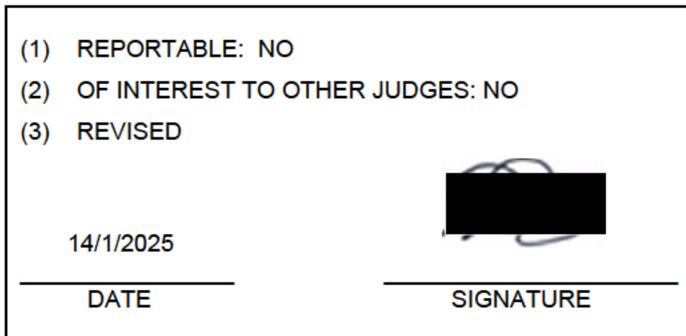
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG



(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

14/1/2025

DATE SIGNATURE

CASE NUMBER: 2024-104602

In the matter between:

IMVULA ROADS & CIVILS (PTY) LTD	**First Applicant**
IMVULA EMPOWERMENT HOLDINGS (PTY) LTD	**Second Applicant**
IMVULA CONSTRUCTION (PTY) LTD	**Third Applicant**
IMVULA QUALITY PROTECTION (AFRICA) (PTY) LTD	**Fourth Applicant**
IMVULA QUALITY PROTECTION AFRICA SA (PTY) LTD	**Fifth Applicant**
IRC PROPERTIES (PTY) LTD	**Sixth Applicant**
LCA PROPERTIES (PTY) LTD	**Seventh Applicant**

and

THE HOLLARD INSURANCE CO. LTD	**First Respondent**
WESTERN CAPE GOVERNMENT	**Second Respondent**

JUDGMENT

DOSIO J:

Introduction

[1] This is an urgent application in terms of the provisions of Uniform Rule 6(12)(c), whereby the applicants seek interdictory relief, restraining the second respondent, who is beneficiary of two performance guarantees, from claiming these guarantees from the first respondent, pending the hearing of part B.

[2] The second opponent opposes the application.

[3] The first respondent abides by the Courts decision.

[4] Having decided it is urgent, I proceeded to consider the matter.

Point in limine

[5] The second respondent contends, apart from the first applicant, the other applicants have no locus standi, as the remaining applicants are not parties to the contract between the first and second respondents.

[6] This Court finds that in addition to the first applicant, the remaining applicants are also parties who stand to lose if payment is made by the first respondent. The remaining applicants naturally have an interest and will be affected if payment is made by the first respondent to the second respondent.

[7] Accordingly, the point in limine raised by the second respondent is dismissed.

Background

[8] The second respondent and the first applicant concluded a written contract ('C1105'), in terms of which the second respondent appointed the first applicant to provide road

rehabilitation services to it for a stretch of road in the Du Toitskloof pass outside Cape Town. The contract price was R96 200 000-00.

[9] The second respondent and the first applicant concluded a separate written contract ('C1203'), in terms of which the second respondent appointed the first applicant to provide road rehabilitation services to it for a second stretch of road described as the Worcester roads, towards Nuy and Villiersdorp, also in the Western Cape. The contract price was R183 962 187-00.

[10] In accordance with the terms of the first and second contract and the respective tenders which preceded the awarding of the contracts, the first applicant was obliged to obtain a performance bond for its proper performance in an amount equal to 5% of the value of both contracts.

[11] On 17 August 2023 the first respondent issued a performance guarantee in favour of the second respondent for the sum of R4 810 000-00. The first guarantee was renewed on the same terms and conditions and replaced with EFP/EBGS P/000186144#1.

[12] On 14 March 2024 the first respondent issued a performance guarantee in favour of the second respondent for the sum of R9 198 109-40, under reference number EFP/EBGSP/000219357.

[13] The terms of both guarantees are that once the second respondent had complied with its relevant terms as set in the guarantee, the first respondent was contractually obliged to pay under the guarantees.

[14] For competent demands to be made upon the guarantees, it was required that (i) the first applicant was in default of its obligations under the contracts and (ii) the second respondent validly terminated the contracts because of such default.

The applicants' contentions

[15] In summary, the applicants contend that the guarantees are conditional, rather than on-demand. It was argued that on a proper construction of the guarantees and the context in which they were issued, there were underlying conditions that were to exist prior to demand thereupon being made.

[16] The applicants contend these conditions were absent and that the demands were bad. As a result, the first respondent did not need to honour them.

[17] It was argued that in the event that the guarantees are found to be on-demand guarantees, then the demands were fraudulent, as the contracts were not validly cancelled. It was argued that the second respondent knew this and fraudulently, alternatively unconscionably, presented its claim to the first respondent, misrepresenting to the first respondent that the contract had been validly terminated.

[18] Under part B of the application, the applicants request that the common law be developed, to admit their alternative ground for relief, which is that of unconscionable conduct.

[19] The first applicant also asserts a contractual right under the contract that would preclude the second respondent from making demand where the first applicant was not in culpable breach of the contract. The applicants contend that any demand made in reliance upon clause 5 of the guarantees, is conditional upon the contractor being in breach of the contract and the contracts having been validly terminated pursuant thereto. Absent thereof the conditions are not fulfilled, rendering the demands bad.

[20] The applicants contend the first applicant was not sufficiently in default to entitle the second respondent to terminate, as the first applicant's failure was not of its making and as a result, the first applicant was not culpable. The applicants contend there was an 'excusable delay' disentitling the second respondent to terminate the contract.

[21] It was argued that the second respondent has R300 million of available funds that have been earmarked for the very projects and the second respondent will suffer no hardship if the order sought in part A is granted, pending the determination of part B. In contrast, it was argued that the applicants stand to suffer substantial harm and financial ruin if payment, pursuant to the demands are made.

[22] The applicants referred to the case of *Wells Vs Army and Navy Cooperative Society,*[1] which states that if a contract provides a time within which the work can be completed, then the first applicant has that time within which to do the work.

[23] It was contended the second respondent breached the undertaking and should be precluded from conducting itself in this manner.

Du Toitskloof

[24] The applicants contend that on 15 July 2024, the second applicant's agent wrote to the first applicant expressing certain concerns. The first applicant addressed the concerns in this regard, on 26 July 2024 and the second respondent's agent was satisfied with the steps to be taken by the first applicant, thereby curing the breach that existed.

[25] It was contended that procedurally, the provisions of clause 9.2 of the contract permit termination only after giving effect to clause 3.2.2 which require engagement by the second respondent's agent with the parties.

[26] The second respondents' agent recorded on 2 August 2024 that:

"Imvula's progress during the next month will be closely monitored and a re-evaluation of the progress will be made by the end of August 2024 to determine if the EA should issue a ruling that Imvula is in breach of Clause 9.2.1.3.4 of GCC third edition (2015)."

This was confirmed by the second respondent's agent in a letter dated 8 August 2024.

[27] The applicants contend that notwithstanding the letter sent by the second respondent's agent on 8 August 2024, the second respondent's agent on 16 August 2024 issued a determination that the first applicant was in breach of clauses 9.2.1.3.4 and 9.2.1.3.6.

[28] On 19 August 2024, the second respondent gave the first applicant fourteen days to remedy the alleged breach and on the version of the second respondent, due to the absence of a response on 4 September 2024, the second respondent terminated the contract. The applicants contend they did respond timeously and also addressed the defaults mentioned by the second respondent's agent. As a result, the second

[1] *Wells Vs Army and Navy Cooperative Society* (1902) 86 LT 764

respondent could not have validly terminated the contract and the demand in respect of the Du Toitskloof project falls to be interdicted.

Worcester

[29] The applicants contend the same applied to the Worcester project, in that on 15 July 2024, the second respondent's agent also wrote to the first applicant expressing certain concerns. The first applicant addressed the concerns on 26 July 2024. On 6 August 2024, the second respondent's agent wrote to the first applicant inviting further engagement between the parties. Notwithstanding the engagements, the second respondent's agent certified the first applicants breach on 16 August 2024 and on 19 August 2024 the second respondent gave the first applicant fourteen days within which to remedy the alleged breach. On 21 August 2024 the first applicant wrote to the second respondent contending it was not in breach. Notwithstanding this, on 4 September 2024, the second respondent terminated the contract on its perception there had been no response, when it is alleged by the first applicant it had responded and also addressed the alleged defaults.

[30] As a result, the first applicant contends it was not in default and the termination was bad, resulting in the application to interdict the demand in respect of the Worcester project.

[31] The applicants contend that in respect to the Du Toitskloof and Worcester projects, the second respondent falsely misrepresented to the first respondent, the first applicants' default and the validity of the terminations.

[32] The applicants contend that the circumstances of this matter do not involve a failure to enquire on the part of the second respondent, but rather a clear indication of knowledge of the facts on the part of the second respondent, yet a deliberate attempt to ignore them for the purposes of benefiting from the guarantee. The applicants argue the second respondent could not honestly have believed in the validity of the demands.

[33] The applicants referred to the case of *Group Five Construction (Pty) Ltd v MEC for Public Transport, Roads and Works, Gauteng*[2] as support that the absence of good faith, resulting in mala fides on the part of the second respondent is also a ground for declining

[2] *Group Five Construction (Pty) Ltd v MEC for Public Transport, Roads and Works, Gauteng* 2015 (5) SA 26 (GSJ)

enforcement of a guarantee, especially where an employer like the second respondent intends to secure an advantage vis-à-vis a contractor, like the first applicant, that contractually would otherwise not be available to the second respondent.[3] Therefore, given the absence of culpable breach on the part of the first applicant it was argued, payment by the first respondent to the second respondent should be prevented. As such the applicants contend they have proven a prima facie right.

Unconscionability and the development of the Common Law

[34] As an alternative, the applicants seek to extend the common law to accommodate an unconscionability exception. Reference was made to the case of *Sulzer Pumps Spain, SA v Hyflux Membrane Manufacturing (S) Pte Ltd*[4] ('*Sulzer Pumps Spain*'). The exception countenances:-

(a) calls for excessive sums;

(b) calls based on contractual breaches that the beneficiary of the call itself is responsible for;

(c) calls tainted by unclean hands, e.g., supported by inflated estimates of damages or mounted on the back of selective and incomplete discourses;

(d) calls made for ulterior motives and;

(e) calls based on a position which is inconsistent with the stance that the beneficiary took prior to calling on the performance bond.

[35] Based on the conduct of the second respondent, the applicants contend they have made out a case for the development of the common law. Even though it was argued this will be determined in part B, at most it demonstrates the existence of a prima facie right.

[36] As regards irreparable harm, the applicants primarily point out that their immediate liability and reputational concerns are sufficient as to threaten the livelihood of their businesses and their employees, particularly within the context of the construction industry which is already constrained.

[37] As regards a satisfactory alternative remedy, the applicants contend that it cannot claim damages from the second respondent as they are not readily quantifiable.

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[3] Ibid para 50

[4] *Sulzer Pumps Spain, SA v Hyflux Membrane Manufacturing (S) Pte Ltd* [2020] SGHC 122 and CEX v CEY & Another [2020] SGHC 100 (CEY)

[38] As regards the balance of convenience, the applicants contend it favours them, because if payment is made by the first respondent to the second respondent, the applicants stand to suffer immediate harm, whereas the second respondent has financial wherewithal to weather the short delay between the granting of the order sought in part A at the determination of part B of the application.

The contentions of the second respondent

[39] In essence the grounds of opposition to the application of the applicants are that:

(a) the guarantees in question are on-demand guarantees,

(b) the requirements for payment set by these guarantees have been met,

(c) the first applicant's claim that the cancellations of the underlying construction contracts were invalid are irrelevant to the merits of the claims under the guarantees,

(d) the allegations of fraud which the applicants are compelled to make to escape the above, have no foundations on the facts of this case,

(e) given the absence of any factual foundation, there is also no prospect of the applicants succeeding with their claim to develop the common law in order to recognise 'unconscionable conduct' as a ground for a non-party to a guarantee to prevent payment under that guarantee.

(f) If there is no prima facie right, the remainder of the requirements for an interim interdict are irrelevant.

[40] It was argued that it is not for the applicants to raise a defence on behalf of the first respondent in circumstances where the first respondent itself has raised no defence and is willing to comply with its contractual obligations vis-à-vis the second respondent. In addition.

[41] It was argued that there is no good argument to suggest the second respondent misrepresented to the first respondent that the required terms of the guarantee have been met.

[42] The second respondent contends that upon receipt of the demands, the first respondent is obligated to pay under the guarantees, as the first respondent undertook in terms of clause 4 and 5, of each guarantee, to pay the second respondent.

[43] The second respondent contends it satisfied the requirements of clause 5 by submitting the required documents and the notices of termination to the first respondent.

[44] It was argued that the first respondent does not need to be satisfied of the validity of the underlying actions which led to the submission of the documents in question to the first respondent, as that is the very purpose and nature of a performance guarantee such as in the matter in casu.

[45] The second respondent argued that the reliance by the applicants on the matter of *Minister v Zanbuild Construction*[5] *('Minister v Zanbuild')* is unfounded, as the Supreme Court of Appeal found that the wording of that guarantee is akin to a suretyship which is not the same wording as in the matter in casu. Accordingly, it was argued that the guarantees in casu are similar to those in the matter of *Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others NNO*[6] (*'Dormell'*), as well as the decisions of *Lombard Insurance Co Ltd v Landmark Holdings (PTY) Ltd and Others*[7] *('Lombard')* and *Bombardier Africa Alliance Consortium v Lombard Insurance Company Ltd and Another*[8] ('*Bombardier*').

Legal principles and evaluation

[46] In the matter of *Minister v Zanbuild*,[9] the Supreme Court of Appeal held that:

'The essential difference between the two, as appears from these authorities, is that 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 … 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.'[10]

[5] *Minister v Zanbuild Construction* 2011 (5) SA 528
[6] *Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others* NNO 2011 (1) SA 70 (SCA) ([2011] 1 All SA 557, [2010] ZASCA 137)
[7] *Lombard Insurance Co Ltd v Landmark Holdings (PTY) Ltd and Others* 2010 (2) SA 86
[8] *Bombardier Africa Alliance Consortium v Lombard Insurance Company Ltd and Another* 2021 (1) SA 397 (GP)
[9] *Minister v Zanbuild* (note 5 above)
[10] Ibid para 13

[47] In the matter of *Mutual Federal Insurance Co. Limited & Another v KNS Construction (Pty) Ltd & Another* [11] and *Nocartis SA v Maphil Trading,*[12] the Supreme Court of Appeal held that:

'. . . the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. . . and the court should always consider the factual matrix in which the contract is concluded – the text to determine the parties' intention*.'*

Whether the guarantee is on-demand or conditional

[48] The applicants rely on the judgment of *Minister v Zanbuild*[13] to argue that the guarantees in casu are conditional guarantees and not on-demand guarantees. This judgment does not assist them as it deals with a bank guarantee which was akin to a suretyship.[14]

[49] The wording of the ABSA bank guarantee in the matter of *Minister of Zanbuild*[15] is different to the wording of the guarantee in casu, which is more akin to the wording in the matters of *Dormell*[16] and *Lombard.*[17]

[50] All the second respondent needed to do in terms of clause 5.1 of the guarantee was to issue the written demand and state that the contract was terminated due to the first applicant's default. There was no need to prove the validity of the contract. Clause 8 of the guarantee also states that 'payment by the guarantor in terms of this clause 5 shall be made within seven calendar days upon receipt of the first written demand to the guarantor'. Clause 8 does not mention that the second respondent must first prove a valid cancelation.

[51] The purpose of a guarantee is to evade all these issues pertaining to the validity of the contract itself. There would be no purpose to have a guarantee if the defaulting party can raise issues like it was not their fault due to the weather, etcetera. These are separate

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[11] *Mutual Federal Insurance Co. Limited & Another v KNS Construction (Pty) Ltd & Another* [2016] ZASCA 87 at paras 8 and 9
[12] *Nocartis SA v Maphil Trading* 2016 (1) SA 518 (SCA) at para 27
[13] *Minister v Zanbuild* (note 5 above)
[14] Ibid para 19
[15] Ibid
[16] *Dormell* (note 6 above)
[17] *Lombard* (note 7 above)

issues that have nothing to do with a performance guarantee. The contract itself in any event provides for dispute resolution mechanisms and arbitration.

[52] Accordingly, this court finds that the guarantees are on-demand guarantees and the requirements set out in the guarantees themselves have been met by the second respondent.

[53] An on-demand guarantee, such as in the matter in casu, ensures the quality of construction or building projects.

The autonomy principle

[54] The fraud exception and the autonomy principle were first recognised and addressed by the courts in the matter of *Loomcraft Fabrics v Nedbank*[18] (*'Loomcraft'*).

[55] The court in *Loomcraft*[19] upheld the widely accepted doctrine of autonomy and adopted the strict view of the fraud exception, emphasising that the guarantor's obligation to pay the employer or beneficiary depended, on the strict compliance of the documents with the requirements. The guarantor would only avoid payment in rare cases, such as when the employer or beneficiary committed fraud.[20] The court also held that the standard of proof was the usual civil one, based on the most likely scenario. However, it warned that fraud was a serious accusation and would not be assumed easily.

[56] In light of the decision of *Loomcraft,*[21] the fraud exception would only apply when the documents submitted under the demand guarantee are falsified. The court did not address if fraud related only to fraud in the documents or also to fraud in the underlying contract or relationship. *Loomcraft*[22] stated that it would apply the fraud exception and withhold payment in cases of interdicts if the documents showed clear evidence of falsification.

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[18] *Loomcraft Fabrics v Nedbank* 1996 (1) SA 812 (A) at 815-816
[19] Ibid
[20] Ibid at 815F-J
[21] Ibid
[22] Ibid

[57] In the matter of *State Bank of India and Another v Denel SOC Limited and Others,*[23] the Supreme Court of Appeal held that:

'…an interdict restraining a bank from paying in terms of such an undertaking, will not usually be granted save in the most exceptional case.[24] [my emphasis]

[58] In the matter of *Lombard*[25] the Supreme Court of Appeal held that:

'…[a] guarantee…is not unlike irrevocable letters of credit issued by banks and used in international trade, the essential feature of [a guarantee] is the establishment of a contractual obligation on the part of a bank to pay the beneficiary (seller). This obligation is wholly independent of the underlying contract… Whatever disputes may subsequently arise between buyer and seller is of no moment insofar as the bank's obligation is concerned. The bank's liability to the seller is to honour the credit. The bank undertakes to pay provided only that the conditions specified in the credit are met. The only basis upon which the bank can escape liability is proof of fraud on the part of the beneficiary. This exception falls within a narrow compass and applies where the seller, for the purposes of drawing on the credit fraudulently presents to the bank documents that to the sellers knowledge mispresent the material facts' [26] [my emphasis]

[59] In the matter of *Dormell*[27] the Supreme Court of Appeal held that:

'In principle therefore, the guarantee must be honoured as soon as the employer makes a proper claim against it upon the happening of a specified event.'[28] [my emphasis]

[60] In the matter of *Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd*,[29] the Supreme Court of Appeal held that:

'The very purpose of a performance bond is that the guarantor has an independent, autonomous contract with the beneficiary and that the contractual arrangements with the beneficiary and other parties are of no consequence to the guarantor.' [my emphasis]

[61] The learned Cloete JA, who handed down the dissenting judgment in the matter of *Dormell,*[30] repeated what had been held in the matter of *Lombard*[31] and stated that:

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[23] *State Bank of India and Another v Denel SOC Limited and Others* (947/13) [2014] SCA 212 [2015] 2 All SA 152 (SCA) (3 December 2014)
[24] Ibid para 7
[25] *Lombard* (note 7 above)
[26] Ibid para 20
[27] *Dormell* (note 6 above)
[28] Ibid para 39
[29] *Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd* 2012 (2) (SCA)
[30] *Dormell* (note 6 above)
[31] *Lombard* (note 7 above)

'The appellant complied with the provisions of clause 5. It was not necessary for the appellant to allege that it had validly cancelled the building contract due to the second respondent's default. Whatever disputes there were or might have been between the appellant and the second respondent were irrelevant to the first respondent's obligation to perform in terms of the construction guarantee.' … That is clear… from the following passage in the judgment of Lord Denning MR in *Edward Owen v Barclays Bank International* [1 All ER 976 (CA) (1977) 3 WLR 764 at 983 b-d]

'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.' [my emphasis]

[62] The Supreme Court of Appeal in the matter of *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Haven Housing Association*[32] ('*Coface*') followed the dissenting judgment in the matter of *Dormell.*[33]

[63] In the matter of *Guardrisk Insurance Company Ltd and Others v Kentz (Pty) Ltd*[34] (*'Guardrisk'*), the Supreme Court of Appeal stated that:

'…One of the main reasons why courts are ordinarily reluctant to entertain the underlying contractual disputes between an employer and a contractor when faced with a demand based on a demand or unconditional performance guarantee, is because of the principle that to do so would undermine the efficacy of such guarantees'.[35]

The court held further that:

'where its terms have been met, they may, at a later stage and after the terms of the guarantee have been met, be an 'accounting' between the parties to finally determine their rights and obligations'.[36]

[64] As a result, a call on an on-demand guarantee can only be interdicted where the contractor is able to clearly show fraud. Any contractual disputes under a construction contract or agreement, are irrelevant to a guarantor in deciding whether or not to make

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[32] *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Haven Housing Association* 2014 (2) SA 382 (SCA)
[33] *Dormell* (note 6 above)
[34] *Guardrisk Insurance Company Ltd and Others v Kentz (Pty) Ltd* (94/2013) [2013] ZASCA 182; [2014] 1 All SA 307 SCA
[35] Ibid para 28
[36] Ibid para 27

payment. This is similar in interdict proceedings. Therefore, an on-demand guarantee must be honoured in accordance with its terms, without reference to the underlying contract.

[65] The Constitutional Court in the matter of *National Gambling Board v Premier, Kwa-Zulu Natal and Others,*[37] stated that the purpose of an interim interdict is to maintain the status quo pending the determination of rights or the dispute between the parties, however, the court cannot interfere with the contractual obligations of the parties.

[66] From the cases of *Lombard,*[38] the dissenting judgment of *Dormell,*[39] the judgment of *Coface*[40] and *Guardrisk,*[41] whatever disputes may subsequently arise between buyer and seller is of no moment insofar as the bank's obligation is concerned. This applies equally to disputes between an employer and employee. The bank's liability is to honour the credit when the demand is made.

[67] With reference to the matter of *Dormell,*[42] the specified event which the applicants allege happened in the matter in casu, is that the first applicant may have delayed in completing the works, which entitled the employer, as per the terms of the contract to then cancel the contract and demand payment. There is no clear proof of fraud or that this demand was not correctly made in terms of clause 4 and 5. As stated in the matter of *Lombard*[43] and *Dormell*,[44] the fact that the second respondent may have called up the guarantee relying on a patently unlawful cancellation does not assist the first applicant. The demand has nothing to do with the underlying contract.

[68] There is no fraud proven by the applicants. The second respondent cancelled the contract and demanded performance from the first respondent. If there had been no cancellation and no letter of cancelation in support of this and the second respondent claimed from the first respondent, then in that event, there would have been room for arguing the fraud exception. However, that is not the case in the matter in casu.

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[37] *National Gambling Board v Premier, Kwa-Zulu Natal and Others* 2002 (2) SA 715 CC
[38] *Lombard* (note 7 above)
[39] *Dormell* (note 6 above)
[40] *Coface* (note 32 above)
[41] *Guardrisk* (note 34 above)
[42] *Dormell* (note 6 above)
[43] *Lombard* (note 7 above)
[44] *Dormell* (note 6 above)

[69] The applicants referred to the matters of *Presidency Property Investments (Pty) Ltd V Patel*[45] at 28 and *Niggli*[46] 1981 2 SA 684 (A). The Supreme Court of Appeal and the Appellate Division (as it then was), respectfully held that an opinion that contains express or tacit statements of this nature which are incorrect, are actionable like any other wrongful representation of fact.

[70] The applicants contend that an assessment of the reasonableness of an opinion requires an investigation into the existence, or otherwise, of facts that provide a reasonable basis for the opinion. The absence thereof leads to the inescapable inference that the second respondent acted fraudulently in proffering the opinion. Reference was made to the matter of *R v Meyers*[47] where the Appellate Division, as it then was, held that:

'…the absence of reasonable grounds for belief in the truth of the matter stated does not amount to or necessarily prove malice, but it provides cogent evidence that there was in fact no such belief, which, in turn, will generally lead to the inference of malice…'

[71] Fraud is not likely presumed, fraud needs to be proven and there needs to be clear facts of fraud. There needs to be relevant fraud and there needs to be dishonesty which is mala fides with the intention to defraud.

[72] The applicants cannot identify the party who is supposed to have committed the alleged fraud in casu. Was it the second respondent's agent who followed the process which culminated in the termination of the Du Toitskloof pass contract, or was it the second respondent itself, represented by Mr Mostert? Or was it Ms Buys who submitted the claim for payment under the first guarantee? Or was it all three sets of people, acting in cahoots with each other? The applicants do not say. Given the seriousness of the claim and the strict requirements for the charge to be established, it does not assist the applicants to simply say it was all of the above acting in unison. The onus is on the applicants to prove that which they are alleging, and such conduct is not lightly inferred.

[73] The second respondent contends that the first applicant admitted in 'IM5' to the founding papers that it had failed to proceed with due diligence on contract C1105 as at 26 July 2024. The second respondent's agent responded by way of 'IM6' on 2 August 2024, stating it would closely monitor progress during the month in order to determine whether

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[45] *Presidency Property Investments (Pty) Ltd v Patel* 2011 5 SA 432 (SCA)
[46] *Niggli* 1981 2 SA 684 (A) at page 695C
[47] *R v Meyers* 1946 AD 83

it would issue a ruling that the first applicant was in breach of clause 9.2.1.3.4. and that if the norm of slow progress was maintained, it would have no option but to report a breach at the end of August. On 16 August 2024 by way of 'IM8' the second respondent's agent noted inter alia that on 14 August 2024 no traffic accommodation of any form was taking place on site, the sub-contractor had withdrawn from the site for the second time owing to non-payment, the site had been left in an unsafe condition and there was no evidence of any substantial effort to remedy the defaults which had been previously pointed out. The second respondent's agent certified that the first applicant had failed to proceed with the works in accordance with the approved programme and was not carrying out the works in accordance with the contract. The second respondent issued a notice to remedy the default, by way of 'IM9' on 19 August 2024. On 26 August the first applicant replied to the second respondent's agent's letter of 16 August 2024 by way of 'IM10', addressed to the second respondent's agent. On 30 August the second respondent's agent responded to an earlier submission of a revised contract programme stating that it was not approved and providing advice as to what was required, but in the same process identified all the shortcomings in performance under the contract, by way of 'IM11'. It was contended by the second respondent that it issued its notice of termination, stating inter alia that the first applicant had not responded to its letter of 19 August, namely 'IM9', which detailed the various breaches of contract which had not been remedied. This was dated 4 September, 15 days after 'IM9' had been sent, to which there had been no response. The applicants allege a response was sent together with a revised program. Whether or not this was indeed sent, is an issue pertaining to the underlying contract and does not amount to fraud.

[74] Courts must distinguish between fraud, on the one hand, and innocent breach of contract, on the other. A mere breach of the underlying contract by the beneficiary of a demand guarantee will not necessarily entitle the applicant to block payment by acquiring an interdict against the bank to prevent payment.

[75] The dispute is irrelevant to the claim under the guarantees, unless the first applicant can prove that the second respondent did not cancel the contracts and untruthfully claimed that it had. This is not the applicants' case. Whether the second respondent knew that it was not entitled to cancel and intentionally misrepresented not only the fact of cancellation but the validity of the cancellation, knowing it to have been invalid, to the first respondent with the intention to defraud the insurer and get it to make a payment to it which it knew was not due to it, cannot be shown on the facts of this matter.

[76] The applicants argued that the second employer was mistaken in cancelling the contract on the ground that there had not been a formal response, within 14 days, to the letter of demand sent by the agent of the second respondent. The fact that the second respondent's agent did not accept the revised contracts should not have allowed the second respondent to cancel. If this argument raised by the applicants is valid, it is a mistake or an error and definitely not fraud. An error, misunderstanding or oversight on the part of the people mentioned in paragraph [72] supra or a contracting party, however unreasonable, is not a ground for raising the fraud exception in a claim under a performance guarantee.[48]

[77] Even if the representatives of the second respondent were incorrect in their actions and understanding of the legal effect of that which they did, this still does not constitute knowledge on their part that they had no right whatsoever to cancel the contracts.

[78] It appears that there were in fact many other letters and communications which preceded those referred to above, which show that the termination was preceded by a lengthy process aimed at providing the first applicant with many opportunities to comply with its contractual obligations. If the revised program was not accepted by the second respondent or its agent, this is a matter which relates to the contract itself and not the guarantee. The applicants can seek recourse via arbitration and a claim for damages.

[79] It is important to remember that the primary contract is between the first and second respondent. These are the only two parties as concerns the guarantee and the performance guarantee stands on its own. The contract between the second respondent and the first applicant is a separate contract between these two parties and has its own implications.

[80] The applicants contend that there is misrepresentation in that the second respondent knew that the contract was not validly cancelled and that they dishonestly and mala fides misrepresented to the first respondent that the contract had been validly cancelled. Should the applicants have proof that this is the case, then that is an issue which will be dealt via arbitration.

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[48] *Bombardier* (note 8 above) para 22

[81] This court has considered whether the facts of the matter in casu raise a constitutional issue, notwithstanding the decisions of *Lombard,*[49] *Dormell,*[50] *Coface*[51] *or Guardrisk*[52] which may amount to a prima facie right to grant the interdict.

[82] In the matter of *Beadica 231 CC and Others v Trustees for the time being of the Oregan Trust and Others*[53] ('*Beadica*'), the Constitutional Court held that:

'…A careful balancing exercise is required to determine whether a contractual term, or its enforcement, would be contrary to public policy…'[54] [my emphasis]

and further

'…The common law must be developed so as to promote the spirit, purport and objects of the Bill of Rights. Constitutional values an essential role to play in the development of constitutionally infused common-law doctrines'[55]

and further

'The first is the principle that '(p)ublic policy demands that contracts freely and consciously entered into must be honoured'. This court has emphasised that the principle of pacta sunt servanda gives effect to the 'central constitutional values of freedom and dignity'. It has further recognised that in general public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken. Pacta sunt servanda is thus not a relic of our pre-constitutional common law. It continues to play a crucial role in the judicial control of contracts through the instrument of public policy, as it gives expression to central constitutional values'.[56] [my emphasis]

and further

'The second principle requiring elucidation is that of 'perceptive restraint', which has been repeatedly espoused by the Supreme Court of Appeal. According to this principle a court must exercise 'perceptive restraint' when approaching the task of invalidating, or refusing to enforce, contractual terms. It is encapsulated in the phrase that a 'court will use the power to invalidate a contract or not to enforce it, sparingly and only in the clearest of cases'.[57] [my emphasis]

and further

'This principle follows from the notion that contracts, freely and voluntarily entered into, should be honoured. This court has recognised as sound the approach adopted by the Supreme Court of Appeal that the power to invalidate, or refuse to enforce, contractual terms should only be

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[49] *Lombard* (note 7 above)
[50] *Dormell* (note 6 above)
[51] *Coface* (note 32 above)
[52] *Guardrisk* (note 34 above)
[53] *Beadica 231 CC and Others v Trustees for the time being of the Oregan Trust and Others* 2020 (5) SA 247 (CC)
[54] Ibid para 71
[55] Ibid para 77
[56] Ibid para 83
[57] Ibid para 88

exercised in worthy cases. [90] However, courts should not rely upon this principle of restraint to shrink from their constitutional duty to infuse public policy with constitutional values. Nor may it be used to shear public policy of the complexity of the value system created by the Constitution. Courts should not be so recalcitrant in their application of public policy considerations that they fail to give proper weight to the overarching mandate of the Constitution…'[58] [my emphasis]

Unconscionability

[83] The applicants argued that in the absence of fraud, the common law should be developed to accommodate an unconscionability exception. Reliance was placed on the decision of *Sulzer Pumps Spain.*[59]

[84] In the matter of *Sulzer Pumps Spain*[60] the Court held that it is not only fraud that may prohibit the calling up of a construction guarantee, 'but also unconscionable conduct and also when a contract to the contrary has been entered into between the relevant parties (in this instance including the bank)'[61]

[85] Unconscionability has been described as follows in a comprehensive paper entitled *Calling on a Performance Security: As Good as Cash*?,[62] namely:

'b) unconscionability – generally involves 'taking advantage of a special disadvantage of another' or 'unconscientious reliance on strict legal rights' or 'action showing no regard for conscience, or that are irreconcilable with what is right or reasonable. In *Olex Focas Pty Ltd v Skodaexport Co Ltd and ACCC v Samton Holdings Pty Lts* (2002) 117 FCR 301, unconscionability was held to include:-

(i)exploitation of vulnerability or weakness;

(ii)abuse of a position of trust or confidence;

(iii)insistence upon rights in circumstances which make that harsh or oppressive; and

(iv)inequitable denial of legal obligations.

c) breach of a negative stipulation in the underlying contract -where calling on the security would be a breach of an express or implied negative stipulation in the underlying contract, the courts may restrain a beneficiary from involving the financier's autonomous obligation.'

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[58] Ibid para 89
[59] *Sulzer Pumps Spain* (note 4 above)
[60] Ibid
[61] Ibid para 115
[62] *Calling on a Performance Security: As Good as Cash*? (presented by Michael Whitten (18 June 2012) to the Commercial Bar Association Construction Law Section (The Victorian Bar)

[86] The argument raised by the applicants that the common law should be developed to include unconscionable conduct is unnecessary in that the Constitutional Court in the matter of *Beadica*[63] has already stated that any contract that is contrary to the public interest will not be enforced. Therefore, the common law does not need to be developed.

[87] In addition, the issues the applicants seek to raise for purposes of developing the common Law under Part B could only notionally arise if the guarantees are not on–demand guarantees and if the validity of the cancellation of the underlying construction contracts was relevant, which would then make the second respondent's conduct in respect thereof an issue. This Court has found the guarantees are on-demand guarantees.

[88] As a result, whether the second respondent mistakenly thought they were valid or not, and whether they were negligent or reckless in their thinking, and whether or not this was unconscionable, is all equally irrelevant.

[89] In any event, a mistake in thinking that the contract could be cancelled when in fact the second respondent was not entitled to, is not unconscionable conduct. It is simply an error and everyone makes errors. Even if there was an error, the fact remains that the first respondent merely requires a receipt of a written demand to cancel from the second respondent.

[90] The fraud exception, recognised under the common law, presents the necessary safeguards already and strikes the right balance. The lesser test advocated by the applicants has also not been met.

The requirements for an interdict

Prima facie right

[91] The purpose of an interdict is to maintain the status quo pending the determination of the rights or the dispute between the parties.[64]

[92] In order to succeed in obtaining an interim order restraining the first respondent from paying the second respondent in terms of the guarantee, the applicants need to first

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[63] *Beadica* (note 53 above)

[64] *National Gambling Board v premier Kwa-Zulu Natal and Others* 2002 (2) SA 715 CC at para 49

establish a prima facie right to have the demand for payment in terms of the guarantees set aside on the grounds that the demand did not comply with the terms of the guarantee and that the fraud rule or exception finds application on the facts or that they have prospects of succeeding with their claim for a development of the common law, once again on the facts of the matter.

[93] This Court has serious doubt as regards the fraud exception or the unconscionability exception and if this Court has serious doubt with the applicants' prima facie right, then all the other requirements become irrelevant.

[94] Given that the applicants are seeking an interim interdict pending the determination of certain issues under part B, when it is clear that they have no prospects of succeeding with their claim under Part B, then logically, they are not entitled to the relief sought under Part A.

[95] In the matter of *SA National Roads Agency SOC Limited v Fountain Civil Engineering (Pty) Ltd and Another*[65] ('*SANRAL*'), the SCA dealt with the issue whether an interdict against payment under a construction guarantee should have been granted pending the hearing of a dispute in respect of the merits of the cancellation of the construction contract.

[96] In the matter of *SANRAL*[66] the Supreme Court of Appeal held that:

'As stated above, the guarantee is an unconditional one. Its wording is instructive: Lombard (the insurer) was obliged to pay 'on receipt of a written demand' from SANRAL, which could be made if, in SANRAL's 'opinion and … sole discretion', the Joint Venture had failed and/or neglected to commence the work as prescribed, or if it had failed and/or neglected to proceed therewith, 'or if, for any reason, [it] fails and/or neglects to complete the services in accordance with the conditions of the contract'. The catch-all provision, viz. 'any reason', is important. The Joint Venture's failure to complete the project, be it due to force majeure or otherwise, falls into this category. In other words, the reason for such failure is irrelevant.'[67]

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[65] *SA National Roads Agency SOC Limited v Fountain Civil Engineering (Pty) Ltd and Another* (395/2020) [2021] ZASCA 118 (20 September 2021)

[66] Ibid

[67] Ibid para 28

[97] The Supreme Court of Appeal in the matter of *SANRAL*[68] held on appeal that no interdict against payment under the guarantee should or could have been granted. The same applies in the matter in casu.

Balance of convenience

[98] Even if this court is wrong and the cancelations were invalid, then the applicants can be compensated for their loss in due course by following the dispute resolution process provided by the construction contracts. There is no serious suggestion that the second respondent is unable to pay any damages which may ultimately be proven by the applicants.

[99] This Court has empathy for the position the applicants find themselves in, however, so too has this Court to consider what disruption it may cause the second respondent should the interdict be granted.

Costs

[100] The second respondent seeks costs on a punitive scale in that it alleges that the allegations of the first applicant were made out of desperation and that there are allegations made that some officials have been implicated in fraud which is not the case.

[101] Costs are within the discretion of the Court and this Court does not find that this matter is an instance where punitive costs are warranted.

Order

[102] The application is dismissed. Costs to follow the result.

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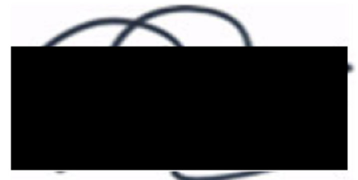
[68] Ibid



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JUDGE OF THE HIGH COURT

JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 14 January 2025

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