HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1)	REPORTABLE: Electronic publishing only.
(2)	OF INTEREST TO OTHER JUDGES: No.
(3)	REVISED.

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DATE	SIGNATURE

Case No: 22474/2018

In the matter between:

FAST TRACK CONTRACTING (PTY) LIMITED Applicant

and

CONSTANTIA INSURANCE COMPANY LIMITED First Respondent

GROUP FIVE CONSTRUCTION (PTY) LIMITED Second Respondent

GROUP FIVE COASTAL (PTY) LIMITED Third Respondent

***Case summary*: Construction guarantee – Interdict restraining payment in terms of guarantee – liability absolute provided requirements of guarantee were met – disputes in relation to the construction contract precluded – requirements for liability under guarantee met – Application for interdict dismissed.**

JUDGMENT

MEYER J

[1] The applicant, Fast Track Contracting (Pty) Limited (Fast Track), seeks an interdict preventing the first respondent, Constantia Insurance Company Limited

(Constantia), from paying out an 'N/S Construction Guarantee No 117961J' (the guarantee) in favour of the third respondent, Group Five Coastal (Pty) Limited (Group Five Coastal), acting as agents for the second respondent, Group Five Construction (Pty) Limited (Group Five Construction), (collectively referred to as 'Group Five'). The underlying agreement for which the guarantee was issued is a written construction contract concluded between Fast Track, as subcontractor, and Group Five Coastal, acting as agents for Group Five Construction, the contractor. The construction contract is governed *inter alia* by the terms of the JBCC N/S Subcontract Agreement, July 2007, Edition 5.0 (the subcontract). Group Five has called upon Constantia to make payment to it of the sum of R2 199 817.25 and Constantia has indicated that it would honour the guarantee. Fast Track is disputing the entitlement of Group Five to call up the guarantee, and hence the present application.

[2] The guarantee records in clause 3.1 that:

'[a]ny reference in this Guarantee to the Agreement is made for the purpose of convenience and shall not be construed as any intention whatsoever to create an accessory obligation or any intention whatsoever to create a suretyship.'

The guarantee, as was said by Malan JA in *Firstrand Bank Ltd v Brera Investments CC* 2013 (5) SA 556 (SCA) para 2 about a guarantee with a similar recordal, is-

'. . . thus of the same nature as a performance guarantee, performance bond or letter of credit and consists of an undertaking to make payment of an amount of money on the happening of a specified event (see Cloete JA in *Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others NNO* 2011 (1) SA 70 (SCA) ([2011] 1 All SA 557) para 61). A guarantee of this nature must be paid according to its terms, and liability under it is not affected by the relationship between other parties to the transactions that gave rise to its issue, particularly not with the question whether the subcontractor performed in terms of his contract with the contractor (see *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others* 2010 (2) SA 86 (SCA) paras 19 and 20; *Loomcraft Fabrics CC v Nedbank Ltd and Another* 1996 (1) SA 812 (A) ([1996] 1 All SA 51) para 38; and *Minister of Transport and Public Works, Western Cape, and Another v Zanbuild Construction (Pty) Ltd and Another* 2011 (5) SA 528 paras 11 – 15). The words of the guarantee under consideration make it clear that it is not a suretyship but an independent, and not accessory, agreement that must be performed according to its terms (see also *Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd* 2012 (2) SA 537 (SCA) para 15).'

[3] Clause 4 of the guarantee envisaged that Constantia could incur liability to Group Five Construction where the sum certified in a payment advice has not been paid. That clause reads as follows:

'4. Subject to the Guarantor's 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 Guarantor to make payment in terms of clause 4.2.

4.2 A first written demand issued by the Contractor to the Guarantor's *domicilium citandi et executandi* with a copy to 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.'

[4] The autonomy of letters of credit, demand guarantees, performance bonds and similar documents is well recognised and it is only where fraud is involved that the issuing institution may decline liability. (See *Brera* para 11.) In *Loomcraft Fabrics CC v Nedbank Ltd and another* 1996 (1) SA 812 (A) at 816B-G, Scott AJA said the following:

'The autonomous nature of the obligation owed by the bank (whether the issuing bank or, if there is one, the confirming bank) to the beneficiary under a credit has been stressed by courts both in South Africa and overseas. (As to the former, see, for example, *Phillips and Another v Standard Bank of South Africa Ltd and Others* 1985 (3) SA 301 (W); *Ex parte Sapan Trading (Pty) Ltd* 1995 (1) SA 218 (W) at 224I-225G.) An interdict restraining a bank from paying in terms of a credit will accordingly not be granted at the instance of the buyer (the bank's customer) save in the most exceptional cases. The approach of the Courts with regard to such an interdict was stated by Kerr J in *R D Harbottle (Mercantile) Ltd and Another v National Westminster Bank Ltd and Others* [1977] 2 All ER 862 (QB) at 870*b-d* to be as follows:

'It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the lifeblood of international commerce. Such

obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged. . . .

Nonetheless, it is now well established that a Court will grant an interdict restraining a bank from paying the beneficiary under a credit in the event of it being established that the beneficiary was a party to fraud in relation to the documents presented to the bank for payment. For, as was observed by Lord Diplock in the *United City Merchants* case *supra* at 725*j* [*United City Merchants (Investments) Ltd and Others v Royal Bank of Canada and Others* [1982] 2 All ER 720 (HL),

'". . . fraud unravels all". The courts will not allow their process to be used by a dishonest person to carry out a fraud.'

But the fraud on the part of the beneficiary will have to be clearly established. *Tukan Timber Ltd v Barclays Bank plc* [1987] 1 Lloyd's Rep 171 (QB) at 175. The *onus*, of course, remains the ordinary civil one which has to be discharged on a balance of probabilities but, as in any other case where fraud is alleged, it will not lightly be inferred. See *Gates v Gates* 1939 AD 150 at 155; *Gilbey Distillers & Vintners (Pty) Ltd and Others v Morris NO and Another* 1980 (2) SA 217 (SE) at 226A.'

[5] In *Dormell Properties 282 CC v Renasa Insurance Co Ltd & others NNO* 2011 (1) SA 70 (SCA) para 64, Cloete JA, writing for the minority, described the legal relationships that arise in relation to construction guarantees and associated construction agreements, in the absence of fraud, as follows:

'Once the appellant [the beneficiary] had complied with clause 5 of the guarantee, the first respondent [the guarantor] had no defence to a claim under the guarantee. It still has no defence. The fact that an arbitrator has determined that the appellant was not entitled to cancel the contract, binds the appellant — but only *vis-a-vis* the second respondent [the employer]. It is *res inter alios acta* so far as the first respondent is concerned. As the cases to which I have referred above make abundantly clear, the appellant did not have to prove that it was entitled to cancel the building contract with the second respondent, as a precondition to enforcement of the guarantee given to it by the first respondent. Nor does it have to do so now.'

(The minority judgment of Cloete JA, in which Mpati P concurred, was subsequently endorsed by the Supreme Court of Appeal, *inter alia* in *Brera* (para 10) and in *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association* 2014 (2) SA 382 (SCA) para 25.)

[6] *In casu* there is no suggestion of fraud on the part of Group Five. Fast Track's defence to the claim under the guarantee is that Group Five had not complied with clause 4 of the guarantee. It argues that no binding payment advice was issued in favour of the contractor, Group Five Construction, since the one on which reliance is placed was issued to 'Group Five KZN (Pty) Ltd' (Group Five KZN) and not to Group Five Construction. The payment advice, so Fast Track argues, thus does not entitle Group Five Construction to payment under the guarantee. Group Five, on the other hand, argues that there was proper compliance with clause 4 of the guarantee.

[7] As was said by Malan JA in *Brera* para 2, a 'guarantee of this nature must be paid according to its terms'. The guarantor undertakes to pay the beneficiary provided only that the conditions specified in the guarantee are met. The liability of the guarantor to the beneficiary to honour the guarantee arises upon presentment to the guarantor of the documents specified in the guarantee. (*Loomcraft Fabrics* at 815G-J.) And, as was said by Nugent JA in *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd* 2002 (3) SA 688 (SCA) para 25, '[i]f the presented documents do not conform with the terms of the letter of credit the issuing bank is neither obliged nor entitled to pay the beneficiary without its customer's consent'.

[8] On 25 April 2018, Group Five Coastal sent an e-mail to Fast Track. Attached to it was a payment certificate which showed an amount due to Group Five KZN. The payment certificate is signed by Mr Melvin Murugan, the quantity surveyor of Group Five Coastal under the heading 'APPROVED FOR PAYMENT'. It constitutes clear certification of a sum in a payment advice that has not been made. Fast Track was given 21 days to effect payment. Fast Track failed to make payment of the certified amount. On 18 May 2018, Group Five Coastal issued a first written demand to Fast Track calling for payment to be made within seven days. The request for payment of 25 April 2018 and the payment advice were attached to that first written demand.

[9] Fast Track failed to make payment of the certified amount. On 28 May 2018, Group Five Coastal sent a written demand to Constantia calling for payment under the guarantee. Attached to that written demand were the first written demand sent to Fast Track on 8 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 Construction and a cancelled cheque of Group Five Construction.

[10] In the building contract as well as in the guarantee the contractor is described as Group Five Coastal acting as agents for Group Five Construction. Group Five Coastal changed its name to Group Five KZN. A company may legally change its name. (See s 16(5)(b)(i) of the Companies Act 71 of 2008.) A company is a juristic person that is registered in terms of the Companies Act. (Section 1 defines a company *inter alia* as a juristic person incorporated in terms of the Companies Act 71 of 2008 or a juristic person that immediately before the effective date was registered in terms of the Companies Act 61 of 1973 other than as an external company as defined in that Act.) A company is assigned a unique registration number (s 14(1)(a)) and is a juristic person from the date and time that the incorporation of a company is registered (s 19(1)(a). It exists continuously until its name is removed from the Companies Register in accordance with the Companies Act. Group Five KZN, therefore, is Group Five Coastal.

[11] The call on the guarantee 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 the documents required in clauses 4.1 to 4.3 of the guarantee were received by Constantia.

[12] In the result the following order is made:
The application is dismissed with costs, including those of senior counsel.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	5 December 2018
Date of judgment:	14 December 2018
Counsel for applicant:	MW Collins SC
Instructed by:	V Chetty Inc. La Lucia, Durban C/o SKV Attorneys, Randburg, Johannesburg
Counsel for 2nd and 3rd Respondents:	GC Pretorius SC
Instructed by:	Cox Yeats Attorneys, Umhlanga Ridge, Durban C/o Cuzen Randeree, Victory Park, Johannesburg