



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

Case No: 52933/2025

Reportable: No
Of interest to other Judges: No
Revised: No

SIGNATURE

Date: 6 May 2025

In the matter between:

EPCM CONSULTANTS SA (PTY) LTD

1st Applicant

EPCM TANZANIA SA (PTY) LTD

2nd Applicant

and

GUARDRISK INSURANCE CO LTD

1st Respondent

STANDARD CHARTERED BANK SOUTH AFRICA (PTY) LTD

2nd Respondent

STANDARD CHARTERED BANK TANZANIA LTD

3rd Respondent

TSK TANZANIA COMPANY LTD

4th Respondent

JUDGEMENT

MOOKI J

- 1 The applicants seek to interdict the first respondent, Guardrisk, from making a payment to the second respondent (SCB SA) or to the third respondent (SCB Tanzania) of amounts guaranteed in terms of a performance counter-guarantee or making a payment in terms of an advance payment counter-guarantee. The interdict is sought pending finalisation of a dispute between the second applicant (EPCM Tanzania) and the fourth respondent (TSK). The applicants sought relief on an urgent basis.
- 2 The applicants sought leave to amend their notice of motion when the matter was called for a hearing. The application was made from the bar. Guardrisk, SCB SA and SCB Tanzania opposed the amendment. The court refused the application.
- 3 The first applicant (EPCM SA) and Guardrisk concluded an indemnity agreement in terms of which Guardrisk would issue guarantees upon EPCM SA's request. EPCM SA became obliged, as part of the arrangement, to furnish Guardrisk with security in the form of an indemnity and suretyships.
- 4 The applicants are associate corporations. EPCM SA is a South African registered company. EPCM Tanzania is registered in Tanzania. SCB

Tanzania and SCB SA (the SCB parties) are also associate corporations. SCB Tanzania is registered in Tanzania.

- 5 EPCM Tanzania and TSK entered an agreement for the construction of two bagasse boilers in Tanzania. EPCM SA requested Guardrisk to issue guarantees to TSK in connection with the construction contract. Guardrisk was unable to provide the guarantees because it is not licensed to furnish that type of security outside South Africa. It was then arranged that SCB Tanzania would provide TSK with the guarantees.
- 6 Guardrisk issued a performance counter-guarantee and an advance payment counter-guarantee to SCB SA on 9 January 2024. SCB Tanzania issued an advance payment guarantee to TSK for USD 652, 907,31 on 15 January 2024. SCB Tanzania also issued a performance guarantee on the same date for USD 435, 271,54. The guarantees were payable on first demand. Both guarantees expired on 31 January 2025. The SCB parties concluded back-to-back guarantees in respect of the two guarantees.
- 7 The obligations under the guarantees were, generally, to be triggered as follows. TSK would make a demand on SCB Tanzania. SCB Tanzania would then make a demand on SCB SA. SCB SA would make a demand on Guardrisk. Guardrisk in turn would look to EPCM SA.
- 8 EPCM SA has no privity of contract with SCB SA, SCB Tanzania, or TSK. EPCM Tanzania only has privity of contract with TSK. EPCM SA does not contend for a privity of contract between it and EPCM Tanzania for purposes of the relief sought in this application.

- 9 TSK made a demand on SCB Tanzania for payment on 27 March 2025. It sought payment in the amount of USD 425, 735.07 in respect of the advance payment guarantee and the amount of USD 435, 271. 54 in respect of the performance guarantee. The demand triggered the chain of obligations, with SCB Tanzania making a demand on SCB SA on the same day. SCB SA made a demand on Guardrisk on 31 March 2025 in terms of the advance payment counter-guarantee.
- 10 Guardrisk wrote to EPCM Tanzania on 3 April 2025, informing them of the demand by TSK. Guardrisk advised that the demands appeared to be enforceable and that Guardrisk intended to pay pursuant to the counter-guarantees. Guardrisk requested EPCM Tanzania's feedback in relation to the demands.
- 11 Representatives of Guardrisk and of EPCM SA met on the same day. Attorneys for Guardrisk were informed on that day that TSK's demands were invalid for being made pursuant to expired guarantees. The demand were also said to be invalid for being fraudulent. EPCM SA wrote to Guardrisk on 3 April 2025, recording that TSK acted fraudulently. Guardrisk was advised that Guardrisk was not obliged to pay SCB SA. EPCM SA also informed Guardrisk that EPCM Tanzania would approach a court for relief. Guardrisk informed EPCM SA that Guardrisk would not pay SCB SA pending the outcome of such litigation.
- 12 EPCM Tanzania wrote to Guardrisk on 4 April 2025, repeating and elaborating on the contention that TSK's demands were invalid. EPCM Tanzania wrote that the demands referenced guarantees that were

extended to 31 May 2025, instead of guarantees issued on 5 February 2025 in terms of which the performance guarantee was extended to 30 June 2027 and the advance payment guarantee was extended to 30 June 2025. EPCM Tanzania urged the guarantor to reject TSK's demand.

- 13 Guardrisk wrote to SCB SA on 4 April 2025, recording the allegations concerning TSK. Guardrisk requested confirmation that SCB SA would not require Guardrisk to pay in terms of the counter-guarantees pending the intended litigation and that no interest would be charged. Guardrisk's attorneys informed the applicants' attorneys on 7 April 2025 that Guardrisk would not pay SCB SA pending the hearing of the urgent application.
- 14 The applicants say TSK's demands were fraudulent because, to the knowledge of TSK, EPCM Tanzania had executed 90% of the works allocated to it by TSK and, in doing so, had repaid the advance payment guarantee. The further basis to the stated fraud was that TSK knew that EPCM Tanzania had not breached the contract and there were no outstanding works that EPCM Tanzania failed to execute and for which EPCM Tanzania could be held liable.
- 15 EPCM Tanzania approached the court in Tanzania on 8 April 2025 to restrain SCB Tanzania from honouring TSK's demand for payment. EPCM Tanzania sought relief pending the hearing of the petition *inter parte*. SCB Tanzania was cited as the second respondent in the proceedings.

- 16 Guardrisk sent SCB Tanzania an e-mail at 12:27 on 8 April 2025, advising SCB Tanzania that the applicants were in court for an interdict. SCB Tanzania replied to Guardrisk at 13:22, stating that SCB Tanzania were obliged to pay TSK on demand absent a court order stopping SCB Tanzania from making the payment. SCB Tanzania continued that the process for obtaining an injunction was not sufficient justification for SCB Tanzania to delay making the payment.
- 17 SCB Tanzania paid TSK the amount of USD 861 006.61 on the guarantees at about 14:30 on 8 April 2025. There was no court order by that time. SCB SA in turn paid SCB Tanzania the same amount on the same date. This was consequent to the SCB parties' back-to-back guarantees.
- 18 Guardrisk wrote to EPCM SA on 12 April 2025, advising that SCB SA's demands under the counter-guarantees were compliant demands and that Guardrisk intended to pay SCB SA on 14 April 2025. Guardrisk also demanded payment by EPCM SA and by the sureties pursuant to the indemnity and the deeds of suretyship.
- 19 Guardrisk made its case as follows. It contended that the applicants do not allege that SCB SA's demand on Guardrisk was fraudulent or defective. The allegation is that TSK's demand to SCB Tanzania was fraudulent. There was no basis to interdict Guardrisk absent SCB SA's demand being defective. Guardrisk also contended that it was impermissible for the applicants to interpose the quarrel between EPCM Tanzania and TSK as a reason for Guardrisk not paying SCB SA pursuant to the counter-guarantees.

- 20 It was denied on behalf of Guardrisk that the guarantees had expired. It was pointed out that TSK indicated on 14 January 2025 that the guarantees needed to be extended and that TSK would call on the guarantees absent their extension within 15 days before the expiry date of 31 January 2025.
- 21 Guardrisk contends that clause 3 of the deed of indemnity obliges EPCM SA to pay on first written demand of any amount of money which Guardrisk may be called upon to pay. EPCM SA was obliged to pay notwithstanding whether EPCM SA admitted the validity of a claim against Guardrisk.
- 22 Guardrisk also says the applicants do not meet the requirements for an interdict. It contended that EPCM Tanzania will not suffer prejudice, as EPCM Tanzania was neither a surety nor had to indemnify any party. Guardrisk had already called on EPCM SA to perform, with the result that Guardrisk need only institute collections proceedings, during which EPMC SA would raise any defence available to it.
- 23 The SCB parties raised several defences, including the following. They attacked the applicants' standing, pointing out that the applicants have no legal interest in the contract between Guardrisk and SCB SA. The court was referred to the decision in *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another*¹ in this regard. The applicants were also said not to have met the requirements for the grant of an interdict, including on account of the applicants having an alternative remedy which

¹ 1972 (4) SA 409 (C) at 416H to 417D

EPCM Tanzania had already invoked; namely referring its dispute with TSK to arbitration.

Analysis

- 24 The applicants contend that TSK's demand was invalid on two bases. First, the guarantees had expired when TSK made the demand on 27 March 2025. Second, TSK's demand was fraudulent. The fraud barred Guardrisk from paying SCB SA. The fraud also barred Guardrisk from having to look to EPCM SA pursuant to the indemnity and suretyship agreements.
- 25 The applicants alleged fraud on the following bases. TSK raised "back charges" equal to amounts that had been certified for payment to EPCM Tanzania. The applicants contended that TSK was not entitled to raise "back charges." The applicants also contended that EPCM Tanzania had repaid the advance payments made to it because EPCM Tanzania had completed 90% of the allocated work.
- 26 EPCM Tanzania had, before TSK's demand on 27 March 2025, referred a dispute against TSK to arbitration in terms of the dispute procedure provided for in the parties' contract. EPCM Tanzania is claiming some USD 10 million in those proceedings.
- 27 The applicants say they are entitled to relief because TSK was paid under the guarantees despite Guardrisk and the SCB parties being aware of the allegations of invalidity of the guarantees and of fraud concerning TSK. Guardrisk and the SCB parties deny that the applicants are entitled to relief. They put up various defences in this regard, including as detailed above.

- 28 SCB Tanzania issued an amendment to the performance guarantee and the advance payment guarantee on 22 January 2025, extending their respective expiry dates to 31 May 2025. The quantum of the advance payment guarantee was amended to USD 425, 735.05.
- 29 TSK made a demand on the guarantees on 28 January 2025. The demand was made pursuant to guarantees set to expire on 31 January 2025. EPCM SA applied to Guardrisk on 29 January 2025 for Guardrisk to procure a further extension of the guarantees and an increase of the quantum of the advance payment guarantee. Guardrisk advised TSK in writing on 30 January 2025 that EPCM SA had requested an extension of the performance guarantee to June 2027 and that of the advance payment guarantee to June 2025. TSK advised SCB Tanzania that TSK had withdrawn its demand made on 28 January 2025. The advise was made on 30 January 2025. The withdrawal letter is dated 29 January 2025.
- 30 SCB Tanzania issued an amendment to the performance guarantee and the advance payment guarantee on 5 February 2025. The expiry date of the performance guarantee was extended to 30 June 2027. The expiry date of the advance payment bond was extended to 30 June 2025. SCB Tanzania, also on 5 February 2025, instructed TSK to ignore the amendment of 22 January 225 amending the value and that the value of the advance payment guarantee remained USD 652, 907.31.
- 31 The applicants are required to demonstrate a *prima facie* right to succeed. They made their case as follows in relation to this requirement. They contend that “SCB’s” demand for payment in terms of the counter-

guarantee is impermissible because the guarantees that informed the demand had expired; that “SCB” could not have paid the demands by TSK given the serious allegations made by ECPM Tanzania; that SCB should not benefit from its own unconscionable conduct, and that SCB was not entitled to be reimbursed for satisfying fraudulent demands.

- 32 It is unclear what, precisely, is the “right” which the applicants invoke for the relief being sought. Their pleaded case is a criticism of the SCB parties. What is clear, however, is that whatever the right which the applicants contend for, the vindication of such a right is not advanced with reference to Guardrisk. The right which the applicants contend for is referenced in relation to SCB, on account of the conduct of the SCB parties. The applicants criticise the conduct of the SCB parties yet seek the court to interdict Guardrisk from performing under the counter-guarantees.
- 33 The applicants have no privity of contract with SCB SA, the entity which relationship with Guardrisk the applicants seek to disturb. The SCB parties are correct that the applicants have not shown a legal interest as regards dealings between Guardrisk and SCB SA.
- 34 The applicants do not allege any wrongdoing by Guardrisk. The applicants have not shown a cognisable right as between the applicants and Guardrisk to warrant an interdict. The right being invoked as the basis for an interdict must be in relation to a party which the court is asked to constrain. The applicants’ failure to establish a right as against Guardrisk for the grant of the relief sought is fatal to the application.

- 35 The applicants did not show that the balance of convenience favours the grant of an interdict. The applicants' pleaded case on this requirement is that "SCB" will not suffer undue hardship or prejudice by having to await the finalisation of arbitration proceedings between EPCM Tanzania and TSK before SCB would become entitled to recoup its payments. The applicants also say that SCB is a significant organisation with an international footprint, and that SCB can easily absorb the inconvenience of not sitting with the money pending the finalisation of the arbitration, in contrast to "EPCM" and its sureties. The applicants then make plain that the balance of convenience "favours EPCM (sic) as opposed to SCB." The applicants are required to show that the balance of convenience favours them, as opposed to Guardrisk. That is because the applicants seek to interdict Guardrisk. The applicants thus failed to establish that the balance of convenience favours the grant of an interdict. This too is fatal to their application.
- 36 The applicants' pleaded case on the requirement for alternative relief and that of irreparable harm are run together. There is no delineation as to which averments are meant to support each of these requirements. Indeed, they present this part of their case under the heading "No appropriate alternative remedy and irreparable harm."
- 37 They make their case as follows. They say that TSK is an empty vessel and that EPCM Tanzania has very little chance of recovering the USD 10 million in respect of submitted claims and the amounts paid by SCB to TSK. They

also say that TSK has the propensity for fraud and that there is little chance of EPCM recovering its losses.

38 EPCM Tanzania has instituted arbitration proceedings in relation to its dispute with TSK. The fact of TSK being an empty vessel, as claimed by the applicants, does not establish either the absence of alternative relief or show the presence of irreparable harm. The applicants cannot seek the intervention of the court for having contracted with a man of straw, whom the applicants now say has a propensity for fraud. The applicants failed to establish the absence of an alternative remedy. They also did not show that they stand to suffer irreparable harm absent an interdict.

39 The applicants raise fraud and the stated expiry of the guarantees as the crux of their case. The substance of the fraud contended for is that TSK raised “back charges” contrary to the contract; that EPCM Tanzania had repaid the advance payment, and that EPCM Tanzania had not breached the contract with TSK.

40 The applicants do not impute fraud on the part of Guardrisk. They do not suggest that Guardrisk, in making a demand on EPCM SA and in signifying its intention to pay SCB SA under the counter-guarantees, did so fraudulently or with knowledge of any fraud. The applicants, instead, say “SCB” acted with knowledge of fraud by TSB.

41 The applicants say “SCB” was aware of the invalidity and fraudulent nature of TSK’s demands before paying TSK, and that SCB’s conduct was unconscionable because SCB paid whilst being aware that EPCM would be

approaching a court to pronounce on the legitimacy of TSK's demands. The applicants say that SCB is not entitled to be re-imbursed for satisfying fraudulent demands. The contentions regarding the SCB parties are of no moment in this application. That is because the applicants do not seek to interdict the SCB parties.

42 The applicants accept that the guarantees pursuant to which SCB Tanzania paid TSK are demand guarantees. An inherent characteristic of these guarantees is that a beneficiary is entitled to payment on demand. The law recognises what is called the 'fraud exception' as an instance where a demand guarantee can be resisted.² The applicants say the exception applies to the present case.

43 It was submitted for the applicants that "fraud unravels all", with the result that Guardrisk is not to be allowed to act pursuant to the terms of the counter-guarantees and to pay SCB SA. This, according to the applicants, is the effect of the fraud by TSK travelling up the chain of obligations. The principle that fraud unravels all is part of our law. The applicants would misapply the principle in these proceedings.

44 The exception to liability arising from fraud was laid out in *United City Merchants (Investments) Ltd and others v Royal Bank of Canada and others*³ in a speech by Lord Diplock that "...fraud unravels all'. The courts

²See *Loomcraft Fabrics CC v Nedbank Ltd and Another* (70/94) [1995] ZASCA 127, which details the law on the subject.

³ [1982] 2 All ER 720 (HL)

will not allow their process to be used by a dishonest person to carry out a fraud.”⁴ This statement has been received as part of our law.⁵

45 The applicants seek to interdict Guardrisk. They disavow any fraud on the part of Guardrisk. The case presented for adjudication by the applicants does not entail this court having its process being used by a dishonest person to carry out a fraud. The fraud exception is not applicable, given the case as pleaded by the applicants.

46 The case for the applicants is that the fraud contended for came about when TSK misrepresented facts to SCB Tanzania, leading to the latter making payment to TSK under the guarantees. The issue of misrepresentation of facts will apply as between TSK and SCB Tanzania. It has no bearing on the relationship between SCB SA and Guardrisk. It also has no bearing on the relationship between Guardrisk and EPCM SA. The counter-guarantees that inform the relationship between Guardrisk and EPCM SA are principal obligations in relation to the performance of such obligations.

47 There is no support for the submission on behalf of the applicants that the effect of the stated fraud travels up the chain of obligations. The applicants did not cite any authority for their proposition. The established law on the nature of demand guarantees is that the relationship entails irrevocable obligations. It is only in clear cases of fraud of which banks have notice of

⁴ At 725 J

⁵ See *Loomcraft Fabrics CC v Nedbank Ltd and Another*.

fraud that courts may interfere.⁶ The applicants seek to interdict Guardrisk. They do not allege fraud by Guardrisk, nor do they allege Guardrisk having acted with knowledge of a fraud having been committed.

48 The applicants have not made-out a case for the application of the fraud exception even if it were competent for the applicants to raise that defence against Guardrisk. The evidence does not show the existence of “a clear case of fraud.” This is borne by EPCM Tanzania’s averments in its petition before the court in Tanzania.

49 The petition in proceedings in the court in Tanzania shows parties in a dispute about performance of obligations in terms of a contract. EPCM Tanzania complained, among others, that it (i.e. EPCM Tanzania) performed in terms of the contract, whereas TSK raised unsupported allegations of non-compliance by EPCM Tanzania. EPCM Tanzania then pointed out that TSK was, in fact, the party that failed to meet its obligations, including TSK not paying in accordance with payment certificates. EPCM Tanzania also referenced disagreements regarding whether equipment was used as claimed.

50 The applicants did not make out a case that TSK relied on expired guarantees when TSK made its demand on 27 March 2025. SCB Tanzania wrote to TSK on 22 January 2025, confirming that the guarantees had been amended. The value of the advance payment guarantee was changed from

⁶ R D Harbottle (Mercantile) Ltd and another v National Westminster Bank Ltd and others [1977] 2 All ER 862 (QB) at 870 b - d

USD 652, 907,31 to USD 425, 735.07. There was no change to the value of the performance guarantee. The expiry dates for both guarantees was extended to 31 May 2025. TSK made a demand in terms of the guarantees advised on 22 January 2025.

51 TSK wrote to SCB Tanzania on 25 January 2025, recording that it could not allow the existing guarantees to expire and that TSK had no alternative but to submit letters of demand. The existing guarantees were due to expire on 31 January 2025. TSK made a demand on 28 January 2025.

52 EPCM SA applied to Guardrisk on 29 January 2025 for Guardrisk to procure the further extension of the guarantees and an increase of the quantum of the advance payment guarantee. SCB Tanzania wrote to TSK on 29 January 2025, recording that the amended advance payment guarantee had been presented to TSK for acceptance. EPCM Tanzania wrote to TSK on 29 January 2025, recording, among others, that:

Further in response to your points we would like to clarify that the Guarantees are indeed valid now until end of May, hence they remain in full effect. [...]. We therefore request that the call on the bonds be retracted, as they remain in full effect while we are getting the extensions done as per the above. We will respond shortly with the necessary proof that this is in action.

53 Guardrisk confirmed to TSK on 30 January 2025 that EPCM SA had requested an extension of the performance guarantee to June 2027 and that of the advance payment guarantee to June 2025. TSK advised SCB Tanzania

on 30 January 2025 that TSK had withdrawn the demand it made on 28 January 2025. TSK's withdrawal letter was dated 29 January 2025.

54 TSK was adamant on 25 January 2025 that it could not allow the guarantees to lapse. TSK's demand on 28 January 2025 was on guarantees due to expire on 31 January 2025. The demand was clearly made to preserve the currency of those guarantees, by making a demand within the expiration period. TSK withdrew the demand on 30 January 2025, a day before the scheduled expiry date of 31 January 2025.

55 TSK would not have notified withdrawal of its demands if the guarantees were still to expire on 31 January 2025. It would make no sense for TSK to withdraw its demand if the dates of guarantees due to expire on 31 January 2025 had not been extended given TSK's expressed concern on 25 January 2025 that it could not allow the guarantees to lapse.

56 EPCM Tanzania wrote to TSK on 29 January 2025, clarifying that *"Guarantees are indeed valid now until end of May."* TSK wrote on the same day that it had withdrawn its demand. Thus TSK withdrew its demand on an understanding that the guarantees were valid "until the end of May."

57 I find that the guarantees had not expired when TSK made its demands on 27 March 2025. The applicants cannot succeed in this application even if the court be in error in its finding that the guarantees had not expired. The application must fail because the applicants did not meet the requirements for an interdict, as detailed above. Guardrisk and the SCB parties raised

several other defences. It is unnecessary to address those defences in the light of the court's findings in this judgement.

58 I make the following order:

- (1) The application is urgent.
- (2) The application is dismissed.
- (3) The applicants are ordered to pay costs:

58.3.1 Costs in relation to the first respondent includes costs for engaging senior counsel, on scale C.

58.3.2 Costs in relation to the second and third respondents include costs for engaging two counsel, including senior counsel; such costs to be on scale C in relation to senior counsel and scale B in relation to junior counsel.

O MOOKI

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Heard: 28 April 2025

Decided: 6 May 2025

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