REPORTABLE

CASE NO: SA 11/2006

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

STANDARD BANK OF SOUTH AFRICA LTD **Appellant**

and

COUNCIL OF THE MUNICIPALITY OF WINDHOEK **Respondent**

Coram:	MARITZ JA, STRYDOM AJA and DAMASEB AJA
Heard:	**18 October 2006**
Delivered:	**26 October 2015**

APPEAL JUDGMENT

MARITZ JA (STRYDOM AJA and DAMASEB AJA concurring):

[1] The appellant, Standard Bank of SA Ltd (the Bank), issued a 'Retention Money Guarantee' on 19 December 2002 to the respondent, the City of Windhoek (the City), for the payment of up to N$3 015 869. The guarantee, according to its terms, was payable upon the City's first written demand and declaration that DB Thermal (Pty) Ltd (Thermal) had failed to rectify defects in terms of a contract concluded between the City and Consortium Stocks Structures (Pty) Ltd (Stocks)

on 15 October 1999 for the construction of the Goreangab Water Reclamation Plant under Contract No CW 025/97. The City accepted the guarantee on the terms issued but, when it demanded payment thereunder on 12 July 2004, the Bank refused to pay the guaranteed amount or any part thereof.

[2] Aggrieved by the Bank's refusal, the City claimed payment of the guaranteed amount, interest and costs from the Bank in proceedings brought on notice of motion in the High Court. The Bank opposed the application on a number of grounds: that the City failed to establish a case for the relief claimed in the founding papers; that the City's demand for payment did not conform with or fulfil the requirements or conditions of the guarantee; that the guarantee did not correctly reflect the common intention of the parties and stood to be rectified, alternatively, that it was void and of no effect as a result of a *bona fide* unilateral mistake by the Bank. The Bank, therefore, lodged a counter-application in which it sought rectification of the guarantee; and a declarator to the effect that the guarantee was void and costs. At the hearing of the main and counter-applications, the Bank also sought condonation for the late filing of a supplementary affidavit and an order referring material factual issues apparent from the affidavits to trial, alternatively, for cross-examination of certain deponents on those issues.

[3] The High Court (per Mainga J) did not refer the issues raised in the application to trial or cross-examination; dismissed the counter-application; refused condonation for the late filing of the supplementary affidavit and ordered the Bank to pay the amount of N$3 015 869 as well as *mora* interest at a rate of

20% per annum from 12 July 2004 to date of payment and costs to the City, such costs to include the costs consequent upon the employment of two instructed counsel, the costs of the counter-application and that of the application for condonation. This order is the subject matter of the appeal.

[4] The main issue on appeal is - as it was in the court below - whether the City is in law entitled to payment by the Bank of the retention money guarantee issued on 19 December 2002. Mr Botes, appearing for the Bank, contends, on essentially the same grounds as those advanced in the court below, that it was not. Dr Henning SC (assisted by Mr Heathcote), seeking to support the order of the High Court on behalf of the City, forcefully argued that the Bank was obliged to honour the guarantee upon receipt of the City's demand and declaration. Before I turn to the conflicting contentions advanced by counsel, it is necessary to summarise the broader factual context within which the issues must be determined. I shall also expound on the summary of facts when dealing with specific matters later in the judgement.

[5] The City, desirous to extend its capacity to reclaim water, called for tenders to construct, as a turnkey project, a water purification plant at Goreangab near Windhoek capable of delivering 21 000 m^3 water of a defined quality per day. Thermal and Stocks were interested in the tender and, to that end, concluded a consortium agreement on 12 October 1998. In terms thereof, they agreed to prepare and submit a tender for the supply of all equipment, labour and materials for the design, manufacture and proposed construction of the Water Reclamation Plant as contemplated in the tender documents. They also agreed to participate in

all the rights and obligations arising out of or in connection with the consortium agreement but recorded that their respective participation would be several and that all profit and loss, provision of plant, personnel and equipment, provision of funds and liabilities of any kind would have to be directly related to works attributable to each of them. It was further agreed that Thermal would be the designated leader of the consortium.

[6] The tender, submitted on 26 November 1998 by the executive director of Thermal, referred to and included the consortium agreement. The tender was formally accepted on behalf of the City and, in a letter addressed to Thermal on 10 May 1999, it was required to sign the contract agreement and return it to the City within 28 days. The letter of agreement subsequently signed, records that the agreement was one between the City and Thermal, leader of the consortium. The letter also incorporates, amongst others, the tender, the letter of acceptance and the conditions and special conditions of contract in the agreement. It is of some relevance to the contentions advanced by counsel that the general conditions of contract defines the 'contractor' referred to in the contract as 'the person whose Tender has been accepted by the Employer . . . .' Given the provisions of the consortium agreement earlier referred to as regards the severability of rights, duties and obligations between the parties to that agreement, it is only appropriate at this point to draw attention to clause 1.14 of the general conditions of contract. The sub-clause provides that 'if the contractor is a joint-venture (or consortium) of two or more persons, all such persons shall be jointly and severally liable to the employer for the fulfilment of the terms of the contract'. It further provides that

'such persons shall designate one of them to act as leader with authority to bind the joint-venture (or consortium) and each of its members'.

[7] The City avers that, although it was entitled to retain 10% of the contract price during the retention period, it nevertheless paid the full contract price to Thermal. It claims to have done so in terms of the oral agreement concluded between representatives of the City and Thermal at the end of October 2002. In terms of that agreement Thermal, in turn, had to furnish the City with a retention guarantee equivalent to 10% of the contract price. Inasmuch as the Bank was not privy to the oral agreement, it did not take issue with the allegation. Its counsel submitted during argument that the retention money was in any event payable to Thermal in terms of clause 13.4.1 (g) of the special conditions of contract 'against a bank guarantee' after final acceptance of the construction. Whatever the underlying cause for the issuing thereof may be, it is common cause that the Bank furnished the City with two retention money guarantees, the sum of which was equivalent to 10% of the contract amount paid over by the City as retention monies to Thermal. The first guarantee, stated according to its terms to be for 10% of Thermal's 'portion in terms of the consortium agreement' (ie N$6 203 231), was issued on 13 December 2002 by the Bank to the City on the instructions of Thermal. The essential terms of that guarantee were drafted and communicated by Thermal to the Bank as an annexure to a telefax dated 20 November 2002. The second guarantee, dated 19 December 2002, was issued by the Bank at the behest of Stocks. It was for N$3 015 869, stated to be 10% of Stocks' 'portion in terms of the consortium agreement'.

[8] By and large the second guarantee is formulated exactly the same as the first one, that is, except for certain deliberate changes brought about by the Bank on the express written instructions of (or on behalf of) Stocks. What happened, according to the Bank, is that Stocks effected a number of handwritten changes on a copy of the Thermal guarantee to capture what the bank considered to be its guarantee obligations to the City for the repayment of its portion of the retention money. The amended draft was telefaxed on its behalf by WBHO Construction Cape (a division of Stocks' holding company, WBHO Construction (Pty) Ltd) with an express instruction that the Bank should issue a retention guarantee to the City 'as per the attached draft'. One of a number of important changes to Thermal's guarantee that the Bank was instructed to effect for purposes of Stocks' guarantee related to the contents of the written declaration that the City would be required to make upon its demand for payment. The guarantee issued at the behest of Thermal required that the City's demand be supported by a declaration by the City to the effect that 'DB Thermal (Pty) Ltd has failed to rectify defects in terms of the aforementioned contract.' Stocks' mandate to the Bank (as reflected in the handwritten amendments of Thermal's guarantee) required that the name 'Stocks Structures (Pty) Ltd' be substituted for that of 'DB Thermal' in the quoted phrase. An employee of the Bank, who was charged to execute the mandate of Stocks, utilised an electronic version of the Thermal guarantee, which had been saved on the Bank's computer system, to produce the guarantee sought to be issued for and on behalf of Stocks. The employee implemented all the amendments contained in Stocks' draft except the one that I have mentioned.

[9] The Bank avers that it was the common continuing intention of the parties that the guarantee in question should have been one which provides for payment to be made in the event that Stocks fails to rectify defects in terms of the contract; that it should have been obvious to the City on receipt of the guarantee that it contained an error and that the guarantee must be rectified to reflect the true intention of the parties. In the alternative, it claims that the guarantee was issued in that form because of a mistake on the part of the Bank and that the latter should accordingly be entitled to avoid that provision of the guarantee on the grounds of a unilateral mistake. Stocks brought the error to the Bank's attention during June 2004. As a result, the Bank addressed a letter to the City on 24 June 2004 in which it stated that it had amended the Stocks guarantee to record that it would be payable upon the City's declaration that Stocks, and not Thermal, had failed to rectify the defects. The City strongly protested the purported amendment through its lawyers. Given the protest, the Bank accepted that it was not unilaterally entitled to amend the guarantee. Shortly thereafter, on 12 July 2004, the City demanded payment of the guarantee (as well as payment of the one issued at the behest of Thermal). The demand was accompanied by a written declaration that Thermal had failed to rectify defects in terms of the contract; that the claims of the City arising from that failure constituted an amount of N$11 598 945, exceeding the total of the two guarantees and calling upon the Bank to make payment in the sum of N$9 219 100, being the aggregate of the two guarantees issued by it on behalf of Thermal and Stocks respectively. The Bank honoured the guarantee of N$6 203 231 issued on the instructions of Thermal but refused payment of the demand based on the guarantee issued to the City on the behalf of Stocks.

[10] I pause here to point out that the exposition of events as set out above has drawn on allegations of fact apparent from the affidavits filed by or on behalf of the parties. It must be apparent that these events created multiple contractual and other legal relationships between persons or individuals to which only some - and not others - were privy to. This should be borne in mind when examining the conduct and decisions of parties at the time. The City, for example, was a stranger to the contractual relationships between the Bank and its clients; the terms of the mandate that they had given to the Bank; the circumstances that had given rise to the formulation of the two guarantees and the eventual issuing thereof in their stated terms. The Bank, on the other hand, was not privy to the consortium agreement between Stocks and Thermal or to the agreement(s) between Thermal and the City or Stocks and the City. Hence, it could not answer to the allegations as regards the conclusion, terms and conditions or execution thereof. In the normal course of its business, the Bank does not involve itself in the execution of contracts concluded by its clients with third parties. Its duty was to issue the guarantees in question in accordance with its mandate and to honour the terms of the agreements which had come into existence between it and the City by virtue of the latter's acceptance of the guarantees.

[11] The Bank honoured the guarantee that it had issued at the behest of Thermal upon presentation by the City. What remains is to ascertain whether, given the rights and obligations of the respective parties created by the guarantee issued on the instructions of Stocks, the City was also entitled to the payment thereof. In the determination of those rights and obligations it will be necessary to consider the terms of the guarantee, the legal character thereof, the legal

principles applying to guarantees of that nature and the factual matrix within which it was given as summarised above, due regard being had to the considerations of privity.

[12] The most salient provisions of the guarantee read as follows:

'**Our Retention Money Guarantee Number 212199205G108108**

1. On 10.15.1999 you concluded with Consortium Stocks Structures (Pty) Ltd (contractor) a contract number CW 025/97 for new Goreangab Water Reclamation Plant at a total price of N$92,191,004.00 . . . Stocks Structures (Pty) Ltd portion in terms of the consortium agreement amounts to $30,158,699.00 . . . .

2. . . . .

3. According to the provisions of the contract the contractor is obliged to provide a retention guarantee in the order of 10% of the contract price being N$3,015,869 . . . .

4. We, the undersigned, Standard Corporate and Merchant Bank, a division of the Standard Bank of South Africa Ltd, waiving all objections and defences under the aforementioned contract, hereby irrevocably and independently guarantee to pay on your first written demand any amount up to a total of $3,015,869 . . . against your written declaration that DB Thermal (Pty) Ltd has failed to rectify defects in terms of the aforementioned contract.

5-7. . . . .

8. No variations to the terms and/or conditions on this guarantee are permitted without prior written agreement of all the contracting parties who are legally bound thereby.

9. This guaranteed conforms to the International Chamber of Commerce Uniform Rules for Demand Guarantees number 458.

10-11. . . . .

Signed . . . etc.'

(I have added paragraph numbers to the text for reference purposes.)

[13] Although labelled a 'retention money guarantee', it is important that the guarantee's substance and legal character must be ascertained from its formulation, purpose, effect and application. The exigencies and necessities of commerce, especially the need for risk aversion (by transferring the risks associated with non-performance from an unsecured person to a more reliable 'paymaster'[1]) and the commercial demand to secure prompt and full payment for goods, services or credit (by creating an independent, primary obligation to pay when the conditions for payment prescribed in the instrument are satisfied) have forged a number of different, innovative solutions and commercial instruments in recent times, especially in the area of bank guarantees. Thus, a wide range of different bank guarantees, each of a unique legal character and fitting a particular commercial niche, are being used on a daily basis. The question is: How is the guarantee at bar to be classified and what is the legal character of guarantees falling within that category?

[14] It is evident from the provisions of para 9 of the Stocks guarantee that it is part of a broader genus of guarantees, classified as 'demand guarantees'[2] as

[1]See: Clive M. Schmitthoff, Schmitthoff's *Export Trade: The Law and Practice of International Trade*, (9 ed), 1990 p 449.

[2]Sometimes, depending on the jurisdictional connection in international commerce, also referred to as 'standby letters of credit, unconditional performance bonds, bank guarantees, banker's undertakings and independent or first demand guarantees' which, although differently labeled, 'commonly describe the same type of obligation serving the same commercial purpose' as pointed

contemplated in the ICC's Uniform Rules for Demand Guarantees No 458. That it should be so classified is also apparent from the provisions of para 4 defining the nature of the demand – and so too, the guarantee's irrevocability and autonomy – a characteristic shared with guarantees falling within this category.

[15] So classified, the Stocks guarantee falls to be distinguished from conventional bank guarantees such as sureties, where the liability of the guarantor is ancillary to that of the principal, who remains primarily liable to the creditor. By contrast, it is a fundamental characteristic of demand guarantees that they are enforceable on their own terms, independently from the rights and obligations created by the underlying contract. This characteristic makes demand guarantees desirable legal instruments of security in a number of different commercial areas (such as tender guarantees, performance guarantees, retention guarantees, advance payment guarantees and maintenance guarantees - to name a few), particularly in contracts awarded by institutions and, often, in the area of cross-border trade.[3] It is therefore important to understand that this judgment focuses on demand guarantees generally and, in particular, the guarantee issued by the Bank. It must not be construed to apply to other types of bank guarantees.

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out by Dixon, *'As good as cash? The diminution of the autonomy principle*', (2004) Australian Business Law Review 32(6), pp 391-406 para 2.2. 'Whilst standby letters of credit are a by-product of the American system, performance bonds are essentially a product of the English legal system. Bank guarantees and banker's undertakings are, in turn, a product of the European system.'

[3] Compare the remarks of Andrews and Millettt, *Law of Guarantees*, 3 ed, (2000 Sweet & Maxwell) on performance guarantees (or bonds) at p 481: 'Performance bonds (or similar instruments) have assumed an extremely important status in modern commerce. They perform the role of an effective safeguard against non-performance, inadequate performance or delayed performance. The underlying commercial purpose of a performance bond is to provide a security which is to be readily, promptly and assuredly realisable when the prescribed event occurs.'

[16] Although sweeping categorisations by label must be avoided and the legal character of each guarantee must be ascertained with reference to its terms, purpose, effect and application, the different types of demand guarantee share many common attributes. They all contemplate payment of an obligation by the guarantor upon demand made by the beneficiary. As such, they are 'readily, promptly and assuredly realisable' and accord the beneficiary 'a means of immediate compensation without the need to go through arbitration, negotiation or litigation',[4] not unlike the position as regards documentary letters of credit. It is widely recognised in international case law that, except for certain nuanced differences[5], instruments of this nature (most often in the form of performance guarantees) are similar in effect to letters of credit and, importantly for purposes of the discussion that follows, are founded on essentially the same legal principles. Those principles, fundamental to the law relating to letters of credit are twofold: (i) the autonomy of the credit and (ii) the doctrine of strict performance.[6]

[17] Dr Henning forcefully emphasised the importance and application of the autonomy-principle to the Stocks guarantee with reference to quotations from a number of South African cases, such as *Phillips & another v Standard Bank of South Africa Ltd & others*,[7] *Ex parte Sapan Trading (Pty) Ltd*[8] and, in particular, *Loomcraft Fabrics CC v Nedbank Ltd & another*.[9] An exposition of this principle is

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[4] Dixon, *ibid*.
[5]For instance, that the issuing bank's liability in the case of a demand guarantee is triggered by a demand for payment, rather than the production of documents - as is the case in a letter of credit transaction. Compare also Dixon, *op cit*, para 3.2.
[6] Schmitthoff, *op cit* 404.
[7]1985(3) SA 301 (T) at 303 and 304.
[8]1995(1) SA 218 (W) at 223J-224B.
[9]1996(1) SA 812 (AD) at 815 and 816.

also given in *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd & others*,[10] where the South African Supreme Court of Appeal said the following:

> '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's liability to the seller is to honour the credit. 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. This exception falls within a narrow compass and applies where the seller, for the purpose of drawing on the credit, fraudulently presents to the bank documents that to the seller's knowledge misrepresent the material facts.'

[18] Some of these authorities refer to and rely on excerpts from the opinions of Lord Denning M R on the autonomy of these instruments in *Edward Owen Engineering Ltd v Barclays Bank International Ltd*[11] and *Power Curber International Ltd v National Bank of Kuwait SAK.*[12] In the *Edward Owen* case, he said of performance bonds (labelled 'performance guarantees' in this jurisdiction) the following:

> 'All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether

[10] 2010 (2) SA 86 (SCA) para 20. See also *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association* 2014 (2) SA 382 (SCA) for a discussion and application of this principle with reference to a number of cases in that jurisdiction.
[11] [1978] 1 All ER 976 (CA); (1977) 3 WLR 764.
[12] [1981] 3 All ER 607 (CA); (1981) 1 WLR 1233.

> the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.'

[19] I did not understand Mr Botes to cavil with the importance or application of this principle to the guarantee in question. His argument is based on the application of the second principle underpinning these instruments, ie the doctrine of strict performance. The principle, as applied to letters of credit, entitles the bank to reject documents which, upon reasonably careful examination, do not strictly conform with the terms of the credit or do not contain all the particulars specified in the credit.[13] Inasmuch as the performance-requirement in letters of credit requires the production of documents conforming with the terms of the credit and the payment obligation of demand guarantees is triggered by a demand for payment which, in this instance, must be accompanied by a declaration of the basis on which the demand is made,[14] courts have recognised that the principle of strict compliance may not apply with equal force to these two classes of instruments. The difference in approach is highlighted in the 'Law of Guarantees'[15] as follows:

> 'In *Siporex Trade SA v. Banque Indosuez* [1986] 2 Lloyd's Rep 146 at 159, Hirst J observed that there was a substantial difference between letters of credit and performance bonds, since in the former case exact compliance with documentary requirements is imperative but in the latter, precise wording may not be essential. In that particular case, for example, the guarantee required a “declaration to the effect” that a certain event had occurred. This distinction was endorsed by Staughton L J in *IE Contractors Ltd v Lloyds Bank and Rafidain Bank* [1990] 2 Lloyd's Rep 496 at 500, subject to the caveat that the degree of compliance

[13] Schmitthoff, *op cit* at p 406
[14] Compare Dixon, *op cit*, para 3.2
[15] Andrews and Millettt, *supra,* at p 480

> required by each particular bond always depends on its true construction.' (Emphasis is mine.)

[20] This distinction may, therefore, be more apparent than real: 'the degree of compliance required by a performance bond may be strict, or not so strict. It is a question of construction of the bond'.[16] It is not so much that there is one rule for the one and another for the other, but rather that demand guarantees tend to have 'less exacting provisions with regard to precisely what documents or statements are to be submitted in order to make the issuer liable to pay.' *Ibid*.

[21] This principle, it seems, underpins the Bank's contentions that the City failed to establish a case for the relief claimed in the founding papers and that its demand for payment did not conform with or fulfil the requirements or conditions of the guarantee. Relying on the well-established rule that the applicant has to make out his case in his founding affidavit, the Bank's counsel drew attention to the City's statement that the construction agreement was concluded between the City and Thermal on 10 May 1999 that Stocks was appointed by Thermal, the leading contractor, to do work on the purification plant. He refers to various quotations from the affidavits lodged on behalf of the City in support of the contention that, according to the latter, it only entered into a contract with Thermal and with no one else. The guarantee on which the City relies for payment, however, refers in the first paragraph thereof to a contract concluded by it with 'Consortium Stocks (Pty) Ltd' on '10.15.1999'. Because the guarantee requires that the demand for payment should be accompanied by a written declaration 'that D B Thermal (Pty) Ltd has

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[16] Per Staughton LJ in *I.E. Contractors' Ltd v Lloyds Bank PLC and Rafidain Bank*, [1990] 2 Lloyd's Rep 496 at 501.

failed to rectify defects in terms of the aforementioned contract', he contends that it is clear on any construction of the guarantee that the phrase 'aforementioned contract' in para 4 thereof refers to the contract mentioned in the first paragraph, ie the one concluded by the City with 'Consortium Stocks (Pty) Ltd' on '10.15.1999'. He also urged the court to consider that the relationship between the Bank and Stocks is based on the contract and mandate which the latter had given to the Bank to issue the guarantee in question and contends that, if the bank were to pay the guarantee without the conditions of payment in the guarantee having been complied by the City, the Bank may lose its right to be indemnified by Stocks. He submits that, on the City's own version, its claim must fail for want of proof that the condition for payment as specified and contained in the guarantee has been fulfilled.

[22] Dr Henning conceded on behalf of the City that the description of the parties to the contract and the date of the contract in para 1 of the guarantee are incorrect. These incorrect references matter not, he argues, because the demand cites the reference number of the contract (CW 025/97). In support of this contention, he seeks support from examples in other or related areas of the law and, on the basis thereof submits that the description of the parties and the date of the contract were superfluous; because a false or inaccurate recital will not invalidate an arbitration award; because a wrong reference does no harm; because the description in a recital does not impose contractual obligations and because it is analogous to a situation where a testator makes a mistake in the description of the beneficiary, but no uncertainty exists as to whom he intended.[17]

[17] He refers to the following authorities in support of those contentions: Voet 35.1.14; *Fisher's Executors v Dickinson and Brown*, 1914 NPD 505 at 512; Claassen, *Dictionary of Legal Words and*

[23] A bank's obligation to honour a demand guarantee arises only as and when the beneficiary seeks payment in *accordance with the terms of the guarantee*. It must be borne in mind that guarantees are issued by banks to beneficiaries on specific terms mandated and approved by their clients (often referred to as 'account parties'). Although banks may generally be inclined to honour such guarantees on demand to protect their commercial reputation, those considerations are counterbalanced by the need not to compromise the rights and interests of their clients beyond the parameters of the commitments acceded to in the demand guarantee. As it is, demand guarantees, by their nature and application, impose heavy risks on account parties (such as Stocks). (a) The autonomous nature of demand guarantees deprive them of the right to resist payment of the guarantee on grounds which would otherwise be well-founded had the demand been based on the underlying agreements – the obligation to pay demand guarantees is not even extinguished if the underlying agreement is cancelled on valid grounds.[18] (b) In the absence of fraud, the question whether or not there has been compliance with the requirements of the demand guarantee by the beneficiary, is apparently for the bank alone to determine when the demand is made and it is not open for the account party to seek an interdict to restrain the bank from paying on grounds of non-compliance with the required demand.[19] (c)

Phrases, 2 ed, Vol 2, F8-F9; Voet 35.1.3; Corbett *et al*, *The Law of Succession in South Africa*, 475, *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd & another*, 2005 (6) SA 1 (SCA), 8-10, paras 13-19.

[18] Compare the minority view in *Dormell Properties 282 CC v Renasa Insurance Co Ltd & others NNO* 2011 (1) SA 70 (SCA) which was approved by the South African Supreme Court of Appeal in the *Coface* case, *supra*, paras 22 – 26.

[19] Andrews and Millet, *op cit*, p 480: 'The question whether or not there has been compliance is a matter for the Bank alone to determine at the time when a demand is made. It is not open to the account party to seek an injunction to restrain the Bank from paying on grounds of non-compliance. This was established in the case of *Ermis Skai Radio & Television v Banque Indosuez SA & another* (unreported, Commercial Court, Thomas J, February 26, 1997). Thomas J held that there was no basis for the implication of a term into the contract between the Bank and the beneficiary

The counter-indemnity sought from an account party by the bank issuing a demand guarantee will invariably be on wider terms than the liability of the bank under the guarantee itself.[20] (d) The account party is financially exposed to the possibility of unfair demand or abuse of the guarantee;[21] etc.

[24] These considerations highlight the place and importance of the principle of strict compliance to demand guarantees, subject, of course, to 'the caveat that the degree of compliance required by each particular bond always depends on its true construction'.[22]

[25] When faced with a demand for payment, it seems to me that a bank has a general[23] duty towards the client on whose mandate it had issued a demand guarantee, first, to construe the guarantee and assess what the beneficiary has to do so as to make a valid demand under it and, then, to assess the demand and, if required, associated declaration in order to determine whether the beneficiary has complied with those obligations. It is to these considerations that I shall turn next.

[26] On the face thereof, the Stocks guarantee is clear: the written demand for payment must be accompanied by a declaration that 'Thermal' has failed 'to rectify

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that the latter should not make a demand for sums which it did not honestly believe were due. He also held that a stranger to the contract, such as the account party, had no *locus standi* to restrain the bank from paying on the grounds of non-fulfillment of a term of the guarantee.'

[20] *Ibid*, p 490: 'As a condition of giving a performance bond, the bank or surety company will invariably require a counter-indemnity from the person whose performance it secures. The indemnity is likely to be couched in wider terms than the bond itself, requiring the account party to pay the bank whatever amount it actually pays under the bond, rather than requiring him to indemnify the bank in respect of such sums as it may be obliged to pay, because the latter form would enable the account party to question the basis of payment.'

[21] *Ibid*, p494: 'The nature of performance bonds clearly leaves them open to abuse by an unscrupulous beneficiary.' Compare also: Schmitthoff, *op cit*, p 452.

[22] Andrews & Millett, *supra*, p 480.

[23] Subject to contractual exclusions agreed to between a bank and its client.

defects in terms of the aforementioned contract'. The requirement does not use words that introduce any uncertainty about the contract under which the obligation to rectify the defects must arise. Neither does it allow for a demand based on a failure to rectify defects in terms of any other contract. The phrase 'aforementioned contract' refers to the one described in the first paragraph of the guarantee, ie the one concluded on '10.15.1999' by the City with 'Consortium Stocks Structures (Pty) Ltd (contractor) a contract number CW 025/97 for New Goreangab Water Reclamation Plant at a total price of NAD 92,191,004.00 . . . .' This is also the contract, according to para 3 of the guarantee, from which Stocks' obligation to provide the retention guarantee arose in the first instance. The Bank, therefore, had the right and duty to require that the demand and declaration would be based on the failure to rectify defects in terms of the contract so defined. In construing the guarantee in the manner it did and, in particular, by identifying the operative contract for remedial work as the one defined in the first paragraph of the guarantee, there are two further considerations that are of some import.

[27] The first is this: the Bank states that it did not see a copy of the contract in terms of which the guarantee had to be presented to the City. It did not concern itself with the execution of the underlying contract. As is the usual practise in the banking industry, it did not even enquire into the circumstances that gave rise to Stocks' obligation to present the guarantee. The Bank simply acted on the mandate of Stocks to issue a guarantee to the City in the terms provided to it in writing by Stocks. Except for the alleged erroneous reference to Thermal, instead of Stocks, in para 4 of the guarantee (with which I shall deal with later in the judgment), the issued guarantee recites the terms of the mandated guarantee

requested by Stocks exactly. None of these assertions are disputed by the City. The Bank was therefore not in possession of the underlying written contract from which it could verify the correctness of the particulars conveyed to it in Stocks' mandate about the identity or description of the parties to the contract; the date of the contract; the number of the contract; the works to which the contract related; the identity of the party obliged to effect the retention work; the obligation to provide a guarantee (or if it arose from the contract at all); etc. It merely acted on the premise that the mandate of Stocks correctly captured its contractual guarantee obligations to the City and that, should the City not be satisfied with the terms of the guarantee issued on that premise by the Bank, it would refuse to accept the guarantee and insist that a guarantee should be provided on the terms agreed on in the underlying contract.

[28] The second point of import follows from the first: The Bank issued the guarantee to the City on 19 December 2002. It was entitled to assume that, if the City was not satisfied that the terms of the guarantee accorded with the obligations of the contractor in terms of the underlying agreement, it could refuse to accept the guarantee on the issued terms. That is not what the City did. It tacitly accepted the guarantee on the terms it was issued: it did not object to the guarantee's terms during the period of 18 months that preceded the eventual demand for payment on 12 July 2004; it opposed the Bank's attempt during June 2004 to unilaterally rectify the mistake of its employee (by retaining the reference to Thermal in para 4 of the electronic copy of the Thermal guarantee; it refused to consent to the amendments proposed by the Bank on 7 July 2004 to the terms of the guarantee by substituting

that reference for one to Stocks and it demanded payment of the guarantee on 12 July 2004.

[29] From the Bank's point of view, the underlying contract in terms of which defects to the construction work had to be repaired was correctly defined by Stocks in its mandate and the description of that contract in the guarantee was accepted as such by the City. In construing the guarantee and assessing what the City had to do so to make a valid demand under it, the Bank was entitled to require, in addition to the demand, a declaration by the City that Thermal failed to rectify defects in terms of the contract which the City concluded on '10.15.1999' with 'Consortium Stocks Structures (Pty) Ltd (contractor) a contract number CW 025/97 for New Goreangab Water Reclamation Plant at a total price of NAD92,191,004.00' The contract's definition is a collective of at least 4 descriptive elements: the date and the works to which it relates.

[30] The second stage of the strict compliance-assessment was for the Bank to assess the City's demand and declaration in order to determine whether the City had complied with its demand-obligations as required by the guarantee. The City's demand for payment refers only to a contract number and the works to which it relates. No mention was made by the City in the demand to the date of, and parties to, the contract in terms of which the defects had to be remedied. It is clear, however, from the accompanying declaration that the City does not refer to or, for that matter, rely on obligations arising from a contract concluded between it and 'Consortium Stocks Structures (Pty) Ltd' on '10.15.1999' for Thermal's failure to rectify the defects thereunder – as the guarantee states. The City's demand is

based on Thermal's failure to rectify those defects under a contract with the same number concluded between the City and DB Thermal (Pty) Ltd on 10 May 1999 in respect of the works. According to the City's declaration, Thermal's obligation to rectify defects to the works arose from the latter contract.

[31] Dr Henning submits that it matters not if the date and parties to the contract relied on in the demand and declaration are different from those that are part of the contract's definition in the guarantee. The contract number being the same, particulars of the date and parties in the recital-portion of the guarantee were superfluous, he submits on the authority of Voet 35.1.4.[24] In Title 1 of Book 35, Voet deals with the conditions, descriptions, causes and purposes 'of those things which are written in a last will'. In s 4 thereof he deals with, qualifies and illustrates the application of the *falsa demonstratio non nocet* – rule to testamentary bequests. If a superfluous 'description has been attached to the thing bequeathed that it can still be known without it of what thing the testator was thinking, then it is very true that a legacy is by no means spoilt by the false description', he commented. He explains that the 'reason for this appears to be that whatever is added for the purpose of description to a thing already enough described is added to no purpose, and must be considered as though it had not been written; and superfluous writing does no harm to a legacy.' He illustrates the comment with a number of examples.[25]

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[24] In his *'Commentarius ad Pandectas'*, Gane's translation (Vol V), Butterworth & Co (Africa) Ltd, 1956.

[25] 'Instances would be if he bequeaths "the home-born slave Stichus" when Stichus had been bought, or the other way round; or bequeaths him as having been bought from Maevius, when he had been bought from someone else; or bequeaths certain purple clothes "which were bought and gotten for the benefit of my wife", when such clothes were in existence, but had not been gotten for the use of his wife.'

[32] Whatever weight may be accorded to Voet's comments on the law relating to testamentary succession, they fall to be distinguished from the case at bar both on principle and in substance.

[33] As Corbett[26] noted, in dealing with the principles applicable to the interpretation of wills, there are important differences between wills and contracts that 'affect the process of interpretation'. Referring to those differences, he continues:

> 'This explains why since time immemorial judges have adopted a benevolent approach in interpreting wills. They will do their best to ascertain the testator's true intention, however poorly expressed, and will not invalidate a disposition on grounds of uncertainty unless perplexity leaves them no other choice. It also explains why, in the interpretation of a will the courts will try harder to unravel the testator's subjective intention from its objective manifestation than in the interpretation of a contract. As Mr Justice Van den Heever put it in *Crookes NO v Watson*:
>
> > “In interpreting and putting into effect the provisions of a will the testator's wishes are of paramount importance . . . whereas a contracting party is sternly held to his intention as expressed.”'

And later:[27]

> 'As *Jarman* said in words upon which it would be difficult to improve:
>
> > “In the construction of wills the most unbounded indulgence has been shown to the ignorance, unskillfulness, and negligence of testators: no degree of technical informality, or of grammatical or orthographical error nor

[26] Corbett *et al*, *The Law of Succession in South Africa*, 2 ed, (Juta 2001) at p 448.
[27] *Ibid*, p 459

> the most perplexing confusion in the collocation of words or sentences, will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of its author, the faintest traces of which will be sought out from every part of the will and the whole carefully weighed together . . . .'"

[34] This 'benevolent approach' of 'unbounded indulgence' which is inherently part of the principles applicable to the interpretation of wills is so self-evidently distinguishable from the principle of strict compliance as applied to demand guarantees that it does not justify further elaboration. The distinction applies with equal force to the support counsel sought to glean from two other comparisons applicable to the interpretation of testamentary dispositions in the law of succession, ie from instances where the testator made a mistake in the description of the beneficiary but no uncertainty exists as to whom he intended[28] and the application of the *falsa demonstration non nocet*-rule in that area of the law.[29]

[35] The distinction is not only one of principle, but also of substance. Contracts are generally referred to or described by reference to the names of the parties thereto. In the circumstances of this case, the reference in the guarantee to Stocks as a party to the underlying contract was of particular relevance and importance to the Bank. Stocks, either directly or indirectly, mandated the Bank to issue the guarantee. In the mandate, Stocks identified itself as the party who had contracted with the City; defined the limited extent of its liability as a portion of the total contract price; acknowledged that its obligation to provide the guarantee and to rectify defects arose from the terms and provisions of the contract so concluded by

[28] Also referred to in Voet 35.1.3, *supra* and by Corbett, *op cit*, p 475.
[29] As discussed by Claassen, *Dictionary of Legal Words and Phrases*, 2 ed, Vol 2, F8-F9.

it with the City. Although the City was not privy to the terms of the mandate, all of these mandated provisions were repeated in the guarantee – to which the City raised no objection and required no correction for a period of approximately 18 months. Stocks was also the Bank's client from whom or on whose behalf the Bank required a counter-indemnity for the issuing of the guarantee. It should also be noted that, although the City's demand avoided any reference to the date and parties to the contract (referring only to a contract number and nature of the works), its accompanying declaration expressly relies on the obligations that arose from a differently dated contract concluded by the City with another person, ie Thermal. It, therefore, is not a case where the contract's date and the name of the other contracting party have been omitted but the contract has otherwise been sufficiently identified – in this instance it is expressly stated in the declaration that the contract had been concluded by the City with a different person on a different date.

[36] Does the reference to the contract number and the works to which it relates in the demand so clearly identify the contract described in the guarantee that a reference to the names of the parties to - and the date of - the contract was not only unnecessary but that they were so superfluous that the Bank had to disregard the statement in the declaration that the contract relied on was concluded between different parties on a different date? I shall deal with the significance of the contract number first and then turn to the identification of the works. There is no evidence that the Bank or Stocks were aware of the protocol followed by the City in the numbering of contracts it concludes with suppliers or service providers. They did not know – and neither does the court - whether every contract bears a unique

number or sequential number. Are the numbers of all the contracts relating to the same project not perhaps the same? Is contract number not referring to the number of the budget vote under which the expenses for multiple contracts have been authorised? Does the number not perhaps refer to the City departments responsible for the administration of the contract? Considering these uncertainties from the Bank's point of view, sight should not be lost of the fact that the City simultaneously demanded payment of Thermal's guarantee where the same contract number was used to refer to a contract concluded by the City with 'Consortium D B Thermal (Pty) Ltd and Stocks Structures (Pty) Ltd' dealing exclusively with Thermal's guarantee obligations in respect of its portion of the works. On the face of the two guarantees under which the demand was made, there were at least two contracts with identical numbers but concluded between different parties with the City and relating to distinctive portions of the work involved in the construction of the new Goreangab Water Reclamation Plant. This illustrates why a mere reference in the demand to the same contract number and works could not be regarded by the Bank, upon a reasonable construction thereof, as sufficiently clear to disregard as superfluous the assertions in the accompanying declaration that the contract underpinning the demand was concluded on a different date by different parties.

[37] Counsel for the City also submits that the date of and description of the parties to the contract in the guarantee should be disregarded because 'the description on the recital does not impose contractual obligations' and, by analogy, because 'a false or inaccurate recital will not invalidate an arbitration award'. For the first of these contentions he relies on *Consol Ltd t/a Consol Glass v Twee*

Jonge Gezellen (Pty) Ltd & another.[30] In that case the South African Supreme Court of Appeal had to determine whether an introductory sentence to a claims clause regarding *Consol's* manufacturing procedures and techniques imposed an obligation on *Consol* or whether it was merely a recital in the nature of a preamble or an introduction to the operative provisions of the claims clause. Brand JA, who wrote for the Court, recognised[31] that –

> '(p)rovisions are sometimes inserted in written contracts by means of recitals or preambles which create no obligations for any of the contracting parties. The purpose of such provisions is, for example, to serve as an introduction to the rest of the contract or to record good intentions or pronouncements of good faith. The question whether a provision constitutes a mere recital, on the one hand, or a contractual obligation, on the other, is dependent upon the intention of the parties. Such intention is to be found in the language of the stipulation itself, read in its proper context and construed in accordance with the recognised tenets of construction. Consequently, an answer can rarely be transposed from one case to another unless their facts are almost identical. Nevertheless, considerations underlying the decisions in comparable cases may serve as useful guidelines.'

After an analysis of the contract the court concluded that, unlike other sentences in the contract commencing with the words 'while' or 'whilst' or 'notwithstanding' - which are indicative of an introductory nature - the sentence in question contains a positive statement of fact relating to matters which could, in the ordinary context, be expected to form the subject matter of a contractual obligation undertaken by *Consol*. It, therefore, concluded that the first sentence in the claims clause imposed a contractual obligation.

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[30] 2005 (6) SA 1 (SCA) paras 13 – 19.
[31] Para 13.

[38] The description of the underlying construction contract in the first paragraph of the guarantee is, in my view, an essential part of the substance of the guarantee. Without that description, it will not be possible to give content to the multiple references to the contract in the text of the guarantee and, in particular, the obligation 'to rectify defects in terms of the aforementioned contract'. The phrase 'aforementioned contract' can only be understood if and when regard is had to the description of that contract in the first paragraph of the guarantee. The description of the contract entered into between the City and Stocks is part of a positive factual statement in that paragraph and the reference to 'contract' in the guarantee as a whole. It is not simply a phrase which has been included to record 'good intentions or pronouncements of good faith' and is not preceded by words of an introductory nature such as 'whereas', 'while' or 'whilst'. As it is, the contract number on which the City relies for the identification of the underlying contract in its demand for payment is part of that description. It would be a gross instance of selective reading if only one or two of the descriptive elements of the contract in that paragraph is read as part of the substance of the guarantee and the other descriptive elements are disregarded as part of a recital.

[39] The case of *Fisher's Executors v Dickinson and Brown*[32] on which counsel relies for the second contention (ie that a false or inaccurate recital will not invalidate an arbitration award) may be distinguished on the same basis. In that matter, an arbitrator's award was preceded by a recital in the following terms: 'And whereas the said parties did continue "as partners in terms of the said deed until the death of the said Robert Harry Underwood Fisher on or about the 9th October,

[32] 1914 NPD 505 at 502.

1910.'" The executors sought an order to make the arbitration award an order of court but, in a counter-application the respondent prayed that the award should be set aside because it was bad in law. The respondent contended that the factual conclusion evidenced in the quoted passage was wrong. The court dismissed the counter-application because it disagreed with the interpretation that the respondent sought to attach to the quoted finding but, in an *obiter* remark, referred in passing to authority in which it was held that a false or inaccurate recital would not invalidate an award. This case, dealing with the interpretation of awards in the law for arbitration – and in *obiter* remarks referring to the effect of incorrect factual findings incorporated in the recital on the validity of an arbitrator's award – is distinguishable from the case at hand for a number of reasons: the description of the underlying contract is not part of a recital, as I have held earlier; the description of the contract in the guarantee was not based on any factual findings but on the Bank's mandate; unlike an arbitrators award, which is normally[33] final and binding as between the parties to the arbitration, the City was at liberty to reject the guarantee if it was not satisfied that the contract was correctly described therein.

[40] In the result, I cannot accept the contentions advanced on behalf of the City that, in determining whether the demand and accompanying declaration conformed to the requirements of the Stocks' guarantee under which payment was sought, it was irrelevant or unnecessary for the Bank to consider that the demand and supporting declaration were based on a contract concluded between the City and Thermal on 10 May 1999 whereas the obligations for which the Bank assumed liability in terms of the guarantee related to the rectification of defects in

[33] Absent misconduct or irregularities that may give rise to the review thereof.

terms of a contract concluded by the City with Stocks on '10.15.1999' (ie 15 October 1999, being the only sensible date discernable from the format used). Not only was the Bank entitled to assess whether the demand and declaration complied with the terms of the guarantee, but it also had a responsibility towards its client, Stocks, to do so. The Bank's assessment was a necessary incidence of the principle of strict compliance as applied to demand guarantees generally and to the guarantee in question in particular. So assessed, the Bank was justified in concluding that the demand and declaration did not comply with the terms of the guarantee, reasonably construed. The Bank was entitled to refuse payment of the guarantee.

[41] It is for the same reasons that I must also agree with the Bank's contentions that the City failed to make out a case for the payment of the guarantee in its founding papers: the demand for payment does not comply with the requirements of the guarantee. This conclusion is different to the one reached by the court *a quo*. It is different because, although the court below extensively and with reference to a number of authorities considered the principle of autonomy and the fraud exception to the principle, it did not consider the principle of strict compliance as it applies to the guarantee or to financial instruments of this nature. The principle of autonomy does not exclude the application of the principle of strict compliance and the one does not derogate from the other at all: the latter, it seems, is a necessary corollary of the former to ensure that the independent payment obligation created by the guarantee does not extend to obligations for a bank (and, indirectly, for an account party) beyond the terms thereof. Had the court below applied the principle of strict compliance to the guarantee in question,

as it should have, the result may well have been different. In the result, the appeal against the part of the order for payment of the guaranteed amount and interest thereon must succeed.

[42] The court *a quo* also dismissed the Bank's counter-application. The primary relief sought by the Bank in the counter-application is for rectification. The court reasoned that, even if the reference to Thermal in the fourth paragraph of the guarantee was by error, the error was irrelevant because the Bank could 'only escape liability of the guarantee in question once there is clear evidence of fraud on the part of the applicant in presenting the guarantee for payment'. The reasoning of the court suggests (a) that fraud is the only exception to a bank's obligation to pay a demand guarantee and (b) that in the absence of fraud, it is not possible to rectify the terms of a guarantee.

[43] It is well-recognised that demand guarantees and other financial instruments of a like nature have assumed an extremely important status in modern commerce.[34] Hence, 'the importance of allowing banks to honour their obligations under irrevocable credits without judicial interference' has been emphasised in the *Loomcraft* case:[35]

> 'In *Intraco Ltd v Notis Shipping Corporation (The Bhoja Trader*) [1981] 2 Lloyd's Rep 256 (CA) Donaldson LJ, after upholding the refusal of the Court below to interfere with the seller's right to call upon a bank to make payment under its guarantee where fraud was not involved, observed at 257:

[34] Andrews & Millett, *op cit,* p 481.
[35] *Supra*, at p 816G – 817A.

> “Irrevocable letters of credit and bank guarantees given in circumstances such as that they are equivalent to 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 equivalent to cash in hand."

Lord Denning MR in *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 3 All ER 607 (CA) at 613b sounded a similar warning:

> "No foreign seller would supply goods to that country on letters of credit because he could no longer be confident of being paid. No trader would accept a letter of credit issued by a bank of that country if it might be ordered by its courts not to pay.”'

[44] The Bank does not allege that the City has acted fraudulently in any way. It is therefore not necessary to decide the fraud exception or to determine the scope of its application.[36] In the absence of supporting allegations, it is also not necessary to decide whether there are not further exceptions to the principle of autonomy, such as 'restrictions in the underlying contract' about the circumstances under which a beneficiary may demand payment of the guarantee or 'statutory unconscionability'[37] to the payment thereof. There may be further exceptions that the courts may wish to consider in future: Will a bank be obliged to honour a guarantee when it later becomes apparent to it that, notwithstanding the seemingly innocent description of the performance required in the demand and/or declaration, the performance contemplated will actually constitute a criminal act? For these reasons, I do not think it is prudent that we should stifle the further

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[36] As Dixon, supra, points out, the approach of the House of Lords in *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 seems to limit the fraud exception to 'fraud in the documents' rather than 'fraud in the underlying transaction'.

[37] Dixon, *ibid*, discusses these exceptions with reference to authorities in paras 4 and 5 of his article.

development of law in this area of commerce, if necessary, by endorsing an approach that will limit the exceptions to one only, ie fraud.

[45] Even if I were to accept that fraud is the only exception, as the court below held, that limitation does not bear on the question whether the guarantee may not be rectified in appropriate instances. Fraud constitutes an exception to the autonomy of the credit created by the guarantee, whereas rectification is directed at the formulation of the terms of the credit. Andrews & Millett[38] propose the following as regards the rectification of guarantees:

> 'Although there may be no reason in principle why the doctrine of rectification should not be used to make good omissions in a written guarantee in the same way as in any other type of contract, it may be that in practice the prerequisites for the remedy are difficult to establish in this particular context, where particular care is likely to be taken to avoid depriving a defendant of a legitimate statutory defence. It is rarely the case that the written guarantee is merely a reflection of a pre-existing agreement which has been concluded orally; on the contrary, it is generally the intention of the parties that there should be no binding agreement until the guarantee is signed.'

[46] These comments also illustrate the difficulty for the Bank to obtain rectification in this case. Even if I were to assume (without deciding) for purposes of this judgment that a demand guarantee may be rectified, the question remains whether the Bank made out a sufficient case to justify rectification of the guarantee by the substitution of Stocks for a reference to Thermal in para 4 of the guarantee.

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[38] *Op cit*, at p 62.

It has been held in *Denker v Cosack & others*[39] that the following facts must be alleged and proved in an application for rectification:

> '(a) an agreement between the parties which had been reduced to writing;
>
> (b) that the written document does not reflect the common intention of the parties correctly. In *Benjamin v Gurewitz* 1973 (1) SA 418 (A) at 425H Van Blerk JA says that in reforming an agreement all the Court does is to allow to be put in writing what both parties upon proper proof intended to be put in writing and erroneously thought they had (cf *Meyer v Merchants' Trust Ltd* 1942 AD 244 at 253);
>
> (c) an intention by both parties to reduce the agreement to writing;
>
> (d) that there was a mistake in the drafting of the document. See *Von Ziegler & another v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T) at 411F-H. Rectification and unilateral mistake are mutually exclusive concepts. See *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A);
>
> (e) the actual wording of the agreement as rectified. See *Levin v Zoutendijk* 1979 (3) SA 1145 (W) at 1147H-1148A.'

[47] The Bank, admittedly, had no prior negotiations or agreement with the City to issue a guarantee in specific terms – neither was it a party to a tripartite agreement of sorts with the City and Stocks to issue a guarantee in those terms. The facts demonstrate that the Bank, acting on the request of Stocks, issued the guarantee to the City. The City, by its conduct, tacitly accepted the terms of the guarantee. There is no factual basis for an allegation of a common intention prior to the issuing of the guarantee between the City and the Bank. In the

[39] 2006 (1) NR 370 (HC) at 373E–G. See also *T Scheffler t/a Night Watch Services v Institute for Management Leadership Training* 1997 NR 50 (HC) at 52A–D and the approval of this approach by this court in *Namibia Broadcasting Corporation v Kruger & others*, 2009 (1) NR 196 (SC).

circumstances, the prayer for rectification in the counter-application was rightly refused – albeit for different reasons.

[48] The alternative prayer for a declaration of invalidity based on *justus error* is equally without merit. The question when an error can be said to be *justus* for the purpose of entitling a person to repudiate his or her apparent assent to a contractual term was answered by Fagan CJ in *George v Fairmead (Pty) Ltd* as follows: [40]

> 'As I read the decisions, our courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party the one who is trying to resile been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself? . . . If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound. . . .' (References omitted.)

In *Total Namibia (Pty) Ltd v OBM Engineering Petroleum Distributors CC*[41] this court approved the following approach by the South African Appellate Division in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis*,[42] to this question:

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[40] 1958 (2) SA 465 (A) at 471B–D

[41] As yet unreported judgment of this court in Case No SA 9/2013 handed down on 30 April 2015.

[42] 1992 (3) SA 234 (A) at 239J–240A. The Bank also relies on this authority in argument (particularly at p 235B) where the court said: 'If the offeree realises (or should, as a reasonable man), realised that there is a real possibility of a mistake, he has a duty to speak and to enquire whether the intention expressed was the actual intention. Whether or not there is a duty to speak would obviously, depend upon the facts of the case. The snapping of a bargain, however, in the knowledge of the possibility that the declared intention did not represent actual intention, would not be *bona fide*. Where an offeree is alive to the real possibility of a mistake and, failing in his duty to speak and enquire, decides instead to snatch a bargain, there is no consensus, thus, no binding agreement.'

> '. . . the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? . . . To answer this question, a three-fold enquiry is usually necessary, namely, firstly was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? . . . The last question postulates two possibilities: was he actually misled and would a reasonable man have been misled?'

[49] The City states that it accepted that the guarantee was correctly worded when it received it. I am also satisfied on the evidence that a reasonable person in the position of the City would have accepted that the guarantee correctly communicated the Bank's intention and commitment to pay the guaranteed amount upon demand and against the City's written declaration that the Thermal (not Stocks) has failed to rectify the defects in terms of the construction contract referred to therein. The principal concerns that the City had at the time the guarantee was issued related to the work that Thermal still had to do and for which it had already received payment. The City was uneasy about delays, the suitability of the installed filtration system to serve its intended use, its design and capacity – to name a few – all of which fell within the ambit of Thermal's obligations. In terms of clause 1.14 of the general conditions of the contract, to which I have already referred, Stocks and Thermal were jointly and severally liable for the fulfilment of the terms of the contract. The City, therefore, had reasonable cause to accept that Stocks would assume joint and several liability for Thermal's obligation to rectify the defects. From the City's point of view, it was no mistake for para 4 of the guarantee to refer to Thermal instead of Stocks. I find no substantiation on the affidavits for the contention that the City was aware (or should reasonably have

been aware) that the Bank had made a mistake in the formulation of para 4 of the guarantee and that, instead of enquiring about the formulation, the City sought to snatch a bargain. The 'mistake,' on which the Bank relies, was entirely of its own making and neither knowledge of nor fault for it can be imputed to the City.

[50] The counter-application was not conditional upon any findings of the High Court in the main application. The court, therefore, had to deal with it, irrespective of its findings in the main application. For the reasons given above, the court was correct in dismissing the counter-application with costs, inclusive of the costs of two instructed counsel.

[51] The Bank is also aggrieved about the High Court's refusal to remit the factual issues between the parties for evidence or cross-examination. Mr Botes submits that there is a real possibility that the Bank, through oral evidence and/or cross-examination will be able to establish fraud on the part of the City. The Bank's answering affidavits do not allege or rely on any fraudulent conduct on the part of the City. Absent any assertion or factual substantiation to that effect in the Bank's affidavits, the purpose of the application was essentially to broaden the scope of the issues to include the fraud-exception and hope that evidence may be elicited at the hearing in substantiation thereof. The object of the rule allowing for referrals to trial or cross-examination should not be abused to facilitate fishing excursions of this nature.[43] In my view the court exercised its judicial discretion correctly in refusing the referral and I find no reason to interfere with it.

[43] See: *Hopf v Pretoria City Council* 1947 (2) SA 752 (T) where Roper J said at 768: 'In the circumstances personal examination of the councilors would only be undertaken with the object, or in the hope, of eliciting from them admissions which might supplement the allegations in the petition. In other words, it would amount to a fishing excursion. In my view this is not the true function of the Rule, and accordingly I am not prepared to accede to the application.'

[52] The High Court also refused to condone the late filing of a supplementary affidavit by the Bank's legal practitioner of record. I am satisfied that, had the Bank timeously required and, to the extent required, enforced discovery of the documents referred to in the City's affidavits in terms of rule 35(12) of the High Court Rules, all the relevant documents referred to in that affidavit could have been placed much earlier before the court. In any event, having been discovered as such, the documents of relevance were before the court without the need of a supplementary affidavit. In the circumstances, I do not propose to set aside the dismissal of the application for condonation by the court below.

[53] It follows from the reasons given above that I propose that the appeal succeed in part and be dismissed in part. The costs of the appeal must be determined with that result in mind. Although the Bank is substantially successful as far the High Court's order in the main application is concerned, considerable time, industry and argument have been devoted to deal with the court's order in the counter-application. In that respect – and in respect of the appeal against the refusal of the court below to refer the factual issues to trial and to grant condonation for the late filing of a supplementary affidavit – the appeal falls to be dismissed. In the view I take, it will serve the interests of fairness if no order as to costs is made in the appeal, with the exclusion of the costs occasioned by the application for condonation and reinstatement of the appeal, which was made at the hearing of the appeal.

[54] In the premises, the following order is made:

1. The appeal succeeds in part and is dismissed in part.

2. Paragraph 1 of the order of the High Court made on 6 March 2006 under Case No (P) A 383/2004 is confirmed.

3. Paragraphs 2, 3 and 4 of that order are set aside and the following order is substituted:

'2. The main application is dismissed.

3. The applicant pays the respondent's costs in the main application, such costs to include the costs of instructed counsel.

4. The respondent pays the applicant's costs in the counter-application, the application for condonation for the late filing of the supplementary affidavit and the application for referral to evidence/cross-examination, such costs to include the costs of two instructed counsel.'

4. Aside from the order of costs made at the hearing in the application for condonation and reinstatement of the appeal, no order of costs is made in the appeal.

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MARITZ JA

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STRYDOM AJA

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DAMASEB AJA

APPEARANCES

APPELLANT:	L C Botes
	Instructed by Ellis & Partners
RESPONDENT:	P J v R Henning SC (with him R Heathcote)
	Instructed by Fisher, Quarmby & Pfeifer