

SOUTH AFRICA / JUDGMENT

Group Five Construction (Pty) Ltd v Constantia Insurance Company and Others (34068/2019) [2023] ZAGPJHC 233 (15 March 2023)

[2023] ZAGPJHC 233

COURT

South Gauteng High Court, Johannesburg

BEFORE

M A Makume

CASE / FILE NUMBER

34068/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: 34068/2019

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

DATE:

15 MARCH 2023

In

the matter between:

GROUP
FIVE CONSTRUCTION (PTY) LTD Applicant
(IN
BUSINESS RESCUE)
And
CONSTANTIA
INSURANCE COMPANY First
Respondent
FAST
TRACK CONTRACTING AFRICA (PTY) LTD Second
Respondent
FAST
TRACK CONTRACTING AFRICA (PTY) LTD First
Third Party
BRIDGENUN
MOHANLALL Second
Third Party

JUDGMENT

MAKUME, J:

INTRODUCTION

- [1] In this matter the Applicant seeks an order compelling the first Respondent to make payment to the Applicant in the amount of R2 199 817.25 (first Guarantee) and R1 206 717.89 (second Guarantee).
- [2] It is common cause that the Applicant and the second Respondent concluded three separate and distinct N/S JBCC subcontract agreements. The first Respondent Constantia issued three separate and distinct guarantees for the works to be performed under each of the subcontracts.
- [3] Payment in the amount R2 199 817.25 is demanded under Guarantee number 117961 J (the first Guarantee) pursuant to a demand made on the 28th May 2018.
- [4] Payment of the sum of R1 206 717,89 is demanded under guarantee number 117926 J (the second Guarantee) pursuant to a demand made on the 28th May 2018. This claim was introduced pursuant to an application to amend granted to the Applicant by this Court on the 10th June 2021.

BACKGROUND

FACTS

- [5] During or about 26 May 2015 the Applicant was appointed as the main contractor for a project described as “Pearls Sky for Pearls of Umhlanga Development.” The project was for the construction of a new multi-storey residential and hotel tower (the Project)
- [6] The Applicant subsequently appointed the second Respondent as a subcontractor to execute portions of the work on the project. The Applicant and the second Respondent concluded a sub-contract agreement to be governed by the provisions of the JBCC Services 2000 N/S subcontract Agreement 2007 edition (the subcontract).
- [7] Pursuant to the conclusion of the subcontract agreement the second Respondent approached the first Respondent which subsequently issued the Applicant with a construction Guarantee number 117961 J. The guarantee provides for security to the Applicant on a reducing basis as the project progresses.
- [8] For purposes of this judgment I set out hereunder the relevant clauses of the guarantee which read as follows:

“4. Subject to the Guarantors maximum liability referred to in clause 1 above the Guarantor hereby undertakes to pay the contractor the sum certified upon receipt of the documents identified in clause 4.1 to 4.3 below:

4.1 A copy of the first written demand issued by the contractor to the subcontractor stating that payment of a sum certified by the contractor in a payment advice has not been made in terms of the agreement and failing such payment within seven (7) calendar days the contractor intends to call upon the contractor to make payment in terms of clause 4.2.

4.2 A first written demand issued by the contractor to the guarantors domicilium citandi et executandi with a copy of the subcontractor stating that a period of seven (7) calendar days has elapsed since the first written demand in terms of clause 4.1 and the sum certified has still not been paid therefore the contractor calls up this N/S construction guarantee and demands payment of the sum certified from the guarantor.

4.3 A copy of the payment advice which entitles the contractor to receive payment in terms of the agreement of the sum certified in clause 4.”

- [9] In this guarantee agreement contractor refers to the Applicant being Group Five Construction (Pty) Ltd. Guarantor refers to the first Respondent being Constantia Insurance Company Ltd and Subcontractor refers to the second Respondent being Fast Track Contracting (Pty) Ltd.
- [10] On the 25th April 2018 the Applicant issued a certified payment certificate in terms of clause 31.12 of the N/S agreement calling for payment within 21 days. No payment was received.

- [11] On the 28th May 2018 the Applicant as it was entitled to do in terms of clause 4 of the guarantee called upon the first Respondent to make payment to it in the amount of R2 199 817.25.
- [12] The first Respondent was advised that demand to it is on the basis that Fast Track the second Respondent had failed to pay the sum certified.
- [13] On receipt of the letter of demand Constantia the first Respondent addressed their response on the 31st May 2018 informing the Applicant that according to them Fast Track the second Respondent advised them that the project was practically complete the guarantee was returned to them for cancellation. Secondly that as regard the project involving the “Residential Kitchen Cabinets, BIC and Vanities that the claim was premature.
- [14] On the 4th June 2018 Messrs Cox Yeats Applicant’s attorneys addressed a letter to Constantia referring them to the terms and conditions of the guarantee and informing them that they are liable in terms of clauses 4.1 and 4.3 of the guarantee. Constantia made no payment. On the 20th June 2018 Messrs Cox Yeats repeated the demand to Constantia. Still no payment was forthcoming.
- [15] On the 15th June 2018 Fast Track contracting as Applicant in an urgent application under case number 22575/2018 sought to interdict Constantia from making payment to Group Five Construction. The matter was heard by Meyer J as he then was on 5th December 2018 and on the 14th December 2018 the application was dismissed with costs.
- [16] On the 20th December 2018 Fast Track applied for leave to appeal which application was dismissed by Meyer J. A petition to the Supreme Court of Appeal was similarly dismissed on the 13th September 2019. The SCA order reads as follows:
- “The application for leave to appeal is dismissed with costs on the grounds that there are no reasonable prospects of success in an appeal and there is no other compelling reason why an appeal should be heard.*
- [17] On the 19th December 2018 the Applicants attorneys addressed another letter to the First Respondent this time in accordance with Section 345 of the Companies Act in which the Applicant pointed out to the first Respondent that first Respondent’s failure to make payment in terms of the guarantee will result in the first Respondent being deemed to be insolvent as it was unable to pay its debts. On the receipt of that letter the first Respondent’s attorneys indicated to the Applicant’s attorneys that in their view demand for payment was premature as there was a pending application for leave to appeal the judgement by Meyer J.
- [18] First Respondent attorneys then indicated that the amount claimed will be paid into their trust account presumably to be held as security and to be paid to the Applicant on dismissal of the application for leave to appeal or the appeal.

- [19] On the 7th January 2019 second Respondent's attorneys advised the Applicant's attorneys that indeed the amount of R2 199 817.25 has been paid into their trust account and invested in an interest bearing account.
- [20] On the 16th September 2019 after dismissal of the application for leave to appeal by the SCA Applicant's attorneys once again addressed a letter to the Respondent calling for payment of the amount of R2 199 817.25 plus interest. Instead of making payment the first Respondent referred Applicant to a letter from the second Respondent attorneys in which they advised that no payment shall be made under the first guarantee as the underlying contract to which the guarantee related had been cancelled. A further letter was received in which Fast Track the second Respondent made allegation of fraud against the Applicant.
- [21] On the 21st September 2019 the Applicant issued and served its notice of motion on an urgent basis seeking relief that the first Respondent be ordered to make payment to it in the sum of R2 199 817.25 plus interest thereon at the rate of 10% per annum calculated from the 18th May 2018.
- [22] That application became opposed and in particular the second Respondent through its Managing Director Mr Bridgenun denied that the application was urgent specifically indicating that the Applicant could have filed a counter-application to the interdict application that Fast Track had instituted earlier which interdict application was unsuccessful.
- [23] Secondly Fast Track argued that the call on the guarantee was bad for failure to comply with a number of procedural aspects as well as properly identifying the parties in the transaction.
- [24] In paragraph 64 of its Answering Affidavit Fast Track says the following:

"As I have already stated herein above the facts underpinning the 2018 interdict application were focussed on the "disconnect"

between the party issuing the "payment certificate and reconciliation statement" and the party identified in the guarantee ("C"). The second Respondent also did rely on the fact that an arbitration was pending between the parties in which

the accuracy of the "certificate" was in issue but did not persist with that approach in argument."

- [25] The first Respondent Constantia in its Answering Affidavit question the citation of the correct party at whose instance the guarantee was issued. In particular, at paragraph 10 of its Answering Affidavit Constantia says the following:

"Group Five's entire case is predicated on its interaction with the second Respondent, not Fast Track. Its claim against Constantia is based on monies that Group Five alleges is owed to it by the second Respondent and which Group Five alleges is owed to it by Constantia under the guarantee (annexure C to Group Five's Founding Affidavit) which Group Five alleges Constantia gave it for the obligation owed by the second Respondent to Group Five."

[26] This argument was raised because the guarantee being annexure “C” Indicated the subcontractor to the “Fast Track Shop fitters (Pty) Ltd registration number 1995/003574/07” and not “Fast Track Contracting (Pty) Ltd.”

[27] In the result so argues Constantia that Group Five had failed to set out a cause of action for payment under the guarantee.

[28] Simultaneous with its Answering Affidavit Constantia filed a Notice of Counter-application in which it cited Fast Track Contracting Africa (Pty) Ltd as the First Third Party and Mr Bridgenun Monhaulall as the Second Third Party.

[29] In the counterclaim Constantia seeks the following relief:

- (i) That should Group Five be successful in the main application and Constantia being ordered to pay Group Five the sum of R2 199 817.25

that Constantia be released from all further liability and payments under guarantee number 117961 J.

[30] Constantia made common cause with the second Respondent on the issue of urgency as well as on the issue of the alleged fraud. At paragraph 24 to 26 Constantia says the following:

“24 Pursuant to the resolution of the interdict proceedings Fast Track attorneys began engaging with Constantia attorneys. New grounds for resisting payment under the guarantee were raised. These new grounds were (albeit unsubstantiated) allegations of fraud.

25 Constantia sought as it is entitled to investigate these claims

26 Group Five has never rejected the contention that Constantia is entitled to investigate allegations of fraud prior to making payment under the guarantee.”

[31] On the 4th October 2019 Constantia issued a notice to third parties being Fast Track Constructing Africa (Pty) Ltd and Mr Bridgenun Monhaulall seeking relief in the following terms:

- a) That the third parties’ indemnify the first Respondent Constantia against any order granted against Constantia in the main application.
- b) That the third parties be ordered to pay Constantia the amount Constantia shall have been ordered to pay to Group Five pursuant to the main application including costs and interest.

[32] The indemnity claim is based on two documents the first being a deed of

indemnity executed by Fast Track on the 15th April 2000. Fast Tracks was duly represented by Mr Bridgenun Monhaulall. The second document is a deed of surety in solidum for and as co-principal debtor jointly and severally together with Fast Track to Constantia of all amounts which Fast Track may be liable to pay to Constantia under the principle indemnity.

- [33] In opposing the third party application Mr Bridgenun relies on his assertion that the guarantee and the claim by Group Five are fraudulent and that no payment is due to Group Five.
- [34] On the 31st January 2020 the Applicant Group Five served a notice of motion set down for hearing on 20 April 2020. The notice of motion is in two parts. In part A Group Five seeks leave to amend its notice of motion to incorporate a claim for payment in part B of the sum of R1 206 717.89 based on a guarantee and to admit the affidavit by Gary Elliot as evidence. The second guarantee is 117926J.
- [35] The claim in the amendment is based on the second construction guarantee issued by the first Respondent in favour of the Applicant in relation to work to be performed by the second Respondent. The amendment also seeks an order amending the citation of the second Respondent from “Fast Track Contracting (Pty) Ltd” to Fast Track Contracting Africa (Pty) Ltd
- [36] The Applicant in the notice of amendment also seeks leave to file a Supplementary Founding Affidavit in relation to the further relief it sought in the main application. The second Respondent is not opposing the notice of amendment. Likewise, the application to cite the second Respondent correctly is not opposed. The application to amend was granted by this Court on the 10th June 2021.

ISSUES

TO BE DETERMINED

- [37] The following are the issues before me for determination
- i) Whether Group Five has made a valid and lawful demand in terms of the first and second guarantees.
 - ii) Has Group Five’s claim in respect of the second guarantee prescribed?
 - iii) Has Fast Track the second Respondent succeeded in proving that Group Five’s demand in respect of the guarantees was fraudulent and improper.
 - iv) Is Constantia the first Respondent entitled to its counterclaim in which it seeks enforcement of the indemnity and relief against the third parties who have indemnified Constantia against a call on the guarantees as well as any costs incurred in relation to any enforcement proceedings.
 - v) Was the application urgent.
- [38] Before I deal with the issues enumerated above I need to quickly dispose of the issues around the citation of the parties.

[39] Initially Constantia in its Answering Affidavit contended that on the face of the first Guarantee it was not given for the company cited as the second Respondent but rather a different company. However, in their heads of argument dated 15 November 2019 Constantia accepted that the entity cited was the second Respondent and the entity whose performance Constantia guaranteed are one and the same entity.

[40] It is common cause that there are five (5) companies which all share the name Fast Track they are:

i) Fast Track Contracting Africa (Pty) Ltd

ii) Fast Track Contracting (Pty) Ltd

iii) Fast Track Shopfitters (Pty) Ltd

iv) Fast Track Contracting

v) Fast Track Shopfitters

[41] All these companies or entities are headed and controlled by one and the same person. Now for the second Respondent for sinister motives contends that the Applicant cited the wrong entity since it relies on a guarantee which does not identify the correct subcontract. This was in the affidavit by Mr Bridgenun dated the 19th November

2020. However, in an earlier affidavit signed by the same person dated the 4th October 2019 Mr Bridgenun at paragraph 37 admitted that Fast Track had been correctly cited as the Respondent.

[42] It is clear that by raising this issue the second Respondent was obviously being opportunistic and disingenuous. I am satisfied that the correct party was cited in the application as well as in the demand letters.

HAS GROUP FIVE MADE A VALID AND LAWFUL DEMAND IN TERMS OF THE
FIRST AND SECOND GUARANTEES?

[43] This issue has been the subject of two decisions already involving the same parties. First it was the judgement by Meyer J as he then was in case number 22474/2018 a judgment delivered on the 14th December 2018. The second was in the judgement by Matojane J as he then was in case number 39034/2018.

[44] In case number 22474/2018 Fast Track Contracting (Pty) Ltd as Applicant sought to interdict Constantia from paying Group Five under the guarantee. Fast Track contended that Group Five had not complied with clause 4 of the guarantee. At paragraph 9 of the judgment the following is said:

“Group Five sent a written demand to Constantia calling for payment under the guarantee. Attached to that written demand was the first written demand sent to Fast Track on the 8th May 2018, the request for payment dated 25 April 2018 with the payment advice attached thereto a letter from FNB confirming the bank details of Group Five Contraction and a cancelled cheque of Group Five.”

- [45] After citing various decisions dealing with similar on demand guarantees Meyer J concluded as follows at paragraph 11:

“The call on the guarantees was thus proper and compliant with the requirements of clause 4 of the guarantee. A sum was certified as due and owing to Group Five Construction a payment advice that entitled Group Five Construction to payment had been issued to Fast Track and all documents required in clause 4.1 and 4.3 of the guarantee were received by Constantia.”

- [46] In the judgement by Matojane J as he then was the subcontractor Millennium opposed payment of the amount due in terms of the guarantee issued to Group Five on the basis that Group Five failed to comply with the terms of the guarantee in making its demand. It was also contended that the guarantee had been cancelled. This was disputed by Group Five.

- [47] In his judgment at paragraph 37 Matojane J concluded as follows:

“I find that Group Five has presented the demand to Constantia properly and has met all the jurisdictional requirements set out in clause 4 of the guarantee. The demand has triggered the indemnification of Constantia by the third parties as they undertook to pay all amounts which Millennium may be liable to pay to Constantia under the Principal Indemnity.”

- [48] It is common cause that the terms of the first and second guarantee are similar. They are autonomous guarantee payable on demand, without reference to any underlying dispute which may exist between Group Five and Fast Track.

- [49] It is not disputed by Group Five that when it sent out a payment advice to Fast Track in respect of the first and second guarantees it had collated and recorded information for works under all three subcontracts of Fast Track in a single payment advice statement. In fact, Group Five called up the first and second guarantees on the same date being 28 May 2018 the same subcontract payment advice was attached to both demands. This in my view clearly indicated that Constantia was properly inform that the payment advice was not only relied upon for a single subcontract but two separate subcontracts for which two separate guarantees had been issued by it.

- [50] On receipt of the demands Constantia replied by letter dated the 31st May 2018 and separately in that one letter made reference to guarantee number 117926J being in respect of “Residential Partitioning and Ceilings” as well as to guarantee number 117961J being in respect of “Residential Kitchen Cabinets BICS and vanities.”

- [51] In the letter Constantia did not dispute having issued the guarantees in respect of the works to be performed by Fast Track relating to “Residential Kitchen Cabinets BICS and vanities” (the first guarantee) all that Constantia said was that it has been informed by its

client Fast Track that it has raised a dispute with Group Five about the amount claimed in the payment certificate dated 24th April 2018. Constantia also said that Fast Track informed them that it has a claim of R16 million against Group Five which claims have been referred to Arbitration and as a result Constantia contended that “your demand under the guarantee is premature.”

- [52] Responding to the demand in respect of a guarantee 117926J (the second guarantee) Constantia contended that Fast Track their client had informed them that the guarantee had been cancelled because the project was practically completed. Constantia did not regard themselves to pay bound because of that.
- [53] The starting point in dealing with these defence is to emphasise that guarantees are autonomous obligations free from the terms of the underlying subcontract agreements not unless there is fraud.
- [54] When Fast Track noticed that the defence based on non-compliance will carry or carries no weight it delivered a supplementary affidavit and reverted to reliance on fraud when in fact it had earlier abandoned reliance thereon.
- [55] It is common cause that Constantia abandoned its defence based on identity of Fast Track. Its position is that it will abide by the relief claimed subject to this Court also upholding its counterclaim against the named third parties.
- [56] I am satisfied that Group Five filed a valid document for payment in terms of the first guarantee and that Constantia must pay and should have paid on receipt of the demand and not rely on a spurious and dilatory defence raised by Fast Track.
- [57] Clause 4 of the guarantee envisaged that Constantia could incur liability to Group Five where the sum certified in a payment advise has not been paid.

HAS FAST TRACK SUCCEEDED IN ESTABLISHING FRAUD BY GROUP FIVE RELATING TO THE DEMANDS

- [58] This defence is raised by the Fast Track the second Respondent it is captured at various instances in the affidavits by Mr Bridgenun. In paragraph 29.4 of his Answering Affidavit dated the 4th October 2019 Mr Bridgenun takes issue with the contents of Annexure D2 which is the payment certificate issued by Group Five. He says that it is materially wrong and cannot constitute a valid payment certificate under the provisions of the guarantee.
- [59] In his supplementary affidavit filed in August 2021 under the heading “Applicants conduct amount to Fraud” Mr Bridgenun at paragraph 13 says the payment advice is fraudulent and should not attract payment. At paragraph 20 he says the following:

“The misleading (and therefore fraudulent) call on the guarantee was then made to the first Respondent yet the Applicant knew the D2 was not limited to that subcontract.”

- [60] The alleged fraud according to Fast Track is said to consist of the fact that whilst there were three separate subcontract agreements in respect of the same project and separate guarantees were issued by Constantia in respect of the different subcontracts, Group Five Construction relied on a single payment advise (Annexure D2) which incorporated work under three subcontracts when it claimed payment from Constantia.
- [61] This defence is vehemently being pursued by Fast Track the second Respondent only Constantia has indicated that it is not involving itself in the fraud issue. Constantia only denies liability in respect of the second guarantee on the basis that the claim has prescribed.
- [62] It is trite law that a party wishing to rely on fraud must not only plead it but also prove it clearly and distinctly (See Courtney-Clarke vs Bassingthwaite [1991] 3 ALL SA 625 (NM)). The Constitutional Court in Absa v Moore 2017 (1) SA 255 at paragraph 39 stated the following:
- “Fraud unravels all directly within its compass but only between victim and perpetrator at the instance of the victim. Whether fraud unravels a contract depends on its victim, not the fraudster or third parties.”*
- [63] The facts in this matter are that Constantia is the guarantor in respect of all three guarantees to which Fast Track refers. The payment advices refer to two different subcontracts one for “retail” and the other for residential. Constantia itself in its reply letter dated the 31st May 2018 never raised any confusion or misunderstanding of the payment advice. It clearly in its reply identified the two payment guarantees separately. These facts alone clearly reveal that Fast Track’s theory of fraud is unsustainable.
- [64] When one follows the logic discussed in the Constitution matter of Absa v Moore (supra) one can conclude that the “victim”

in this matter should be Constantia and the perpetrator of the fraud is Group Five. The Constitutional Court made it clear that whether fraud unravel, a contract depends on its victim and not the fraudster or third parties. The victim Constantia is not complaining about fraud. It is the third party Fast Track which is complaining of fraud. Constantia has not contended that it was misled in any way by misrepresentation.

- [65] Fast Track maintains that its defence of fraud cannot be determined in motion proceedings and sought leave that the issue of fraud be referred to oral evidence. I dismissed that application for reasons set out in my judgement dated the 26th July 2022. In the result the defence of fraud is dismissed.

HAS GROUP FIVE’S CLAIM IN RESPECT OF THE SECOND GUARANTEE

PRESCRIBED

- [66] Constantia the first Respondent contends that the Group Five’s second claim for payment of the sum of R1 206 717,89 has prescribed Constantia says the following:

The common cause issues in this instance are the following:

66.1 on the 28th May 2018 Group Five sent its demand for payment to Constantia and attached all the documents as required in clause 4.1 to 4.3 of the guarantee.

66.2 On the 31st May 2018 Constantia acknowledged receipt of the demand and withheld same on the basis that there was still a dispute between Fast Track and Group Five which dispute has gone or has been referred to arbitration.

66.3 On the 27th September 2019 Group Five launched an urgent application claiming payment of R2 199 817.25 from Constantia under guarantee number 117961J.

66.4 The Respondents opposed the application. They filed Answering Affidavit where after the Applicant filed its Replying Affidavit.

66.5 On the 3rd February 2020 Group Five served on Constantia and on Fast Track a notice of motion seeking leave to amend its notice of motion and claim payment of the sum of R1 206 717.89 over and above the R2 199 817.25

66.6 The Court granted leave to amend on the 10th June 2021 and the amended notice of motion and the supplementary affidavit were served on the Respondent on the 14th June 2021.

66.7 On the 7th July 2021 Constantia delivered a notice in terms of Rule 6(5)(d) (iii) in which it gave notice of its intention to argue a point of law namely that the second guarantee had prescribed.

[67] In support of its defence of prescription Constantia contend that:

67.1 The amount claimed being the sum of R1 206 717.89 was due and payable on the 18th May 2018 being the date of demand to Fast Track.

67.2 That the only process in terms of which Group Five claimed payment of the second guarantee is in its amended notice of motion which was served on Constantia on the 17th June 2021.

67.3 The service of the amended notice of motion was more than three years after the second demand was made.

67.4 That the service of the amended notice of motion did not serve to interrupt prescription.

67.5 In the result so contends Constantia the second guarantee being a new claim prescribed on 28 May 2021.

[68] Section 15(1) of the Prescription Act number 68 of 1969 read as follows:

“The running of prescription shall subject to provisions of subsection (2) be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.”

[69] Corlbet JA as he then was in *Evins v Shield Insurance Co Ltd* 1980

(2) SA 814 (AD) at page 86 836 (1) reasons as follows:

“Where the Plaintiff seeks by way of amendment to augment his claim for damages he will be precluded from doing so by prescription if the new claim is based upon a new cause of action and the relevant prescriptive period has ran but not if it was part and parcel of the original cause of action and merely represent a fresh quantification of the original claim or the addition of a further item of damages.”

[70] The critical question to be answered is whether the service of the notice of motion on 3rd February 2020 served to interrupt prescription or whether it was the service of the amended notice of motion on the 14th June 2021 which brought in a new claim or a new cause of action.

[71] The Applicant amended notice of motion dated the 3rd February 2020 which is accompanied by the affidavit of Gary Elliot culminate in a prayer by Elliot which reads as follows:

“Wherefore the Applicant prays for judgment in terms of the amended notice of motion annexed hereto as SUP7.”

[72] The SCA in *Brompton Court Body Corporate vs Khumalo* 2018 (3) SA 347 held that an arbitration award does not create a new debt it merely affirms the existing debt that was in dispute.

[73] In the matter of *Rustenburg Platinum Mines Ltd v Industrial Maintenance Painting Services* CC 2008 JDR 1203 at paragraph 11 the Court concluded that in the case where an amendment was sought to introduce an alternative contractual basis for the claim which was originally framed on the basis of unjust enrichment the Court held that although the allegations or cause of action differed, the claim and correlative debt was the same.

[74] Eksteen JA in *Sentrachem Ltd vs Prinsloo* 1997 (2) SA 1 (A) at 151 -161 put the test as follows:

“Die eintlike toets is om te bepaal of die eiser nog steeds dieselfde of wesenlik dieselfde skuld probeer afdwing. Die skuld of vorderingsreg

moet minstens uit die oorspronklike dagvaarding kenbaar wees so dat ‘n daaropvolgende wysiging eintlik sou neerkom op die opklaring van ‘n gebrekkige of onvolkome pleitstuck waarin die vorderingsreg waarop daar deurgans gesteun is uiteengesit word.”

[75] It is trite law that the running of extinctive prescription is interrupted when the creditor commences Court proceedings for the enforcement of the claim before expiration of the prescription period or when the debtor acknowledges liability before the expiration of the prescription period.

[76] In the matter of *Chiwawa vs Mutzuris and Others* [2009] ZWHHC7 CHC7429/06 the Court held that an action to enforce a debt may be commenced by the filing of an application and in the absence of an appeal the process is brought to conclusion by the judgement of the Court.

[77] The learned writer Max Loubser in the book titled “Extinctive Prescription” second edition July 2019 at page 219 in dealing with the word any process as appear in Section 15(1) writes as follows:

“For the purposes of interruption of prescription under Section 15 a “process” includes a petition, a notice of motion, a rule nisi, a pleading in reconvention, third party notice referred to in any rule of Court and any documents whereby legal proceedings are commenced. This includes a simple or combined summons. A notice of motion is included provided it claims payment of a debt.”

[78] Constantia relies on wrong facts and incorrect interpretation of Section 15(1) of the Prescription Act when it contends that Group Five’s claim prescribed on the 28th May 2021 because the Court granted leave to amend on 10 June 2021 which is more than 3 years since the claim arose.

[79] There is nowhere in their heads where Constantia deals with the effect of service of the notice of motion during February 2020 which date effectively interrupted the running of prescription.

[80] I am persuaded that the service of the notice of application to amend did not introduce a new claim. Secondly mere service was sufficient to interrupt the running of prescription. In the result the plea of prescription by Constantia is dismissed.

THE THIRD PARTY APPLICATION

[81] It is common cause that the first third party (Fast Track) executed an indemnity in favour of Constantia and the second third party Mr Bridgenun Mohaulall bound himself as surety and co-principal debtor for the first third party’s obligation to Constantia.

[82] Both third parties resist Constantia’s claim for indemnification on the ground that their obligation to indemnify

Constantia has not arisen because the demands on the guarantee was bad.

[83] I have already made a ruling that Group Five’s demands were good in law and that payment should be made. It must also be recalled that the amount in respect of the first guarantee has already been paid into the Trust Account of Constantia’s attorneys and await payment once judgment is given in this matter.

[84] The third parties do not deny that they concluded or executed the document on which Constantia relies for seeking relief against them.

[85] In Lombard Insurance Company Limited vs Stewart and Others 2016 JDR 1912 KZN at paragraph 22 the Court concluded as follows:

“22. 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 right to deliver a demand to Cyclone. Cyclone was then obligated to pay and for the sake of clarity clause 3 records that such payment would be due even if Cyclone did not admit the validity of the claim against Lombard.”

- [86] The Lombard matter referred to above clearly puts it beyond doubt that the principles ordinarily applicable to demand guarantee find application in the interpretation and enforcement of the indemnity and the suretyship in this matter.
- [87] The fact that Fast Track is disputing the claim by Group Five has no bearing on the claim by Constantia against the third parties. In the result the third parties’ resistance to indemnifying Constantia is unsustainable and falls to be rejected.
- [88] Constantia made demand on the third parties in terms of the indemnity and suretyships on the 3rd October 2019. The third parties have not made any payment in accordance with their obligation set out in the indemnity and the suretyship. The words of the indemnity are clear it calls on the third parties to make payment to Constantia of the amount demanded irrespective of whether or not Constantia has paid out to Group Five or not. The alleged issue of fraud alleged by Fast Track in respect of the Group Five’s claim is for all intents and purposes irrelevant and cannot be used as a defence to make payment in terms of the Indemnity and The Suretyship.

WAS THE APPLICANT GROUP FIVE ENTITLED TO APPROACH COURT ON AN URGENT BASIS

- [89] Constantia and Fast Track contend that Group Five had no reason to approach Court on an urgent basis and therefore should be liable for the costs of the 8th October 2019.
- [90] This Court per Goldstone J in the matter of Twentieth Century Fox Films Corporation v Anthony Black Films (Pty) Ltd 1982 (3) SA 582 (W) at 586 said the following:

“In my opinion the urgency of commercial interest may justify the invocation of Uniform Rule 6 (12) no less than any other interest.

Each case must depend on upon its own circumstances for the purposes of deciding upon the urgency of this matter. I assumed as I have to do that the Applicants case was a good one and that the Respondent was unlawfully infringing the Applicants copyright in the film in question.”

- [91] In the present matter Group Five demanded payment in May 2018 and was met with spurious defences. The same defence that had been dismissed earlier by Meyer J and Matojane J. The longer Group Five waited the more the Respondent made it difficult for Group Five to be paid what was genuinely due to them. This is evidenced by the sudden invention of the defence of fraud and that of prescription.

- [92] I can find nothing wrong in Group Five having decided to act in an urgent manner to protect its commercial interest. It must be recalled that shortly before or during the launching of the urgent application Group Five went into business rescue. This is a further urgent reason to try and get money in quickly to enable it to get out of business rescue and possibly liquidation.
- [93] I am satisfied that Group Five had good and sufficient reason to approach Court on an urgent basis. If this matter was not urgent the application should have been struck off the roll on the 8th October 2019 by the Court hearing that matter. I do not have any indication that it was.

COSTS

- [94] The general rule as regards costs is that the trial court has the discretion which it has to exercise judicially after taking into consideration the facts in particular matters.
- [95] It is trite law that the general rule is that the successful party should be granted costs. That rule can only be departed from where there are good grounds for doing so.
- [96] Group Five has been successful in all respects and should be granted its costs. Constantia had no basis to indirectly piggy bag on Fast Track spurious defences instead of meeting its obligations in terms of the demand guarantee.
- [97] In the result I make the following order:

ORDER

- i) The first Respondent is ordered to make payment to the Applicant in the sum of R2 199 817.25 and R1 206 717.89.
- ii) The first Respondent is ordered to pay interest on the amount of R2 199 817.25. at the rate of 10% per annum calculated from 5 June 2018 to date of payment and on the amount of R1 206 717.89 at the rate of 10% per annum from 5 June 2018 to date of payment.
- iii) The first and second Respondents are ordered to pay the taxed party and party costs of the Applicant including the costs of senior counsel jointly and severally the one paying the other to be absolved.
- iv) The first and second and third Parties are hereby ordered to jointly and severally the one paying the other to be absolved.
- a) Indemnify the first Respondent against the order granted against it in the main application where first Respondent has been ordered to make payment of the amount of R2 199 817.25 and R1 206 717.89 plus interest and costs.
- b) Pay the first Respondent the amounts that this Court has ordered it to pay to the Applicant including interest and costs.

- c) Pay the first Respondents taxed party and party costs incurred by the first Respondent in resisting the Applicant's claim against it as well as the costs incurred in pursuing the third party proceedings against first and second third parties.
- d) Pay interest at the rate of 10% above prime overdraft rate of Standard Bank from date of first Respondent's payment of each amount paid pursuant to the orders in (i) and (ii) above.

Dated at Johannesburg on this 14th day of March 2023

M A MAKUME

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 16 MAY 2022

DATE OF JUDGEMENT : 14 MARCH 2023

FOR APPLICANT : ADV VERMOOTEN SC

INSTRUCTED BY : MESSRS COX AND YEATS

DURBAN

FOR 1ST RESPONDENT: ADV PULLINGER

INSTRUCTED BY: MESSRS

RYAN D LEWIS INC

RIVONIA

FOR 2ND RESPONDENT: ADV COLLIN

AND THE THIRD PARTIES

INSTRUCTED BY: MESSRS

V CHETTY INC.

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