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

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
SIGNATURE	DATE: 17 April 2023

Case No. 2023/009986

In the matter between:

THE CONSORTIUM COMPRISING: **KC COTTRELL CO. LTD** **ELB ENGINEERING SERVICES (PTY) LTD (in liquidation)** **ELB EDUCATIONAL TRUST FOR BLACK SOUTH AFRICANS**	First Applicant
KC COTTRELL CO. LTD	Second Applicant
and	
SANTAM LIMITED	First Respondent
NGODWANA ENERGY RF LTD	Second Respondent
NEDBANK LIMITED C/O NEDBANK INCORPORATED	Third Respondent

Neutral Citation*: The Consortium: KC Cottrell Co. Ltd and others v Santam Limited and* Others (Case No: 2023/009986) [2023] ZAGPJHC 337 (17 April 2023)

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

WILSON J:

1 The applicants, to whom I shall refer as KC Cottrell, seek leave to appeal against my judgment of 7 March 2023. In that judgment, I dismissed KC Cottrell's application for an interim interdict restraining the second respondent, Ngodwana, from making a call on a demand guarantee given in its favour by the first respondent, Santam. The guarantee is meant to operate as security for the performance of KC Cottrell's obligations in a construction contract it concluded with Ngodwana.

My judgment

2 In my judgment, I held that, to be called up, the guarantee required no more than that Ngodwana informs Santam that KC Cottrell is in breach of the construction contract, and that Ngodwana honestly believes that this is so. The fact that KC Cottrell is in breach of the construction contract was common cause between the parties in the main application. I held that this meant that there could be no lawful restraint imposed upon Ngodwana's right to make a call on the guarantee.

3 That conclusion entailed my rejecting KC Cottrell's argument that the construction guarantee required more than the mere allegation and honest belief that Ngodwana is in breach. Mr. Redman, who appeared with Mr. Desai for KC Cottrell, argued that the text of the guarantee requires that Ngodwana calls up only so much of the guaranteed sum as it honestly believes it needs to remedy the breach it alleges.

4 This was, I found, untenable on the text of the guarantee, read in light of its purpose as a form of security for KC Cottrell's performance under the construction contract.

The case to be argued on appeal

5 In arguing the application for leave to appeal, Mr. Redman advanced three arguments against the correctness of my judgment,

6 In the first place, Mr. Redman renewed his textual submission, and sought to persuade me that there is a reasonable prospect that a court of appeal will differ with the conclusion I drew against it.

7 The second argument was that the call on the guarantee would be unlawful because it would rest on the fraudulent assertion that KC Cottrell is entitled to reverse the various payment milestones it had previously certified under the construction contract. Mr. Redman argued that the construction contract provides for defects found in the work to be dealt with by engaging a special procedure designed for that purpose, not by decertifying payments that Ngodwana had previously certified. In choosing to reverse the payment milestones, rather than to follow the procedure specifically intended for the rectification of defects, Ngodwana, it was argued, perpetrated a fraud that tainted any call on the guarantee Ngodwana chose to make based on it.

8 The third argument was a novel one. It was that the law applicable to construction guarantees should be developed to allow a contractor to restrain unconscionable, rather than merely fraudulent, calls on demand guarantees. I was referred in support of this development to decisions of the Singaporean courts, to the position in Australian law, and to a *dictum* of the

Supreme Court of Appeal which was said to be indicative of an appetite for such a development.

9 It was contended that, even if Ngodwana's call on the guarantee might not have been fraudulent, it would certainly have been unconscionable. For that reason, if the law is developed in the manner to be contended for on appeal, then KC Cottrell would be entitled to its interim interdict.

No prospect of success on appeal

10 In my view, these arguments stand no prospect of success on appeal.

The text and purpose of the guarantee

11 There is no basis on which the text of clause 4 of the guarantee is capable of meaning anything other than that Ngodwana is entitled to call up any amount up to the limit of the guaranteed sum on the honest allegation of a breach of contract. In clause 4, Santam undertakes, on receipt of a "Demand" that states that there is such a breach, to pay, up to the limit of the guarantee, such sum as Ngodwana "may in that Demand require" (less any sums previously called up). Mr. Redman argued in the main application, and again in the application for leave to appeal, that the use of the word "require" instead of "demand" means that Ngodwana may only call up what it needs to remedy the breach it alleges. But that interpretation is untenable. In the context of clause 4 of the guarantee, what is required is what is demanded, not only because the requirement must itself be stated in a "Demand", but also because no self-respecting drafter of a guarantee of this nature would have used the formulation "in that Demand demand".

12 The guarantee was written so as to provide Ngodwana with security for its losses in, amongst other eventualities, precisely the situation that has now arisen – the construction of a defective power station. The effect of the guarantee is to allow Ngodwana to draw down a sum up to the limit stated in it without having to sue on the contract. That does not mean, of course, that Ngodwana gets to keep the guaranteed sum if it is later established that Ngodwana was not after all entitled to it. The right to draw on the guarantee means only that, by binding itself to Santam for the value of the guarantee, KC Cottrell must pay out the guaranteed sum now, and complain about it later. To read into the guarantee conditions and requirements that have little or no textual foundation is to undermine the very purpose of the instrument, and the arrangements made between the parties.

13 This approach is entirely consistent with, and in fact required by, the principles and cases that I cited and glossed in my judgment on the main application, all of which are binding on me, and none of which I can imagine that the Supreme Court of Appeal, or the Full Bench of this court, would be inclined to revisit.

The contractual fraud alleged

14 A further settled principle evident from the cases is that the right to call up the guarantee, and the obligation to pay out in response to such a call, are entirely separate from the rights and obligations between the parties to the underlying contract. It follows that, whatever may be said of the propriety of Ngodwana's conduct in reversing the payment milestones it previously certified, that is a question arising on the contract, not on the guarantee. The

clear legal separation evident in the cases between disputes on the contract and the employer's right to make a call on the guarantee is necessary to give guarantees of this nature their efficacy. I cannot see any basis on which a court of appeal would be inclined to interfere with this principle.

The novel argument

15 As I made clear in my judgment on the main application, it seems to me that Ngodwana's decision to reverse the payment milestones it had previously certified, rather than to follow the procedure specifically intended for the rectification of defects, was oppressive. Perhaps it was unconscionable. If that had been demonstrated, and if a *prima facie* basis for developing the law to restrain unconscionable calls on construction guarantees had been established, I might well have issued the interim interdict KC Cottrell applied for.

16 But none of this was demonstrated. The proposal is rather that it will be argued for the first time on appeal, and it is precisely the novelty of the argument that dooms it. Ngodwana was brought to court on the allegation that it had threatened to make a fraudulent call on the guarantee. It answered, argued and won that case. Had Ngodwana been told that it faced a different case, that it had threatened to act unconscionably rather than fraudulently, its answer on the facts, and its arguments on the law, would mostly likely have been different. Ngodwana was entitled to the opportunity to adduce the facts necessary to meet such a case. Without knowing what those facts might have been, and how they would have stacked up against

the background of the commercial purposes and relationships at stake in this area of law, I cannot say which way I would have ruled.

17 Moreover, as a legal concept, unconscionability has a protean character. I do not think that there is any prospect that an appeal court will adopt a novel development that deploys the concept in a complex social and commercial field without a case based squarely on a clear account of it having been argued at first instance, even if only on a *prima facie* basis.

No other compelling reason to grant leave

18 It was finally contended that my judgment had departed from two previous decisions of this court. These decisions are *Group Five Construction (Pty) Limited v Member of the Executive Council for Public Transport Roads and Works Gauteng* 2015 (5) SA 26 (GJ) and *Phenix Construction Technologies (Pty) Ltd v Hollard Insurance Company* [2017] ZAGPJHC 174. In each of these cases, calls on demand guarantees were disallowed. It was argued that my decision cannot be reconciled with either of them, and that this inconsistency is a "compelling reason" to grant leave to appeal, within the meaning given to that phrase in section 17 (1) (a) (ii) of the Superior Courts Act 10 of 2013.

19 However, I see no inconsistency. *Group Five* was about a call made on a guarantee that could only have been activated on the cancellation of a contract that had not in fact been cancelled, and that the MEC in that case could not honestly have believed had been cancelled. *Phenix* restrained a call on a guarantee for a sum greater than was secured under guarantee at the time the call was made. These were both clearly fraudulent calls on the

text of the applicable guarantees. They are examples of precisely the kind of fraud that KC Cottrell has failed to demonstrate on the facts of this case.

Order

20 There is, accordingly, no basis on which to detain an appellate court with a reconsideration of my judgment.

21 The application for leave to appeal is dismissed with costs, including the costs of two counsel.

S D J WILSON
Judge of the High Court

This judgment was prepared and authored by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 17 April 2023.

HEARD ON:	13 April 2023
DECIDED ON:	17 April 2023
For the Applicant:	NP Redman SC M Desai Instructed by LNP Attorneys, Sandton c/o PPN Attorneys, Parktown
For the Second Respondent:	PHJ Van Vuuren SC

DS Hodge
Instructed by Tiefenhalter Attorneys c/o
Dockrat Inc, Dunkeld