THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 337/2018

In the matter between:

RAUBEX CONSTRUCTION (PTY) LTD **APPELLANT**

and

BRYTE INSURANCE COMPANY LTD **RESPONDENT**

Neutral citation: *Raubex Construction v Bryte Insurance Company* (337/2018) [2019] ZASCA 14 (20 March 2019)

Coram: Leach, Swain, Mathopo, Makgoka JJA and Eksteen AJA

Heard: 19 February 2019

Delivered: 20 March 2019

Summary: Construction contract – retention guarantee issued by insurance company in lieu of retention money – construction company calling on insurer to make payment – insurer contending that guarantee limited to defects arising after issue of certificate of completions, that amount claimed not a correct estimate of cost of remedying such defects and that the claim was fraudulent – on proper interpretation of main and subcontract, retention guarantee related to all defects and not only those arising after certificate of completion – fraud not established – insurer liable.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Fisher J, Van Oosten and Weiner JJ concurring sitting as court of appeal):

1 The appeal is allowed, with costs.

2 The order of the court a quo is set aside and replaced with the following:

'The appeal is dismissed, with costs.'

JUDGMENT

Eksteen AJA (Leach, Swain, Mathopo and Makgoka JJA concurring):

[1] The dispute in this appeal relates to a 'Retention Money Guarantee' (the guarantee) issued by the respondent (Bryte) in favour of the appellant (Raubex) pursuant to a construction contract. When Raubex called upon Bryte to make payment in terms of the guarantee Bryte declined to do so. Raubex therefore successfully applied to the high court to compel payment under the guarantee. An appeal to the Full Court followed with the result that the order in favour of Raubex was set aside. Raubex appeals against that finding with special leave obtained from this Court.

[2] During 2013, Raubex, a civil construction company, successfully tendered for and secured a contract (the main contract) with Eskom for the construction of an Eskom Operations and Management Office and Visitors Centre. Upon the award of the contract, Raubex subcontracted a portion of the works to Peak Star 133 (Pty) Ltd, trading as Dolphin Construction (Dolphin). The subcontract provided for 10 % of the contract price to be withheld as and for retention money during the contract period. Raubex, however, waived its rights to retain any retention money against the delivery of a satisfactory retention money guarantee. Hence the guarantee by Bryte.

[3] Dolphin executed the works which reached practical completion on 29 October 2014. A certificate of completion in terms of the subcontract was issued on 31 October 2014, together with a 'punch list' setting out incomplete and defective work which still had to be performed after the issuing of the certificate. A dispute arose later between Raubex and Dolphin in respect of the work listed in the punch list and, by February 2015, Dolphin refused to perform any further remedial work.

[4] In these circumstances Raubex called upon Bryte to make payment in the amount of R1 409726.11 in terms of the guarantee, which, as recorded earlier, Bryte declined to do. Bryte contends that the demand for payment in terms of the guarantee does not comply with the provisions of the guarantee itself as it contained fraudulent misrepresentations. Bryte alleges that, to the knowledge of Raubex, Dolphin was not in breach of its contract and no money was therefore due and payable. In any event, even if it is found that Dolphin was in breach the cost to remedy the breach could, to the

knowledge of Raubex, not have amounted to the sum claimed. In any event, so the argument went, Bryte was released from liability by the fraud of Raubex. The alleged fraud by Raubex lies at the heart of each argument.

[5] I turn to consider the terms of the guarantee. The material portion of the guarantee records:

'The Guarantor renounces the benefits of excussion and division and undertakes to pay to (Raubex) upon demand all such monies as (Raubex) may require to be paid to it in lieu of any retention monies which have been repaid by (Raubex) to (Dolphin) and which (Dolphin) would otherwise be liable to pay to (Raubex) under and in terms of the Subcontract, and such monies shall be paid by the Guarantor conditionally upon receipt of demand from (Raubex) that any such retention monies are due and payable to (Raubex) by (Dolphin) as provided for in terms of the Subcontract, provided however, that the liability to the Guarantor hereunder shall not exceed the sum of R1686721.89 (One Million Six Hundred and Eighty Six Thousand Seven Hundred and Twenty One Rand and Eighty Nine Cents) and is subject to the following further conditions:

(1) Each demand by (Raubex) shall be in writing signed by (Raubex) and delivered to the Guarantor . . . and shall be accompanied by a certificate complying with Clause 2, signed by (Raubex's) authorised representative.

(2) Each demand by (Raubex) shall certify:

(a) That the signatory is (Raubex's) authorised representative;

(b) That (Dolphin) is in breach of its obligations under the Subcontract;

and (Raubex) is entitled to be paid amounts for which (Dolphin) is liable under the Subcontract; and

(c) That the amount demanded, which amount the certificate shall specify:

(i) Does not exceed the amount of Retention monies which, but for this Guarantee, would have been retained by (Raubex) as Retention Monies in terms of the Subcontract at the date of the certificate, less the aggregate of the amounts, if any, of retention money and other securities actually retained or held by (Raubex) in terms hereof; and

(ii) Does not exceed a good faith estimate of the costs to (Raubex) of having the breach referred to in paragraph (b) remedied less aggregate (sic) of any amounts withheld by (Raubex) from payments due to (Dolphin) in terms of the Subcontract by reason of the breach referred to, and any amount of the Retention money actually held by (Raubex) save to the extent that the same had been deducted from any previous demand in terms hereof.

(3) The Guarantor shall within 21 days after its receipt of a demand complying with the provisions of Clause 1 and 2 make payment to (Raubex) of the amount demanded at such address as (Raubex) should in writing notify the Guarantor.

(4) Subject to compliance with the provisions hereof, the Guarantor's liability to make the payment herein referred to shall be unconditional and shall not be affected or diminished by any disputes, claims or counterclaims between (Raubex) and the Subcontractor.

(5) . . .'

[6] The nature of the guarantee is to be determined by its terms.[1] There may be instances where a guarantee may be no more than an accessory obligation.[2] In this case, however, there is no dispute between the parties that they intended the guarantee to be

[1] *Minister of Transport and Public Works, Western Cape & another* v *Zanbuild Construction (Zanbuild)* 2011 (5) SA 528 (SCA); [2011] ZASCA 10 para 14; and *Compass Insuranc*e v *Hospitality Hotel Developments* 2012 (2) SA 537 (SCA); [2011] ZASCA 149 para 15.
[2] Ibid.

a separate contract enforceable on its terms. They expressly made the guarantee unconditional,[3] subject only to compliance with the terms and conditions in respect of the demand to be made. Upon compliance with the terms of the guarantee, the guarantor cannot escape liability thereupon unless there is proof of fraud on behalf of the beneficiary.[4] A party alleging fraud attracts the onus to establish it, which is not to be easily inferred.[5]

[7] On 26 February 2015, Raubex called upon Bryte to make payment of the amount of R1 409726.11. The demand was made in writing accompanied by a certificate which complies, *prima facie*, in all respects with para 2 of the guarantee. The Court *a quo*, however, concluded that the demand made was not in accordance with the terms of the guarantee. It reasoned that the reference in para 2(c)(ii) of the guarantee to 'good faith' estimates of the costs of having the breach referred to remedied, required the certification to contain a substantive specification or statement to enable an objective assessment whether the estimate is made on a proper basis. It accordingly concluded that it was not enough for Raubex to show that there had been a formal process of certification of good faith; it also had to show that the certification was, in fact, made in the honest belief that it was a correct estimate of what it was entitled to be paid under the guarantee.

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[3] Paragraph 4 of the Guarantee.
[4] *Loomcraft Fabrics CC v Nedbank Ltd & another* [1995] ZASCA 127; 1996 (1) SA 812 (AD) at 815J. *Zanbuild* fn 1 above para 15; *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd & others* [2009] ZASCA 71; 2010 (2) SA 86 (SCA).
[5] *Gilbey Distillers & Vintners (Pty) Ltd v Morris NO* 1990 (2) SA 217 (SE).

[8] I can find no justification for this conclusion in the guarantee. What the court *a quo* in effect did was to place the onus upon Raubex to prove that it did not act fraudulently. Such a conclusion, in my view, is clearly incorrect. An allegation of fraud is a serious charge and the onus to prove it clearly and distinctly will always rest on the party making such allegation. Absence of fraud was not part of Raubex's cause of action and it bore no onus in this regard. Whereas the demand in this case was made in accordance with the terms of the guarantee, Bryte was obliged to make payment in terms of the guarantee unless it was able to establish fraud on the part of Raubex.

[9] It is necessary to consider briefly the sequence of the events relied upon by Bryte in argument in order to understand the alleged fraud in respect of Dolphin's alleged breach of contract. A number of 'punch lists' were issued by Raubex to Dolphin during the construction period and prior to the issue of certificate of completion. The 'punch list' which was ultimately annexed to the certificate of completion is materially the same as the punch lists which were previously issued. Bryte alleges, with support of an affidavit by one Van Niekerk, who professes to be the Chief Executive Officer of Dolphin, that Dolphin had attended to the items on the punch lists prior to the issue of the certificate of completion and that they were therefore not in breach of their contract. Raubex, on the other hand, denies that the matters listed in the punch list were adequately attended to and it relies on the punch list annexed to the certificate of completion for its allegation of breach of contract. By virtue of the provisions of para 4 of the guarantee the dispute between Raubex and Dolphin in this regard is immaterial to the liability of Bryte. The mere

say so of Van Niekerk, falls far short of what would be required to establish fraud on the part of Raubex in respect of the existence of a breach.

[10] It is common cause that during the construction phase Dolphin had provided a performance guarantee to Raubex in terms of the subcontract. The performance guarantee was returned upon the issue of the certificate of completion. The only remaining security Raubex had at its disposal was a guarantee in respect of retention money. Bryte, however, could only be liable to Raubex for such an amount, in lieu of retention money, as Dolphin would have been liable for to Raubex in terms of the subcontract. On behalf of Bryte it is argued that retention money is held to secure the obligation of the contractor to remedy the defective work which is discovered after the issue of the completion certificate. It is accordingly contended that Bryte could only incur liability to Raubex in respect of defective work which manifests after the issue of completion certificate, as opposed to work which remained incomplete at the time of the issue of the certificate of completion. The completion of works stipulated under the subcontract is secured under the performance guarantee and therefore, so it is argued, the issue of the completion certificate certifies the completion of the contract.

[11] The ‘punch list’ annexed to the certificate of completion referred to a number of items which Raubex contended remained incomplete and which had manifested prior to the issue of the certificate of completion. Accordingly, it is contended that Raubex fraudulently misrepresented to Bryte that these constituted ‘defects’. Counsel for Bryte was buoyed in this submission by the pronouncement by the court a quo that the purpose

of a guarantee of the kind given is to secure the obligations of a contractor to remedy defects in workmanship found after the completion of the works. This dictum appears at the commencement of the judgment, as a point of departure in the court a quo, and was pivotal to its ultimate finding of fraud. No authority was provided for this proposition which for the reasons set out below is clearly wrong.

[12] The guarantee was provided in lieu of the retention of the money stipulated in the subcontract as retention money. The purpose for which such money could be retained must necessarily be determined by a process of interpretation of the contract. Although the subcontract was annexed to the founding affidavit, Raubex placed no reliance on its terms as it sought to implement the guarantee as a separate independent contract. However the subcontract expressly incorporates all the general conditions of the main contract in the subcontract, save where they are inconsistent with the express provisions of the subcontract. It records further that the subcontractor has like rights and responsibilities in relation to the contractor as the contractor has in relation to the employer in the main contract.

[13] In these circumstances Bryte delivered a notice in terms of Rule 35(12) and (14) of the Uniform Rules of Court calling for a copy of the main contract. Raubex obliged and the main contract was duly delivered and forms part of the papers before us. Bryte relies on the terms of the subcontract for its contention that retention money secures the obligation of the contractor to make good defects discovered after the completion of the works. It argues, however, that, notwithstanding the incorporation of the terms of the main

contract in the subcontract, the court is precluded from having regard to the terms of the main contract in circumstances where neither party has made any reference thereto.

[14] It is true that it is not open to a party in application proceedings to attach volumes of annexures to affidavits without identifying the portion relied upon. In *Swissborough Diamond Mines Pty Ltd & others v Government of the Republic of South Africa & others* 1999 (2) SA 279 (T) at 324F-G the principle was set out in the following terms:

'Regard being had to the functions of the affidavits, it is not open to an applicant or respondent to merely annex to its affidavits documentation and to request the court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of the established practice would be destroyed. A party would not know what case must be met.'

[15] This, however, is not such a case. In this case, neither party had annexed the main contract to their papers. It was elicited by Bryte because the terms of the main contract were incorporated in the subcontract by the terms of the subcontract, and it is Bryte that seeks to rely on the terms of the subcontract. It is well settled that a contract must be interpreted in its entirety in order to place any particular term relied upon in its proper context. Thus, in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[6] this Court held:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by

[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

reading the particular provision or provisions in the light of document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the contents in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose for the document.'

[16] In seeking to determine the purpose for which the retention money may be retained in terms of the particular contract, it is incumbent upon the court to have regard to the terms of the contract in the context in which they appear in the contract as a whole. There can be no purpose in seeking to isolate a portion of the contract and to seek to attribute meaning to that portion as if it exists independently of the remainder of the contract. In the circumstances I find that the court is entitled, and indeed obliged, to have regard to the terms of the main contract where they apply to the subcontract.

[17] Retention money is defined in the main contract with reference to clause 14.9 of the general conditions of the main contract. Clause 14.9 provides for 50 per cent of the retention money, as calculated by the engineer, to be released upon the issue of a 'taking-over' certificate as defined in the general conditions of the main contract. The remainder of the retention money is to be released upon the expiry of the defects notification period. The significance, however, of clause 14.9 is that it expressly records that in the event that any work remains to be executed under clause 11 [defects liability], the engineer shall be

entitled to withhold certification of the estimated costs of this work until it has been executed.

[18] Clause 11 of the general conditions of the main contract provides for the defects liability. It records:

'In order that the Works and Contractor's Documents, and each Section, shall be in a condition required by the Contract (fair wear and tear excepted) by the expiry date of the relevant Defects Notification Period or as soon as practicable thereafter, the contractor shall:

(a) complete any work which is outstanding on the date stated in a Taking-Over Certificate,[7] within such reasonable time as is instructed by the Engineer, and

(b) execute all work required to remedy defects or damage, as may be notified by (or on behalf of) the Employer on or before the expiry date of the Defects Notification Period for the Works or Section (as the case may be).'

[19] The subcontract, read in the context of the general conditions of the main contract, therefore leaves no doubt that retention money may be retained both for work which remains outstanding on the date stated in the taking-over certificate and defects or damage which exist in the works after such date, irrespective of when they first manifested. This interpretation accords with the provisions of clause 11.2 of the subcontract which provides for the subcontractor, upon receipt of the written notice from

[7] A taking-over certificate in terms of the main contract is to be issued when the works or a section is complete except for any minor outstanding work and defects which will not substantially affect the use of the works or section for their intended purpose. This accords with clause 16 of the subcontract which provides for the issue of a certificate of completion when the works are substantially complete as read with cause 11.1 thereof, which provides for the defects notification period to run from the date of practical completion, being the date when the works or part thereof, have reached a stage which allows their use for the intended purpose without danger or undue inconvenience.

the contractor during the defects notification period, to make good any 'defect or omission' in the subcontract works and, in the event of it failing to do so, for the contractor to recover from the subcontractor the cost of carrying out such work.[8]

[20] On a proper interpretation of the contract, it provides that upon the issue of the completion certificate, Raubex was entitled to require Dolphin to complete any work which was outstanding on the date stated in the certificate of completion within a reasonable time and would be entitled to withhold certification for the repayment of the retention money for the estimated costs of such work until it had been executed. Retention money would therefore, but for the guarantee, have been retained in respect of the work set out in the punch list which relates to incomplete work and defects discovered before the issue of the certificate of practical completion. Raubex was entitled to include such items on the punch list and was entitled to rely on such items in demanding payment from Bryte in accordance with the guarantee. I therefore consider that the court a quo erred in its understanding of the purpose of retention money and therefore also in its assessment of the purpose of the guarantee.

[21] There remains the argument on behalf of Bryte that Raubex fraudulently misrepresented the amount of its estimation of the costs to remedy the alleged breach by Dolphin. The court held that such fraudulent representation was indeed made. It reasoned that the estimate made was based on items in respect of which there can be no dispute

[8] The defects notification period is stated in the contract data to be a period of 365 days which, in terms of clause 11.1 of the subcontract, commences upon the date of practical completion – in this case 29 October 2014.

that they do not relate to the rectification of a breach relied upon after completion of the works. It has been shown earlier that on a proper interpretation of the contract retention money may be retained in respect of incomplete or defective work, irrespective whether it manifests before or after the issue of the certificate of completion. The force of the argument is therefore seriously undermined by the issues dealt with earlier herein.

[22] In the answering papers for Bryte, there is merely a bald allegation of fraud in respect of the estimation of the amount demanded and no facts are advanced for this assertion. In reply, Raubex provided a detailed statement of its estimation of the costs involved to demonstrate how it had arrived at its bona fide estimation. In argument before the court *a quo*, and before this Court, Bryte placed reliance on this document to assert that a number of the expenses set out therein do not relate to the costs incurred by Raubex to remedy any breach on the part of Dolphin. In particular, reference is made to salaries paid to employees of Raubex.

[23] There is a fundamental difficulty with this approach. Although Bryte has raised the issue of fraud, it has made no factual averment that could lead to a conclusion of fraud. No single expense included in the estimation by Raubex annexed to its replying affidavit has been placed in dispute on the papers with the result that Raubex has not been afforded an opportunity to explain or justify the inclusion of such amounts in its estimation.

[24] As recorded earlier, fraud will not be readily inferred; particularly where it is sought to be established in motion proceedings. A mere error, misunderstanding or oversight,

however unreasonable, does not amount to fraud and it is insufficient merely to show that contentions are incorrect. A party has to go further and show that the representor advanced the contentions in bad faith, knowing them to be incorrect.[9] There is no foundation laid in the papers for such a conclusion. Clause 11.2 of the subcontract entitles Raubex, in the event that Dolphin fails to make good any defects or omissions during the defects notification period, to recover the costs of carrying out such remedial works from Dolphin. Raubex is not required to engage an alternative contractor and it may choose to carry out the work itself. Where Raubex proceeds to carry out the remedial work itself, it would be required to deploy staff which would otherwise have been deployed on other projects to generate profit for Raubex. This, it seems to me, would constitute legitimate expenses incurred in remedying the breach. There is accordingly no merit in the argument that the inclusion of salaries in the estimation of such costs gives rise to the inevitable conclusion of fraud.

[25] I am therefore of the view that Bryte has failed to discharge the onus of establishing fraud on the part of Raubex.

[26] In the result, the appeal must succeed. There is no reason for costs not to follow the event.

[27] It is therefore ordered:

1 The appeal is allowed, with costs.

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[9] *Schoeman v Constantia Insurance Company Ltd* 2003 (6) SA 313 (SCA); [2003] ZASCA 48 para 37.

2 The order of the court a quo is set aside and replaced with the following:

‘The appeal is dismissed, with costs.’

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J Eksteen

Acting Judge of Appeal

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