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**Summary:** Construction guarantee – whether the requirements were met - insurer's obligation to pay – failure by the subcontractor to pay the certified payment advice triggers insurer's liability to pay – terms of the guarantee met.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Johannesburg (Matojane J, sitting as court of first instance):

The appeal is dismissed with costs.

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## JUDGMENT

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**Zondi JA (Mothle JA and Nhlangulela, Salie-Hlophe and Siwendu AJJA concurring):**

[1] The first respondent, Group Five Construction (Pty) Ltd (Group Five Construction), had, in the Gauteng Division of the High Court, Johannesburg (the high court), claimed payment of an amount of R1 490 364.09 including interest and costs, from the second respondent, Constantia Insurance Company Limited (Constantia) and the first appellant, Millenium Aluminium and Glass Services CC (Millenium), in terms of the guarantee.

[2] Subsequently, Constantia had, by way of a third party notice procedure, sought and obtained from the high court an order joining Millenium, Mr Mohanlall Bridgenun, the second appellant, and Fast Track Contracting Africa (Pty) Ltd (Fast Track), the third appellant, as third parties on the basis of the indemnity and the deed of suretyship signed by these third parties in favour of Constantia.

[3] Millenium's defence was that Group Five Construction did not comply with the terms of the guarantee when it demanded payment from Constantia, because it presented Constantia with a payment advice which did not, on its face, entitle Group Five Construction to receive payment in terms of agreement.

[4] The high court ordered Constantia to pay Group Five Construction the amount claimed, together with interest and costs. It also granted relief in a dispute between

Constantia and Millenium which did not concern Group Five Construction.<sup>1</sup> The appeal is before this Court with the leave of the high court and is directed at paragraphs 3-7 of the high court order.

[5] The relevant parts of the high court order read as follows:

‘3. The First Respondent is ordered to make payment to the Applicant in the amount of R1 419 364.09.

4. The first respondent is ordered to pay applicant's costs.

5. It is declared that the third parties are obliged, jointly and severally, to indemnify Constantia Insurance Company Limited (“Constantia”) from the demand made on Guarantee 117929J by Group Five Construction Proprietary Limited (in business rescue) (“Group Five”).

6. The third parties, jointly and severally, the one paying the other to be absolved, are ordered to pay Constantia the sum of R 1 419 364.09 together with interest at a rate of 10% per annum from 18 May 2020 to date of final payment.

7. The third parties pay all costs, on an attorney and client scale, incurred by Constantia in resisting Group Five's claim against it and pursuing the third party proceedings against the third parties.’

[6] The issue therefore is whether Group Five Construction in making a demand on the guarantee complied with its requirements. The facts within which the issue must be determined are the following. During or about 26 May 2015, Group Five Construction was appointed as a building contractor to carry out a project in Durban known as Pearls of Umhlanga – Pearl Sky. Group Five Coastal (Pty) Ltd (Group Five Coastal), acting as an agent of Group Five Construction, appointed Millenium as a subcontractor to carry out the design, supply and installation of the residential windows and shopfronts at the sub-contract sum of R20 750 937 excluding VAT. The sub-contract sum was fixed and not subject to contract price adjustment for the duration of the contract. In terms of the letter of appointment, it was agreed that the contractual relationship between Group Five Construction and Millenium would be governed by the provisions of the JBCC Series 2000 Nominated/Selected Sub-contract Agreement, edition 5.0, 2007.

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<sup>1</sup> The high court granted an order which included prayers 1 and 2 of the notice of motion. The order that was sought in prayer 1 was ‘The First Respondent’s purported cancellation of guarantee 117929J is revoked and set aside’ and in prayer 2 was ‘The Applicant’s call on guarantee 117929J is declared valid and enforceable’. Group Five abandoned those prayers in the high court. Therefore, to the extent that the high court order included prayers 1 and 2, it was made in error.

[7] As part of Millenium's contractual obligations, it was required to provide and maintain performance guarantees in favour of Group Five Construction. Millenium obtained and provided a guarantee<sup>2</sup> from Constantia. The relevant terms of the guarantee are as follows:

N/S CONSTRUCTION GUARANTEE NO. 117929J  
for use with the  
JBCC Nominated/Selected Sub-Contract Agreement  
JBCC SERIES 2000

GUARANTOR DETAILS AND DEFINITIONS

Guarantor means : CONSTANTIA INSURANCE COMPANY LIMITED  
(Reg. No. 1952/001514/06)

...

Contractor means : GROUP FIVE COASTAL (PTY) LTD ACTING AS AGENTS  
FOR GROUP FIVE CONSTRUCTION (PTY) LTD  
(Reg. No. 1974/003166/07)

Subcontractor means : MILLENIUM ALUMINIUM & GLASS SERVICES CC  
(Reg. No. 2006/140485/23)

...

Works means : PEARL SKY – SUPPLY AND INSTALLATION OF  
RESIDENTIAL WINDOWS & SHOPFRONTS

...

Agreement means the JBCC Series 2000 Nominated/Selected Subcontract Agreement

...

3.1 Any 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.'

Clause 3.1 of the guarantee makes it clear that the reference in the guarantee to the agreement should not be construed as an intention to create 'an accessory obligation' or 'to create a suretyship'.

[8] Clause 4 regulates the circumstances under which Constantia would become obliged to honour the guarantee. It provides as follows:

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<sup>2</sup> Guarantee 117929J.

'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 clauses 4.1 to 4.3 below.

4.1 A copy of a 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 at 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 said payment advice which entitles the Contractor to receive payment in terms of the Agreement of the sum certified in clause 4.'

Further, clause 12 provides as follows:

'12. This N/S Construction Guarantee, with the required demand notices in terms of clauses 4. or 5., shall be regarded as a liquid document for the purpose of obtaining a court order.'

[9] On 25 April 2018, Group Five Coastal issued a payment certificate to Millenium confirming that it was indebted to it in the sum of R12 239 967.24 and called upon it to pay the certified sum within twenty-one days. Millenium failed to pay. Pursuant to the terms of clause 4.1 of the guarantee, on 18 May 2018, Group Five Coastal sent a written demand to Millenium calling on it to make payment within seven days. The email sent to Millenium on 25 April 2018 was attached to this written demand. The payment certificate and reconciliation statement which accompanied the demand was issued by Group Five Coastal under its new trading name, Group Five KZN (Pty) Ltd (Group Five KZN).

[10] When payment was not forthcoming pursuant to the written demand, Group Five Coastal on behalf of Group Five Construction on 28 May 2018, and in terms of clause 4.2 made a demand on Constantia. Constantia refused to pay and in consequence, on 22 October 2018, Group Five Construction approached the high

court seeking payment in terms of the guarantee. Constantia did not oppose the application. It is not opposing this appeal and has filed a notice to abide.

[11] Millenium opposed the application on two grounds. It contended that no proper demand was made by Group Five Construction on Constantia in terms of the Construction Guarantee with the result that Millenium's obligation to pay in terms of the indemnity in favour of Constantia was not triggered. Millenium alleged that the payment certificate was issued by Group Five KZN, an entity that was not a party to the construction contract or the guarantee. It contended that the payment advice was thus not a contractual document upon which Constantia could rely. It argued that absent a payment advice entitling Group Five Construction to receive payment, it was not entitled to call up the guarantee, as the guarantee's jurisdictional requirements were not met.

[12] The high court rejected Millenium's argument. It held, among other things, that Group Five KZN is the same company as Group Five Coastal, which it found was supported by the registration number 2002/011542/07 and that it changed its name on 19 July 2010. It reasoned that Group Five Coastal, acting as agents for Group Five Construction, is listed as a contractor in the guarantee and 'any instruction payment [advice] or other document issued by Group Five Coastal was done in its capacity as agents for Group Five Construction (Pty) Ltd'. The high court accordingly concluded that Group Five Construction had presented the demand to Constantia properly and had met all the jurisdictional requirements set out in clause 4 of the guarantee.

[13] Millennium attacked the findings of the high court. Relying on *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd*<sup>3</sup> and *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others*,<sup>4</sup> Millenium submitted that the high court erred in finding that the call on the guarantee was lawful and valid in the circumstances where the payment advice and guarantee make no reference to Group Five KZN or its registration number. It argued that those judgments require strict compliance with demand guarantees. Millenium submitted that the absence of a payment certificate

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<sup>3</sup> *OK Bazaars (1929) Ltd v Standard Bank of South Africa Ltd* 2002 (3) SA 688 (SCA).

<sup>4</sup> *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others* [2009] ZASCA 71; [2009] 4 All SA 322 (SCA); 2010 (2) SA 86 (SCA).

and reconciliation statement in the name of the contractor identified in the guarantee ought to have been sufficient for the high court to find that the requirements of the guarantee were not met.

[14] This Court, in *First Rand Bank Ltd v Brera Investments CC*,<sup>5</sup> had this to say regarding a guarantee:

‘The guarantee 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 & others* [2011] 1 All SA 557 (SCA), 2011 (1) SA 70 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 sub-contractor performed in terms of his contract with the contractor (see *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd & others* 2010 (2) SA 86 (SCA) paras 19 and 20; *Loomcraft Fabrics CC v Nedbank Ltd* 2010 (2) SA 86 (SCA) para 38 and *Minister of Transport and Public Works, Western Cape & another v Zanbuild Construction (Pty) Ltd & another* 2011 (5) SA 528 (SCA) 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).’

[15] In *Schoeman and Others v Lombard Insurance Co Ltd*,<sup>6</sup> a defence similar to the one raised by Millenium was raised. In rejecting it, this Court held:

‘The argument proceeded from the basis that a demand guarantee was, like a letter of credit, subject to strict and precise compliance in all respects. I am in agreement with Maier-Frawley AJ in the court below that there is “little to gain from attempts to divine the essential distinction between letters of credit, on the one hand, and demand guarantees, on the other”: the real issue, which involves an interpretation of this particular demand guarantee, is “simply whether there was compliance with the terms of the guarantee under circumstances where the beneficiary’s demands for payment were made to the guarantor at its address, rather than at the address of the beneficiary”.’

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<sup>5</sup> *First Rand Bank Ltd v Brera Investments CC* [2013] ZASCA 25; 2013 (5) SA 556 (SCA) para 2.

<sup>6</sup> *Schoeman and Others v Lombard Insurance Company Ltd* [2019] ZASCA 66; 2019 (5) SA 557 (SCA) para 22.



[16] Accordingly, Millenium's defence should fail. As I see it, the issue is about the interpretation of the demand guarantee and the question is whether there was compliance with the terms of the guarantee in circumstances where an entity which made a demand on guarantee is not the same as an entity that issued a payment certificate and the reconciliation statement. Clause 4 of the guarantee stipulates the requirements that should be met first in order to establish the liability of guarantor under the guarantee. Clause 4.1 states that there must be a first written demand issued by the Contractor to the Subcontractor stating that the payment of a sum certified by the Contractor in a payment advice was not made. The payment advice was issued by Group Five KZN (Group Five Coastal), which was in terms of the guarantee the appointed Group Five Construction's agents. As required by clauses 4.2 and 4.3, the payment advice which entitled Group Five Construction to receive payment accompanied a demand on guarantee that was made on Constantia by Group Five Coastal.

[17] Constantia was in no doubt about the identity of the Contractor, because that was easily ascertainable from the guarantee itself which it had issued. The demands for payment were made to Millenium and to Constantia on the basis of the payment advice which identified the contract in respect of which it related, namely Pearls of Umhlanga – Pearls Sky. Millenium is identified as a subcontractor in the payment advice. The purpose of the guarantee was to enable Group Five Construction to obtain payment from Constantia in the event of default by Millenium.

[18] During argument, Millenium contended for the first time that the high court erred in granting Group Five Construction relief on a copy of the guarantee which did not meet the requirements of clause 12 of the Construction Guarantee. Clause 12 on which Millenium relies provides that the 'N/S Construction Guarantee, with the required demand notices in terms of clause 4 or 5, shall be regarded as a liquid document for the purpose of obtaining a court order'.

[19] Millenium's contention has no merit. In the first instance this contention does not form part of its grounds of appeal. It is raised for the first time on appeal. When this difficulty was pointed out to him, counsel conceded that this was indeed the case,

but he argued that it was a legal point and that the court was not precluded from considering it.

[20] I will assume in favour of Millenium that the point it raises is a legal one and that the court is not precluded from considering it. Millenium is however opportunistic to argue that the high court should not have granted relief to Group Five Construction because the guarantee on which it made a demand was a copy and not the original. Millenium was aware of the reason why Group Five Construction did not submit the original guarantee to Constantia. The original guarantee that was reissued after the expiry of the initial one was returned by Mr Rakesh Chunilall, Millenium's director and the deponent to Millenium's answering affidavit, to Constantia for cancellation, purportedly on the basis that the project was practically complete. Thus, Group Five Construction never had in its possession the reissued original guarantee and could not be blamed for having submitted a copy of the guarantee to Constantia.

[21] The high court was therefore correct to find that Group Five Construction had properly presented the demand to Constantia and that it had met all the jurisdictional requirements set out in clause 4 of the guarantee. The demand triggered Millenium obligations to Constantia to indemnify it against Group Five Construction's demand and to pay to Constantia an amount equal to Group Five Construction's demand.

[22] In the result, the appeal is dismissed with costs.

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D H ZONDI  
JUDGE OF APPEAL

## APPEARANCES

For the appellants:	A Collingwood
Instructed by:	V Chetty Incorporated, Durban Lovius Block Attorneys, Bloemfontein
For the first respondent:	A V Voormolen SC
Instructed by:	Cox Yeats Attorneys, Durban McIntyre Van der Post, Bloemfontein
For the second respondent:	Abides the decision of this Court
Instructed by:	Ryan D Lewis Attorneys, Sandton Pieter Skein Attorneys, Bloemfontein