**SAFLII Note:** Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, JOHANNESBURG**

Case number: 02252/20234

| | |
|---|---|
| [1] | REPORTABLE: NO |
| [2] | OF INTEREST TO OTHER JUDGES: NO |
| [3] | REVISED: NO |
| **SIGNATURE** | **DATE:** 15 October 2024 |

In the matter between:

**THE JOINT VENTURE COMPRISING GOROGANG PLANT RAZZ CIVILS** — First Applicant

**H L MATLALA PROPERTIES t/a GOROGANG PLANT HIRE (PTY) LTD**
(Registration Number: 2004/067203/23) — Second Applicant

**RAZZ CIVILS AND PLANT HIRE**
(Registration Number: 2016/145104/07) — Third Applicant

and

**INFINITI INSURANCE LIMITED**
(Registration Number: 2005/029823/06) — First Respondent

**THE EASTERN CAPE DEPARTMENT OF TRANSPORT** — Second Respondent

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**JUDGMENT**

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**PULLINGER AJ**

**INTRODUCTION**

[1] The second respondent ("**the Department**") applies for the reconsideration of an interim order granted by Mia AJ on 19 September 2023. The interim order was granted on an urgent basis in the Department's absence. The first respondent ("**Infiniti**") abides.

[2] Mia AJ ordered

> "2. Pending the determination of Part B of this application, that:-
>
> 2.1 the first respondent is interdicted and restrained from making payment to the second respondent pursuant to the purported demand made upon the guarantee issued by the first respondent with reference PS GUA RZZ01, a copy of which is annexure JV3 to the founding affidavit (the guarantee), made by the second respondent in terms of the letter dated 11 September 2023, and which appears at annexure JV23 to the founding affidavit in the application (the demand); and
>
> 2.2 the second respondent is interdicted and restrained from making demand, or purporting to make demand, upon the guarantee, either in respect to any issue arising out of and/or in connection with the purported termination of the contract concluded between the first applicant and the second respondent and/or at all."

[3] This application was set down on the Urgent Court Roll for 26 March 2024, ostensibly in accordance with Rule 6(12)(c).

[4] The Department contends that reconsideration applications are "inherently urgent" and ought properly to be heard before the Urgent Court, notwithstanding the lapse of some six months between the time Mia AJ granted the above order and the date of the launch of this application.

[5] Mr Hodge, who appeared for the applicants presented a forceful and well-reasoned argument, the gist of which, was that because the Department brought the application in terms of Rule 6(12)(c), it did not axiomatically and automatically warrant the enrolment and hearing of the matter before the Urgent Court. The point was made, especially in the context of what must be seen as an extraordinary delay in the launch of the Department's reconsideration application.

[6] Although I am inclined to agree with Mr Hodge, I am not inclined to strike this matter from the roll and prefer to address the merits of the matter as all the papers are before me, I have heard full argument in relation to both the procedural aspects and the merits and therefore there is no good reason to burden another Court in the circumstances. This should not however, be construed as any sort of judicial sanction of the Department’s conduct. I deal more fully therewith below.

**THE FACTS**

[7] In April 2022, and pursuant to a tender, the Department appointed the first applicant to upgrade certain roads in the Eastern Cape Province. The performance of the works by the first applicant was to be undertaken in terms of a written agreement (“**the Agreement**”) which was in terms of The General Conditions of Contract for Civil Engineering Works, Third Edition, 2015.

[8] In terms of the Agreement the applicants were required to deliver a performance guarantee to the Department's agent. In terms of clause 6.2.1 of the Agreement, the applicants were required to deliver “…*the type of security for the due performance of the Contract, as selected in the Contract Data*”. Clause 25 of the Contract Data stipulates that “*[t]he security to be provided by the Contractor* [a

reference to the applicants] *shall be a Fixed Performance Guarantee of 10% of the Contract Sum*".

[9] A guarantee issued by Infiniti in favour of the Department was duly delivered by the applicants ("**the Guarantee**"). The Guarantee is in the form of the *pro forma* as required by the Department.

[10] Pursuant to the delivery of the Guarantee, the applicants proceeded with the works in terms of the Agreement.

[11] Subsequent thereto a dispute arose between the applicants and the Department. The dispute concerns delays in reaching milestones, the causes thereof and payment for work done by the applicants. This culminated in the Department cancelling the Agreement. The applicants contend that the Department was not entitled to cancel the Agreement and contend that cancellation was a repudiation of the Agreement.

[12] This dispute is the subject of a pending adjudication before the South African Institute of Civil Engineering.

[13] On 11 September 2023 the Department made written demand on Infiniti calling upon it to make payment under the Guarantee.

[14] The applicants contend, in relation to the demand, that

> "92. On 13 September 2023, and in reliance upon its (bad and ineffectual) termination of the contract, the Employer addressed a demand under the Guarantee to Infiniti, a copy of which is annexure "JV23" hereto (as aforesaid, "the demand").
>
> 93. The Employer recorded therein that:-
>
> *…*

94. The demand is non-compliant in a number of respects:-

94.1 first, the demand falsely and knowingly, misrepresents that:-

94.1.1 the Contractor has defaulted on the contract. For the reasons set out above, the Contractor had not defaulted on the Contract, either as alleged by the Employer and/or at all;

94.1.2 the Employer terminated the Contract in terms of Clause 9.2.1.3.3. For reasons set out above, this, too, is, to the Employer's knowledge, false. Neither the Employer's Agent's correspondence nor the Employer's correspondence references this clause;

94.1.3 the letters of 7 and 21 June 2023 are relied upon yet neither of these are annexed, if they exist;

94.2 second, the demand of 13 February 2023 was not delivered to Infiniti's physical address, as required by Clause 2.3 of the Guarantee;

94.3 third, the demand is not accompanied by the notice of termination (had it been it would have been abundantly clear that what is recorded in the demand was false), as required by Clause 2.3.3 of the Guarantee (if it were it would be plain that the demand is bad);

94.4 fourth, the Employer does not expressly state that the Contract has been terminated due to the Contractor's default;

94.5 fifth, the Employer has demanded payment despite not having returned the original Guarantee to Infiniti, as required by Clause 2.7 of the Guarantee; and

94.6 finally, the demand is for an amount in excess of the Guaranteed Sum and Infiniti's maximum liability, thereby invalidating the demand.

95. On this basis alone the demand is fatally defective and cannot, or ought not to, be given effect to."

[15] The applicants conclude

"100. The demand is thus fraudulent and unconscionable, falls to be declared as such and payment pursuant thereto falls to be interdicted."

[16] The applicants contend that the Guarantee is a conditional guarantee. Their case is that

"105. … the Guarantee is not a demand guarantee but, rather, a conditional one and payment thereunder is conditional upon a valid termination of the contract for the Contractor's default. This is because, the link created in the Guarantee itself, being the statements to be made and, more particularly, that the notice of termination must be supplied with the demand (thereby opening a demand to be assailed on the basis of either the statements being incorrect or there being deficiencies in the termination), renders payment thereunder dependent upon facts and jurisdictional requirements that arise under the contract. Put differently, the Guarantor (in this case Infiniti's) obligation is not '*wholly independent of the underlying contract*' as would be the case in respect of a demand guarantee but, rather, is dependent upon the facts of a valid termination and the Contractor being in default being substantiated in the demand.

106. The Employer's entitlement to benefit thereunder is predicated upon, and inextricably linked to, the validity of the termination <u>and</u> the Contractor having been in breach of the contract sufficient as to permit the Employer to terminate.

107. As intimated above, this is so because Clause 2.3.1 of the Guarantee requires two statements, namely that the contract has been

terminated (implicit in which is that the termination must have been valid and unimpeachable) and it was terminated to [sic] the Contractor's default (implicit in which is that the Contractor must, factually have been in default).

108. Self-evidently, the statements, in being made, are being made to derive a benefit under the Guarantee. Accordingly, in so making the statements the Employer must ensure not only that they are correct but, also, any relevant information in respect thereof must be placed before the Guarantor, Infiniti. It is for this reason that Clause 2.3.3 requires that the notice of termination accompanies the written demand."

[17] The Department takes issue with the applicants' contentions concerning the demand on the Guarantee, their conclusion of fraud and their interpretation of the Guarantee.

[18] The Department contends that the Guarantee is a demand guarantee and as such it is independent of the underlying agreement and the Department is entitled to insist on performance from Infiniti under the Guarantee. The Department contends that there is no privity of contract between the applicants and Infiniti insofar as the Guarantee is concerned. Thus, it is contended, the applicants lack *locus standi* to have sought the interim order granted by Mia AJ.

[19] The applicants have a further string to their bow. They contend for a development of the common law to require that an employer, such as the Department, in making a demand on a guarantee "*… must ensure not only that they are correct but, also, any relevant information in respect thereof must be placed before the Guarantor Infiniti.*" They contend that the development of the common law in this regard is consonant with the development of the law in other jurisdictions and is particularly apposite to conditional bonds. The applicants propose that a less stringent standard can justifiably be adopted for determining whether a call on a guarantee can, or should, be restrained.

[20] The applicants rely on the *boni mores* of society demanding that where parties are drawing on a guarantee, to the detriment of other parties, "*… their dealings must be in the utmost good faith and ought not to be permitted [sic] that conduct which is unconscionable …*". The detriment is stated as being, *inter alia*, financial prejudice as payment under the Guarantee by Infiniti will "trigger" Infiniti to make a claim against the applicants in terms of the security they provided to Infiniti (being a special counter-indemnity given by the applicants to Infiniti, a deposit and pledge and a deed of suretyship and indemnity given by certain companies and individuals to Infiniti). This will affect the applicants' cashflow crippling their short-term ability to trade and "inevitably" leading to the demise of their businesses and a consequent loss of employment for their employees.

[21] The applicants contend that

> "116. The exception would, or should, accommodate demands:-
>
> 116.1 for excessive sums;
>
> 116.2 based on contractual facts, circumstances and/or breaches that the beneficiary of the call itself is responsible for;
>
> 116.3 tainted by unclean hands, mounted on the back of selective and incomplete disclosures;
>
> 116.4 made for ulterior motive;
>
> 116.5 based on a position which is inconsistent with the stance that the beneficiary took prior to calling on the performance bond."

[22] In the context of this matter, the applicants contend that the Department's conduct was unconscionable and tainted by unclean hands arising from incomplete disclosures, breaches of the GCC Agreement for which the Department was

responsible and in particular the circumstances in which the Agreement was terminated.

**THE GUARANTEE**

[23] In **Zanbuild**,[1] the Supreme Court of Appeal identified the two forms of guarantee familiar to our law. The first being a "conditional guarantee" and the second being a "demand guarantee". The difference between the two was explained thus

> "… a claimant under a conditional bond is required at least to allege and — depending on the terms of the bond — sometimes also to establish liability on the part of the contractor for the same amount. An 'on demand' bond, also referred to as a 'call bond', on the other hand, requires no allegation of liability on the part of the contractor under the construction contracts. All that is required for payment is a demand by the claimant, stated to be on the basis of the event specified in the bond."

[24] Accordingly, it is necessary to begin by establishing the nature of the Guarantee.

[25] The material portion of Guarantee in this case provides

> "1. **Fixed Performance Guarantee**
>
> 1.1 Where a Fixed Performance Guarantee has been selected, the Guarantor's liability shall be limited to the amount of the Guaranteed Sum.
>
> 1.2 The Guarantor's period of liability shall be from and including the date on which the Performance Guarantee is signed, up to and including the Expiry Date, or the date of issue by the Employer's Agent of the Certificate of

[1] **Minister of Transport and Public Works, Western Cape and Another v Zanbuild Construction (Pty) Ltd and Another** 2011 (5) SA 528 (SCA) at [13] and [14]

Completion of the Works, or the date of payment in full of the Guaranteed Sum, whichever occurs first.

1.3 The Employer's Agent and/or the Employer shall advise the Guarantor in writing of the date on which the Certificate of Completion of the Works has been issued.

2. **Conditions Applicable to Variable and Fixed Performance Guarantees**

2.1 The Guarantor hereby acknowledges that:

2.1.1 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 whatsoever to create a suretyship.

2.1.2 Its obligation under this Performance Guarantee is restricted to the payment of money.

2.2 Subject to the Guarantor's maximum liability referred to in 1.1, the Guarantor hereby undertakes to pay the Employer the sum certified upon receipt of the documents identified in 2.2.1 to 2.2.3:

2.2.1 A copy of a first written demand issued by the Employer to the Contractor stating that payment of a sum certified by the Employer's Agent in an Interim or Final Payment Certificate has not been made in terms of the Contract and failing such payment within seven (7) calendar days, the Employer intends to call upon the Guarantor to make payment in terms of 2.2.2;

2.2.2 A first written demand issued by the Employer to the Guarantor at the Guarantor's physical address with a copy to the Contractor stating that a

period of seven (7) days has elapsed since the first written demand in terms of 2.2,1 and the sum certified has still not been paid:

2.2.3 A copy of the aforesaid payment certificate which entitles the Employer to receive payment in terms of the Contract of the sum certified in 2.2.

2.3 Subject to the Guarantor's maximum liability referred to in 1.1 the Guarantor undertakes to pay the Employer 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 that;

2.3.1 the Contract has been terminated due to the Contractor's default and that this Performance Guarantee is called up in terms of 2.3; or

2.3.2 a provisional or final sequestration or liquidation court order has been granted against the Contractor and that the Performance Guarantee is called up in terms of 2.3; and

2.3.3 the aforesaid written demand is accompanied by a copy of the notice of termination and/or the provincial/final sequestration and/or the provisional liquidation court order.

2.4 It is recorded that the aggregate amount of payments required to be made by the Guarantor in terms of 2.2 and 2.3 shall not exceed the Guarantor's maximum liability in terms of 1.1.

2.5 Where the Guarantor has made payment in terms of 2.3, the Employer shall upon the date of issue of the Final Payment Certificate submit an expense account to the Guarantor showing how all monies received in terms of the Performance Guarantee have been expended and shall refund to the Guarantor any resulting surplus. All monies refunded to the Guarantor in

terms of this Performance Guarantee shall bear interest at the prime overdraft rate of the Employer's bank compounded monthly and calculated from the date payment was made by the Guarantor to the Employer until the date of refund.

2.6. Payment by the Guarantor in terms of 2.2 or 2.3 shall be made within seven (7) calendar days upon receipt of the first written demand to the Guarantor.

2.7. Payment by the Guarantor in terms of 2.3 will only be made against the return of the original Performance Guarantee by the Employer.

2.8. The Employer shall have the absolute right to arrange his affairs with the Contractor in any manner which the Employer may consider fit and the Guarantor shall not have the right to claim his release from this Performance Guarantee on account of arty conduct alleged to be prejudicial to the Guarantor."

[26] The principles of interpretation of documents are uncontroversial. A Court undertakes a unitary, purposive and objective exercise by giving the words used their ordinary grammatical meaning, in their correct contextual setting, and construed consistently with the Constitution[2] together with admissible background circumstances.[3]

[27] The Department relies upon clause 2.3 of the Guarantee. This clause imposes a contractual obligation on Infinity to pay the Department, subject to its maximum liability, the sum certified on the first written demand which must be accompanied by certain documents as stipulated in the relevant sub-clauses. This is an independent obligation between the Department and Infiniti, discrete from the GCC.

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2 **Cool Ideas 1186 CC v Hubbard and Another** 2014 (4) SA 474 (CC) at [28]

3 **The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association** 2019 (3) SA 398 (SCA) at [61]

[28] This is not unlike the guarantees held to be a demand guarantee by the Supreme Court of Appeal in **Kentz**[4] citing its earlier decision **Landmark**[5] where the relevant clause provided

"'3. The Guarantor hereby acknowledges that:

3.1 Any reference in this Guarantee to the Agreement is made for the purpose of convenience and shall not be construed as any intention whatsoever to create an accessory obligation or any intention whatsoever to create a suretyship.

3.2 Its obligation under this Guarantee is restricted to the payment of money.

3.3 Reference to a practical completion certificate or to a final completion certificate shall mean such certificate as issued by the Principal Agent.'"[6]

[29] In each of the **Landmark** and **Kentz** authorities, the guarantees were held to be demand guarantees.

[30] **Landmark** was distinguished by the Supreme Court of Appeal in **Zanbuild** where it considered a guarantee framed as follows:

"[18] …

'. . . whereas it is stipulated in the [construction] contract that the contractor [ie Zanbuild] shall provide the employer [ie the department] with a bank guarantee of 10% of the contract value . . . as security for the compliance of the contractors performance of obligations in accordance with the contract,

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4 **Guardrisk Insurance Company Limited v Kentz (Pty) Ltd** [2013] ZASCA 182 (29 November 2013) at [13]

5 **Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others** 2010 (2) SA 86 (SCA) at

6 At [5]

and whereas the bank [ie Absa] is willing to agree to guarantee an amount . . . which is equal to 10% of the contract value under certain conditions stipulated hereafter . . . .

Now therefore we the undersigned . . . in our capacities as [employees of] the bank do hereby guarantee and bind the bank as guarantor for the due and faithful performance by the contractor of all its obligations in terms of the said contract subject to the following conditions . . .

With each payment under this guarantee the bank's obligation shall be reduced *pro rata*.

Each claim by the employer must be made in writing accompanied by a signed statement that the contractor has failed to fulfil his obligations in terms of the contract and shall be sent to the bank's domicilium address as indicated below . . .

The bank reserves the right to withdraw the guarantee after the employer has given 30 (thirty) days written notice of its intention to do so, provided the employer shall have the right to recover from the bank the amount owing and due to the employer by the contractor on the date the notice period expires.'."

[31] The Court held that this guarantee was not an "on demand" guarantee but gives rise to a liability akin to a suretyship. It said:

"The first indicator in that direction is the assertion at the outset that the guarantee '*provide security for the compliance of the contractor's performance of obligations in accordance with the contract*'. And in the body of the document the bank guarantees '*the due and faithful performance by the contractor*'. This accords with language associated with suretyships."[7]

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7 At [19]

[32] **Zanbuild** was discussed further in **KNS**[8] where the Supreme Court of Appeal considered a guarantee framed as follows:

> "[2] …
>
> '1. . . Mutual & Federal Insurance Company Limited (Reg. No: 1970/00619/06) (hereinafter referred to as "the Guarantor") do hereby hold at your disposal the amount of R3 423 850.49 (Three million, four hundred and twenty three thousand, eight hundred and fifty rand and forty nine cents) for the due fulfilment by Aqua Transport & Plant Hire (Pty) Ltd (Reg No. 2003/007768 (hereinafter referred to as "the sub-contractor") of its obligations to KNS Construction (Pty) Ltd Reg. No: 2004/013912/07 thereafter referred to as "KNS" [Construction] in terms of the above stated contract between the Sub-Contractor and KNS [Construction].
>
> 2. The Guarantor hereby renounces the benefits of the exceptions *non numeratae pecuniae*, non-causa debiti, excussion and division, the meaning and effect whereof we declare ourselves to be fully conversant.
>
> 3. The Guarantor undertakes to pay KNS the said amount of R3 423 850.49 (Three million, four hundred and twenty three thousand, eight hundred and fifty rand and forty nine cents) or such portion as may be demanded on receipt of a written demand from KNS [Construction] which demand may be made by KNS [Construction] if, (in your opinion and at your sole discretion), the said Contractor fails and/or neglects to commence the work as prescribed in the contract or if he fails and/or neglects to proceed therewith or if, for any reason, he fails and/or neglects to complete the services in accordance with the conditions of contract, or if he fails or neglects to refund to KNS [Construction] any amount found to be due and payable to KNS [Construction], or if his estate is sequestrated or if he surrenders his

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[8] **Mutual and Federal Insurance Company Limited and Another v KNS Construction (Pty) Limited and Another** (208/2015) [2016] ZASCA 87 (31 May 2016)

estate in terms of the Insolvency Law in force within the Republic of South Africa'."[9]

[33] The Court went on to find that:

"The language used is similar to that in *Zanbuild*. Clause 1 states that it is issued for the 'due fulfilment' by Aqua of its obligations to KNS Construction in terms of the sub-contract. Clause 3 of the guarantee states that the guarantee amount is payable '. . . on receipt of a written demand from KNS [Construction], which demand may be made by KNS [Construction] if (in your opinion and at your sole discretion) the said Contractor [Aqua] fails and/or neglects to commence the work as prescribed in the contract or if he fails and/or neglects to proceed therewith or if, for any reason, he fails and/or neglects to complete the services in accordance with the conditions of contract. . ."[10]

[34] The Court concluded:

"… The inescapable conclusion is therefore that the guarantee is akin to suretyship (like that in *Zanbuild*), and thus a conditional guarantee and not a call or demand guarantee. Therefore the court *a quo* erred in holding that the guarantee is a demand and not a conditional guarantee."[11]

[35] There is no language in the Guarantee indicating that Infiniti's obligations thereunder are not sperate and that the primary obligations are owed to the Department. Clause 2.3 of the Guarantee is clear in its terms and the applicants do not contend otherwise.

[36] The applicants' case of the Guarantee being conditional is predicated on a link (or, as the applicants suggest, an implied term) between the requirement in the Guarantee stating that "*the Contract has been terminated due to the Contractor's*

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[9] At [2]
[10] At [13]
[11] At [16]

*default*" and the facts underlying this statement. The applicants' argument is substantially the same argument advanced and rejected in **Kentz**.[12] Similarly, the assertion that an employer in the position of the Department is required to "*prove*" cancellation, by "*substantiating it" and placing "…any relevant evidence in respect thereof before the Guarantor*" has been rejected in **Dormell**.[13] As stated in **Dormell**:

> "… the cases to which I have referred above make abundantly clear, the appellant did not have to prove that it was entitled to cancel the building contract with the second respondent, as a precondition to enforcement of the guarantee given to it by the first respondent. Nor does it have to do so now."

[37] I, in turn, and as I am bound to do, reject the applicants' argument too.

**<u>FRAUDULENT DEMAND</u>**

[38] It is not a new controversy that a contractor, in the position of the applicants, disputes an employer's right to cancel the construction contract that gave rise to the guarantee. It is also asserted that the call on the guarantee is, in those circumstances, fraudulent and thus approaches a court for interdictory relief in those circumstances. The learned author of *The Law of Letters of Credit and Bank Guarantees*[14]*,* with reference to **Sztejn**[15], suggests that injunctive relief is available to stop payment by the guarantor. This goes to the Department's *locus standi* point. By virtue of the view I have taken in this case, this point does not need to be decided.

[39] It is long established that a court will only reach a conclusion on paper that a fraud has been committed in the clearest of cases.[16]

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12 At [9] and [15]

13 **Dormell Properties 282 CC v Renasa Insurance Company Limited and Others NNO** 2011 (1) SA 70 (SCA) at [64] approved and followed in **First Rand Bank Ltd v Brera Investments CC** 2013 (5) SA 556 (SCA) at [10]; **Coface South Africa Insurance Company Limited v East London Own Haven t/a Own Haven Housing Association** 2014 (2) SA 382 (SCA) at [16]

14 Mugasha, *The Law of Letters of Credit and Bank Guarantees* at 138

15 **Sztejn v J. Henry Schroder Banking Corporation** (1941) 31 N.Y.S.2d at 634

16 **Kentz** at [18]

[40] The issue herein is whether the dispute between the applicants and the Department surrounding the latter's right to cancel the Agreement, and the circumstances surrounding that dispute, disentitle the Department to make demand on Infiniti in terms of the Guarantee and whether having done so, it is fraudulent as contemplated in the authorities.

[41] In effect, the applicants seek a judicial pronouncement on whether the Department was entitled to terminate the Agreement.

[42] I have difficulties with the proposition that the demand "misrepresents" certain facts (the misrepresentation being the high-watermark of the applicants' case on fraud) and with what it seeks this Court to do. This falls short of the bar set in **Loomcraft**[17] which holds that a factually incorrect contention is insufficient to found fraud. Knowledge that a factual contention is incorrect and bad faith in advancing that contention are required.[18]

[43] As pointed out by Cloete JA in **Dormell**,[19] the "dispute" between the applicants and the Department is *res inter alios acta* as far as the applicants are concerned.[20] Further, and notwithstanding any adjudication in relation to that dispute, it is not bad faith for the Department to insist upon payment from Infiniti while the dispute is pending before an adjudicator.[21]

[44] This is not a situation where the Department has called on the Guarantee with knowledge that it is not entitled to the payment.[22] When viewed from the Department's perspective, there is a dispute surrounding cancellation. The applicants' case is that the Department was not entitled to cancel for various reasons and thus it cannot be said that it was in default. The Department's contrary

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[17] **Loomcraft Fabrics CC v Nedbank and Another** 1996 (1) SA 812 (A)

[18] At 822G to 823 C. See further, **Bombardier Africa Alliance Consortium v Lombard Insurance Company Ltd and Another** 2021 (1) SA 397 (GP) at [22]

[19] **Dormell v Renasa** [2010] ZAS CA 137 (1 October 2010)

[20] *ibid* [64]. See further, **Joint Venture Aveng (Africa) (Pty) Ltd/Strabag International GmbH v South African National Roads Agency SOC Ltd** 2021 (2) SA 137 (SCA) at [28]

[21] *ibid* at [65]

[22] **Kentz** at [17]

contention is that irrespective of any dispute raised by the applicants, the applicants failed to achieve the milestones required in terms of the Agreement.

[45] I am not entitled to determine the parties' rights and obligations flowing from the Agreement.[23] Consequently, I find that the applicants have not discharged the onus of establishing the fraud exception.

[46] In any event, and even if the, I am uncertain whether this court enjoys jurisdiction over the Department. Be that as it may, this is an issue for the court seized with Part B of this application to determine.

**VALID DEMAND ON THE GUARANTEE**

[47] I have found above, that the Guarantee is unconditional and an on-demand Guarantee. The consequence of these findings is that Infiniti is obliged to pay the Department in terms of the Guarantee, subject only to the demand satisfying its requirements.

[48] The applicants' contention in this regard is that the demand is fatally defective. The grounds upon which it relies for this conclusion are quoted above.

[49] Before addressing these grounds, it is necessary to establish some principles.

> [49.1] In **Hospitality Hotel Development**[24] the Supreme Court of Appeal left the question of "whether strict compliance" is necessary for a proper demand on a performance guarantee.[25] It held that the point did not arise because there had not been compliance, let alone strict compliance, with the express terms of the guarantee which required a particular document to accompany the demand. Because the relevant document did not accompany

[23] **Kentz** at [22]
[24] **Compass Insurance Company Ltd v Hospitality Hotel Developments (Pty) Ltd** 2012 (2) SA 537 (SCA)
[25] At [13]

the demand, it was held that the demand did not comply with the terms of the guarantee.

[49.2] In **Schoeman**[26] the Supreme Court of Appeal considered the distinction between mandatory and directory provisions of a demand in the context of the address at which the demand was to be made. In that case, the appellants contended that the demand was bad because it was made at an address other than that stipulated in the guarantee. With reference to English authority, the Supreme Court of Appeal held that efficacy of the presentation is the guiding principle. It held the demand to be effective.

[49.3] Accordingly, a proper demand on an on-demand guarantee requires an effective demand that, on the face of it, satisfies its requirements for validity.

[50] Turning now to the Department's demand on the Guarantee.

[51] The demand is couched as follows:

"Infiniti Insurance Limited has provided the Performance Guarantee No. PS GUA RZZ 01 to Gorogang Plant/ Razz Civils JV for the above contract - see attached copy of Performance Guarantee.

The Contractor, Gorogang Plant/ Razz Civils JV has defaulted on the Contract and the Performance Guarantee is now being called up. In terms of Clause 9.2.1.3.3 of the GCC 2015 (Third Edition), the Employer has terminated the above contract - see attached letters dated 07 & 21 June 2022.

You are hereby given Notice in terms of Clause 2.3.1 and 2.3.3 of the Performance Guarantee, that the Department of Transport, Eastern Cape as the Employer is now calling up the payment of the Guaranteed Sum, of R

[26] **Schoeman and Others v Lombard Insurance Company Limited** 2019 (5) SA 557 (SCA)

44,442,702.75 (Forty Four Million Four Hundred and Forty Two Thousand Seven Hundred and Two Rand Seventy Five Cents).

Payment is to be made within 7 days of receipt of this Notice, in terms of Clause 2.6 of the Performance Guarantee, into the following bank account number :

…

Could you please indicate as to the details as to where the original Guarantee Documents can be delivered.

If you have any questions regarding the above, please do not hesitate to contact Mr Clive Boshoff atc[…]."

[52] *Ex facie* the demand, the notice of termination contemplated in clause 2.3.1. of the Guarantee is attached thereto. The applicants dispute this, specifically, they deny that there are letters dated 7 and 21 June 2022. In answer, the Department states that the "*termination letter was attached to the demand*" and "*the correct letter of termination is annexed to the demand*." The applicants appear to accept that is the position in the replying affidavit. To the extent that there is a dispute on this issue, the balance of probabilities is against the applicants.[27]

[53] I am not satisfied that the demand was bad. Infiniti received the demand and it was accompanied by the termination. The demand states that the Agreement was terminated on account of the applicants' default. The requirement in clause 2.7 to return the original Guarantee is not a requirement for a valid demand. The clause pertains to when payment will be made.[28] In the same way, the overstatement of the amount claimed in the demand does not defeat it. In terms of clause 2.3 of the Guarantee, Infiniti's liability is limited to "Guaranteed Sum". In these circumstances, the "amended" demand is of no moment.

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[27] **Webster v Mitchell** 1948 (1) SA 1186 (W) at 1189

[28] **Bombardier** at [23]

**DEVELOPMENT OF THE COMMON LAW**

[54] In **Sasfin**[29] the Appellate Division considered whether a *parate executie* clause was contrary to public policy and the decision therein holds that contractual provisions are contrary to public policy when that is their clear effect. In **Juglal**[30] the Supreme Court of Appeal, having considered **Sasfin**, held that if a contractual provision is capable of implementation in a manner that is against public policy, but the tenor of the provisions are neutral, then the offending tendency is absent. In such an event, the creditor who implements the contract in a manner which is unconscionable, illegal or immoral will find that a court refuses to give effect to this conduct but the contract itself will stand.[31]

[55] It is correct that, as a general proposition, demand guarantees may be the subject of abuse in the sense of a fraudulent demand. That is the very reason that the fraud exception to a guarantor's liability exists.

[56] In *Gutteridge and Megrah's Law of Bankers' Commercial Credits*, the authors, citing numerous English decisions, submit that:

> "… it is now established that the bank is under no obligation to pay the seller where the seller fraudulently presents documents that contain material misrepresentations of fact that to the sellers' knowledge are untrue. The corollary of this is that where the fraudulent conduct of the seller is obvious or clear to the bank, the bank is not entitled to reimbursement from the buyer if he pays it. In this respect there is an amplified limitation on the bank's mandate to pay under the letter of credit and it is no discretion to pay where it knows of the fraud".[32]

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[29] **Sasfin (Pty) Ltd v Beukes** [1989] 1 All SA 347 (A)
[30] **Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division** 2004 (5) SA 248 (SCA)
[31] At [12]
[32] King, *Gutteridge and Megrah's Law of Bankers' Commercial Credits*, 8th Edition at 66

[57] This is not a controversial proposition. It is based on the New York Supreme Court case of **Sztejn**[33], which was approved by the English Court of Appeal in **Edward Owen Engineering Limited**[34] which, in turn, was approved and followed by the Appellate Division[35] and of the Supreme Court of Appeal in, *inter alia*, **Coface**.[36]

[58] When due regard is had to the purpose of demand guarantees which have been set out with precision and clarity by, *inter alia*, the Supreme Court of Appeal in the numerous decisions cited in this judgment, I can find no basis for the development of the common law along the lines suggested by the applicants.

[59] The effect of the applicants' contentions is to turn demand guarantees into conditional guarantees and impose a higher threshold on a party seeking to enforce their security.

[60] To do so would defeat the entire purpose of demand guarantees in circumstances where our law already recognises and provides safeguards against the abuses contended for by the applicants.

[61] There is nothing *contra bonis mores* in the Guarantee, specifically, or generally.

## REQUIREMENTS FOR INTERDICTORY RELIEF

[62] The requirements for interdictory relief are long established. The applicants were required to establish *a prima facie* right even if it is open to some doubt; a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; the balance of convenience must favour the grant of the interdict; and the absence of a suitable alternative remedy.[37]

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[33] *supra* at 631

[34] **Edward Own Engineering Ltd v Barclays Bank International Ltd** [1978] QB 159 at 169

[35] **Loomcraft Fabrics CC v Nedbank Ltd and Another** 1996 (1) SA 812 (A) at 816 G to 817 A

[36] **Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association** [2014] (1) All SA 536 (SCA) at [10], [12] and [21] referring to **Guardrisk Insurance Company Ltd v Kentz (Pty) Ltd** [2014] (1) All SA 307 (SCA) at [13]

[37] **Setlogelo v Setlogelo** 1914 AD 221 at 227; **Hix Networking Technologies v System Publishers (Pty) Ltd and Another** 1997 (1) SA 391 (A) at 398 I to 399 A

[63] The applicants' *prima facie* right is predicated on it having not breached the Agreement and the proposition that the Department's demand on the Guarantee "… *is inextricably linked to whether or not [they were] in breach*".

[64] So it is contended, "…*the applicants have a clear right to have the [Department] restrained from benefitting under a demand that is not only procedurally defective but, also, unsubstantiated by the underlying jurisdictional prerequisites and tainted on the bases traversed in this affidavit, more particularly fraud and unconscionability.*"

[65] In the alternative, the applicants content for a *prima facie* right on the basis that they enjoy a "right" to prevent the department from benefitting under the Guarantee on the aforementioned grounds and to seek that Infiniti be restrained from making payment pending Part B.

[66] I have found above, that the applicants' construction of the Guarantee is unsustainable and that the onus in respect of fraud has not been passed. In these circumstances, they do not enjoy a right, whether *prima facie* or at all, to the interim interdict that was sought.

[67] In the absence of a right, an application for interdictory relief must fail.[38]

[68] The position is not saved by the applicants' intention to seek the extension of the common law. As I have indicated, there is no basis upon which the court's duty to develop the common law is triggered.

[69] It follows that, in the absence of a right, no harm can follow.

**URGENCY AND COSTS**

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[38] **Plettenberg Bay Entertainment (Pty) Ltd v Minister van Wet en Order en 'n Ander** 1993 (2) SA 396 (C) at 400G; **Sweets From Heaven (Pty) Ltd and Another v Ster Kinekor Films (Pty) Ltd and Another** 1999 (1) SA 796 (W) at [11]; **Basil Read (Pty) Ltd v Beta Hotels (Pty) Ltd and Others** 2001 (2) SA 760 (C) at 768 C

[70] It is, however, necessary to examine the Department's conduct in bringing this application before Court as this impacts upon the costs.

[71] An application for reconsideration is not urgent for the purposes of Rule 6(12) simply because an order was granted in the Urgent Court.[39] This means, that in the absence of demonstrable prejudice in the time between when an application may be heard before an Urgent Court and in the ordinary course, a party seeking a reconsideration must set out the prejudice that will ensue. The Department did not do so. The vague allegations that it is under pressure to complete the works in the Agreement, without any further explanation, do not pass the threshold. The threshold is the same whether in an application for reconsideration or when approaching the Court under Rule 6(12)(a). In both instances, the parties seeking relief must set out in clear terms facts duly supported that will pass the threshold of "absence of substantive relief" if the matter is not heard before the Urgent Court.

[72] The Department did not do so.

[73] To compound matters the Department delayed considerably in bringing this application. There is simply no explanation for a delay of several months between when Mia AJ granted her order and when this application was brought before the court. This difficulty is further compounded by the fact that when this application was set down, it was not ripe for hearing.

[74] Save for the need for finality, this application should not have been heard before the Urgent Court.

[75] The ordinary rule in respect of costs is that a successful party is entitled thereto. In this case, however and given the Department's conduct, I decline to grant any costs order in its favour.

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[39] **Sheriff Pretoria North-East v Flink and Another** [2005] (3) All SA 492 (T) at 497

**CONCLUSION**

[76] I have found, above, that the Guarantee is a demand guarantee. I have also found that the dispute concerning the termination of the Guarantee is not one that I can adjudicate upon. I have also found that the demand on the Guarantee is good and that there is no basis for the extension of the common law. As a result, the applicants are not entitled to the interdictory relief they sought before Mia AJ.

[77] In all of these circumstances, the interim order granted by Mia AJ falls to be set aside. I intend to do so.

[78] In the circumstances, I make the following order

The Order granted by Mia AJ on 19 September 2023 is set aside.

**A W PULLINGER**
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

*This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 15 October 2024.*

**DATE OF HEARING:** **26 March 2024**
**DATE OF JUDGMENT:** **15 October 2024**

**APPEARANCES:**
**COUNSEL FOR THE APPLICANT:** **D S HODGE**
**ATTORNEY FOR THE APPLICANT:** **TIEFENTHALER ATTORNEYS**
**COUNSEL FOR THE SECOND RESPONDENT:** **N MATHE-NDLAZI**
**ATTORNEY FOR THE DEFENDANT:** **STATE ATTORNEY**