OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case No.: **14667/2014**

In the matter between:

COMPASS INSURANCE COMPANY LIMITED	Plaintiff/Respondent
and	
COBUS SMIT PROJEKBESTUUR CC	First Defendant/Applicant
COBUS SMIT	Second Defendant/Applicant

AND Case No.: **9202/2017**

In the matter between:

CS PROPERTY GROUP (PTY) LTD	Plaintiff
and	
HW BROKERS (PTY) LTD	First Respondent
ROBERT JAMES ANDREW HOLLAND	Second Defendant

JUDGMENT delivered **10 SEPTEMBER 2018**

MEER J.

[1] The Defendants applied for the amendment of their plea in Case No 14667/2014, in accordance with their Notice of Amendment dated 14 May 2018. The Plaintiff in that matter, Compass Insurance Company Limited, has

objected to the proposed amendment by way of Notice of Objection, dated 28 May 2018.

[2] The objection is limited to the amendment contemplated by paragraphs 3 – 7 of the Notice of Amendment, in which the Defendants seek to advance a case for rectification of a guarantee issued by the Plaintiff on behalf of the First Defendant.

THE GROUNDS OF OBJECTION

[3] Whilst the Notice of Objection raises no objection that the amendment is out of time or late, the answering affidavit refers to the prejudice suffered by the Plaintiff due to the ongoing delay in bringing this matter to trial. It is contended that despite having been declared trial ready in February 2017, the matter has not been able to come to trial. With regard to the delay occasioned by the amendment, it is contended that despite a long series of pre-trial conferences dealing with the trial readiness of the matter, it was not until 25 April 2018 that the Defendants decided to bring this amendment.

[4] However, it is noted that when the Notice of Amendment was delivered, no trial date had been allocated and the matter had not yet been declared trial ready. The parties agreed a time table for the filing of papers in this application, and the matter has since been declared trial ready and a preferent date has been granted for the hearing of this application; and the Judge President has indicated that he could be approached for a preferent trial date. Given these circumstances, I am inclined to agree with the Defendants that there is no basis for the Plaintiff to allege prejudice which would warrant this

application being refused. The application is accordingly not refused on the basis of the alleged delay.

[5] The Plaintiff's objection in the Notice of Objection, on the merits, is on two grounds:

5.1 Firstly, that the Defendants have failed to allege an antecedent agreement that has been reduced to writing; and

5.2 Secondly, that the First Defendant is not a party to the guarantee contract sought to be rectified, it being a contract between the Plaintiff and the beneficiary under the guarantee.

[6] In respect of the first ground, the Plaintiff subsequently conceded that an antecedent agreement is not a prerequisite for a claim for rectification and that the authorities and precedents do not support the first ground of objection. See *Meyer v Merchant's Trust* 1942 AD 244 at p 253; *Netherlands Bank of South Africa v Stern, NO & Another* 1955 (1) SA 667 (W) at p 672 C - D; and *Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others NNO* 2011 (1) SA 70 (SCA) at para 36. The first ground accordingly falls away.

[7] With regard to the second ground of objection, the crisp issue that has to be determined is whether the Second Defendant, as contractor, can rectify the guarantee agreement.

Defendants' submissions in support of the amendment

[8] The founding affidavit of Miles Bruce Manning, the attorney of record for the Defendants, states that the Plaintiff's contention that the First Defendant was not a party to the disputed guarantee, if same was issued, is untenable in the light of *inter alia* the following:

8.1 the Plaintiff has at all material times alleged that the disputed guarantee was issued "on behalf of the First Defendant" (paragraph 6 of the Plaintiff's particulars of claim);

8.2 it is the Plaintiff's case that the disputed guarantee was issued pursuant to an application for such guarantee, submitted to the Plaintiff by the First Defendant's brokers, purportedly acting on behalf of the First Defendant (paragraph 7 of the Plaintiff's Reply to the Defendants' Request for Trial Particulars dated 28 November 2016);

8.3 it is further the Plaintiff's case that the disputed guarantee was issued pursuant to the First Defendant complying with all of the internal requirements for the issue thereof, which included payment by the First Defendant of the premium in respect of the disputed guarantee, and the provision by the First Defendant of collateral security required in terms of the disputed guarantee.

[9] If it is found, contends Manning, that the guarantee was validly issued, the Court will have no alternative but to conclude that the disputed guarantee constitutes an agreement in writing, which was concluded between the First Defendant (represented by its brokers) and the Plaintiff.

[10] Mr Bremridge, for the Defendants, pointed out that it is accepted that a unilateral document, signed by only one party, may be rectified if it is intended to embody the common intention of the parties, although not signed by all parties. He referred me to the cases *Netherlands Bank of South Africa supra*; *Steelmetals Ltd v Truck & Farm Equipment (Pty) Ltd* 1961 (2) SA 372 (T) at p 376 A - C; *Meyer v Merchant's Trust Ltd supra; and Union Government (Minister of Finance) v Chatwin* 1931 TPD 317 at p 320 - 321, in support of this proposition.

10.1 He referred also to *Dormell Properties 282 CC v Renasa Insurance Co Ltd & Others NNO* 2011 (1) SA 70 SCA, where he submitted Bertelsmann AJA expressed the view that a construction guarantee in the nature of that in issue in the current matter, "should therefore have been rectified" on the basis of the common intention of all three parties to the guarantee.

[11] The comments in *Dormell,* made *obiter* by Bertelsmann AJA at paragraph 37, were as follows:

> "[37] The facts of this matter clearly demonstrate that Renasa [the insurer] was more concerned with obtaining sufficient security from Synthesis [the contractor], to back up the guarantee, than with the terms of the building contract, or the exact

description of the employer. There is merit in Dormell's argument that all three parties, and in particular Renasa and Dormell, intended to secure the employer's position. The guarantee should therefore have been rectified to reflect that intention."

[12] Mr Bremridge referred also to the dissenting judgment of Cloete JA in *Dormell.* He submitted this too recognised that the guarantee was intended to reflect the "common continuing intention" of the "appellant, the beneficiary under the guarantee, the second respondent, that procured the guarantee, and the first respondent, that gave the guarantee", and in the light thereof Cloete JA held that the guarantee should be rectified.

[13] Cloete JA, in his dissenting judgment in *Dormell,* stated at paragraphs 51 and 52 as follows:

"[51] The court a quo non-suited the appellant on the basis that it was not entitled to rectification of the construction guarantee to reflect that it, and not the Dormell company, was the employer. The court a quo reasoned that the first respondent was unaware of the existence of the appellant and that there could accordingly have been no antecedent agreement between them. Furthermore, so the court a quo reasoned, there can be no question of a common intention because the parties' intention must be gleaned from the building agreement, which requires that a guarantee be issued in favour of the employer; and the 'employer' was defined as the Dormell company.

[52] The fallacy in the court a quo's approach is this. The common continuing intention of the appellant, the beneficiary under the guarantee, the second respondent, that procured the guarantee, and the first respondent, that gave the guarantee, was quite obviously that the guarantee should be issued in favour of whomever was the employer in terms of the building contract - not who was defined as the employer, but who was in fact the employer. The mistake that the first respondent made was that, contrary to its belief, the Dormell company was not the employer as (unbeknown to the first respondent) the Dormell company had been converted to a close corporation, the appellant. The mistake made by the appellant and the second respondent was that they thought that the appellant's conversion

> into a close corporation was irrelevant. But all parties concerned intended that the guarantee should be in favour of the employer under the building contract; and the appellant was in fact the employer. That suffices for rectification: *Meyer v Merchants' Trust*." (Footnote omitted.)

Plaintiff's submissions in opposition

[14] Mr Crookes, for the Plaintiff, countered that whilst it is a trite principle that not only the signatory to a document may be a party to the agreement that it reflects, and in this case there is no doubt that the Malik Trust, as beneficiary under the construction guarantee, is a party to the agreement, it does not follow that the contractor whose performance is guaranteed in the written guarantee, is also a party. *Dormell supra,* he submitted, is not authority for the legal conclusion that the contractor under a construction guarantee, whose performance is guaranteed, is a party to the guarantee, and may seek a rectification of the guarantee. He referred to the cases mentioned below, which emphasise the autonomy of a guarantee contract as a contract between the guarantor and beneficiary. The autonomy principle, he submitted, infuses the relationships in a guarantee contract.

Finding

[15] The nature of the suite of agreements comprising the performance guarantee and the counter indemnity was described in ***Molebatsi t/a Tswelelopele Building Construction v Aegis Insurance Co Case No: AD 4/92 7-8-1992***, Boputhatswana Appellate Division, by Galgut AJA as follows:

> "The purpose of a performance guarantee is to ensure that the land owner will be entitled to look to the guarantor . . . for payment of a specified amount, should the building contractor concerned not carry out its obligations in terms of the relevant building contract in a satisfactory manner. The Respondent invariably requires a

counter-indemnity and further security from the building contractor. The nature of the counter-indemnity and further security depends upon the risk to be incurred by the Respondent."

[16] Galgut AJA went on to say at page 7 of the judgment:

"The counter indemnity is the contract between the Appellant [the contractor, whose performance is guaranteed] and Respondent [the guarantor under the guarantee]. The relevant portions thereof ... define Appellant's obligations to Respondent."

And at page 8 of the judgment that:

"... it is perhaps unnecessary to stress that Annexure B [the performance guarantee] is the contract between the Respondent [the guarantor] and the DET [the guarantee]. It sets out the former's obligations to the DET."

The autonomy of the guarantee agreement has similarly been recognized, as referred to by Mr Crookes, in *Hollard Insurance Co Ltd v Jeany Industrial Holdings (Pty) Ltd* 2016 JDR 1300 (GJ) at paras 27 & 32, and *Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd* 2012 (2) SA 537 (SCA) at para 14.

[17] In similar vein, in *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others* 2010 (2) SA 86 (SCA), at p 90 E-G, it was stated:

"The guarantee was to protect the Academy [the employer] in the event of default by Landmark [the contractor] and it is to the guarantee that one should look to determine the rights and obligations of the Academy and Lombard [that is the employer and the guarantor].

The guarantee by Lombard is not unlike irrevocable letters of credit issued by banks and used in international trade, the essential feature of which is the establishment of

a contractual obligation on the part of a bank to pay the beneficiary (seller). This obligation is wholly independent of the underlying contract of sale and assures the seller of payment of the purchase price before he or she parts being with the goods being sold."

[18] In *Hollard Insurance supra*, it was put as follows at para 27:

"Generally, guarantees create a self-contained and primary obligation between the guarantor and the beneficiary and must be honoured by payment when a demand is made that complies with the formalities as recorded in the demand."

[19] In *Compass Insurance Co Ltd supra* Lewis JA said at para 14:

"The very purpose of a performance bond is that the guarantor has an independent, autonomous contract with the beneficiary and that the contractual arrangements with the beneficiary and other parties are of no consequence to the guarantor."

[20] It is thus trite that the guarantee contract is an autonomous, independent contract, as recognized in the aforementioned cases, and the First Defendant did not contend otherwise. The Defendants' stance is, however, that the contract, although autonomous, is founded on the common intention of the insurer, the beneficiary and the contractor. Mr Bremridge referred me to a doctoral thesis, *"Selective Legal Aspects of Bank Demand Guarantees"* by Dr. Michelle Kelly –Louw, University of South Africa, October 2008, on the subject of demand guarantees, of the nature of the construction guarantee in this case. The thesis defines a demand guarantee, which it contends is typically used *inter alia* in construction contracts, as follows[1]:

1 Chapter 2, paragraph 2.1, page 17.

"The International Chamber of Commerce ('ICC') defines a demand guarantee in article 2(a) of its Uniform Rules for Demand Guarantees ('URDG') as follows:

> For the purpose of these Rules, a demand guarantee (hereinafter referred to as "Guarantee") means any guarantee, bond or other payment undertaking, however named or described, by a bank, insurance company or other body or person (hereinafter called the "Guarantor") given in writing for the payment of money on presentation in conformity with the terms of the undertaking of a written demand for payment and such other document(s) (for example, a certificate by an architect or engineer, a judgment or an arbitral award) as may be specified in the Guarantee, such undertaking being given
>
> (i) at the request or on the instructions and under the liability of a party (hereinafter called "the Principal"); or
>
> (ii) at the request or on the instructions and under the liability of a bank, insurance company or any other body or person (hereinafter "the Instructing Party") acting on the instructions of a Principal to another party (hereinafter the "Beneficiary")."

[21] The thesis goes on to explain[2] that the purpose of the demand guarantee, is "to allow the beneficiary to have immediate access to funds necessary to remedy an alleged default under the underlying contract by the principal". The thesis describes the parties to a demand guarantee in relevant part[3] as follows:

> **"2.3.1 Parties to a Demand Guarantee and the Terminology**
>
> Generally, there is a minimum of three parties involved in the provision of a demand guarantee. However, sometimes a fourth party may also be involved. The different parties that are involved are discussed below.

2 At paragraph 2.2, page 20.
3At paragraph 2.3.1, page 20.

2.3.1.1 *Principal*

The principal, as he is termed in the URDG, is typically the party to the underlying contract; for example, a seller, exporter, supplier or contractor whose performance is required to be covered by the demand guarantee and who gives instructions for its issue. He is also commonly referred to as the 'account party'. However, for purposes of this thesis, the term 'principal' will be used to describe this party.

2.3.1.2 *Guarantor*

The guarantor (usually a bank) is the party issuing the demand guarantee on behalf of the principal (normally its customer).

2.3.1.3 *Beneficiary*

The beneficiary, as he is named in the URDG, is the other party to the underlying contract; for example, the buyer, importer or employer in whose favour the demand guarantee is issued. For purposes of this thesis, the term 'beneficiary' will be used to describe this party." (Footnotes omitted.)

[22] The guarantee contract in this case, in keeping with the above, ensures that the beneficiary, Malik Trust, will be able to claim from the guarantor, Compass Insurance, a specific amount, should the contractor, the First Defendant, not carry out its obligations in terms of the construction contract.

[23] The guarantee contract thus arose as a result of the underlying construction contract between Malik Trust and the First Defendant. Pursuant to the underlying contract being concluded, it is common cause that the First Defendant's brokers approached the Plaintiff and gave instructions for a guarantee contract, to cover the First Defendant's obligations under the construction contract. The parties confirmed these instructions, which appear at page 114 of the pleadings, in a document "APPLICATION FOR A

PERFORMANCE GUARANTEE" by H W Brokers. The content of the guarantee contract was informed by H W Brokers, on behalf of the First Defendant.

[24] The common intention of the Plaintiff, Malik Trust and the First Defendant, was for the guarantee contract to guarantee the contractor's performance and the document was drafted in accordance with the instructions of the Defendants' brokers. It cannot but be so, as a matter of fact, in these circumstances, that the guarantee contract reflects the common intention of all three parties. Thus the guarantee contract, although autonomous, reflects the common intention of the Malik Trust, the Plaintiff and the First Defendant, albeit the latter is not a signatory to the agreement. This does not detract from the autonomous nature of the guarantee contract, as recognized in *Molebatsi, Lombard, Hollard and Compass supra.*

[25] The comments of Bertelsman AJA and Cloete JA in *Dormell,* support the principle that a guarantee contract can be rectified to reflect the common intention of all three parties, and are, in my view, "potent persuasive force" for the Defendants' stance. See *Turnbull-Jackson v Hibiscus coast Municipality and Others* 2014 (6) SA 592 (CC) at para 56. The fact that in *Dormell* it was the employer who sought to rectify the guarantee to reflect his position, does not detract from the recognition of the principle that the contract can be rectified to reflect the intention of all 3 parties.

[26] The First Defendant's interest in the guarantee contract, and his part in the arrangements leading thereto, is, in all of the circumstances, apparent. What the Defendants seeks to rectify in the amendment application pertains

to the specific terms of payment by the guarantor to the beneficiary, in the guarantee agreement. Mr Bremridge indicated the Defendant's stance to be that due to a miscommunication between the First Defendant, and the Plaintiff, the wrong amount was paid out to the beneficiary in terms of the guarantee agreement, an amount which does not reflect the common intention of the parties. Such amount is now sought to be recovered by the Plaintiff from the First Defendant and hence the rectification of the guarantee agreement that is being sought. Given that the content of the guarantee contract emanated from an arrangement between the First Defendant and the Plaintiff, the First Defendant, in my view should not be barred from seeking to rectify the guarantee contract to reflect what it alleges to be the common intention of all 3 parties, in line with the principle in *Dormell supra*.

[27] In view of all of the above, I agree that the amendment raises a triable issue and should be allowed, to enable a proper ventilation and determination of that issue.

[28] I order as follows:

1. The First and Second Defendants' plea is amended in the manner set out in the First and Second Defendants' Notice of Amendment dated 14 May 2018, being annexure "MBM2"to the founding affidavit in support of the application.

2. The First and Second Defendants shall pay the costs of the Application, whilst the Plaintiff shall pay the costs of opposing the application.

Y S MEER

Judge of the High Court

REPORTABLE

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AND

In the matter between:

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and

HW BROKERS (PTY) LTD — First Respondent
ROBERT JAMES ANDREW HOLLAND — Second Defendant

PRESIDING JUDGE	:	**YASMIN SHEHNAZ MEER**
Applicants'/Defendants' Counsel	:	**Adv IC Bremridge SC**
Instructed by	:	**C & A Friedlander Inc** **Ref.: Mr MB Manning**
Respondent's/Plaintiff's Counsel	:	**Adv T Crookes**
Instructed by	:	**Frese Moll & Partners** **Ref.: Mr I Gurovich**
Defendant's Counsel in Case No. 9202/2017	:	**Adv J-H Roux SC**
Instructed by	:	**Mellow & De Swart** **Ref.: Mr S De Swart**
Date of Hearing	:	**21 August 2018**
Date of Judgment	:	**10 September 2018**