantee (which demands were compliant), and the applicant demanded payment from the respondent. Even, as correctly contained by the applicant, if Lanseria's demand was for any reason deficient, the respondent was still obliged to pay the amount to the applicant, that is whether or not the respondent admit the validity of the demand.”¹⁶

[63] In the leading case of *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others* 2010 (2) SA 86 (SCA) the Supreme Court of Appeal explained the nature of Demand Guarantees, stressing they are entirely separate from the underlying contract. In rejecting the reasoning of the court *a quo* the Supreme Court of Appeal said:

“[19] In my view the court below misconstrued the nature of the guarantee and the indemnities provided by the three respondents. The terms of the guarantee by Lombard referred to in paras 2, 3 and 4 above are clear. The guarantee creates an obligation to pay upon the happening of an event. The guarantee itself records that reference to the construction contract is solely for the purpose of convenience and that there is no intention to create an accessory obligation or suretyship. Clause 14.5 of the construction contract merely records that security exists in respect of the contractor's obligations. The guarantee was to protect the Academy in the event of default by Landmark and it is to the guarantee that one should look to determine the rights and obligations of the Academy and Lombard.

[20] The guarantee by Lombard is not unlike irrevocable letters of credit issued by banks and used in international trade, the essential feature of which is the establishment of a contractual obligation on the part of a bank to pay the

¹⁶ At paras 47-48

beneficiary (seller). This obligation is wholly independent of the underlying contract of sale and assures the seller of payment of the purchase price before he or she parts with the goods being sold. Whatever disputes may subsequently arise between buyer and seller is of no moment insofar as the bank's obligation is concerned. The bank's liability to the seller is to honour the credit. The bank undertakes to pay provided only that the conditions specified in the credit are met. The only basis upon which the bank can escape liability is proof of fraud on the part of the beneficiary. This exception falls within a narrow compass and applies where the seller, for the purpose of drawing on the credit, fraudulently presents to the bank documents that to the seller's knowledge misrepresents the material facts.

[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.

[64] It is emphasised that the Supreme Court of Appeal also rejected the notion that the provisions were *contra bonos mores*, unconscionable and unconstitutional. In conclusion it was stated:

[23] In light of the reasoning set out above there is no need to address the constitutionality of the wording of the indemnities provided by the three respondents. It was contended that the wording was such as to render the clauses in question unconscionable, unduly harsh and prejudicial, against public policy, contra bonos mores and offensive to the respondents' constitutional rights. This submission was based on a mistaken view of the basis of the indemnity. Nothing further need be said on this issue."

[65] It is thus apparent that the fraud exception in the law of demand guarantees is a narrow one. In *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others*¹⁷, Navsa JA confirmed that a guarantor's obligation to pay is wholly independent of the underlying contract and that "*the only basis upon which the bank can escape liability is proof of fraud on the part of the beneficiary.*" In *Guardrisk Insurance Company Ltd and Others v Kentz (Pty) Ltd*,¹⁸ Theron JA confirmed that the fraud exception "*falls within a narrow compass*" and requires

¹⁷ Supra at para [20]

¹⁸ Supra footnote 14

that the beneficiary made a demand knowing that the factual basis for the demand was untrue and that the demand was advanced in bad faith.

[66] The cases quoted above make it plain that the only basis upon which the guarantor may refuse payment is when the fraud appears *ex facie* the demand itself; a fraud in the underlying contract is irrelevant.

[67] However, the question raised by the Sureties in the present may fall outside of the clear and unequivocal judicial precedent concerning Demand Guarantees: They do not only rely on the fraudulent nature of the underlying transaction (which they say was a fraud on the fiscus as it was not VAT compliant), their concern raises the further question namely, whether Hollard - armed with specific knowledge that the demands may have been fraudulent and having been specifically asked by the sureties not to make payment - may look to the S for reimbursement in circumstances where it proceeded, at its own risk, to honour the demands regardless.

[68] This is a contentious issue as Hollard insists it had no choice but to honour its guarantees (and there is ample authority for its approach) and advised the Sureties to bring an urgent application to preclude it from doing so, that they failed to do. This does present a difficulty to the Sureties and it does not lie in their mouths now to say, as they do, it was incumbent upon Hollard to approach the court on an urgent basis. Had they brought the urgent application that they were advised to bring, they may not now have been in their current predicament. This, however, is said that the urgent court could have found a basis in law for excusing Hollard from payment.

[69] Having considered the matter carefully as well as all of the relevant authorities, it is with much reluctance that I feel compelled to grant the Sureties a life line and a chance to file the appropriate affidavits (provided that they are granted condonation) and raise the arguments advanced by them in these proceedings in a hearing in due course together with all of the remaining respondents. I do so on the basis that some of the arguments at least *prima facie* present a triable issue and it would be contrary to the interests of justice and s 34 of the

Constitution to preclude them from raising their defences before a court of law in a fair hearing.

[70] Additionally, the question of Hollard's ostensible authority argument - advanced for the first time in the replying affidavit - raises a further basis upon which the Sureties should be able to engage. The sureties correctly point out that this constitutes a new case not foreshadowed in the founding papers, and that they should be entitled to respond to it if the matter were to proceed on the merits. However, this is said appreciating that ostensible authority is often raised in a replication or a plea following a denial of actual authority. This is akin to where prescription is raised in a plea or answering affidavit and the lack of knowledge of the debt is raised in a replication or replying affidavit.

[71] I am mindful that Hollard strenuously sought to persuade me that this was yet another delaying tactic of the Sureties (which it may well be), but I am constrained in view of s 34 of the Constitution to at least afford the Sureties an opportunity to oppose the relief sought in a fair hearing in due course.

Costs

[72] The general rule in relation to costs is that costs follow the result. Hollard has not succeeded in obtaining a default judgment against the Sureties and the Sureties have been successful in securing a postponement of the matter to enable them to be heard in the same forum as the other respondents.

[73] The sureties sought a punitive costs order against Hollard on the basis that Hollard should have consented to the requested postponement that had been orally made in court rather than insisting that a formal application be launched that it opposed occasioning unnecessary costs.

[74] I do not agree with this at all. The Sureties have requested an indulgence. They ought properly to have prepared a substantive application for a postponement in advance of the hearing and were not entitled to assume that all that was required of them was to simply ask for a postponement from the bar; a postponement is not granted simply by the asking.

[75] In addition, Hollard has raised legal points that would preclude the Sureties from relying on the accessory nature of their liability as in their express terms, the Deeds of Suretyship make it plain that they are also indemnifiers and not only sureties. It has also argued that despite the allegations of fraud and the warnings from the sureties not to honour the on demand guarantees, it was legally obliged to honour them as the fraud exception was not met. On top of this, there is authority from the Supreme Court of Appeal that the argument that the surety and indemnity contracts that they signed are not *contra bonos mores*, unconscionable or unconstitutional.

[76] This undoubtedly justified Hollard opposing the postponement. It may be that a hearing in due course the court will make a finding in Hollard's favour on these points and hold the sureties liable on the basis of their own indemnities which may properly be severed from their suretyship obligations. In these circumstances I feel that the appropriate costs order is to make costs of the postponement costs in the cause.

Order

[77] In the circumstances, the following order is granted:

1. The application by the Second to Seventh Respondents for a postponement is granted.
2. The matter as between the applicant and all the remaining respondents is postponed sine die, to be enrolled once the proceedings are ripe for hearing in respect of all respondents.
3. The costs of the postponement application are to be costs in the cause in the main action.

WENTZEL-THOMSPON J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

