



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: A280/2013

In the matter between:

**KARIBIB CONSTRUCTION CC**

**APPLICANT**

and

**STANDARD BANK NAMIBIA LIMITED**

**1<sup>ST</sup> RESPONDENT**

**FIRST NATIONAL BANK OF NAMIBIA LIMITED**

**2<sup>ND</sup> RESPONDENT**

**BPO LOGISTICS CC**

**3<sup>RD</sup> RESPONDENT**

**DF MALHERBE & PARTNERS**

**4<sup>TH</sup> RESPONDENT**

**Neutral citation:** *Karibib Construction CC v Standard Bank Namibia Limited* (A280/2013) [2017] NAHCMD 110 (31 March 2017)

**Coram:** UEITELE J

**Heard:** 18 July 2014 & 08 August 2014

**Delivered:** 31 March 2017

**Fly note:** *Contract* - Construction of - Undertaking, contained in a letter, to pay the amount on the date that DF Malherbe in writing advises Standard Bank Namibia Limited that the Covering Bond over the lease No.1 and No. 3 on Portion 196 Walvis Bay Town & Townlands registered in the name of the Municipality of Walvis Bay was registered in the Deeds Registration Office at Windhoek was registered.

*Banker* - Letter of Undertaking - Generally - establish contractual obligation by bank to pay beneficiary (seller) which is wholly independent of underlying contract - Unique value thus lies in bank's liability to pay arising regardless of subsequent disputes between buyer and seller in relation to performance, or even existence, of underlying contract.

*Letter of Undertaking* - similar to letter of credit – obligation - independent of underlying contract - payment to be made if conditions in guarantee met - guarantor can only escape liability on proof of fraud on part of beneficiary.

**Summary:** The applicant issued a quotation to the third respondent to construct a roadbed in Walvis Bay ("the Project") the quotation was for the amount of N\$ 2 250 000. The applicant required a 50% deposit of the construction costs prior to it commencing with the work. The third respondent issued a purchase order in favour of applicant.

The applicant commenced with the construction of the project without the payment of the deposit on the strength of an undertaking by the third respondent that it will pay the deposit when it has secured financing from Standard Bank. Standard Bank acting on the instructions of third respondent issued a letter to the second respondent's Usakos Branch, advising that it (i.e. Standard bank) undertakes to pay the sum of N\$ 1 293 750, being 50% deposit, to applicant for work to be performed as per quotation. On the strength of this letter second respondent also advanced an amount of N\$ 600 000 to applicant.

Third respondent informed the applicant that it has secured the required deposit and that it (third respondent) is now ready to proceed with the project. A draft agreement was also enclosed which it requested applicant if satisfied, to sign. Third respondent did not sign the agreement. The payment in terms of the guarantee was also demanded and first respondent refused and argued that the letter is a not a guarantee and that applicant was not entitled to call upon the guarantee because the underlying construction agreement upon which the guarantee is reliant had not been concluded between the applicant and the third respondent.

*Held* that a 'bank demand guarantee' is an undertaking by a bank in terms of which a bank promises payment, the bank has to pay if the documents presented with the demand for payment comply with the documents that are mentioned in the text of the demand guarantee.

*Held further* that a guarantee is an obligation wholly independent of the underlying contract between the parties. A bank issuing an on demand guarantee is obliged to pay where such a demand complies with the terms of the guarantee, and it provides conclusive evidence that payment is due.

*Held further* that the terms of the letter of undertaking are clear and unambiguous. The words used by the parties must be given their ordinary meaning. The letter of undertaking constitutes a guarantee on demand which must be payable upon demand and secondly upon fulfilment of any conditions imposed in the guarantee. The only condition imposed in this guarantee is firstly the registration of a covering Mortgage Bond in favour of Standard Bank Namibia Limited over the lease No 1 and No 3 on Portion 196, Walvis Bay Town and Townlands.

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**ORDER**

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1. It is declared that the letter issued by Standard Bank Namibia Limited, on 14 December 2012 at the behest of BPO Logistics Services CC to First National Bank of Namibia Limited, for the benefit of Karibib Construction Services CC is a 'demand guarantee'.
2. It is declared that the demand guarantee issued by Standard Bank on 14 December 2012 is independent of the underlying agreement between Karibib Construction and BPO Logistics.
3. It is declared that the revocation, on 31 May 2013, by Standard Bank of the 'demand guarantee' issued by it on 14 December 2012 is unlawful and therefore invalid.
4. It is declared that the payment of the guaranteed amount of N\$ 1 293 750 (plus any interest earned on that amount), is due and payable on the date that DF Malherbe in writing advises Standard Bank Namibia Limited that the Covering Bond over the lease No.1 and No. 3 on Portion 196 Walvis Bay Town & Townlands registered in the name of the Municipality of Walvis Bay was registered in the Deeds Registration Office at Windhoek.
5. DF Malherbe & Partners are hereby directed to conduct a search at the Deeds Registration Office in Windhoek in order to confirm whether or not the Covering Bond over the lease No.1 and No. 3 on Portion 196 Walvis Bay Town & Townlands registered in the name of the Municipality of Walvis Bay was registered and to in writing inform Standard Bank Namibia Limited accordingly.
6. Standard Bank Namibia Limited is directed to honour and comply with its contractual obligations in terms of the 'demand guarantee' that it issued on 14 December 2012 at the behest of BPO Logistics Services CC to First National Bank of Namibia Limited, for the benefit of Karibib Construction Services CC and to pay the amount of N\$ 1 293 750 (plus any interest earned on that amount), to First National Bank of Namibia

Limited not later than three days from the date that Standard Bank Namibia Limited receives written confirmation from DF Malherbe & Partners that the Covering Bond over the lease No.1 and No. 3 on Portion 196 Walvis Bay Town & Townlands registered in the name of the Municipality of Walvis Bay was registered in the Deeds Registration Office in Windhoek.

7. First National Bank of Namibia Limited is directed to make available and pay into the Banking account of Karibib Construction Services CC the amount of N\$ 1 293 750 (plus any interest earned on that amount) **LESS** any advances made by First National Bank Namibia on the strength of the demand guarantee to Karibib Construction Services CC, not later than three days from the date that First National Bank Namibia receives that amount from Standard Bank Namibia Limited.
8. Standard Bank Namibia Limited and BPO Logistics CC must, jointly and severally the one paying the others to be absolved, pay the costs of Karibib Construction Services CC and First National Bank of Namibia Limited in respect of this application.

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## JUDGMENT

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**UEITELE, J**

### Introduction and Background

[1] On 17 July 2014 and 08 August 2014 (that is, two years and six months ago) I heard arguments in the dispute between Karibib Construction Services CC on the one hand and Standard Bank Namibia Limited, First National Bank of Namibia Limited and BPO Logistics Close Corporation on other side. At the conclusion of hearing the 08 August 2014 I promised to deliver judgment not later than six months (that is around March 2015) from that date.

[2] I have unfortunately failed to keep to my promise and commitment. I must confess that whatever excuse I have for the failure to keep to the promise I made to the parties, it is unfair and unreasonable to parties who approached court to wait for more than two years for the pronouncement by the court on their dispute. I therefore unreservedly and sincerely apologize to all the parties in this matter for the delay in delivering this judgment.

[3] The applicant is Karibib Construction Services CC, a close corporation incorporated in Namibia. I will, in this judgement, refer to the applicant as "Karibib Construction".<sup>1</sup> Standard Bank, FNB and BPO Logistics opposed the application and filed answering affidavits. No heads of argument were filed on behalf of FNB. FNB's opposition to this application was limited to the order of costs sought in the application but, in substance, it expressly stated in its papers that it supports this application. After FNB filed answering affidavits, Karibib Construction abandoned (in the replying affidavit) the cost order sought against FNB. DF Malherbe did not file any papers and they are not participating in these proceedings.

[4] The brief background to this matter is as follows. During August 2012, Karibib Construction issued a quotation to BPO Logistics to construct a roadbed in Walvis Bay ("the Project") the quotation was for the amount of N\$ 2 250 000 exclusive of Value Added Tax. In terms of the quotation Karibib Construction indicated that it required a 50% deposit of the construction costs prior to it commencing with construction work with the balance of the construction costs to be paid on the completion of the project.

[5] BPO Logistics was satisfied with the quotation it received from Karibib Construction and on 11 September 2012 issued a purchase order in favour of Karibib Construction. After receiving the purchase order Mr Foelscher, the representative of Karibib Construction, indicated to Mr Polster, the

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<sup>1</sup> For the sake of convenience, I will refer to the first respondent as "Standard Bank", the second respondent as "FNB", the third respondent as "BPO Logistics" and the fourth respondent as "DF Malherbe".

representative of BPO Logistics that it (i.e. Karibib Construction) is eager to commence with the construction work in respect of the project despite the fact that the deposit had not been paid as long as the parties conclude a written agreement. But prior to the parties signing a written agreement Foelscher and Polster orally agreed that the deposit will be paid as soon as BPO Logistics has secured financing from Standard Bank.

[6] Mr Foelscher accordingly drafted an agreement and forwarded that agreement to Polster who, on behalf of BPO Logistics, signed the agreement and send it back to Mr Foelscher on 20 September 2012. On that day, that is the 20<sup>th</sup> September 2012, Karibib Construction commenced with the construction works in respect of the project.

[7] On 14 December 2012 Standard Bank acting on the instructions of BPO Logistics issued a letter, a copy of this letter is annexed to Karibib Construction's founding affidavit as *annexure 'KCS 1'*, to FNB Usakos Branch, under the signatures of Thiammy Sagarias (its Manager Business banking Assistant, Walvis Bay Branch) and Yolanda Hansen (its Manager: Credit Origination, Business Banking Walvis Bay Branch) advising FNB that it (i.e. Standard bank) undertakes to pay the sum of N\$ 1 293 750, being 50% deposit, to Karibib Construction for work to be performed as per quotation dated 15 August 2012. The letter in material terms reads as follows:

'Dear Sir/Madam

Acting under instructions received from **BPO Logistics CC** we advise that we undertake to pay the sum of N\$ 1 293 750.00 (**ONE MILLION TWO HUNDRED AND NINETY THREE THOUSAND SEVEN HUNDRED AND FIFTY NAMIBIA DOLLARS ONLY**) being 50% deposit to **KARIBIB CONSTRUCTION SERVICES CC** for work to be performed as per quotation dated 15 August 2012.

This amount will be paid to your account with First National Bank, Usakos upon advice in writing from **DF MALHERBE AND PARTNERS** that the following transaction has been registered in the Deeds Office, Windhoek:

Registration of a covering Mortgage Bond in favour of Standard Bank Namibia Limited over the lease No 1 and No 3 on Portion 196, Walvis Bay Town and Townlands registered in the name of the Municipality of Walvis Bay.

Should any circumstances arise to prevent or unduly delay registration of the abovementioned transaction we reserve the right to withdraw here from by giving you written notice to that effect, whereupon the said sum will no longer be held at your disposal...'

[8] On the strength of the above quoted letter FNB during December 2012 advanced an amount of N\$ 600 000 to Karibib Construction. From the evidence placed before me it appears that Karibib Construction stopped the work on the project during early December 2012. Between 15 December 2012 and 18 April 2013 no activity occurred between Karibib Construction and BPO Logistics. On 26 April 2013 the covering Mortgage Bond in favour of Standard Bank Namibia Limited over the lease No 1 and No 3 on Portion 196, Walvis Bay Town and Townlands registered in the name of the Municipality of Walvis Bay was registered by Van Der Merwe and Associates Attorneys in the Deeds Registration Office at Windhoek.

[9] On 18 April 2013 Mr Polster on behalf of BPO logistics addressed a letter to Karibib Construction in which letter he informed Karibib Construction that BPO Logistics has now secured the required deposit and that it (BPO Logistics) is now ready to proceed with the project. It also enclosed in that letter a draft agreement which it requested Karibib Construction to peruse and if satisfied sign so that the project could continue.

[10] Karibib Construction did not respond to the letter of 18 April 2013 but instead instructed its legal practitioners to address a letter of demand to BPO Logistics in which letter it indicated that it had entered into a written agreement with BPO Logistics and demanded that it be compensated for the work that it had already performed and that it be issued with a guarantee to complete the remainder of the work in respect of the project. After this letter the parties through their legal practitioners exchanged correspondences culminating in a



letter dated 24 May 2013 authored by BPO Logistics legal practitioners terminating the agreement.

[11] On 31 May 2013 Standard Bank addressed a letter to Karibib Construction's legal practitioners in which letter it informed the legal practitioners that it was instructed by BPO Logistics not to honour the obligations stipulated in the letter of 14 December 2012 because, so the letter read:

'According to our client your client is not entitled to call upon the guarantee because the underlying construction agreement upon which the guarantee is reliant had not been concluded.

In our view the guarantee only becomes due and payable once the construction agreement - especially in respect of the quotation referred to in the guarantee - is in place between the parties. In the meantime your client is prohibited to call upon the guarantee.'

[12] The nature and effect of the letter of 14 December 2012 quoted above is at the centre of the dispute between the parties in this case. Karibib Construction alleges that the letter of undertaking issued by Standard Bank to FNB for its (i.e. Karibib Construction's) benefit constitutes a demand guarantee which became irrevocable when the condition to which it was subject, was met and fulfilled, and on 14 August 2013, instituted proceedings, by Notice of Motion, out of this Court for an order to:

- (a) Declare that the guarantee issued by Standard Bank on 14 December 2012 became irrevocable on 26 April 2013 when the condition pertaining to the registration of a Covering Bond over the lease No.1 and No. 3 on Portion 196 Walvis Bay Town & Townlands registered in the name of the Municipality of Walvis Bay was met and fulfilled.

- (b) Declare that the guarantee issued by Standard Bank on 14 December 2012 is independent of the underlying agreement between Karibib Construction and BPO Logistics.
- (c) Declare the revocation, on 31 May 2013, by Standard Bank of the guarantee issued by it on 14 December 2012 as invalid.
- (d) Declare that the payment of the guaranteed amount of N\$ 1 293 750, by Standard Bank to FNB in favour of Karibib is due and payable on the date that DF Malherbe in writing advises Standard Bank that the Covering Bond over the lease No.1 and No. 3 on Portion 196 Walvis Bay Town & Townlands registered in the name of the Municipality of Walvis Bay was registered in the Deeds Office.
- (e) Direct DF Malherbe to conduct a search at the Deeds Registration Office in Windhoek in order to confirm whether or not the Covering Bond over the lease No.1 and No. 3 on Portion 196 Walvis Bay Town & Townlands registered in the name of the Municipality of Walvis Bay was registered.
- (f) Direct Standard Bank to honour and comply with its contractual obligations in terms of the guarantee that it issued on 14 December 2012 to FNB in favour of Karibib Construction and to pay the amount of N\$ 1 293 750, to FNB not later than three days from the date that Standard bank receives confirmation from DF Malherbe that the Covering Bond over the lease No.1 and No. 3 on Portion 196 Walvis Bay Town & Townlands registered in the name of the Municipality of Walvis Bay was registered.
- (g) Direct FNB to make available and pay into the Banking account of Karibib Construction the amount of N\$ 1 293 750 not later than three days from the date that FNB receives that amount from Standard Bank.
- (h) Direct the respondents to, jointly and severally the one paying the others to be absolved, pay the costs of the application.

[13] I have indicated above that Standard bank and BPO Logistics are actively opposing the application. After pleadings the matter was allocated to me and I set down the hearing of the application on 17 July 2014. After hearing submissions from counsels, I invited counsel to address the Court on whether *intercessio* came into being with reference to the judgment in *Schoeman v Moller*.<sup>2</sup> I accordingly postponed the matter to 8 August 2014 to enable the parties to file supplementary arguments. The parties did file supplementary arguments within the time afforded to them and I am grateful for their industry.

[14] In its opposition of the application, Standard Bank raised one preliminary point, namely that the pleadings filed by the applicant do not set out all the allegations that are necessary to disclose a cause of action. I will therefore before I go to the merits (if necessary) of the application deal with the point *in limine*.

The point *in limine*.

[15] In the affidavit filed on behalf of Standard Bank a point *in limine* is raised in the following terms:

‘...Applicant relies on the document annexed marked “**annexure KCS 1**” to its founding affidavit which it depicts as a demand guarantee ... In its first paragraph the letter clearly states that that first respondent undertakes upon instructions from BPO Logistics CC (the third respondent herein) to pay “N\$ 1 293 750.00..... being 50% deposit to KARIBIB CONSTRUCTION SERVICES CC for work to be performed as per quotation dated 15 August 2012.’

[16] Mr Coleman who appeared for Standard Bank argued that this undertaking is predicated upon the work to be performed as per the quotation and that the money was intended as a deposit for the work. Accordingly, so he argued, it is an essential element for applicant’s cause of action that it alleges

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<sup>2</sup> 1951 (1) SA 456 (O) (“*Schoeman’s Case*”).

and prove, firstly, that the quotation dated 15 August 2012 was agreed upon, secondly that the 50% deposit became payable in terms of the agreed quotation and lastly, work had to be performed in terms of this agreement. Therefore in the absence of these allegations, the argument proceeded, is a fatal flaw and the application must be dismissed.

[17] I do not find any merits in Mr Coleman's submissions. I say so for the following reasons. In the matter of *Walker's Fruit Farms Ltd v Summer*<sup>3</sup> Greenberg J said:

'Then we are asked to read the word guarantee as meaning something equivalent to 'advance'. It is clear that this would be a strained meaning of the word guarantee. The word is capable of a number of meanings, but the ordinary meaning is to assure a person the receipt of possession of something'

I am therefore of the view that the essential elements which the applicant needs to allege and prove are that the respondent assured it of the receipt of possession of something when the conditions set out in the assurance materializes and that the conditions materialized.

[18] In the matter of *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others*<sup>4</sup> it was held that a guarantee is an obligation wholly independent of the underlying contract. It is therefore wholly irrelevant for the applicant to allege and prove firstly, that the quotation dated 15 August 2012 was agreed upon, secondly that the 50% deposit became payable in terms of the agreed quotation and lastly, that work had to be performed in terms of this agreement. The point *in limine* therefore fails.

### Applicant's Case

[19] As I have indicated above Karibib Construction argues that the letter of 14 December 2012 (*Annexure KCS 1*) constitutes a guarantee on demand

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<sup>3</sup> 1930 TPD 398.

<sup>4</sup> 2010 (2) SA 86 (SCA).

which must be payable upon demand and secondly upon fulfilment of any conditions imposed in the guarantee. The only condition imposed in this guarantee is firstly the registration of a covering Mortgage Bond in favour of Standard Bank Namibia Limited over the lease No 1 and No 3 on Portion 196, Walvis Bay Town and Townlands ("Standard Bank Bond"), secondly that DF Malherbe and Partners must advise Standard Bank of the completion of this registration of Standard Bank Bond.

[20] Secondary to this argument is Karibib Construction's contention that the guarantee is irrevocable upon the fulfilment of the conditions above. In this case, it was argued that the guarantee became irrevocable on 26 April 2013 when the condition in respect of the registration of the Standard Bank Bond was effected in the Deeds Office. In addition, payment of the guaranteed amount, to FNB in favour of Karibib Construction became due and payable when Standard Bank was informed of the completion of registration of its bond with the Deeds Office.

[21] As stated above, I raised an issue of *intercessio* with Counsel. The issue is this: if the court finds that the undertaking by Standard Bank to pay the sum of N\$ 1 293 750 is not a guarantee, can it find that, such undertaking is an *intercessio* in terms of which Standard Bank, as a principal debtor, is liable to pay Karibib Construction that amount.

[22] Ms Visser who appeared for Karibib Construction submitted that if regard is had to the form and contents of the letter of 14 December 2012, then it is apparent that the Standard Bank undertook to pay BPO Logistics' debt (i.e. the deposit of 50% of the total contract price for the project) and to pay this 50% deposit upon receipt of notification/confirmation of registration of Standard Bank bond from DF Malherbe and Partners. Therefore this undertaking is an *intercessio* in terms of which Standard Bank, as a principal debtor, is liable to pay to applicant the aforesaid sum.

First respondent's case

[23] Standard Bank contends that, the letter of 14 December 2012, relied upon by Karibib Construction to demand payment by FNB is not a guarantee despite that term being used widely and freely in the letter. It further contends that the letter was never intended to be a demand guarantee but simply a letter of undertaking.

[24] Mr Coleman who appeared for Standard Bank argued that the letter of 14 December 2012 conveyed an undertaking to pay 50% for work to be performed as per Karibib Construction's quotation of 15 August 2012. He thus argued that the contention that, the fact that the applicant did not perform in terms of the quotation, is irrelevant, is simply wrong because BPO Logistics does not owe Karibib Construction N\$ 1 293 750 because the latter company did not do construction work as per the quotation.

[25] Mr Coleman also argued that Karibib Construction and BPO Logistics were in dispute on the construction Project agreement. Karibib Construction began with the construction already in September 2012 and then abandoned the Project site during December 2012. It did not return since then. By leaving the site contrary to the oral agreement, Karibib Constructions repudiated the agreement which prompted BPO Logistics to cancel it. Thus eliminating the underlying reason for the letter of 14 December 2104.

[26] Mr Coleman citing the case of *Guardrisk Insurance Co Ltd and Others v Kentz*<sup>5</sup> argued that even if the Court were to find that the letter of 14 December 2012 is a demand guarantee, the Court must decline to enforce if it finds that the beneficiary of the demand guarantee is not entitled to the payments under the guarantee.

[27] On the issue of *intercessio* raised by the Court, Mr Coleman argued that *intercessio* is a factual issue that had to be raised in the founding papers for the respondents to respond to. According to him, this is not a question to be raised without giving Standard Bank and BPO Logistics an opportunity to address it on affidavit.

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<sup>5</sup> [2014] 1 ALL SA 307 (SCA).

### Third Respondent's Submissions

[28] BPO Logistics argued that it simply requested Standard Bank to send a letter to Karibib Construction confirming that the deposit would be paid directly to Karibib Construction's bank account once all the Standard Bank's administrative and legal process had been finalised. It further argued that *ex facie* its content- the letter of 14 December 2012 is linked to the payment of a deposit and inextricably intertwined with the contract between BPO Logistics and Karibib Construction.

[29] BPO Logistics further contend that the letter of 14 December 2012 does not reflect or even make reference to the words "guarantee", "irrevocable", "unconditional" or "independent". Furthermore, it does not describe or identify Standard Bank as a principal debtor and does not provide that any obligations in terms of this letter shall be absolute and unconditional in all circumstances.

[30] Mr Obbes who appeared for BPO Logistics argued that the letter does not state that it shall not be construed to be, accessory or collateral on any basis whatsoever and it also does not provide that any demand for payment shall not be delayed, by the fact that a dispute may exist between the contractor and the employer. He further argued that this letter is distinguishable from the documents considered in the matter of *Guardrisk Insurance Company Ltd & Others v Kentz (Pty) Ltd*<sup>6</sup> and the matter of *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others*.<sup>7</sup>

### Issues to be determined

[31] In my view the issues which I am called upon to determine are the following:

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<sup>6</sup> *Ibid.*

<sup>7</sup> *Supra* footnote no. 4.

- (a) Is the letter of 14 December 2012 a guarantee in favour of FNB for the benefit of Karibib Construction?
- (b) Must Standard Bank pay the amount of N\$ 1 293 750 over to FNB for the benefit of Karibib Construction?

### Discussion

[32] I have indicated above that this matter, turns on the interpretation and application of the letter of 14 December 2012 which was issued by Standard Bank, in favour of FNB for the benefit of Karibib Construction, at the behest of BPO Logistics. It is now well established, that the first step in construing any written instrument is to determine the ordinary grammatical meaning of the words used by the parties.<sup>8</sup>

[33] It is undisputable that very few words, however, bear a single meaning, and the "ordinary" meaning of words appearing in a written instrument will necessarily depend upon the context in which they are used, their interrelation, and the nature of the transaction as it appears from the entire written instrument. It may, for example, be quite plain from reading the written instrument as a whole that a certain word or words are not used in their popular everyday meaning, but are employed in a somewhat exceptional, or even technical sense. The meaning of a written instrument is, therefore, not necessarily determined by merely taking each individual word and applying to it one of its ordinary meanings.

[34] Before I apply this well-established first step, to Standard Bank's letter of 14 December 2012 I find it appropriate to first set out the legal principles governing guarantees.

### *Legal Principles*

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<sup>8</sup> *Alexander v Minister of Justice and Others* 2009 (2) NR 712 (HC) at para [38].



[35] Forsyth and Pretorius<sup>9</sup> argue that with a contract of guarantee “the guarantor undertakes a principle obligation to indemnify the promisee on the happening of a certain event.” Michelle Kelly-Louw<sup>10</sup> defines a ‘demand guarantee’ as “a short and simple instrument issued by a bank (or other financial institution) under which the obligation to pay a stated or maximum sum of money arises merely upon the making of a demand for payment in the prescribed form and sometimes also the presentation of documents as stipulated in the guarantee within the period of validity of the guarantee.”<sup>11</sup>

[36] She further argues that many demand guarantees are payable on first demand without any additional documents, which reflects their origin in replacing cash deposits, although increasingly guarantees require at least a statement indicating that the principal is in breach. She thus concludes that ‘a demand guarantee is like a substitute for cash and must be honoured on presentation of a written demand that complies with the provisions of the guarantee.

[37] In the matter of *Minister of Transport and Public Works, Western Cape, and Another v Zanbuild Construction (Pty) Ltd and Another*:<sup>12</sup> Brand JA who authored the Court’s judgment said:

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<sup>9</sup> *Caney’s Law of Suretyship* Juta, 6<sup>th</sup> edition at p 32.

<sup>10</sup> *Selective Legal Aspects of Bank Demand Guarantees: A Doctoral Thesis* presented to the University of South Africa in October 2008 at p 17.

<sup>11</sup> She provides an example of The International Chamber of Commerce (‘ICC’) which 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 “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”).’

<sup>12</sup> 2011 (5) SA 528 (SCA) at paras [13]-[14].

[13] In the parlance of the English authorities the dispute can be usefully paraphrased as being whether the guarantees are 'conditional bonds' (as suggested by Zanbuild) or 'on demand bonds' (as suggested by the department). The essential difference between the two, as appears from these authorities, is that a claimant under a conditional bond is required at least to allege and — depending on the terms of the bond — sometimes also to establish liability on the part of the contractor for the same amount. An 'on demand' bond, also referred to as a 'call bond', on the other hand, requires no allegation of liability on the part of the contractor under the construction contracts. All that is required for payment is a demand by the claimant, stated to be on the basis of the event specified in the bond.

[14] Our law is familiar with the distinction. In *Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others NNO*; and *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others*, for example, the construction guarantees involved were construed by this court as 'on demand' bonds, while in *Basil Read (Pty) Ltd v Beta Hotels (Pty) Ltd and Others* the guarantee was interpreted to create conditional liability akin to that of a surety. In English law, as in our law, it is accepted that the question whether the guarantee under consideration constitutes the one or the other is dependent on the interpretation of the terms of that guarantee.'

[38] From the above statements a 'bank demand guarantee' can be described as an undertaking by a bank in terms of which a bank promises payment, the bank has to pay if the documents presented with the demand for payment comply with the documents that are mentioned in the text of the demand guarantee. For this reason, argued Michelle Kelly-Louw<sup>13</sup>, the bank's obligations are autonomous from the underlying contract between the beneficiary and the principal; which means that, in principle, the bank must pay if proper complying documents are presented, even if the beneficiary and the principal have not stipulated that there is a default under the original underlying contract.<sup>14</sup>

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<sup>13</sup> Supra footnote 10 at p 19.

<sup>14</sup> Also see Magolego "Weighing the risk-Revisiting various risk-mitigating mechanisms." In DR, September 2013:30 [2013] DEREBUS 173.

[39] The principles I set out in the preceding paragraphs were recognised in the matter of *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others*<sup>15</sup> where the Court commented that:

'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 with the goods being sold. Whatever disputes may subsequently arise between buyer and seller is of no moment insofar as the bank's obligation is concerned ... The bank undertakes to pay provided only that the conditions specified in the credit are met. The only basis upon which the bank can escape liability is proof of fraud on the part of the beneficiary.'

[40] A bank issuing an on demand guarantee is only obliged to pay where a demand meets the terms of the guarantee. Such a demand, which complies with the terms of the guarantee, provides conclusive evidence that payment is due. From this it follows that the beneficiary in the case of an on demand guarantee should comply with the requirements stipulated in the guarantee. In *Frans Maas (UK) Ltd v Habib Bank AG Zurich* [2001] Lloyd's Rep Bank 14 para 58, it was put as follows:

'The question is: what was the promise which the bank made to the beneficiary under the credit, and did the beneficiary avail himself of that promise? ... It is a question of a construction of the bond. If that view of the law is unattractive to banks, the remedy lies in their own hands.'

[41] In the matter of *Minister of Transport and Public Works, Western Cape & Another v Zanbuild Construction (Pty) Ltd & Another*<sup>16</sup>, it was stated that all that is required for payment is a demand by the beneficiary, stated to be on

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<sup>15</sup> 2010 (2) SA 86 (SCA) at para [20]. See also *Petric Construction CC t/a AB Construction v Toasty Trading t/a Furstenburg Property Development and Others* 2009 (5) SA 550 (ECG).

<sup>16</sup> 2011 (5) SA 528 (SCA) para [13].

the basis of the event specified in the guarantee. Whether or not the demand is compliant will turn on an interpretation of the guarantee.

[42] The only exception to the rule that the guarantor is bound to pay without demur, is where fraud on the part of the beneficiary has been established. The party alleging fraud has to establish it clearly on a balance of probabilities. Fraud will not lightly be inferred and a party has to prove that the beneficiary presented the guarantee to the bank knowing that the demand was false. Mere error, misunderstanding or oversight, however unreasonable, would not amount to fraud.

[43] In *Loomcraft Fabrics CC v Nedbank Ltd and Another*<sup>17</sup> the Court said:

'Irrevocable letters of credit and bank guarantees given in circumstances such as that they are the equivalent of an irrevocable letter of credit have been said to be the lifeblood of commerce. Thrombosis will occur if, unless fraud is involved, the Courts intervene and thereby disturb the mercantile practice of treating rights thereunder as being the equivalent of cash in hand.'

[44] The Court went on to say:

'.... 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,

"... 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. 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.'

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<sup>17</sup> 1996 (1) SA 812 (A).

[45] Having set out the legal principles I will now proceed to apply those principles to the facts of this case.

*The application of the legal principles*

[46] I will first consider the terms of the letter of 14 December 2012. In that letter Standard Bank informs FNB that:

- (a) It acts at the behest of BPO Logistics CC;
- (b) It undertakes to pay the sum of N\$ 1 293 750 (One Million Two Hundred And Ninety Three Thousand Seven Hundred And Fifty Namibia Dollars Only);
- (c) The sum is 50% deposit to Karibib Construction Services CC for work to be performed as per quotation dated 15 August 2012;
- (d) That the amount will be paid to its account with First National Bank, Usakos upon Standard Bank being informed in writing from **DF MALHERBE AND PARTNERS** that a covering Mortgage Bond in favour of Standard Bank Namibia Limited over the lease No 1 and No 3 on Portion 196, Walvis Bay Town and Townlands registered in the name of the Municipality of Walvis Bay has been registered in the Deeds Office in Windhoek.
- (e) If any circumstances arise that will prevent or unduly delay registration of the covering mortgage bond Standard Bank reserve the right to withdraw from the undertaking by in writing notifying FNB of its intention to withdraw from the undertaking,
- (f) Where it has notified FNB that it is withdrawing from the undertaking it (Standard Bank) will no longer hold the amount at the disposal of FNB.'

[47] In my view the terms of the letter are clear and unambiguous. There is no suggestion of any ambiguity of any of its provisions either. The words used by the parties must be given their ordinary meaning.<sup>18</sup> 'The question is: what was the promise which the Standard Bank made to FNB in the letter, and did the beneficiary, Karibib Construction, avail itself of that promise?

[48] The answer to that question is clear, in the letter of 14 December 2012 Standard Bank undertook or promised, to pay to FNB the sum of N\$ 1 293 750.00, once it was informed in writing by DF Malherbe that a covering Mortgage Bond in favour of Standard Bank Namibia Limited over the lease No 1 and No 3 on Portion 196, Walvis Bay Town and Townlands registered in the name of the Municipality of Walvis Bay has been registered in the Deeds Office in Windhoek.

[49] There is no suggestion that the payment is dependent on anything else happening. The liability of Standard Bank to the beneficiary to honour the undertaking arises upon written confirmation to it by D F Malherbe that the conditions set out in the letter (i.e. the registration of a covering bond over the lease No 1 and No 3 on Portion 196, Walvis Bay Town and Townlands registered in the name of the Municipality of Walvis Bay) has been effected in the Deeds Office in Windhoek.

[50] Construing the letter of undertaking of 14 December 2012 by Standard Bank as a whole, I agree with the interpretation contended for by Ms Visser namely that that letter constitutes a 'demand guarantee'. In other words, the letter of undertaking of 14 December 2012 does not constitute a 'conditional bond', giving rise to liability on the part of Standard Bank akin to suretyship. The argument by Mr Coleman that Standard Bank never intended the letter to be a demand guarantee is immaterial so is the attempt by Standard Bank to place extrinsic evidence of what its intention was, impermissible. I say so because it is no well-established that '*... the law does not concern itself with*

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<sup>18</sup> *Dormell Properties 282 CC v Renasa Insurance Company Ltd and Another* (491/09) [2010] ZASCA 137; 2011 (1) SA 70 (SCA) para 26.

*the working of the minds of parties to a contract, but with the external manifestations of their minds.*<sup>19</sup>

[51] I have earlier made reference to Mr Coleman's argument with reference to the *Guardrisk Insurance*<sup>20</sup> matter that where a beneficiary to a demand guarantee makes a call on a guarantee with the knowledge that it is not entitled to payment, the courts will protect the Bank and decline the enforcement of the guarantee in question.

[52] I considered *Guardrisk Insurance* and I must point out that, the court in that case clearly indicated that this proposition is only applicable in cases where fraud is alleged. In this context the court said that this fraud exception falls within a narrow compass and applies 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."

[53] I have also indicated above that insofar as the fraud exception is concerned, the party alleging and relying on such exception bears the *onus* of proving it and that that *onus* is an ordinary civil one which has to be discharged on a balance of probabilities, but will not lightly be inferred.<sup>21</sup>

[54] In *Loomcraft Fabrics CC v Nedbank Ltd & another*<sup>22</sup> it was pointed out that in order to succeed in respect of the fraud exception, a party had to prove that the beneficiary presented the bills (in this instance the Letter of 14 December 2012) to the Bank knowing that they contained material misrepresentations of fact upon which the bank would rely and which they knew were untrue. Mere error, misunderstanding or oversight, 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

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<sup>19</sup> See *SAR & H v National Bank of SA Ltd* 1924 AD 704 at p 715.

<sup>20</sup> In para [24].

<sup>21</sup> See para [21].

<sup>22</sup> *Ibid* at 815G-816G.

advanced in bad faith.<sup>23</sup>

[55] In this matter it was argued that because Karibib Construction had abandoned the site and the agreement between it and BPO Logistics was cancelled the demand under the letter of 14 December 2012 was fraudulent. In my view, Standard Bank has not established the fraud exception. In fact, what it has sought to do is to have this Court determine the rights and obligations of the parties in relation to the construction agreement, which on the authorities, this court is precluded from deciding.

[56] I also do not accept the argument raised by Standard Bank and BPO Logistics to the effect that they are not liable because the underlying construction agreement upon which the guarantee is reliant had not been concluded. I say so because, the authorities I have referred to in this judgment points to the fact that an undertaking to pay in no way depends on the conclusion of an underlying agreement.<sup>24</sup> In *Loomcraft Fabrics CC v Nedbank Ltd & another*<sup>25</sup> Scott AJA said:

'...The unique value of a documentary credit, therefore, is that whatever disputes may subsequently arise between the issuing bank's customer (the buyer) and the beneficiary under the credit (the seller) in relation to the performance or, for that matter, even the existence of the underlying contract, by issuing or confirming the credit, the bank undertakes to pay the beneficiary provided only that the conditions specified in the credit are met. The liability of the bank to the beneficiary to honour the credit arises upon presentment to the bank of the documents specified in the credit, including typically a set of bills of lading, which on their face conform strictly to the requirements of the credit. In the event of the documents specified in the credit being so presented, the bank will escape liability only upon proof of fraud on the part of the beneficiary.'

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<sup>23</sup> *Loomcraft* at 822G - 823C.

<sup>24</sup> *Lombard Insurance Supra* 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).

<sup>25</sup> *Ibid* at 815G-J.



[57] This disposes of the matter and makes it unnecessary for me to consider the question *intercessio* that I have raised with the parties. In the result I make the following order.

- 1 It is declared that the letter issued by Standard Bank Namibia Limited, on 14 December 2012 at the behest of BPO Logistics Services CC to First National Bank of Namibia Limited, for the benefit of Karibib Construction Services CC is a 'demand guarantee'.
- 2 It is declared that the demand guarantee issued by Standard Bank on 14 December 2012 is independent of the underlying agreement between Karibib Construction and BPO Logistics.
- 3 It is declared that the revocation, on 31 May 2013, by Standard Bank of the 'demand guarantee' issued by it on 14 December 2012 is unlawful and therefore invalid.
- 4 It is declared that the payment of the guaranteed amount of N\$ 1 293 750 (plus any interest earned on that amount), is due and payable on the date that DF Malherbe in writing advises Standard Bank Namibia Limited that the Covering Bond over the lease No.1 and No. 3 on Portion 196 Walvis Bay Town & Townlands registered in the name of the Municipality of Walvis Bay was registered in the Deeds Registration Office at Windhoek.
- 5 DF Malherbe & Partners are hereby directed to conduct a search at the Deeds Registration Office in Windhoek in order to confirm whether or not the Covering Bond over the lease No.1 and No. 3 on Portion 196 Walvis Bay Town & Townlands registered in the name of the Municipality of Walvis Bay was registered and to in writing inform Standard Bank Namibia Limited accordingly.
- 6 Standard Bank Namibia Limited is directed to honour and comply with its contractual obligations in terms of the 'demand guarantee' that it

issued on 14 December 2012 at the behest of BPO Logistics Services CC to First National Bank of Namibia Limited, for the benefit of Karibib Construction Services CC and to pay the amount of N\$ 1 293 750 (plus any interest earned on that amount), to First National Bank of Namibia Limited not later than three days from the date that Standard Bank Namibia Limited receives written confirmation from DF Malherbe & Partners that the Covering Bond over the lease No.1 and No. 3 on Portion 196 Walvis Bay Town & Townlands registered in the name of the Municipality of Walvis Bay was registered in the Deeds Registration Office in Windhoek.

- 7 First National Bank of Namibia Limited is directed to make available and pay into the Banking account of Karibib Construction Services CC the amount of N\$ 1 293 750 (plus any interest earned on that amount) **LESS** any advances made by First National Bank Namibia on the strength of the demand guarantee to Karibib Construction Services CC, not later than three days from the date that First National Bank Namibia receives that amount from Standard Bank Namibia Limited.
- 8 Standard Bank Namibia Limited and BPO Logistics CC must, jointly and severally the one paying the others to be absolved, pay the costs of Karibib Construction Services CC and First National Bank of Namibia Limited in respect of this application.

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Ueitele SFI  
Judge

**APPEARANCES:**

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For First Respondent:

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Instructed by Angula Coleman,  
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