



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 247/2023

In the matter between:

JORGE ALEXANDRE DA COSTA BONIFACIO
SERGIO RUI DA COSTA BONIFACIO

FIRST APPELLANT
SECOND APPELLANT

and

LOMBARD INSURANCE COMPANY LIMITED

RESPONDENT

Neutral citation: *Bonifacio and Another v Lombard Insurance Company Ltd*
(247/2023) [2024] ZASCA 86 (4 June 2024)

Coram: PONNAN, NICHOLLS and MATOJANE JJA, KOEN and SEEGOBIN
AJJA

Heard: 14 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 4 June 2024.

Summary: Construction law – performance guarantee – guarantor resisting liability on basis that the claim is fraudulent – guarantor thereafter compromising on liability – whether third parties who indemnified guarantor against payment liable to guarantor – legal nature of performance guarantee – whether settlement deprived third parties of a procedural advantage which would excuse them from liability – whether claim

against third parties conditional – whether fraud could properly be adjudicated on the affidavits.

ORDER

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

The appeal is dismissed with costs, such costs to include the costs of two counsel where so employed.

JUDGMENT

Koen AJA (Ponnan, Nicholls and Matojane JJA and Seegobin AJA concurring)

Introduction

[1] This appeal considers whether the first appellant, Jorge Alexandre Da Costa Bonifacio, and the second appellant, Sergio Rui Da Costa Bonifacio (collectively referred to as the appellants), are liable to indemnify the respondent, Lombard Insurance Company Limited (the respondent), for a payment it made to DBT Technologies (Pty) Ltd (DBT). The payment was made in respect of a guarantee which the respondent had issued for the due performance of the obligations of Tubular Construction Projects (Pty) Ltd (TCP) to DBT. The Gauteng Division of the High Court, Johannesburg (the high court) found that the appellants were so liable. This appeal is against the whole¹ of that judgment with the leave of the high court.

Background

[2] During or about 2009 Eskom Holdings SOC Limited (Eskom) contracted with Alstom S & E Africa (Pty) Ltd (Alstom) to fabricate, paint and erect six ACC units at Eskom's Kusile Power Plant. Alstom, in turn, subcontracted some of the work to DBT,² which, on 23 July 2009 subcontracted some of its work (the subcontracted work) to

¹ Notwithstanding the order of the high court stating that it is against the whole of its judgment, the true scope of the appeal is considered in paragraph 15 below.

² DBT was the applicant in the high court in the application giving rise to this appeal. It is not a party to the appeal.

TCP³. In terms of TCP's subcontract it was required to provide an on-demand performance guarantee in favour of DBT with respect to the subcontracted works. On 8 September 2009, the respondent issued such a guarantee in favour of DBT for an amount of R128 375 851.20. The guarantee provided that the respondent held this amount at the disposal of DBT and undertook to pay to it on a written demand for payment, signed on behalf of DBT by an executive director thereof, stating that the amount demanded was payable to DBT in terms of the subcontract with TCP, and the circumstances of TCP's breach under its subcontract.⁴

[3] On 7 June 2019, the appellants executed a 'Deed of Suretyship and Indemnity' (the indemnity)⁵ in favour of the respondent. The following terms of the indemnity are material to this appeal:

- (a) The appellants indemnified the respondent against any claims, losses, demands, liabilities, costs and expenses of whatsoever nature, and legal costs as between attorney and client, which the respondent may at any time sustain as a result of having executed any guarantee on behalf of the guarantors.⁶ (clause 2)
- (b) The appellants agreed to pay on demand any sum of money which the respondent may be called upon to pay under any guarantee, whether or not the respondent shall, at such date, have made such payment, and whether or not the guarantors, TCP or the appellants admitted the validity of such claims against the respondent under the guarantee. (clause 3)
- (c) The appellants agreed that they were liable to the respondent for the payment of interest on any sum which the respondent may pay under any guarantee, from the date the respondent made such payment until the date that the sum was repaid by the appellants, at a rate equal to the overdraft rate of ABSA Bank Limited, plus 2 percent. (clause 4)

³ TCP was the second respondent in the high court in the application giving rise to this appeal. It has subsequently been liquidated. Like DBT, neither it nor its liquidators have played any role in this appeal.

⁴ Additional terms of the guarantee included: that the guaranteed sum would reduce in accordance with a reduction schedule annexed to the guarantee against the presentation of six 'Taking-Over' certificates; that the respondent's obligation to make payment was absolute and unconditional and would not be construed to be accessory or collateral on any basis; that any demand for payment received by the respondent would not be delayed by the fact that a dispute might exist between DBT and TCP; and, that DBT was entitled to arrange its affairs with TCP in any manner it saw fit without advising the respondent or it affecting the respondent's liability under the guarantee.

⁵ The suretyship portion of the Deed is irrelevant to this appeal.

⁶ The guarantors were defined in the indemnity as Tubular Technical Construction (Pty) Ltd and Tubular Holdings (Pty) Ltd.

- (d) The respondent would be entitled, without reference to the appellants and without affecting the appellants' liability under the indemnity, to consent to any arrangement between DBT, the guarantors and/or TCP, and to make any arrangements or compound with DBT, the guarantors and/or TCP, or to release the guarantors or any other person from any liability to the respondent. (clause 6)
- (e) The respondent would be entitled to enter into compromises and/or to accept settlements, without affecting the appellants' obligations under the indemnity, and would be entitled to require the appellants to pay any amount which the respondent may be called upon to pay, or any loss it may have suffered or incurred. (clause 9.4)
- (f) The indemnity would be enforceable against the appellants in accordance with the tenor thereof, whether as an indemnity or otherwise. (clause 10)

[4] On 13 January 2020, a written demand, in compliance with the terms of the guarantee, for the full guaranteed amount, was submitted by DBT to the respondent. On 15 January 2020, the respondent, relying on the terms of the indemnity, in turn demanded payment of the same amount from the appellants jointly and severally. When DBT's demand to the respondent was not met, DBT launched an application (the main application) in the high court against the respondent, as the first respondent, claiming an order that it be directed to honour payment of the guarantee in the sum of R128 375 851.20 with interest thereon from 13 January 2010, and costs. TCP was cited as the second respondent in the main application, but no relief was claimed against it, save for costs in the event of opposition.

[5] Both the respondent and TCP opposed the relief claimed and filed answering affidavits. Both affidavits, that of the respondent based mainly on what had been reported to it by TCP, raised as a primary defence that the demand by DBT was fraudulent, inter alia because the guarantee amount covered work that had already been completed and in respect of which taking-over certificates allegedly should have been issued, which should have reduced the guaranteed amount. TCP's answering affidavit also raised a number of further defences.⁷ After DBT had filed its replying affidavit the respondent filed a 'further affidavit' providing additional details of the

⁷ These included inter alia prescription, breaches of the agreement between it and DBT, the acceptance amount having been reduced, certain parts of the contract subsequently having been excluded from the subcontracted work, and extensions of time having been granted.

alleged fraud. The response of DBT was that these allegations were irrelevant to the relief sought by DBT and fell to be struck out, that the respondent and TCP were simply impermissibly seeking to embroil the high court in disputes in respect of which it had no jurisdiction, and that the respondent sought to manipulate the true facts to suit a version which supported an allegation of fraud in an attempt to avoid its obligations under the guarantee.

[6] On the strength of DBT's claim and the indemnity, the respondent on or about 5 May 2020 served third party notices⁸ on ten third parties, the appellants being the seventh and eighth third parties respectively. The notices substantially⁹ followed the standard form 7 to the Uniform rules of court, and advised the third parties: that DBT had commenced the main application against the respondent and TCP; that the respondent had opposed the application and delivered an answering affidavit (copies of which were attached); and, that the respondent claimed an indemnification from the third parties on the strength of the indemnity as set out in the annexures to the notices. They were further advised that if any of them disputed those grounds, and consequentially the claim of the respondent to an indemnification, or if they disputed the claim of DBT against the respondent, they had to give notice of their intention to oppose within five days of the notice, filed with the Registrar of the high court and a copy on DBT, the respondent and TCP, and thereafter file an answering affidavit within 15 days if they opposed the relief sought by the respondent against them, or the relief sought by DBT against the respondent.¹⁰ In the annexure to the third-party notices the respondent prayed that the first to tenth third parties be declared liable jointly and severally to indemnify it in the amount of R128 375 851.20, interest,¹¹ and the costs of the third-party proceedings.

⁸ Leave to serve these notices after the close of pleadings, as required by rule 13(3)(b) was obtained during early June 2020.

⁹ Uniform rule 6(14) provides that the provisions of rule 13 apply to all applications. The third party notices accordingly had to be modified, where required, to provide for the proceedings being pursued on motion.

¹⁰ This followed from the provisions of rule 13 and form 7 of the Uniform Rules of Court.

¹¹ Interest was claimed on the amount of R128 375 851.20 at the rate of 2 percent above the prime overdraft rate charged by ABSA Bank Limited in respect of the sixth to tenth third parties, calculated from the date of payment by the respondent to DBT, to date of repayment by them to the respondent.

[7] During June 2020, the first to sixth and ninth and tenth third parties filed affidavits opposing the relief claimed against them. The appellants, satisfied that DBT's claim was being opposed by the respondent and TCP and that they would be exonerated if the defences raised by them were successful, did nothing further. TCP was, however, liquidated thereafter. On 6 November 2020 the appellants were furthermore advised by their broker that the respondent was reluctant to continue opposing the matter in the absence of TCP, as it had misgivings advancing a fraud defence of which it had no personal knowledge and TCP, which was supposed to have that knowledge, would no longer be opposing the main application.

[8] In a letter from the appellants' attorney to the respondent's attorney dated 27 January 2021, the appellants acknowledged that they were now forced to enter 'into the litigation'. In their reply dated 29 January 2021, the respondent's attorneys referred to a meeting held on 16 November 2020, which confirmed that they had advised the appellants' attorneys that the enrolment of the application was imminent, that the TCP group of companies was no longer actively opposing the claim of DBT, and that if the appellants wished to participate in the proceedings, they had to do so as a matter of extreme urgency. The appellants were also advised that the respondent had concluded that it was in its best commercial interests to compromise and settle DBT's claim, that such a settlement was clearly authorised by the terms of the indemnity, that the settlement would be made an order of court at the hearing on 1 February 2021, and that the respondent would then move for a corresponding order against the third parties that were not in liquidation or business rescue.

[9] On 1 February 2021, the high court, in accordance with the terms of the settlement agreement, granted an order directing the respondent to pay to DBT an amount of R100 million in full and final settlement of all issues between them, with DBT and the respondent each paying its own costs.¹² The appellants and the other third parties, had up to that stage, not taken any steps to advance their defences and contentions, notwithstanding the elapse of several months. The high court, on 1 February 2021, adjourned the proceedings against the first, fourth, fifth, and sixth

¹² The high court also granted an order, based on the indemnity, for the second, third, ninth and tenth third parties to indemnify the respondent for the settlement amount.

third parties and the appellants to afford them the opportunity to deliver their affidavits to raise whatever contentions they wished to advance, and to apply for condonation for not having done so previously.

[10] Pursuant to that order, the appellants on 20 February 2021 delivered a counter application in which they applied for condonation for the late filing of their answering affidavits to the third party notices, filed affidavits opposing the third party relief claimed by the respondent, asked that the dispute between them and the respondent be referred for trial, and claimed rectification of the Deed of Suretyship and Indemnity. As with the contents of the answering affidavits, filed previously by the respondent and TCP in opposition to the claim by DBT, the appellants opposed the claims against them inter alia on the basis that the calling up of the guarantee had been fraudulent (the fraud defence). In addition, they contended that prior to them being joined as third parties they had been released from their obligations (the release defence), that the settlement had deprived them of a procedural advantage to present their defences to the claim of the respondent and DBT (the procedural advantage defence), and, that the respondent was estopped from proceeding against them (the estoppel defence).

[11] In its reply to the appellants' counter application and affidavits the respondent denied the various defences and the rectification claim. It furthermore contended that the fraud issue had to be resolved as between DBT and the appellants, as the respondent was not a party thereto and did not collude in any alleged fraud.

In the high court

[12] On 20 September 2022, the high court granted condonation for the late filing of the appellants' answering affidavits;¹³ declared the appellants liable, jointly and severally to pay to the respondent the sum of R100 million with interest thereon at the rate of 2 percent above the prime overdraft rate charged by ABSA Bank from time to time from the date of demand, being 15 January 2020, to date of payment; and declared the appellants liable jointly and severally, to pay the costs of the respondent on the scale as between attorney and client, including the costs of two counsel where employed.

¹³ Condonation had already previously been granted by the court.

[13] The high court concluded, inter alia, that for the purposes of deciding the application it did not have to make a finding regarding the alleged fraud; that the respondent was seeking an indemnity no longer on the basis of an adverse finding by the court against the respondent, but on the changed factual circumstances that the respondent had settled the claim by DBT; that proceeding for the settlement amount rather than the high court making a finding of liability made no difference to the respondent's claim; that the respondent was not proceeding on the basis of a new case only made out in its replying affidavit; that the matter did not require to be referred for trial where DBT who allegedly had acted fraudulently was no longer a party in the main application; and, that the appellants were liable to indemnify the respondent. The estoppel defence, the procedural advantage defence, the release defence, and the rectification claim, were dismissed.

The scope of the appeal

[14] When granting leave to appeal, the high court stated that the appellants sought leave to appeal 'on essentially one ground which is elaborated upon in paragraph 1.3.3 of the application for leave to appeal'; that this argument could be raised, although not previously ventilated on the papers or during argument, as it was of a legal nature; and that another court may conclude that the right to challenge the liability of the respondent towards DBT, had remained intact. Leave to appeal was granted against 'the whole of the judgment' of the high court.

[15] At the outset of the argument before this Court, Mr Ferreira SC, for the appellants, confirmed that the estoppel defence, the release defence, and the rectification claim were not part of the appeal. He conceded that leave to appeal was granted specifically with respect to paragraph 1.3.3 of the application for leave to appeal only. Paragraph 1.3.3 was to the effect that the high court ought to have found that the settlement did not entitle the respondent to obtain an indemnity in terms of the third party procedure, as that procedure entitled the appellants also to contest the claim by DBT against the respondent, but that this right had been affected, to their prejudice, by the settlement. Mr Ferreira further maintained that the issue of fraud was still an issue in the appeal, but only insofar as it related to this defence. This judgment proceeds on that basis.

The legal nature of the guarantee

[16] It is trite law, confirmed again in *Lombard Insurance Co Ltd v Landmark Holdings(Pty) Ltd*¹⁴ (*Landmark*), that a performance guarantee, such as the guarantee in this appeal, is autonomous and that the legal effect thereof is that it ‘creates an obligation to pay upon the happening of an event.’ The fact that it relates to a construction contract does not create an accessory obligation of suretyship. The security afforded by the guarantee is in respect of the contractor’s obligations and protects the employer, in the event of default. Such a guarantee is not unlike irrevocable letters of credit issued by banks and used in international trade to establish a contractual obligation on the part of a bank to pay a seller beneficiary. The obligations created by the guarantee are wholly independent of any underlying contract. Whatever disputes may subsequently arise between buyer/employer and seller/contractor are of no moment insofar as it concerns the obligations of the party which provided the guarantee. Its obligation remains to honour the guarantee and it undertakes to pay, provided that the conditions specified in the guarantee are met.

[17] On the facts of this appeal, all that was required to give rise to liability on the part of the respondent to DBT was a demand contemplated by the guarantee. Such a written demand¹⁵ was made on 13 January 2020, signed on behalf of DBT by its managing director and general manager. The liability of the respondent would be unaffected by any disputes arising from the terms and obligations of the underlying agreement between DBT and TCP, such as whether portions of the work had indeed been taken over, disputes regarding delays, and the like.

Fraud

[18] Following what was confirmed in *Landmark*,¹⁶ the only basis upon which liability on the guarantee could be avoided, would be if there was fraud on the part of the beneficiary. That would require proof that DBT had presented a written demand, which it knew misrepresented the true facts when it submitted the demand drawing on the

¹⁴ *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd* [2009] ZASCA 71; 2010 (2) SA 86 (SCA); [2009] 4 All SA 322 (SCA) paras 19-21.

¹⁵ *Coface South Africa Insurance Co Limited v East London Own Haven t/a Own Haven Housing Association* [2013] ZASCA 202; [2014] 1 All SA 536 (SCA); 2014 (2) SA 382 (SCA) para 2.

¹⁶ Op cit fn 15.

guarantee. As has been said, fraud, if established, 'unravels everything'.¹⁷ No court will give effect to a fraud.

[19] As regards the claim for an indemnity by the respondent against the appellants, the appellants would not only have to show that the demand by DBT was fraudulent, but also that the respondent's settlement of DBT's demand was fraudulent, that is that the respondent paid a claim which it knew was not due and thereby colluded in the fraud of DBT. As a general rule, if fraud which induces a contract does not proceed from one of the parties, but from a third person, it would have no effect upon the contract - the fraud must be the fraud of one of the parties.¹⁸

[20] There was no suggestion in the affidavits that the respondent had acted fraudulently or colluded in any alleged fraud by DBT. The high-water mark of the appellants' case against the respondent was that the respondent had not investigated the claim by DBT against it sufficiently. But it is not expected of a guarantor, faced with a valid demand in respect of a performance guarantee, to investigate the contractual position between a beneficiary and a debtor.¹⁹ In *Landmark*,²⁰ where fraud was similarly raised as a defence to avoid liability on indemnities sought to be enforced, this Court remarked that:

'In the present case Lombard undertook to pay the Academy upon Landmark being placed in liquidation. Lombard, it is accepted, did not collude in the fraud. There was no obligation on it to investigate the propriety of the claim. The trigger event in respect of which it granted the guarantee had occurred and demand was properly made.

The same [that is as applied to Lombard's liability on the performance guarantee] applies to the undertaking by the three respondents. They undertook to indemnify Lombard in the event that it paid a claim based on the guarantee provided by it. That event occurred and the respondents were likewise liable.'

The high court was therefore correct, insofar as liability based on the indemnity was concerned, that it did not have to consider the question of fraud, because there was no fraud alleged on the part of the respondent to consider.

¹⁷ *Lazarus Estates Ltd v Beasley* [1956] 1 Q.B 702 at 712.

¹⁸ *Slip Knot Investments 777 (Pty) Ltd v Du Toit* [2011] ZASCA 34; 2011 (4) SA 72 (SCA) para 8.

¹⁹ *Guardrisk Insurance Company Limited & Others v Kenz* [2013] ZASCA 182; [2014] 1 All SA 307 (SCA) para 28.

²⁰ Paras 21 and 22.

[21] Insofar as it concerned any fraud on the part of DBT potentially tainting the guarantee, thereby affecting the liability of the respondent to DBT, and following from that any liability of the appellants to the respondent, the question more correctly was not whether the high court should have enquired into the issue of any fraud on the part of DBT, but whether it was competent for the high court to do so on the affidavits/pleadings as they stood after the settlement had been made an order of court. DBT would be an essential party to any proceedings enquiring whether it had acted fraudulently. A finding of fraud could not be made against DBT, in its absence, where relief to that effect was not claimed against it²¹ in proceedings that were current and ongoing.

The alleged loss of a procedural right

[22] The appellants had been brought into the application as third parties, at the instance of the respondent. Not having been joined as parties at the instance of DBT there was no *lis* between the appellants and DBT, and the appellants did not become defendants *vis-à-vis* DBT.²² When served with the third party notices the appellants were vested with various procedural rights contained in rule 13²³ as well as other rules, and the common law, which they could have invoked. They included the following:

²¹ It was for the parties in their affidavits to set out and define the nature of their disputes, and for the court to adjudicate upon those issues so determined – *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 paras 15 and 19.

²² *Shield Insurance Co Ltd v Zervoudakis* 1967 (4) SA 735 (E) at 739B.

²³ Rule 13 of the Uniform Rules of Court provides:

Third Party Procedure

(1) Where a party in any action claims—

(a) as against any other person not a party to the action (in this rule called a “third party”) that such party is entitled, in respect of any relief claimed against him, to a contribution or indemnification from such third party, or

(b) any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between such party and the third party, and should properly be determined not only as between any parties to the action but also as between such parties and the third party or between any of them,

such party may issue a notice, hereinafter referred to as a third party notice, as near as may be in accordance with Form 7 of the First Schedule, which notice shall be served by the sheriff.

(2) Such notice shall state the nature and grounds of the claim of the party issuing the same, the question or issue to be determined, and any relief or remedy claimed. In so far as the statement of the claim and the question or issue are concerned, the rules with regard to pleadings and to summonses shall *mutatis mutandis* apply.

(3)(a) The third party notice, accompanied by a copy of all pleadings filed in the action up to the date of service of the notice, shall be served on the third party and a copy of the third party notice, without a copy of the pleadings filed in the action up to the date of service of the notice, shall be filed with the registrar and served on all other parties before the close of pleadings in the action in connection with which it was issued.

- (a) In terms of rule 13(4) and (6), to oppose the claims by the respondent;
- (b) In terms of rule 13(6), to contest the liability of the respondent to DBT;²⁴
- (c) As provided in the proviso to rule 13(6), to pursue the joinder of DBT in terms of the provisions of rule 24 in respect of any specific relief they might have wished to pursue against DBT;
- (d) Pursuant to the provisions of rule 13(8), to issue third party notices for appropriate relief²⁵ against any other parties to the litigation, including DBT;²⁶

(b) After the close of pleadings, such notice may be served only with the leave of the court.

(4) If the third party intends to contest the claim set out in the third party notice he shall deliver notice of intention to defend, as if to a summons. Immediately upon receipt of such notice, the party who issued the third party notice shall inform all other parties accordingly.

(5) The third party shall, after service upon him of a third party notice, be a party to the action and, if he delivers notice of intention to defend, shall be served with all documents and given notice of all matters as a party.

(6) The third party may plead or except to the third party notice as if he were a defendant to the action. He may also, by filing a plea or other proper pleading contest the liability of the party issuing the notice on any ground notwithstanding that such ground has not been raised in the action by such latter party: Provided however that the third party shall not be entitled to claim in reconvention against any person other than the party issuing the notice save to the extent that he would be entitled to do so in terms of rule 24.

(7) The rules with regard to the filing of further pleadings shall apply to third parties as follows:

(a) In so far as the third party's plea relates to the claim of the party issuing the notice, the said party shall be regarded as the plaintiff and the third party as the defendant.

(b) In so far as the third party's plea relates to the plaintiff's claim, the third party shall be regarded as a defendant and the plaintiff shall file pleadings as provided by the said rules

(8) Where a party to an action has against any other party (whether either such party became a party by virtue of any counterclaim by any person or by virtue of a third party notice or by any other means) a claim referred to in subrule (1), he may issue and serve on such other party a third party notice in accordance with the provisions of this rule. Save that no further notice of intention to defend shall be necessary, the same procedure shall apply as between the parties to such notice and they shall be subject to the same rights and duties as if such other party had been served with a third party notice in terms of subrule (1).

(9) Any party who has been joined as such by virtue of a third party notice may at any time make application to the court for the separation of the trial of all or any of the issues arising by virtue of such third party notice and the court may upon such application make such order as to it seems meet, including an order for the separate hearing and determination of any issue on condition that its decision on any other issue arising in the action either as between the plaintiff and the defendant or as between any other parties, shall be binding upon the applicant.'

²⁴ In terms of rule 13(7)(b) in so far as the appellants' plea would relate to DBT's claim, the appellants would be regarded as defendants/respondents and DBT would have to file pleadings as provided by the rules.

²⁵ Van Loggerenberg in *Erasmus 'Supreme Court Practice'* vol 2 page D1-145 explains that '[s]ubrule (1) provides for two alternative bases upon which a litigant can join a third party. The remedies and relief that a litigant may seek against a third party differ, depending upon whether the third party is joined under subrule (1)(a) or (b).'

²⁶ According to Van Loggerenberg in *Erasmus 'Supreme Court Practice'* vol 2 page D1-148A rule 13(8) was designed to fill a lacuna, for had it not been for the subrule, a party to an action/application having a claim in subrule (1) against another party to the same action, which could not be brought within the ambit of a claim in reconvention, would have to enforce such a claim by way of a separate action. Now, if not already a party to the action/application, such person could be joined by a third-party notice.

(e) to have proceeded against DBT separately, and then to have asked for a consolidation of such separate proceedings and the third-party proceedings. Joinder is often simply a form of consolidation and consolidation a form of joinder.²⁷

These processes were all available to the appellants to avoid a multiplicity of actions²⁸ but they had to be invoked by them.

[23] The appellants' specific complaint in their application for leave to appeal was that the settlement denied them the right in rule 13(6) to file an affidavit to contest the claim of DBT against the respondent. They however had that right from the time they were served with the third party notices, just as they had the right to deliver answering affidavits to oppose the indemnity claimed against them by the respondent. They had elected not to drive the process of opposing what they considered to be a fraudulent claim, in respect of which the respondent sought an indemnity from them. They had hoped that the initial opposition by the respondent and TCP to DBT's demand would be persisted with and would procedurally unfold in a manner which opportunistically would benefit them as well. However, the circumstances had changed by November 2020. TCP was liquidated, and its liquidators apparently elected to not participate further in the proceedings. The respondent decided to compromise the claim by DBT. It had the inalienable right²⁹ to do so³⁰ at common law and in accordance with the express terms of the indemnity, notably clauses 6 and 9.4. The law generally favours a compromise (*transactio*) to achieve finality.³¹ The appellants were aware by at the latest November 2020, if not already in October 2020, of the changed circumstances

²⁷ *Nel v Silicon Smelters (Edms) Bpk* 1981 (4) SA 792 (A) at 802B, it was held that the purpose of rule 13 is in broad terms the same as that of a consolidation of actions under rule 11: to have issues which are substantially similar tried at a single hearing so as to avoid the disadvantages attendant upon a multiplicity of trials.

²⁸ *Gross v Commercial Union Assurance Co Ltd* 1974 (1) SA 630 (A) at 634E. See also Bekker, T (2017). 'Third Party joinder: A plea for reform' *THRHR* (1682-4490), 80 (4), p. 622.

²⁹ 'Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.' – *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) para 57.

³⁰ The third parties could never negate the right of Lombard to settle the claim by DBT. It also had that right in terms of the provisions of the indemnity. The third parties could not compel DBT remaining as a party to the litigation, for a procedural advantage, post the settlement between DBT and Lombard. If there were procedural advantages to be enjoyed from DBT being a party to the litigation, such as producing documents referred to in affidavits (rule 35(12)) then they might have to be secured otherwise.

³¹ 'The law, in fact, rather favours a compromise (*transactio*), or other agreements of this kind; for *interest rei publicae ut sit finis litium* [it is in the public interest that there be an end to litigation]. – *Schierhout v Minister of Justice* 1925 AD 417 at 423.

and that they would have to take steps to establish any procedural rights they might require for the fraud allegations to be ventilated fully. Yet they did not do so.

[24] The respondent's claim throughout remained based on the indemnity contract, not the settlement agreement. The only impact of the settlement agreement was that the amount to be paid was reduced. When the relevant terms of the settlement agreement were incorporated by the high court in its order of 1 February 2021, the issue of the respondent's liability to DBT, including that it was not affected by any fraud or any other defence as between the respondent and DBT, had become *res judicata*. DBT was from then no longer a party to the litigation. All that remained were the third party proceedings. These are independent of the main application.³² Even then, the procedural rights in paragraph 22(a), (c) and (e) were still available to the appellants, subject to them obtaining condonation, where required, to invoke those out of time.

[25] The opportunity which the appellants had to file a plea/answer to contest DBT's claim against the respondent in terms of rule 13(6), was however no longer available because DBT was no longer a party to the proceedings. It is important that finality must be achieved in litigation. The appellants only had themselves to blame for losing that procedural opportunity, because when they had the right to file processes to resist DBT's claim against the respondent and DBT was still the applicant in the litigation, they had failed to invoke it. The settlement did not deny the appellants the procedural right to contest the claim of DBT. They had simply failed to pursue it in the first place when they were entitled to have done so.

[26] But even after the claim of DBT was settled, the terms of the settlement had been incorporated into the court order, and DBT was no longer a party to the litigation, the appellants could still have invoked appropriate procedures to properly introduce whatever issues relating to the fraud they might wish to have raised to resist liability. They could have invoked any of the rights and procedures detailed in paragraph 22(a), (c) and (e) above. They applied for condonation and filed a counter application and an affidavit to oppose the claims by the respondent against them, but they did not take any of the other steps open to them to bring DBT back into the proceedings as a party.

³² *ABSA Bank Ltd v Boksburg Transitional Local Council* 1997 (2) SA 415 (W) at 416A.

Absent those procedures being invoked, there was simply no *lis* between the appellants and DBT³³ in which the issue of fraud could be addressed.

Conditionality

[27] During argument the emphasis in the appellant's case shifted somewhat. It was contended that any liability of the appellants to the respondent had been expressed to be conditional upon a court, presumably in a considered judgment, reaching a definitive finding that the respondent was liable in law to DBT, before the appellants in turn could be held liable to the respondent in the third party proceedings. The appellants placed reliance in this regard on the following allegations in the respondent's founding affidavit in the third party proceedings:

'In the event that the [high court] upholds [DBT's] claim, then [the respondent] alleges that it is entitled to an indemnification from the [appellants] on the basis of the allegations set out below.

. . . and . . .

In consequence of the Indemnity and Deed [o]f Suretyship and in the event that [the respondent] is ordered to pay any amount to [DBT], [the respondent] is entitled to payment of the same amount from the [appellants], Ninth and Tenth Third Parties.'³⁴ (Emphasis added)

[28] It was argued by the appellants that following the settlement, the respondent could not obtain an indemnity from them in the third party proceedings, but that an indemnity for the settlement amount, would have to be claimed in separate fresh proceedings to be instituted. This argument cannot succeed.

[29] Firstly, the indemnity sought in terms of the provisions of rule 13 was based on the contract of indemnity, the terms whereof made it clear that: the respondent was indemnified against any claim, or demand of whatsoever nature (clause 2); the appellants agreed to pay to the respondent on demand any sum of money which they may be called upon to pay, whether or not the respondent had made such payment and whether or not the appellants admitted the validity of such claim against the

³³ *Geduld Lands Ltd v Uys* 1980 (3) SA 335 (T) at 340G.

³⁴ In their answering affidavit to the third-party proceedings, Mr Jorge Alexandre Da Costa Bonifacio explained the appellants' understanding as being that '[the respondent's] third party process against my brother and I were conditionally issued on the condition that the above Honourable Court upholds DBT's claim against [the respondent].'

respondent (clause 3); and, payment was to be made once the respondent had received a demand from DBT and the respondent in turn demanded payment from the appellants (Clause 3). On the wording of the indemnity, this liability was not conditional on the respondent firstly being found liable to DBT by a court.

[30] Secondly, the settlement simply quantified the amount of the claim. When the issues in the main application between DBT and the respondent became *res judicata* the amount of the appellants' liability in terms of the indemnity was no longer dependent on an adverse finding against the respondent by the court, but followed from the changed factual basis that the respondent had chosen to settle the claim by DBT, as was set out in the respondent's replying affidavit in the third party proceedings.

[31] Thirdly, the allegations in the affidavit, if given the meaning contended for by the appellant, would contradict the express wording of the indemnity, the express wording of rule 13, the wording of the standard form 7 annexed to the Uniform Rules of Court, and the wording of the annexure to the third party notice. When the high court incorporated the terms of the settlement in its order it fixed the amount of the payment to be made. That did not contradict the wording of the affidavit when interpreted purposively in the context in which the third party proceedings were issued. The settlement amount is the amount the high court 'ordered' the respondent to pay.

[32] If separate fresh proceedings were to have been instituted the appellants would still have been required to join DBT for the issue of fraud to be ventilated and adjudicated properly, and for any available right of recourse to be exercised against DBT. The position would have been no different to the position in which the appellants found themselves during November 2020. The procedural rights allegedly lost would also not have been available had the respondent not settled DBT's claim and abided by the high court's ultimate finding, simply because the appellants had not invoked such right.

[33] The issue of any fraud on the part of DBT was accordingly not an issue which properly arose for adjudication before the high court. The high court was correct not to consider the question of fraud because it was not competent to do so on the

pleadings. The appellants certainly had not been denied any procedural rights which would excuse them from liability.

Conclusion

[34] The appeal falls to be dismissed with costs. Both sides employed two counsel and were agreed that any costs order should include the costs consequent upon the employment of two counsel, where employed. Such an order is appropriate in the circumstances of this appeal.

[35] In the result, the following order is made:

The appeal is dismissed with costs, such costs to include the costs of two counsel where so employed.

P A KOEN
ACTING JUDGE OF APPEAL

Appearances

For appellants: F J Ferreira SC with C Richard.
Instructed by: Raees Chothia Attorneys, Johannesburg
Honey Attorneys, Bloemfontein.

For respondent: C J McAslin SC with L Laughland.
Instructed by: Frese, Moll & Partners, Johannesburg
Webbers Attorneys, Bloemfontein.