**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case No: 099/23

In the matter between:

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| **SET SQUARE DEVELOPMENTS (PTY) LTD** | **APPELLANT** |

and

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| **POWER GUARANTEES (PTY) LTD** | **FIRST RESPONDENT** |
| **VAHVA CONSTRUCTION (PTY) LTD** | **SECOND RESPONDENT** |

Case No: 150/24

And in the matter between:

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| **POWER GUARANTEES (PTY) LTD** | **APPELLANT** |

and

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| **SET SQUARE DEVELOPMENTS (PTY) LTD** | **FIRST RESPONDENT** |
| **VAHVA CONSTRUCTION (PTY) LTD** | **SECOND RESPONDENT** |

**Neutral citation:** *Set Square Developments (Pty) Ltd v Power Guarantees (Pty) Ltd and Another and a related matter* (099/2023 and 150/24) [2025] ZASCA 64 (20 May 2025)

**Coram:** MEYER, MATOJANE and UNTERHALTER JJA and PHATSHOANE and MOLITSOANE AJJA

**Heard:** 27 February 2025

**Delivered**: 20 May 2025

**Summary:** Contract Law – on-demand performance guarantees – liability of guarantor.

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**ORDER**

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

1 The appeal under case number 150/24 is dismissed with costs.

2 The appeal under case number 099/23 is upheld with costs.

3 In respect of the appeal under case number 099/23, paragraphs 2 and 3 of the order of the high court are set aside and replaced with the following:

‘2. The first respondent is further ordered to make payment to the applicant in the amounts of:

2.1 R1 999 875.19 in respect of performance guarantee PWR 111623.

2.2 R3 333 500.57 in respect of performance guarantee PWR 111504.

3. The first respondent is ordered to make payment of interest calculated at the rate of 7% per annum as follows:

3.1 On the amount of 1 940 290.78, in respect of performance guarantee PWR 111632, calculated from 17 February 2021 to date of final payment.

3.2 On the amount of R3 333 500.57, in respect of performance guarantee PWR 111504, calculated from 18 February 2021 to date of final payment.

3.3 On the amount of R1 999 875.19, in respect of performance guarantee PWR 111623, calculated from 5 April 2021 to date of final payment.

4. The respondents are ordered to pay costs of the application, jointly and severally, the one paying the other to be absolved.’

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**JUDGMENT**

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**Phatshoane AJA (Meyer, Matojane and Unterhalter JJA and Molitsoane AJA concurring):**

[1] Two appeals serve before us. The first is with the leave of the court a quo, in terms of which the appellant, Set Square Developments (Pty) Ltd (Set Square), appeals against a portion of the judgment and order of the court a quo dismissing its claim for payment under two performance guarantees issued in its favour by the first respondent, Power Guarantees (Pty) Ltd (Power Guarantees). The second is with the leave of this Court, in terms of which Power Guarantees appeals against para 1 of the order in which the court a quo upheld Set Square's monetary claim of R1 940 290.78 pursuant to Set Square's claim under performance guarantee PWR 111632. The second appeal also lies against a portion of para 2 of the order which directed Power Guarantees to pay part of Set Square's costs of the application. The second respondent, Vahva Construction (Pty) Ltd (the contractor), did not participate in the appeals and abides the decision of this Court.

[2] The appeals raise a number of issues. Firstly, whether the terms of three on-demand guarantees PWR 111504 (the first on-demand guarantee), PWR111632 (the second on-demand guarantee) and PWR 111623 (the third on-demand guarantee) issued by Power Guarantees (the guarantor) in favour of Set Square, as security for the due performance by the contractor of its obligations as they arose under the building construction contracts specified in the guarantees, precluded an interrogation into Set Square's claim that it had cancelled the underlying contracts due to breach by the contractor. Secondly, whether the underlying construction contracts between Set Square and the contractor existed, and if so, whether they were inextricably linked to the performance guarantees. Thirdly, whether Power Guarantees' defences of fraud and unconscionability are sustainable on the facts.

[3] The factual background is straightforward. Set Square undertook a large development project titled E930: Lethabong Housing Development which comprised the construction of many low-cost residential units as well as its infrastructure. It awarded certain portions of the works to the contractor in respect of phases 2, 2.2, and 3 of the project. On 28 August 2018 it awarded work relating to the Lethabong Phase 3 Housing Scheme: Civil Works to the contractor which included certain remedial works of a previous contractor in respect of Phase 2. The standard form General Conditions of the Contract for Construction 2015 applied. The contract value was in the order of R33 335 005,73. The award was subject to the contractor providing a performance bond or surety in the sum of 10% of the contract value. The contract period was eight months which commenced on 29 August 2018 and would end on 29 April 2019.

[4] On 24 October 2019 Power Guarantees issued the first on-demand guarantee in which it guaranteed the contractor's performance under the contract 5200/3: Civil Engineering Infrastructure to the Lethabong Residential Area (Phase 3) with a guaranteed limit of R3 333 500.57.

[5] Set Square and the contractor concluded an addendum to the Service Level Agreement (Expansion Contract 5200/3) in terms of which they expanded the scope of works awarded to the contractor to include infrastructure for 100 residential units of the Lethabong Residential Area (Phase 2) with effect from 15 January 2020.

[6] On 16 January 2020 Set Square awarded contract E930 Lethabong Housing Development Phase 2.2 to the contractor. The standard form JBCC Principal Building Agreement, edition 4.1 March 2005 applied. The contract value was R25 690 925.

[7] On 12 May 2020 Power Guarantees issued the second on-demand guarantee, which guaranteed the contractor's performance under contract 5200/3: Civil Engineering infrastructure to the Lethabong Residential Area (Phase 2) with a guarantee limit of R1 940 290.78. Set Square contended that the contractor fell considerably behind on the

progress of the works and failed to remedy certain defective work when called upon to do so.

[8] On 17 November 2020 Set Square issued a notice of default to the contractor in respect of expansion contract 5200/3 (Phase 2); it further put the contractor on terms to expedite progress on the project failing which Set Square would cancel the contract. Set Square submitted that the contractor remained in default. It therefore cancelled the expansion contract 5200/3 (Phase 2) on 04 December 2020.

[9] On 20 November 2020 Set Square and the contractor concluded a JBCC Series 2000 Principal Building Agreement Code 2101 Edition 4.1 March 2005 in respect of Phase 2.2 for the construction of 158 government-subsidised housing units for the Lethabong residential area.

[10] On 23 November 2020, Set Square issued a notice of default to the contractor in respect of contact 5200/3. It also placed the contractor on terms that unless it completed the necessary remedial work by, inter alia, rectifying the defective foul sewer manholes the contract would be cancelled. Set Square maintained that the contractor remained in default. Therefore, it cancelled contract 5200/3 (Phase 3) on 10 December 2020.

[11] On 21 January 2021 Power Guarantees issued the third on-demand guarantee in which it guaranteed the contractor's performance under contract 5200/3 in respect of E930 Lethabong Housing Development Phase 2.2, construction of 158 subsidised housing units, with a guarantee limit of R1 999 875.19.

[12] On 09 February 2021 Set Square made a written demand on Power Guarantees in which it claimed payment under the second on-demand guarantee 111632 in the guaranteed amount. It notified Power Guarantees that the expansion contract 5200/3 (Phase 2) was cancelled on 04 December 2020 due to the contractor's default and attached the requisite notice of termination to the demand. The next day, 10 February 2021, Set Square made a further written demand on Power Guarantees claiming payment

under the first performance guarantee 111504 in the guaranteed amount. To this end, Set Square notified Power Guarantees that contract 5200/3 (Phase 3) had been cancelled on 10 December 2020 due to the contractor's default. Similarly, a notice of termination was attached to the demand.

[13] On 19 March 2021 the contractor professed to cancel the Phase 2.2 contract. Set Square challenged the contractor's right to cancel the contract and maintained that the cancellation in question amounted to repudiation. On 26 March 2021 Set Square cancelled the contract on account of the contractor's alleged repudiation. Ten days later, on 29 March 2021, Set Square made a written demand on Power Guarantees claiming payment under the third on-demand guarantee in the guaranteed amount. It also notified Power Guarantees that contract 5200/3 (Phase 2.2) had been cancelled on 26 March 2021. A copy of the notice of termination was attached to the demand as prescribed in the guarantee.

[14] Power Guarantees refused to make payment in respect of any of the demands made. This prompted Set Square to launch an application in the court a quo in which it sought payment of R7 273 666.54, being the total amount outstanding in terms of the three guarantees, together with interest and costs. In the court a quo both Power Guarantees and the contractor opposed the relief sought by Set Square on different grounds.

[15] The court a quo commenced its consideration of Set Square's application on the second on-demand guarantee (Phase 2). It had regard to the contractor's defence that Set Square had allegedly failed to pay its R433 965.46 invoice when payment fell due. The court rejected the defence as untenable and reasoned that Set Square complied with all its obligations in terms of the guarantee and was therefore entitled to the payment of its R1 949 290.78 claim. The Court a quo then turned its attention to the third on-demand guarantee (Phase 2.2) and found that the contractor had terminated the underlying agreement between itself and Set Square on 19 March 2021. The court held the view that the subsequent termination of the same agreement by Set Square precluded it from

lodging a claim and consequently it could not claim under the third on-demand guarantee. In any event, so reasoned the court, Set Square's conduct bordered on fraud as it was alive to the fact 'that it cannot claim in the circumstances [where] the other party had cancelled the agreement due to its alleged default'. It refused to enter judgment in favour of Set Square for its R1 999 875.19 claim.

[16] In respect of the first on-demand guarantee (Phase 3) the court a quo held that Set Square failed to provide the contractor access to the site to enable the latter to perform its obligations in terms of the underlying contract and found it unconscionable that Set Square would seek to lodge a claim under the on-demand guarantee when it contributed to the contractor's failure to perform. The court preferred that the dispute be resolved through the alternative dispute resolution procedures provided for in the construction contract. Accordingly, the court dismissed Set Square's claim of R3 333 500.57.

[17] The issues raised in both Set Square's and Power Guarantees' appeals are somewhat interlinked, thus, little purpose would be served in separating the consideration thereof. It is convenient at this stage to set out the terms of the guarantees in question. The relevant terms of the first and second on-demand guarantees, as contained in clause 5 thereof, are identical. They provide in relevant part:

'Subject to the Guarantor's maximum liability referred to in 1, the Guarantor undertakes to pay the Employer [Set Square] the guaranteed sum or the full outstanding balance upon receipt of a first written demand from the Employer to the Guarantor at the Guarantor's physical address calling up this Performance Guarantee, such demand stating:

5.1 the contract has been terminated due to the Contractor's default and this Performance Guarantee is called up in terms of 5.'

[18] Clause 5 of the third on-demand guarantee reads:

'Subject to the Guarantor's maximum liability referred to in clauses 1.0 or 2.0, the Guarantor undertakes to pay the Employer the Guaranteed Sum or the full outstanding balance upon receipt of a first written demand notice from the Employer to the Guarantor at the Guarantor's physical address calling up this Guarantee for construction stating that:

5.1 The agreement has been terminated due to the contractor's default and that the security for construction is called up in terms of 5.0. The demand notice shall enclose a copy of the notice of termination.'

[19] The guarantees must be interpreted in a manner that gives effect to their terms. A plain reading of clause 5 does not admit of any doubt that what was required of the employer was firstly, to include a statement in the demand that the principal contract had been terminated due to the contractor's default and secondly, to affix a copy of the termination notice to the demand. This Set Square did. The written demands it made in respect of the three guarantees are almost identical. They read in part:

'2. Kindly take note that the contract between the parties was terminated on …...

3. We accordingly issue our written demand, in terms of Clause 5, as read with Clause 5.1, of the Guarantee, payment of the Guaranteed Sum in terms of the Guarantee due to the fact that the contract has been terminated due to the Contractor's repudiation and default.

4. In terms of Clause 5.1 of the Guarantee, we attach hereto a copy of the termination of the Agreement by the Employer, as issued to the Contractor (refer to Annexure A).'

[20] It is common cause that the three guarantees in issue are on-demand guarantees. This Court in *Joint Venture between Aveng (Africa) (Pty) Ltd/Strabag International GMBH v South African National Roads Agency Soc Ltd*[1] reaffirmed the principle of the autonomy of the performance guarantee from the underlying contract. A construction guarantee is intended to provide security to the employer in the event that the contractor defaults on its obligations under the principal contract or is liquidated. An 'on-demand' guarantee, also referred to as a 'call bond' requires no allegation of liability on the part of the contractor under the construction contracts. What is required for payment is a demand by the claimant, stated to be based on the event specified in the bond.[2] Simply put, the beneficiary must comply with the terms of the guarantee.

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[1] *Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v South African National Roads Agency Soc Ltd and Another* (577/2019) [2020] ZASCA 146; 2021 (2) SA 137 (SCA) para 7.

[2] *Minister of Transport and Public Works, Western Cape and Another v Zanbuild Construction (Pty) Ltd and Another* [2011] ZASCA 10; 2011 (5) SA 528 (SCA) para 13.

[21] In *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association*,[3] this Court, in emphasising the independence of on-demand performance guarantees from the underlying contracts, referred to the seminal passage on performance guarantees of Lord Denning MR in *Edward Owen Engineering Ltd v Barclays Bank International Ltd*:[4]

'So, as one takes instance after instance, these performance guarantees are virtually promissory notes payable on demand. So long as the Libyan customers make an honest demand, the banks are bound to pay and the banks will rarely, if ever, be in a position to know whether the demand is honest or not. At any rate they will not be able to prove it to be dishonest. So they will have to pay.

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 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.'

[22] The principles referred to above apply to the present matter. Power Guarantees relies on the Constitutional Court decision in *Clicks Retailers (Pty) Ltd v Commissioner for the South African Revenue Service (Clicks Retailers)*[5] in support of its stance that the guarantees are inextricably linked to the underlying contracts, and further to dispel any notion that the underlying agreements had to be disregarded for purposes of determining the liability to make payments under the guarantees. In *Clicks Retailers*, the Constitutional Court said that '[o]ur jurisprudence establishes that there is an "inextricable link" when an issue, claim, contract or conduct cannot be determined or assessed without another, or the legal consequence of the one cannot be understood or measured without reference

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[3] *Coface South Africa Insurance Co Ltd 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 11.

[4] *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 All ER 976 (CA) at 983; ((1977) 3 WLR 764).

[5] *Clicks Retailers (Pty) Ltd v Commissioner for the South African Revenue Service* [2021] ZACC 11; 2021 (4) SA 390 (CC); 2021 (10) BCLR 1102 (CC); 84 SATC 71; 2021 BIP 16 (CC).

to another'.[6] However, *Clicks Retailers* concerned a loyalty programme (the ClubCard programme) in terms of which participating customers received loyalty points which could be translated into vouchers, not redeemable for cash but which may be offset against the cost of Clicks merchandise, provided that the customer accumulated the requisite number of loyalty points within a qualification period. A contract between Clicks and the customer came into existence when the customer completed and submitted the enrolment form (ClubCard contract). Redemption of the vouchers took place when the member concluded a further contract of sale and received discounted merchandise purchased in terms of that further contract (redemption contract).

[23] The dictum relied upon in *Clicks Retailers* cannot be applied to on-demand guarantees because liability under the guarantee is not inextricably linked to the underlying contract. Quite the contrary, our established jurisprudence, as we have explained, renders liability autonomous from the underlying contract.

[24] As already alluded to, the court a quo dismissed Set Square's claim in respect of the second on-demand guarantee on the basis that the contractor had already terminated the underlying contract and therefore there was no contract which Set Square could have terminated in order to satisfy the terms of the guarantee. In my view, it was sufficient that the demand which Set Square made contains a statement that the contract had been terminated due to the contractor's default. Any interrogation into the termination of the underlying agreement fell outside the terms of the guarantee and offends against the autonomous and independent nature of the guarantee. The court a quo's observation, that Set Square's conduct bordered on fraud because it knew that it could not call up the guarantee where the contractor had already cancelled the contract, was without any factual and legal basis.

[25] In dismissing Set Square's claim in respect of the second on-demand guarantee, the court a quo impermissibly subjected contractual disputes between Set Square and the contractor to some scrutiny. The approach adopted by the court a quo is at odds with

[6] Ibid para 44.

the trite principles articulated above. Liability under the guarantee is not affected by the relationship between other parties to the transactions that gave rise to its issue, particularly not with the question whether the sub-contractor performed in terms of his contract with the contractor.[7]

[26] I turn now to consider Power Guarantees' two defences, which are in truth the nub of the appeals. First, it contended that the underlying contracts envisaged in the three guarantees render the guarantees void and unenforceable, because such contracts did not exist. This was, it contended, because in respect of the first guarantee, the contract upon which the obligations were secured was defined in the guarantee as a contract 'made in terms of the Form of Offer and Acceptance and such amendments or additions to the contract as may be agreed in writing between the parties'. It was argued that where, in a proposed contract, the mode of acceptance is stipulated, it is that mode that must be followed before a contract is concluded. The contractor made an offer which prescribed the manner in which Set Square could accept the offer. Set Square did not accept the offer in the manner prescribed. In the absence of compliance with the procedure set out by the contractor for acceptance of its offer by Set Square it followed that the underlying contract between Set Square and the contractor, which formed the basis upon which the guarantee was issued, did not exist.

[27] With regard to the second on-demand guarantee, Power Guarantees contended that the contractor and Set Square concluded a completely different contract than the one described in the guarantee. The works contracted for, it was argued, differed from the description of the works in the guarantee. The argument in respect of the third on-demand guarantee is similar. It was contended that this guarantee was equally unenforceable because the contract under which obligations were secured was described as the 'JBCC PRINCIPAL BUILDING AGREEMENT EDITION 6.2 MARCH 2018' whereas the contract which had been concluded between Set Square and the contractor, and the payment certificate relied upon relate to a different contract, described by Set Square and the

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

contractor as ‘JBCC Series 2000 Principal Building Agreement Code 2101 Edition 4.1 March 2005’.

[28] On the basis of these defences, Power Guarantees argued that Set Square’s claims in respect of the guarantees were bound to fail as the circumstances set out in clause 5.1 of the guarantees in terms of which the guarantees could be called up, did not arise. It argued that Set Square could never have terminated the non-existent contracts, and neither could the contractor have breached them.

[29] There was no dispute between Set Square and the contractor which concerned the validity of the principal agreements. On the contrary, they executed their respective obligations in terms of those contracts. They also knew what obligations were secured under the guarantees. Insofar as there were disputes between them, those concerned primarily issues of their respective performances under the principal agreements. In respect of the first on-demand guarantee the court a quo correctly concluded that the mode of acceptance as set out in the Form of Offer and Acceptance was not couched in peremptory terms and therefore non-compliance did not vitiate the contract. In any event, so reasoned the court, the contractor considered itself bound by the terms of the underlying contract.

[30] More importantly, all the guarantees expressly provide in clause 3.1 thereof:

‘Any reference in this Performance Guarantee to the Contract is made for the purpose of *convenience* and shall not be construed as any intention whatsoever to create an accessory obligation or any intention to create a suretyship.’ (My emphasis.)

In my view, this put paid to any suggestion that Power Guarantees could question the validity of the underlying agreements on the grounds it sought to do except if Set Square had committed fraud, a matter to which I shall revert. The three guarantees are liquid documents for purposes of obtaining a court order. Insofar as the written demands complied with the requirements set out in the guarantees and were accompanied by the stipulated documents, presented before the expiry or cancellation of the guarantee, the

guarantor was obliged to honour payment as it undertook an absolute obligation to pay Set Square according to the tenor of the guarantees.

[31] Power Guarantees also argued that the guarantees were vitiated by mistake and therefore unenforceable. It relied, inter alia, on *Dickinson Motors (Pty) Ltd v Oberholzer*[8] where Schreiner JA said:

'The £291 was paid under a common mistake in regard to a matter which was vital to the transaction and if either of them had been aware of the true position the transaction would not have gone through. In *Huddersfield Banking Company Ltd v Henry Lister & Son Ltd.*, 1895 (2) Ch. 273, LINDLEY, L.J., states the proposition:

"that an agreement founded upon a common mistake, which mistake is impliedly treated as a condition which must exist in order to bring the agreement into operation, can be set aside, formally if necessary, or treated as set aside and as invalid without any process or proceedings to do so."'

[32] Set Square contended that the guarantees could never have been vitiated by mistake as there was no mistake. The basis for Power Guarantees' argument appears to be that the underlying contracts did not exist, or they differed from the contracts described in the guarantees. The mistake Power Guarantees seeks belatedly to rely on, whether common or mutual or unilateral, was not pleaded. The mistake, if there was one, would be unilateral as no evidence was adduced to show that such a mistake was induced by Set Square's misrepresentation. In *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board*[9] Schreiner JA held that:

'Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (*error*) would have to be reasonable (*justus*), and it would have to be pleaded .'

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[8] 1952 (1) SA 443 (A) at 450B-D.
[9] 1958 (2) SA 473 (A) at 479G – H.

[33] In my view, reliance on 'mistake' is unsustainable on the facts of this case. It bears emphasis that where parties seek relief on the ground of mistake, they must explicitly plead the details as to the nature of the mistake and show that the mistake was reasonable.[10] In any event, invoking either unilateral or mutual error to impugn the underlying contract in this case is precluded because, as I have explained, our courts will not, save for proof of fraud, consider the underlying contractual disputes between an employer and a contractor when faced an on-demand or unconditional performance guarantee. To do so would undermine the autonomous nature and efficacy of such guarantee.[11]

[34] Power Guarantees' second defence is based on the fraud exception. It contended that the three guarantees had not been presented for payment with an honest belief that Power Guarantees is liable. This was so because, it argued, in respect of the first on-demand guarantee Set Square knew that it had to complete the Form of Acceptance to accept the contractor's offer. In respect of the second on-demand guarantee it argued that Set Square knew that it concluded a separate agreement with the contractor which was neither the one contemplated in the second guarantee nor related to the works contemplated in the second guarantee. The addendum had a completely different risk regime in that the contractor was required to remedy defective workmanship of a previous contractor. As to the third guarantee, it argued that Set Square knew that the contract secured under it differed from the contract which formed the basis of its claim. In each of the demands for payment Set Square made representations, which to its knowledge were untrue.

[35] The legal position on the fraud exception was trenchantly restated in *Guardrisk Insurance Company Ltd and Others v Kentz (Pty) Ltd*[12] as follows:

'. . . It is trite that where a beneficiary who makes a call on a guarantee does so with knowledge that it is not entitled to payment, our courts will step in to protect the bank and decline enforcement

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[10] *Von Ziegler and Another v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T ) at 411H; *Bokaba v Makona* 1930 (2) PH F135 (T); *Paul Mole v De Charmoy and Another* 1933 NPD 628 at 632-633.
[11] *Guardrisk Insurance Company Ltd and Others v Kentz (Pty) Ltd* 2 [2013] ZASCA 182; [2014] 1 All SA 307; 2013 JDR 2727 (SCA) para 28.
[12] Ibid paras 17-18.

of the guarantee in question. This fraud exception falls within a narrow compass and applies where:

"…the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his (the seller's) knowledge are untrue." Insofar as the fraud exception is concerned, the party alleging and relying on such exception bears the onus of proving it. That onus is an ordinary civil one which has to be discharged on a balance of probabilities but will not lightly be inferred. In *Loomcraft Fabrics CC* v *Nedbank Ltd & Another*[13] it was pointed out that in order to succeed in respect of the fraud exception, a party had to prove that the beneficiary presented the bills (documents) to the bank knowing that they contained material misrepresentations of fact upon which the bank would rely and which they knew were untrue. Mere error, misunderstanding or oversight, however unreasonable, would not amount to fraud. Nor was it enough to show that the beneficiary's contentions were incorrect. A party had to go further and show that the beneficiary knew it to be incorrect and that the contention was advanced in bad faith.'

[36] A contract is defined in both the first and second on-demand guarantees as: 'The Agreement made in terms of the Form of Offer and Acceptance and *such amendments or additions* to the Contract as may be agreed in writing between the parties'. In addition, clauses 10.0 and 9.0 of the three guarantees stipulates that:

'The employer shall have the absolute right to arrange his affairs with the Contractor in any manner which the Employer may deem fit and the Guarantor shall not have the right to claim his release from this Performance Guarantee on account of any conduct alleged to be prejudicial to the Guarantor.' (My Emphasis.)

[37] Power Guarantees' fraud exception defence is founded on a similar reasoning as its primary defence. As already explained, Power Guarantees was precluded from disputing the existence of the underlying contracts when the parties thereto persisted in implementing them. The contracts that Set Square cancelled are the same contracts in respect of which the guarantees were issued. These contracts relate to the same project and correspond to the project description recorded in the guarantees. They relate to the same parties. The contract prices correspond with those recorded in the guarantees. It is

[13] *Loomcraft Fabrics CC* v *Nedbank Ltd & Another* 1996 (1) SA 812 (A).

remarkable that the court a quo did not deal with the fraud exception. However, the reason is not far to seek. The court determined that the underlying agreements were extant. Power Guarantees presented no factual basis to demonstrate that Set Square had any intention to mislead it or misrepresent any facts to claim payment under the guarantees. This much counsel for Power Guarantees correctly conceded. Power Guarantees' fraud defence, therefore, must fail.

[38] Lastly, and in the alternative, Power Guarantees resisted the claims on the basis that Set Square is precluded by public policy from seeking payment under the guarantees. In this regard, it contended that Set Square's argument that there existed three distinct contractual relationships which were separate and autonomous from each other, was the insistence upon rights in circumstances which make that behaviour 'harsh' and or 'oppressive' as recognised in *Sulzer Pumps Limited v Covec-MC Joint Venture (Sulzer Pumps)*.[14] It argued that any finding to the effect that the contracts were separate and autonomous would render the enforcement of the guarantees unconscionable because the contracts secured under these guarantees were not those executed by Set Square and the contractor.

[39] Power Guarantees' submission seeks recognition of a further exception in addition to fraud, the so-called 'unconscionability exception'. We could find no authority wherein this Court previously recognised such exception as a basis for escaping liability under on-demand guarantees. In a long line of cases, our courts have consistently applied the immutable principle that a guarantor on being presented with a valid demand in respect of an on-demand guarantee, is obliged to pay the beneficiary without interrogation of the contractual disputes between the beneficiary and the contractor. Unconscionability was not squarely raised on Power Guarantees' pleaded case nor were the facts specifically advanced in respect thereof. Consequently, we cannot entertain this defence.

[14] *Sulzer Pumps (South Africa) (Pty) Ltd v Covec-MC Joint Venture* [2014] ZAGPPHC 695; 2014 JDR 1828 (GP).

[40] It follows that the appeal by Set Square ought to be upheld and that of Power Guarantees dismissed. In respect of costs, on the conclusion we have come to, the decision of the court a quo, insofar as it ordered Set Square to bear two thirds of the respondents' costs, ought to be upset. The costs of each appeal shall follow the result.

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

1 The appeal under case number 150/24 is dismissed with costs.

2 The appeal under case number 099/23 is upheld with costs.

3 In respect of the appeal under case number 099/23, paragraphs 2 and 3 of the order of the high court are set aside and replaced with the following:

'2. The first respondent is further ordered to make payment to the applicant in the amounts of:

2.1 R1 999 875.19 in respect of performance guarantee PWR 111623.

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3. The first respondent is ordered to make payment of interest calculated at the rate of 7% per annum as follows:

3.1 On the amount of 1 940 290.78, in respect of performance guarantee PWR 111632, calculated from 17 February 2021 to date of final payment.

3.2 On the amount of R3 333 500.57, in respect of performance guarantee PWR 111504, calculated from 18 February 2021 to date of final payment.

3.3 On the amount of R1 999 875.19, in respect of performance guarantee PWR 111623, calculated from 5 April 2021 to date of final payment.

4. The respondents are ordered to pay costs of the application, jointly and severally, the one paying the other to be absolved.'

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M V PHATSHOANE

ACTING JUDGE OF APPEAL

**Appearances:**

| | |
|---|---|
| For the appellant: | B H Steyn |
| Instructed by: | RN Incorporated, Pretoria |
| | Honey Attorneys, Bloemfontein |
| For the first respondent: | N Redman SC with S Tshikila |
| Instructed by: | C De Villiers Attorneys, Johannesburg |
| | Lovius Block Attorneys, Bloemfontein. |