

SOUTH AFRICA / JUDGMENT

Umzwilili Environmental Solution v Rockwood Fund 1 GP (Pty) Ltd (2025/101302) [2025] ZAGPJHC 704 (21 July 2025) [2025] ZAGPJHC 704

COURT

South Gauteng High Court, Johannesburg

BEFORE

Z Khan

CASE / FILE NUMBER

2025/101302

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Before

the Honourable Mr Acting Justice Z Khan

on

this 21st day of July 2025

Case

number: 2025/101302

[1]

REPORTABLE: NO

[2]

OF INTEREST TO OTHER JUDGES: NO

[3]

REVISED: NO

DATE:

21.07.2025

In

the matter between:	UMZWILILI ENVIRONMENTAL SOLUTIONS (PTY) LTD Applicant and ROCKWOOD FUND 1 GP (PTY) LTD First Respondent ABSA BANK LIMITED Second Respondent THE STANDARD BANK OF SOUTH AFRICA LIMITED Third Respondent
Summary:	Interim interdict – Debtor seeking to interdict payment of certain demand guarantees Dispute as to entitlement of monies – Restatement of Law – Allegation of Fraud
Order of Court:	1. The application is dismissed. 2. The Applicant shall pay the costs of the First Respondent on scale ‘C’, which costs shall include the costs of two counsel, where so employed.

JUDGMENT

Z KHAN AJ

BACKGROUND

- [1] This is an urgent application for interdictory relief to restrain the Second and Third Respondent banks from making payment to the First Respondent. The demand guarantees in question were furnished by the Second and Third Respondents to secure transactions between the Applicant and the First Respondent.
- [2] The First Respondent is the general partner of an en commandite partnership that previously held shareholding in Enviroserv Holdings (Pty) Ltd. The Applicant entered into a sale agreement with the First Respondent to acquire the shareholding and associated claims in Enviroserv. A subsidiary of Enviroserv holds certain lucrative commercial contracts outside South Africa, and the benefits from the contracts accrue to Enviroserv and, ultimately, to its shareholders. The First Respondent sought to retain future benefits arising from these contracts. The sale agreement, including the provisions for payment of the

purchase price, was structured to accommodate the First Respondents expectations of a future windfall.

The purchase price and related payments under the sale agreement have been calculated and are payable in accordance with formulae based on assumptions regarding management performance and income to be derived from Enviroserv's foreign subsidiary. These payments are structured across three payout periods, referred to as the 'Earn Out', and are subject to specific payout and cashflow assumptions built into the transaction. The 'Earn Out' payable to the First Respondent also contemplates scenarios in which the projected cashflow and performance targets are not achieved.

- [3] The payments were guaranteed by the Second and Third Respondents, subject to specified payment limits. It is common cause that the guarantees furnished by the Second and Third Respondents are substantially identical.
- [4] A dispute has arisen regarding the outstanding portion of the First Payout Amount. The Applicant made payment of ZAR 51,835,134 in respect of the First Earn Out Period, in accordance with an 'Earn Out' certificate issued. Thereafter, the First Respondent made a demand for a Top Up Amount, based on one of several payment formulae set out in the sale agreement, contending that the projections had not been met.
- [5] The Applicant asserts that the First Respondent is incorrect in claiming payment of the defined 'Top-Up Amount' in terms of a particular formula set out in the sale agreement, and contends instead that the First Respondent is entitled only to an 'Earn Out Amount' calculated in accordance with a different payment formula contained in the same agreement.
- [6] The Applicant subsequently made payment of what it contends to be the correct amount, namely US\$ 751,470, being the equivalent of ZAR 12,224,986.
- [7] The difference between the Applicant's calculation and that of the First Respondent amounts to ZAR 94,446,622. This amount is in dispute, and its determination falls outside the ambit of the present litigation. It is a matter for international arbitration, which has already commenced, and the parties are ad idem that this Court may not interrogate the underlying agreements.
- [8] The Applicant then engaged with the Second and Third Respondent Banks, cautioning them regarding payments made to the First Respondent and drawing their attention to the Guarantee Limits specified in the demand guarantees. The Second and Third Respondents were also informed that payments had already been made.
- [9] On 24 June 2025, the First Respondent made a demand for payment to the Second and Third Respondents, based on the First Respondent's calculation, thus calling on each bank to pay ZAR 47 223 311.

- [10] The Applicant complained that the First Respondent's demands to the Second and Third Respondents were defective on several grounds. These included the failure to make full disclosure regarding payments already received by the First Respondent, and that, without this information about the payout already received, the Second and Third Respondents would be induced to make payments exceeding the amount to which the First Respondent is entitled.
- [11] The conditions of the demand guarantees, relevant terms of which are set out below, also prohibit the Second and Third Respondent Banks from becoming involved in the principal dispute concerning the underlying sale agreements.
- [12] Essentially, the Applicant claims that the First Respondent's failure to disclose the payment received to the banks constitutes fraud, as it seeks payment based on a clearly incorrect representation. This allegation of fraud is central, as the Applicant aims to bring this litigation within the scope of the prevailing case law on demand guarantees, in order to prevent a payout to the First Respondent.
- [13] The Applicant describes the demand for payment as "patently defective," made in "bad faith," "mala fide," and "prima facie fraudulent," designed to circumvent the arbitration process by prematurely obtaining payments that are not due. Thus, the Applicant asks this Court to find that the First Respondent attempted to commit fraud by making a claim against the guarantees without disclosing the payments already received.
- [14] After the institution of this Application before the Urgent Court, the matter was removed from the urgent roll. The First Respondent had resubmitted its claim to the Second and Third Respondents to address procedural deficiencies in the claim process, including the failure to notify both banks simultaneously. The application was answered and set down before this Urgent Court.
- [15] The Second and Third Respondents have sought independent legal advice and have elected to abide the Court's decision regarding this application for an interdict.

THE WORDING OF THE GUARANTEE

- [16] The individual guarantees provided to the First Respondent by the Second and Third Respondents records the Guarantors'

obligations identically. The contentious portions of the guarantee state:

1.5 First Earn Out Amount means the 'Earn Out Amount' (as defined in the Sale Agreement) as may become payable by the Purchaser to the Beneficiary under the Sale Agreement in respect of the First Earn Out Period.

1.6 First Earn Out Guarantee Limit means an amount of R67,500,000 less any amount paid by the Purchaser to the Beneficiary under the Sale Agreement in respect of the First Earn Out Amount

2.1 Subject to the terms of this Guarantee, the Guarantor hereby guarantees to the Beneficiary the payment by the Purchaser of:

...

2.1.3 the First Earn Out Amount (subject always to the First Earn Out Guarantee Limit), if

- (i) same falls due for payment under the Sale Agreement and (ii) the Purchaser has failed to make payment thereof to the Beneficiary in accordance with the Sale Agreement, on the date referred to in clause 7.4.15.1 or 7.4.15.2 (whichever may be applicable) of the Sale Agreement.

2.4 Any demand for payment under this Guarantee must:

2.4.2 be made simultaneously with a demand for payment under the guarantee issue by (the other guaranteeing bank) in favour of the Beneficiary on the same terms as this Guarantee.

2.6 The Guarantor shall not make any determination as to whether or not the amount claimed is in fact due and payable...

- [17] A particular controversy arises from the wording of clause 1.6 of the guarantee. The Applicant argues that each individual bank must calculate the payout taking into account the total payments already made. In contrast, the First Respondent contends that, since the guarantees are equal and the debt is divided equally between both banks, the payment must be reflected and apportioned equally—half to each guarantee.
- [18] Simply put, the Applicant contends that the full 'First Earn-Out Amount' paid to the First Respondent must be deducted in full from each guarantee individually to determine the remaining payable amount. The First Respondent, however, argues that both guarantees should be considered together, with 50% of the amount paid by the Applicant deducted from each guarantee, and the balance thereafter paid. The complaint is that deducting the full payment from each half guarantee effectively reduces the overall value of each guarantee.
- [19] The First Respondent claims an outstanding payment of ZAR 94,446,622, while the Applicant contends that no monies are payable.
- [20] The core of the dispute is that an incorrect amount, which is not due and payable, will be paid by the Guarantor due to the inability to determine the amount payable in the First Earn-Out.
- [21] In its answer, the First Respondent takes the view that the guarantees constitute independent, self-standing obligations, and that once a demand is properly made, payment must be made—unless the demand is tainted by fraud.

- [22] The First Respondent argues that any dispute concerning the interpretation of the sale agreement is subject to arbitration, and that the Applicant, if aggrieved, may institute proceedings against the First Respondent to recover any monies. It contends that this provides the Applicant with an adequate alternative remedy, particularly given the future payments still outstanding to the First Respondent in terms of the sale agreement.
- [23] The First Respondent asserts that the Applicant is merely attempting to frustrate the contract and the payment of monies, despite the fact that the First Respondent has relinquished its shareholding, relying on the comfort provided by guarantees from reputable banks.

URGENCY

- [24] The First Respondent contends that this application is not urgent and that the time periods set out by the Applicant are unreasonable and insufficient. The First Respondent does not explain why it did not seek an extension of time to file papers upon tendering a delay in calling up the guarantee.
- [25] This matter warranted the attention of the urgent Court on Thursday, 17 July 2025. The guarantees are payable ten business days following demand, which falls on Friday, 18 July 2025. The First Respondent made certain limited undertakings, and this payment window has been extended by one Court Day to allow for the delivery of this judgment no later than Monday, 21 July 2025.
- [26] During argument, I was repeatedly informed that the Second and Third Respondents have indicated their intention to act on the demands made by the First Respondent and an urgent interdict is thus required.
- [27] I exercise my discretion to hear this matter on an urgent basis.

THE LAW

- [28] The demand guarantee furnished in this matter is ‘wholly independent of the underlying contract of sale and assures the seller of payment of the purchase price whatever disputes may subsequently arise between buyer and seller is of no moment insofar as the bank’s obligation is concerned’[1] [2].
- [29] The Second and Third Respondents may avoid their obligations under the guarantee agreement in the event of fraud[3].
- [30] The test for fraud in these circumstances, as formulated by our Court, is ‘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 fact that to his (the seller’s) knowledge are untrue.’[4] Such interdicts will only be granted in the most exceptional circumstances. The legal definition of fraud is readily available[5].

- [31] The inference of fraud is not lightly inferred[6]. Theron JA (as she then was) states that ‘Mere errors, misunderstandings or oversights, however unreasonable, would not amount to fraud. Nor was it enough to show that the beneficiary’s contentions were incorrect. A party had to go further and show that the beneficiary knew it to be incorrect and that the contention was advanced in bad faith’[7].
- [32] The Court in Raubex[8] dealt with the onus of proving fraud, it held that ‘What the court a quo in effect did was to place the onus upon Raubex to prove that it did not act fraudulently. Such a conclusion, in my view, is clearly incorrect. An allegation of fraud is a serious charge and the onus to prove it clearly and distinctly will always rest on the party making such allegation’.
- [33] Likewise, Schippers JA held in Pepkor[9] that ‘the cases make it clear that it is inappropriate and unwise for findings of fraud or deceit to be made on the basis of untested allegations on motion, which are denied on grounds that cannot be described as far-fetched or untenable. This is based not only on common sense, but also on ‘many years of collective judicial experience’. This dictum speaks back to the Plascon-Evans[10] test.

- [34] The full bench decision of the Pretoria High Court in Bombardier[11] also warrants reference, as it consolidates the various authorities relating to the implication of fraud in the context of a demand guarantee.

- [35] The position regarding the drawing of inferences is permissible if it consistent with all the proved facts. In *S A Post Office v Delacy and Another*[12]:

‘The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be ‘consistent with all the proved facts: If it is not, then the inference cannot be drawn’

- and it must be the “more natural, or plausible, conclusion from among several conceivable ones” - when measured against the probabilities.’.

- [36] Where one or more inferences are possible, a court must satisfy itself that the inference sought to be drawn is the most plausible or probable, even if that conclusion may not be the only one[13].

FRAUD

- [37] In its pursuit of an interim interdict, the Applicant contends that the First Respondent attempted to commit fraud by failing to disclose to the Second and Third Respondents the payments it had already received from the Applicant. This argument is reinforced by the Applicant’s submission that the First Respondent’s revised demand, now before this Court, reflects a reduction of R24 million in the amount claimed.

- [38] The First Respondent's response in argument is that fraud must be the most plausible inference, and that an accounting error or miscalculation is an equally plausible explanation. The difficulty faced by the Applicant is that it asks this Court to infer an intent to commit fraud, to the exclusion of all other possible explanations.
- [39] The allegation of fraud must be considered in light of the First Respondent's transparency during the claim process, where the Applicant was copied in correspondence. Such conduct is hardly indicative of fraudulent intent.
- [40] Additionally, the First Respondent states that it structured its letters of demand to align with the required wording of the demand guarantees, as it understood it to be. The letters of demand, which are annexed to the Applicant's papers, are essentially identical. They call for payment of a specified amount, identify the trigger event, but do not set out the computation of the claim amount.
- [41] The First Respondent contends that, had the wording of the guarantee required any additional information, such details would have been disclosed—as was subsequently done when the banks made enquiries. It maintains that it acted in accordance with its understanding of the provisions of the demand guarantee.
- [42] A finding that the First Respondent acted with fraudulent intent would necessarily imply that its directors and the attorneys who assisted in the claims process were all complicit in promoting the alleged fraud.
- [43] The Applicant's allegation of fraud can be categorised into two main complaints: (1) the failure to disclose payments already received, and (2) the demand for payment of monies allegedly not due.
- [44] On the first point, the First Respondent makes no representation to the banks that no payment has been received. The final amount claimed, as computed by the First Respondent, is set out in the demand. This computation appears to take into account the First Respondent's interpretation of how the two guarantees operate. While this method of computation is disputed by the Applicant, the determination of the correct methodology is not a matter for this Court or the banks. This is the agreement that Applicant concluded.
- [45] The First Respondent's interpretation of the legal instruments is not so implausible as to warrant an inference of fraudulent intent. The burden lies with the Applicant to prove that the First Respondent acted with fraudulent intent. The First Respondent cannot be required to prove a negative.
- [46] One might consider whether the banks would have made payment without further clarification on the computation of the claim and the payments already received by the First Respondent. If they had, they might have breached their obligations, and the Applicant would have a remedy. However, this consideration is rendered moot because the banks did, in fact, request clarity from the First Respondent on 27 June 2025, regarding payments made. The banks also sought confirmation as to whether any subsequent or additional

payments had been made since the demand.

- [47] On the remaining point, the First Respondent demands what it asserts is due. The Second and Third Respondents are not required to make a finding on indebtedness. As this is a demand guarantee, payment follows provided the conditions of the guarantee are met. If the Applicant is aggrieved, it has remedies available to claim from the Respondents. The amount to be paid is within the domain of the Second and Third Respondents and they have not sought the assistance of the Court.
- [48] The Applicant's claims of fraud are problematic for several reasons. They rely on an assumption of malicious intent based on a limited set of facts presented by the Applicant. These claims disregard any other plausible inferences and speak on behalf of the Second and Third Respondents, against whom the fraud is allegedly committed—yet these principal parties have not made any such allegation before this Court.
- [49] Furthermore, the allegation of overpayment is premature, as the guarantees expressly provide for the deduction of any amounts paid by the Applicant to the First Respondent. This process was interrupted and pre-empted by the Applicant's own correspondence before the banks sought clarification on payments. No representation was made to the banks that no payments had been received. Therefore, the omission to disclose payments is premature, given that the Applicant did not allow the full claims process to unfold.
- [50] The Applicant's allegations regarding the claim process range from a defective claim to fraud. However, there is no conclusive evidence demonstrating a wilful intention to distort the truth for financial gain.
- [51] The allegations underpinning the Applicant's claim of fraud do not meet the threshold required to warrant a finding of fraud by this Court, and at this stage. The First Respondent has made a claim against the guarantee based on a computation it believes to be correct. An bona fidei assertion of debt, even on an allegedly incorrect basis, is not equivalent to claiming a debt that is known not to be due. The Applicant accepted the terms of the bargain, which precludes interrogation of the underlying contract at this stage, and it cannot now raise objections to the process.
- [52] I am satisfied that the First Respondents presentation of demand does not satisfy the requirement[14] to establish fraud. Applicant cannot speak to the First Respondents animus to commit fraud and it cannot overcome the contradictory version set up by the First Respondent. The Applicant is also not assisted by inferences.

INTERIM RELIEF

- [53] The Applicant has not satisfied this Court that the requirement of fraud has been met. Accordingly, interim relief cannot be granted in that regard.

- [54] The Applicant asserts that there is a real apprehension of harm. The First Respondent is the General Partner of a partnership, making it the public face of several unknown downstream partners who stand to benefit from any payout. The complaint is that there exists a real possibility that, if payment is made, any subsequent attempts to recover monies will be futile. However, there is no merit in this concern. The Applicant chose to contract with this entity, which was supported by guarantees. Nothing before me suggests that the First Respondent would be unable to comply with any future order for payment.
- [55] Similarly, the Applicant has an adequate alternative remedy and may litigate its rights, particularly as the underlying agreements provide for future payments to the First Respondent.

PAYMENT OF AN INCORRECT AMOUNT

- [56] The Applicant complains that it will be left exposed should the Second and Third Respondents pay out an incorrect amount. I do not agree. Acting on independent legal advice and by interpreting the guarantee instrument, the Second and Third Respondents must determine the amount payable to the First Respondent based on the wording of the guarantee. They have not approached this Court seeking any findings in that regard.
- [57] The Applicant cannot, however, pre-empt the amount that the Second and Third Respondents—well-advised by independent legal counsel—will pay, nor seek an interdict against a payout or a payout up to a specified ceiling amount. The Second and Third Respondent is a principal party to its guarantee with the First Respondent. For now, what is of moment, is a proper demand not tainted by fraud.

ALTERNATIVE CLAIM

- [58] The Applicant, with a second approach pursued in their reply, claims that two distinct remedies are sought in the Notice of Motion: an interim interdict to prevent payment, and a declaratory order limiting payment to a specified amount. The Applicant also shifts focus to argue that the new demand is defective.
- [59] The issue of an interim interdict and the absence of fraud are addressed above. Despite this, the Applicant continues to seek final declaratory relief based on a purported clear right, even though it has failed to establish the lower threshold of a *prima facie* right.
- [60] It is unclear on what basis the Applicant seeks to fetter the Second and Third Respondents' obligations under the guarantee. It is for the Second and Third Respondents, as principals to the guarantee, to satisfy themselves as to the validity of the demand and the amount they intend to pay, and to bear the consequences of their decision. The Applicant has no rights—certainly no clear declaratory right—to further interfere with the principal obligations between the Respondents.
- [61] The Applicant has not established a cause of action for the apparently alternative declaratory remedy it seeks.

COSTS

[62] There is no reason to depart from the usual practice that costs follow the successful party.

[63] The Applicant's counsel advised that, for a period he was led and seeks an appropriate costs order in the Applicant's

favour. The First Respondent has employed the services of two counsel.

[64] The matter is sufficiently complex to warrant costs on a higher scale, and I am satisfied that the First Respondent is entitled to the cost's consequent upon the employment of two counsel on the party and party scale 'C'.

[65] In the result the following order is made:

Z KHAN

ACTING JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be at 10h00 on 21 July 2025.

DATE OF HEARING: 17 and 18 JULY 2025

DATE OF JUDGMENT: 21 JULY 2025

APPEARANCES:

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DEWEY MCLEAN LEVY INC

[1] Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others 2010

(2) SA 86 (SCA) at [20]

- [2] See also: Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v South African National Roads Agency Soc Ltd and Another 2021 (2) SA 137 (SCA)
- [3] Loomcraft Fabrics CC v Nedbank Ltd & Another [1995] ZASCA 127; 1996 (1) SA 812 (A) at 815G-816G
- [4] Loomcraft citing United City Merchants (Investments) Ltd and others v Royal Bank of Canada and Others [1982] 2 All ER 720 (HL) at 725G
- [5] Ozinsky NO v Lloyd and Others 1995 (2) SA 915 (AD)
- [6] Loomcraft at 817E-F
- [7] Guardrisk Insurance Company Ltd and Others v Kentz (Pty) Ltd [2014] 1 All SA 307 (SCA) at [18]
- [8] Raubex Construction (Pty) Ltd v Bryte Insurance Company Ltd [2019] 2 All SA 322 (SCA) at [8]
- [9] Pepkor Holdings Ltd and Others v AJVH Holdings (Pty) Ltd and Others; Steinhoff International Holdings NV and Another v AJVH Holdings (Pty) Ltd and Others 2021 (5) SA 115 (SCA) at [39]
- [10] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] (3) SA 623 (A)
- [11] 2021
- (1) SA 397 (GP)
- [12] S A Post Office v Delacy and Another 2009 (5) SA 255 (SCA) at [35]
- [13] AA Onderlinge Assuransie-Assosiasie Bpk v De Beer 1982 (2) SA 603 (A)
- [14] Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others 2010 (2) SA 86 (SCA)

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