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

3/4/2023
DATE ______________ SIGNATURE

CASE NUMBER: 2022/26787

In the matter between:

CHRISTOPHER RAYMOND REY N.O (in his capacity as the appointed business rescue Practitioner of TSK Bartlett (Proprietary) Ltd	First Applicant
TSK BARTLETT (PROPRIETARY) LTD	Second Applicant
and	
ADOWA STUDENT ACCOMODATION CO-OWNERSHIP	First Respondent
ADOWA INFRASTRUCTURE MANAGERS RF (PTY) LTD	Second Respondent
THE GOVERNMENT EMPLOYEES PENSION FUND	Third Respondent
PUBLIC INVESTMENT CORPORATION SOC LTD	Fourth Respondent

ADOWA PROPERTY DEVELOPERS (PTY) LTD Fifth Respondent

LOMBARD INSURANCE COMPANY LIMITED Sixth 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 an interdict against the sixth respondent from making payment to the first respondent, in terms of a variable construction guarantee ('the guarantee'). The applicants also seek an order interdicting and restraining the first respondent from preventing or obstructing the second applicant to render performance in terms of the contract.

[2] The first to fifth respondents oppose the application. The sixth respondent does not oppose the application.

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

BACKGROUND

[4] The second applicant is the principal contractor who was appointed by the first respondent, (the employer), to construct student accommodation. A standard-type JBCC Principal Building Agreement was concluded on 13 September 2019 ('the contract'). The second applicant supplied the first respondent with a variable construction guarantee as required in terms of the contract to cover any potential claims by the first respondent.

[5] The contract, with a certified value of R173 427 946-15 (excluding Vat) has progressed past the stage of practical completion which was achieved on 11 February 2022.

[6] The second applicant was voluntarily placed under business rescue on 9 September 2022, however despite this, the applicants contend that the second applicant was not in breach of its performance in terms of the contract. The first respondent cancelled the contract

on 22 September 2022 stating that the second applicant was in breach of clause 36 of the contract and called up the guarantee for the sole reason that the second applicant was placed in business rescue. The guarantee was called up on 29 September 2022 and payment was to be made on 6 October 2022.

[7] The sixth respondent has delayed making payment of the guarantee pending the determination of this urgent application.

***Prima facie* right**

[8] The applicants contend that the guarantee may only be called up in terms of clause 5.1 and 5.2 of the guarantee in the event of the second applicant's default or liquidation. It was contended that the business rescue proceedings did not in any way affect the second applicant's ability to perform in terms of the contract and that with a proper interpretation of clause 36 of the contract, the first respondent could only cancel the contract in the event that the contractor was unable to perform in terms of the contract or was in material breach of its obligations.

[9] It was contended that not more than a month would have been required to complete the minor remedial works which would have enabled the second applicant to reach the stage of completed works. The applicant's counsel contended that the second applicant had the finances to complete the project and was at the time of the application on site completing the remaining snags to a value of less than R145 240-00. To cancel the contract and enforce the guarantee would defeat the purpose of s136 of the Companies Act 71 of 2008 ('the Companies Act') and would go against public policy and render it unconstitutional.

[10] The applicants contend that the demand is unlawful because the first respondent relies for the trigger event on clause 36 that the second applicant asserts is void and unenforceable. It was contended clause 36 is contrary to the statutory prescripts set out in the Companies Act, in that it is unfair and contrary to public policy. Reference was made to the case of *Barkhuizen v Napier*[1], where the Constitutional Court contended that the enforcement of the guarantee, to the exclusion of the consideration as to whether the contract was lawfully cancelled, runs contrary to the commercial considerations that underpin chapter 6 of the Companies Act, as well as the rule of law. The applicants allege that the purpose of the interim order is to maintain the *status quo* pending the outcome of a declaratory order to declare the *ipso facto* clause

[1] *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

unlawful, in which event, the demand would be unlawful. Counsel contended that is particularly so in the circumstances in which it is more convenient and less disruptive to maintain the present position, than it is to unravel the effects of the purported cancellation.[2]

[11] It was contended by the applicant's that the very purpose of chapter 6 of the Companies Act is to allow a company to continue trading and thereby facilitate the rescue and rehabilitation of the second applicant. It was contended that upon the commencement of business rescue, all existing contracts remain in place and in terms of s136(2)(b) may upon the election of the business practitioner be either suspended or cancelled. Counsel also contended that with reference to foreign law the second applicant may, without alleging fraud, restrain the first respondent from presenting the guarantee for payment.

[12] Counsel contended that in matters which involve intricate issues of law, those issues are best left for determination at the declaratory stage. All that is required at the interim interdict stage is for the applicant to show a *prima facie* right that an interim order be granted to maintain the *status quo*.

[13] The respondents contend that the sixth respondent cannot be interdicted from paying the first respondent in terms of the guarantee, as the applicants have not shown that the demand did not comply with the terms of the guarantee or that there was fraud. It was argued that the construction guarantee establishes a contractual obligation on the part of the sixth respondent to pay the first respondent and that this obligation is wholly independent on the underlying construction contract. It was argued that whatever disputes may arise between the second applicant and the first respondent is of no moment insofar as the obligation of the sixth respondent is concerned. It was argued that in the case of an unlawful cancellation, the Courts have made the position clear, namely, that a lawful cancellation is not a prerequisite for a valid call on the construction guarantee. Counsel argued that all that is required for a valid demand in terms of the construction guarantee is for the first respondent to state that the construction contract has been cancelled due to the second applicant's default. It was argued that the second applicant has breached clause 36 of the contract read with clauses 36.1.4 and 36.1.6.

[14] The respondent's counsel contended that the argument raised by the applicants that they can restrain the first respondent from presenting the construction guarantee by relying on a cancellation clause that is void and unenforceable is not the correct legal position.

[2] see *Johannesburg Municipal Pension Fund & Others v City of Johannesburg & Others* 2005 (6) SA 273 (W) at [25].

EVALUATION

[15] The purpose of an interim interdict is to maintain the *status quo* pending the determination of the rights or the dispute between the parties.[3]

[16] The requirements for an interim interdict are a *prima facie* right, an apprehension of irreparable harm if the interim relief is not granted, that the balance of convenience favours the granting of the interim interdict and that there is no other satisfactory or adequate remedy in the circumstances.[4]

[17] In the matter of *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd & others*[5] 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.'[6] [my emphasis]

[18] In the matter of *State Bank of India and Another v Denel SOC Limited and Others*[7] 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.'[8] [my emphasis]

[19] In the matter of *Dormell Properties 282 CC v Renasa Insurance Company Ltd and Another*[9] 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.'[10]

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[3] see *National Gambling Board v Premier, Kwa-Zulu Natal and Others* 2002(2) SA 715 CC at para 49.
[4] see *Setlogelo v Setlogelo* 1914 AD 221, as endorsed in *National Treasury v Opposition to Urban Tolling Alliance* 2012 (11) BCLR 1148 (CC).
[5] *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd & others* 2010 (2) SA 86.
[6] Ibid para 20.
[7] *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).
[8] *State Bank of India* (note 7 above) para 7.
[9] *Dormell Properties 282 CC v Renasa Insurance Company Ltd and Another* (491/09) [2010] ZASCA 137; 2011 (1) SA 70 (SCA) ; [2011] 1 All SA 557 (SCA) (1 October 2010).
[10] Ibid para 39.

[20] The learned Cloete JA, who handed down the dissenting judgment in the matter of *Dormell*[11], repeated what had been held in the matter of *Lombard*[12] and stated that:

'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 Ltd* [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]

[21] The Supreme Court of Appeal in the matter of *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association*[13] followed the dissenting judgment in the matter of *Dormell*[14].

[22] There is a long line of decisions which have consistently recognised the autonomy principle.

[23] In the matter of *Guardrisk Insurance Company Ltd and Others v Kentz (Pty) Ltd*[15] 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'.[16]

The Court held further that:

'where its terms have been met, there may, at a later stage and after the terms of the guarantee have

[11] Ibid.
[12] *Lombard* (note 5 above).
[13] *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association* 2014 (2) SA 382 (SCA).
[14] *Dormell* (note 9 above).
[15] *Guardrisk Insurance Company Ltd and Others v Kentz (Pty) Ltd* (94/2013) [2013] ZASCA 182; [2014] 1 All SA 307 (SCA) (14 November 2013).
[16] Ibid para 28.

been met, be an 'accounting' between the parties to finally determine their rights and obligations.'[17]

[24] In regard to the applicant's contention that this Court should consider foreign law, reference is made to the matter of *Kwikspace Modular Buildings Ltd v Sabodala Mining Company Sarl and Another*[18] where the Supreme Court of Appeal held that:

'…Australian law is to the following effect: a building contractor may, without alleging fraud, restrain the person with whom he had covenanted for the performance of the work, from presenting to the issuer a performance guarantee unconditional in its terms and issued pursuant to the building contract, if the Contractor can show that the other party to the building contract would breach a term of the building contract by doing so; but the terms of the building contract should not readily be interpreted as conferring such a right.' [19] [my emphasis]

[25] In the matter of *Joint venture Aveng v Sanral*[20], the Supreme Court of Appeal held that after a survey of English and Australian law, there was room in South African law to follow the same path as that taken in English and Australian law, with the clear caveat expressed in paragraph 11 of the matter of *Kwikspace*.[21]

[26] The decisions of *Kwikspace*[22] and *Joint Venture*[23], pertaining to foreign law, are in contrast to what was stated in the matter of *Murray N.O. and Another v Firstrand Bank Ltd t/a Wesbank*[24], where the Supreme Court of Appeal held that:

'…The liquidators referred us to corresponding provisions in foreign jurisdictions, particularly those in England, Australia and Canada. Whilst apparently sharing the same aim and goal as Chapter 6 of the [Companies] Act, the wording of the corresponding provisions in these jurisdictions, dealing with moratoriums and stay of proceedings, differ to such an extent from their South African counterpart, that no meaningful assistance would be gained by invoking them in the interpretation of s 133(1) of the Act.'[25] [my emphasis]

[27] The Supreme Court of appeal in the matter of *Joint Venture*[26] did however caution that:

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[17] Ibid (note 15 above) para 27.
[18] *Kwikspace Modular Buildings Ltd v Sabodala Mining Company Sarl and Another* (173/09) [2010] ZASCA 15; [2010] 3 All SA 467 (SCA); 2010 (6) SA 477 (SCA) (18 March 2010).
[19] *Kwikspace* (note 18 above) para 11.
[20] *Joint venture Aveng v Sanral* 2021 (2) SA 137.
[21] Ibid.
[22] Ibid.
[23] *Joint Venture* (note 20 above).
[24] *Murray N.O. and Another v Firstrand Bank Ltd t/a Wesbank* (20104/2014) [2015] ZASCA 39; 2015 (3) SA 438 (SCA) (26 March 2015),
[25] Ibid para 43.
[26] *Joint Venture* (note 20 above)

'…given the significance of performance guarantees and letters of credit in international trade and commerce, such claims as are made by the Joint Venture in relation to the underlying contract, should be approached with caution.'[27] [my emphasis]

[28] *Joint venture*[28] further held that:

'Clause 2.5 is to the effect that, for SANRAL to make a call on the performance guarantee, it must act in the *bone fide* belief that it is entitled to payment under the provisions of the agreement. Whether it is in fact so entitled is immaterial at the time that the call is made. There is no suggestion that SANRAL's call is actuated by malice or that its stance, that it is entitled to payment, is far-fetched. Regard must also be had to the purpose for which the performance guarantee was provided, which undoubtedly was to secure SANRAL's position in the event of a dispute and pending resolution thereof.[29] [my emphasis]

[29] In the matter of *Murray*[30] the Supreme Court of Appeal had to deal with the provisions of Chapter 6 of the Companies Act, with specific reference to the interpretation of s133. The Court dealt with the situation whether a creditor of a company under business rescue could unilaterally cancel an extant instalment sale agreement that it had concluded with the company prior to the latter being placed under business rescue. The liquidator argued that the cancelation by Wesbank was contrary to the provisions of s133 and accordingly had no force or effect. Wesbank on the other hand denied that s133 precluded it from cancelling the contract. The Supreme Court of Appeal held that the term 'enforcement action' does not include the cancellation of an agreement concluded prior to the commencement of business rescue proceedings. It accordingly held that a creditor of a company under business rescue had lawfully cancelled a contract concluded with the company prior to the commencement of business rescue proceedings.

[30] The Supreme Court of Appeal in the matter of *Murray*[31] held that:

'…As explained earlier, our law of contract provides for a unilateral cancellation in the case of a breach of contract. The way I see it, the legislature intended to allow the company in distress the necessary breathing space by placing a moratorium on legal proceedings and enforcement action in any forum, but not to interfere with the contractual rights and obligations of the parties to an agreement. Such an intention would, in any event, be contrary to the tenet of our law that the legislature does not intend to alter the existing law more than is necessary, particularly if it takes away existing rights. See L C Steyn Die Uitleg van Wette 5 ed (1981) at 97 and 237.'[32] [my emphasis]

[27] Ibid para 17.
[28] Ibid.
[29] *Joint Venture* (note 20 above) para 27.
[30] *Murray* (note 24 above).
[31] Ibid.
[32] Ibid para 40.

[31] The Supreme Court of Appeal in *Murray*[33] accordingly found that it is incorrect to cast the meaning of s133 so wide to include a moratorium against a creditor cancelling a contract with a financially distressed company under business rescue. It held that:

'… [in so] …doing [it would cause] violence to the wording of s133(1) of the Act.'[34]

The Supreme Court of Appeal also found that s128(1)(b)(ii) of the Companies Act does not prevent a creditor from cancelling a contract.[35] It held further that:

'What is therefore required, is an interpretation of the specific provisions of s 133(1) and not to seek to interpret it by resorting to s128(1)(b)(ii).'[36]

[32] The Supreme Court of Appeal in the matter of *Murray*[37] held that there are sufficient safeguards in Chapter 6 of the Act to prevent the disastrous result.

[33] The moratorium as envisaged by s128(1)(b)(ii) is evident in s133 of the Companies Act. Whilst this Court is aware that a moratorium on legal proceedings against a company under business rescue is crucial to allow the distressed company the necessary breathing space to restructure its affairs, as per the decision of the matter of *Murray*[38] calling up the guarantee does not constitute 'enforcement action' in terms of s133 of the Companies Act and therefore the consent of the business rescue practitioner is not required.

[34] The second applicant at the time the application was launched was in breach of the contract, with specific reference to clause 36 read with clauses 36.1.4 and 36.1.6. This Court does not agree that the first respondent in cancelling the contract due to the second applicant being placed under business rescue amounts to a breach of the contract or an unlawful demand. There is no suggestion that the demand was actuated by malice or that it was far-fetched. Although the Constitutional Court in the matter of *National Gambling Board v Premier, Kwa-Zulu Natal and Others*[39] stated that the purpose of an interim interdict is to maintain the *status quo* pending the determination of the rights or the dispute between the parties, the Court cannot interfere with the contractual obligations of parties.[40]

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[33] Ibid.
[34] Ibid para 33.
[35] Ibid para 37.
[36] Ibid para 37.
[37] Ibid.
[38] Ibid.
[39] *National Gambling Board v Premier, Kwa-Zulu Natal and Others* 2002 (2) SA 715 CC.
[40] Ibid para 49

[35] From the cases of *Lombard*[41], the dissenting judgment of *Dormell*[42], the judgment of *Coface*[43] and *Guardrisk*[44], 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 is to honour the credit when the demand is made. With reference to the matter of *Dormell*[45], the specified event which the respondents allege happened in the matter *in casu*, is that the contractor went into business rescue, which entitled the employer, as per the terms of the contract, specifically clause 36 read with clauses 36.1.4 and 36.1.6 to then cancel the contract and demand payment. There is no question that this demand was correctly made in terms of clause 36. As stated in the matter of *Lombard*[46] and *Dormell*[47] the fact that the first respondent may have called up the guarantee relying on a patently unlawful cancelation does not assist the second applicant. The demand has nothing to do with the underlying contract.

[36] In terms of the decisions of *Kwikspace*[48], although the Supreme Court of Appeal stated, with reference to foreign law that a guarantor can in the absence of fraud, be restrained from paying the guarantee, this would depend on whether the contractor can show that the other party to the building contract would breach a term of the building contract. In the matter *in casu* there is no breach of the contract on the part of the first respondent.

[37] This court has further considered whether the facts of the matter *in casu* raise a constitutional issue, which notwithstanding the decisions of *Lombard*[49], *Dormell*[50], *Coface*[51], or *Guardrisk*[52] may amount to a *prima facie* right to grant the interdict. In the matter of *Barkhuizen*[53], the Constitutional Court held that a contractual term that is contrary to public policy is unenforceable as under our legal order, all laws derive their force from the Constitution and are thus subject to constitutional control. Any law that is inconsistent with the Constitution is invalid. The matter of *Barkhuizen* also stated that the fact that a term in a contract is unfair or may operate harshly does not, by itself, lead to the conclusion that it offends the values of the Constitution. The Court stated that intruding on contractual arrangements that have been voluntarily concluded must be countenanced with care.

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[41] *Lombard* (note 5 above)
[42] *Dormell* (note 9 above)
[43] *Coface* (note 13 above)
[44] *Guardrisk* (note 15 above)
[45] *Dormell* (note 9 above)
[46] *Lombard* (note 5 above)
[47] *Dormell* (note 9 above)
[48] *Kwikspace* (note 18 above)
[49] *Lombard* (note 5 above)
[50] *Dormell* (note 9 above)
[51] *Coface* (note 13 above)
[52] *Guardrisk* (note 15 above)
[53] *Barkhuizen* (note 1 above)

[38] Clause 36.1.4 states:

'36.1.4 Where the employer effects insurances consequent on the contract's default [12.3] The following is added as a new sub-clause 36.4

'The employer may, furthermore cancel this agreement by giving written notice of termination where the contractor becomes bankrupt or insolvent, goes into liquidation, is placed in business rescue, compounds with his creditors or carries on business under a receiver, trustee, business rescue practitioner or manager for the benefit of his creditors, or if any act is done or event occurs which (under the applicable law) has a similar effect to any of these acts or events'

Clause 36.1.6 states:

'is placed under business rescue or a business rescue practitioner is appointed,

[39] In the matter *in casu* there is no evidence to suggest that the contract was not signed voluntarily by the second applicant. The majority decision in the matter in *Barkhuizen*[54] stated that:

'the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them.'[55]

[40] The majority in the matter of *Barkhuizen*[56] held further that:

'The first question involves the weighing-up of two considerations. On the one hand, public policy, as informed by the Constitution, requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda* which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. <u>The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity.</u>'[57] [my emphasis]

And further at paragraph [69]

'The inquiry is not whether the clause is inflexible. The inquiry is whether in all the circumstances of the particular case, in particular, having regard to the reason for non-compliance with the clause, it would be contrary to public policy to enforce the clause.'

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[54] Ibid.

[55] Ibid para 30.

[56] Ibid.

[57] Ibid para 57.

[41] The underlying dispute between the applicants and the first respondent regarding the validity of the first respondent's cancelation and even the enforceability of the cancelation clause, will be resolved in the manner provided for in the contract between the second applicant and the first respondent or by way of the applicant's intended declaratory application. As stated by Cloeta JA in *Dormell*[58] and repeated by Van der Linde J in *Group Five Power International (Pty) Ltd v Cenpower Generation Company Limited* 2019 JDR 0076 (GJ), even if there is a different conclusion at the declaratory stage finding that the cancelation clause was indeed unlawful or unenforceable, it still affords no defence at all to the calling of the construction guarantee.

[42] The applicants rely on the matter of *Ferreira v Levin NO; Vryenhoek v Powel*[59] in stating that even if there is a mere prospect of success, there is no further threshold which must be crossed before proceeding to a consideration of the other elements of an interim interdict. In line with the cases that this Court has referred to, this Court does not find that there is a mere prospect of success, in that the applicants have not successfully shown non-compliance with the terms of the construction guarantee nor any fraud on the part of the first respondent. As a result, the applicants on these facts must fail.

[43] Even if the Court is wrong in this regard, there is no admissible evidence that the contract was not freely concluded or that there was unequal bargaining power between the parties or that the clause was not drawn to the second applicant's attention. On the contrary, the indications are that the second applicant was aware of clause 36 with specific reference to clause 36.1.4 and 36.1.6. This Court is accordingly unable to conclude on a *prima facie* basis that clause 36 read with clause 36.1.4 and 36.1.6 is so unreasonable and unfair that its enforcement would be contrary to public policy. Even if this Court is wrong, in line with the cited cases, any dispute about an underlying contract cannot preclude the guarantor from making good on the terms of the guarantee.

[44] As a result, in line with the decision of *State Bank of India*[60] this is not one of those exceptional cases where a interdict should be granted to stop the calling up of the guarantee. Accordingly, this Court finds that the applicants have not established a *prima facie* right.

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[58] *Dormell* (note 9 above).
[59] *Ferreira v Levin NO; Vryenhoek v Powel* 1995 (2) SA 813 (W) at 833A-b.
[60] *State Bank of India* (note 7 above).

[45] This Court has empathy for the position that the applicants find themselves in, namely, that to maintain the *status quo* pending the declaratory order may be better, however so too has this court to consider what disruption it may cause the first and sixth respondent, should the interdict be granted. As stated by the respondent's counsel, there is also the matter of the penalties owing by the second applicant in the amount of R12 million which the first respondent is entitled to recover from the guarantee.

[46] In the matter of *Exxaro coal Mpumalanga (Pty) Ltd v TDS Projects Construction and Newrak Mining JV (Pty) Ltd and Another*,[61] the contractor argued that it had no other satisfactory remedy and that its damages would in all likelihood be recovered well into the distant future, whilst its business would be crippled or destroyed in the interim. The Supreme Court of Appeal held that:

'…Consequently, non-compliance with the terms of the guarantee by Exxaro in making its demand is not a violation of any right of TDS. Neither will payment of the guarantee by ABSA result in a violation of a right of TDS. Indeed, this was conceded by counsel for TDS. That being the case, TDS could not show that it would sustain any injury if ABSA honoured the guarantee…'[62] [my emphasis]

[47] The Supreme Court in the matter of *Exxaro*[63] held further that:

'What is more, any contractor that has given a performance guarantee and which is in the same position as TDS, '. . . would have its ordinary contractual remedy against [the guarantor]'. In this matter, the remedy is a complete defence to any claim founded on the honouring of the guarantee when ABSA was not obliged to do so.'[64] [my emphasis]

[48] In accordance with the matter of *Exxaro*[65], the second applicant that claims that the demand is unlawful, will have a complete defence and a satisfactory alternative remedy against the guarantor (the sixth respondent), for honouring an unlawful demand, as the applicants contend.

[49] The court must weigh the prejudice to the applicants if the interim interdict is not granted against the prejudice to the respondents if it is. The applicant's prospects of success are weak and the balance of convenience does not favour them.

[61] *Exxaro coal Mpumalanga (Pty) Ltd v TDS Projects Construction and Newrak Mining JV (Pty) Ltd and Another* (case No 169/2021 [2022] ZASCA 76 (27 May 2022).
[62] Ibid para 14.
[63] Ibid.
[64] Ibid para 15.
[65] Ibid.

COSTS

[50] The First respondent's counsel requested that this application should be dismissed with costs on an attorney and client scale in that the application is vexatious and the Court should show its displeasure by awarding costs on a punitive scale.

[51] 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

[52] The application is dismissed.

Costs to follow the result.

D DOSIO
JUDGE OF THE HIGH COURT

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 3 April 2023

Appearances:

On behalf of the applicants:	Adv. S. Panayiotis SC
	Adv. C. Gibson
Instructed by:	WERKSMANS ATTORNEYS
On behalf of the first to fifth respondents:	Adv. L. Segeels-Ncube
Instructed by:	FLUXMANS INC