

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

9 February 2024
DATE

SIGNATURE

CASE NUMBER: 2023-134395

In the matter between:

INNOVA TURNKEY (PTY) LTD
(Registration number: 2017/034913/07)

First Applicant

JOSEPH REYNOLDS CHEMALY N.O.
**(In his capacity as a Trustee of the Michael Family Trust,
number TMP 2502)**

Second Applicant

MICHAEL NICOLAS GEORGIU N.O.
**(In his capacity as a Trustee of the Michael
Family Trust, number TMP 2502)**

Third Applicant

ANDRIANA GEORGIU N.O.
**(In her capacity as a Trustee of the Michael
Family Trust, number TMP 2502)**

Fourth Applicant

and

HOLLARD INSURANCE COMPANY LIMITED
(Registration number: 1952/003004/06)

First Respondent

BLUE WAVE PROPERTIES 150 (PTY) LTD
(Registration number: 2007/018616/07)

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 applicant ('Innova') seeks to interdict the first respondent ('Hollard'), from making payment to the second respondent ('Blue Waves'), under two on demand guarantees. These will be referred to as the advance payment guarantee and the construction guarantee (collectively referred to as the 'guarantees').
- [2] The interdict is sought for a limited period, namely, pending the institution and finalisation of arbitration proceedings.
- [3] The applicants' prayers in the notice of motion are for the following relief:
- (a) Prayer 1 is in accordance with Rule 6(12) seeking condonation for the applicants' non-compliance with the Rules of Court pertaining to time periods and service.
- (b) Prayer 2 seeks interim relief as follows: -
'Pending the outcome of the arbitration proceedings referred to below and in the founding affidavit of Joseph Reynolds Chemaly ("the arbitration proceedings"), the first respondent is interdicted and restrained from making any payment to the second respondent in terms of the Advanced Payment Guarantee and the Contract Guarantee, both dated 31 October 2023 and bearing number EFP/EBGS P/00200853#2'.
- (c) Prayer 3 requires of the applicants to institute the intended arbitration proceedings within 30 days from the date of the granting of the order sought, failing which the order granted shall lapse.
- (d) Costs are sought in prayer 4.

- [4] Blue Waves opposes the application. Hollard has indicated on 10 January 2024 that they will not be opposing the application and will abide by the Court's ruling.
- [5] Having decided it is urgent, I proceeded to consider the matter.
- [6] The crisp issue to be determined is whether Innova has established valid grounds, pertaining to the contractual dispute between the parties, which pending arbitration, gives Innova a *prima facie* right to secure an interdict.

Background

- [7] On 15 November 2022, Innova, and Blue Waves, entered into a written principal building agreement, ('the agreement') for remedial works on the Onomo Hotel in Sandton, Johannesburg. Innova is the building contractor and Blue Waves is the employer. The second, third and fourth applicants are sureties for the liabilities of Innova to Hollard.
- [8] As part of the agreement, Innova had to secure its performance. As a result, Hollard provided the guarantees for Innova to Blue Waves, ensuring that Innova would fulfil its contractual obligations.
- [9] These guarantees were both extended on 31 October 2023. The advanced payment guarantee was for an amount of R 4 658 136-57. The construction guarantee was for maximum liability of R 1 532 440-97. The expiry date of both guarantees is 31 January 2024. The advanced payment guarantee is effective until expiry date, or until such time as the full advance payment had been recouped by Blue Waves, whichever is the earlier date. The construction guarantee is effective until expiry date or until such time as the guaranteed sum or a portion thereof, certified as owing, has been recouped by Blue Waves, whichever is the earlier date.
- [10] Blue Waves sent a letter on 24 October 2023, demanding repayment of the full advance payment and the certified expense and loss claim. Innova ignored the letter and did not pay. Blue Waves then issued a breach notice to Innova on 30 November 2023, giving Innova another seven days to pay the certified amounts. Innova did not respond, neither did it pay to remedy its purported breaches.

- [11] Innova sent a letter on 16 November 2023 stating that it had not received the payment certificates and supporting documents for the direct payments to subcontractors. This was purported to be a breach of contract by Blue Waves.
- [12] On 28 November 2023, Blue Waves issued and provided evidence of all certificates.
- [13] On 7 December 2023 Innova purportedly gave Blue Waves a notice of termination of the agreement on the grounds of the reasons set out in its notice of disagreement and termination.
- [14] Blue Waves contends that at the time of Innova's termination notice on 7 December 2023, Innova was in material breach of the agreement by:
- (a) not paying amounts certified in an interim payment certificate ('IPC') and recovery statement, as recorded in Blue Waves' notice of breach of 28 November 2023 and
 - (b) not completing the works as required under the agreement, as recorded in the letter dated 28 November 2023.
- [15] Blue Waves called up the guarantees on 8 December 2023.
- [16] On 13 December 2023 Blue Waves delivered a letter of demand for payment under the guarantees to Hollard.

SUBMISSIONS OF THE APPLICANTS

Prima facie right

- [17] The applicants contend that they have a *prima facie* right which stems from:
- (a) the termination of the agreement which took place before Blue Waves called up the guarantee, which resulted in the expiry of the construction guarantee.
 - (b) the validity of the interim payment certificate which has been called into question from the outset and a notice of disagreement which was filed.
- [18] It was argued that the agreement provides for a dispute resolution mechanism, namely arbitration which the applicants in the light of a dispute arising, want to pursue and which prevents Blue Waves from jumping the gun by claiming payment from Hollard. It

was contended that it is only after the completion of the arbitration that it can be established whether Blue Waves is entitled to the monies or not.

- [19] The alleged disputes range from whether Innova was on site since March 2023, to whether the JBCC Agreement was cancelled by Innova or not. It was contended that all that is required for this Court to determine is firstly, whether the conditions for payment under the guarantees have been met. If it has not been met, there can be no payment. Secondly, whether there is another basis upon which the Court can grant an order preventing payment.
- [20] It was contended that the conditions for payment under the advance payment guarantee have not been met for the following reasons:
- (a) There are discrepancies in that firstly there are various iterations of interim certificate 11 and secondly, there is a dispute as to whether a 95% completion had been reached,
 - (b) The principal agent issued no less than three iterations of interim certificate 11 and the differences between them are vast. It is alleged by Innova that in respect to the first iteration and the last, the alleged indebtedness doubled.
- [21] Innova disputes the sum(s) which the principal agent certified.
- [22] Innova contended that the disputes raised creates a problem in that the advance payment guarantee, guarantees payment of the full balance outstanding.
- [23] It was contended that the disputes relating to the principle agent's conduct, puts in doubt the veracity of what he claims to be the full amount outstanding. Accordingly, this condition for payment has not been reached.
- [24] It was contended that even if the principal agent's calculations are correct, the question at which percentage the completion of the project remains, is uncertain.
- [25] It was contended that in light of these disputes, the matter needs to stand over for resolution by arbitration and Blue Waves cannot claim payment from Hollard.
- [26] It was contended that arising from the second to fourth applicants entering into a deed of suretyship, should Hollard make payment to Blue Waves, the trustees, acting on

behalf of the Trust, would become liable under the deed of suretyship, notwithstanding that there are disputes which need to be arbitrated.

Apprehension of harm

[27] It was contended that the amount claimed by Blue Waves is substantial and if Hollard pays it would render Innova and the trustees liable. This will have a devastating effect to the business of Innova. In turn, Innova and the trustees will have no defence to Hollard's claim and will find it difficult to recover such from Blue Waves, resulting in a grave injustice. It was contended that the harm suffered to Innova is beyond something which can be rectified by a claim for damages.

Balance of convenience

[28] It was argued that there would be no real prejudice to Blue Waves if the matter was to be ventilated by way of arbitration, as Innova has undertaken to keep the guarantees in place, pending the arbitration. On the other hand, should the interim relief not be granted, the prejudice which the applicants would suffer is axiomatic and severe.

Absence of any other satisfactory remedy

[29] It was submitted that the applicants have no alternative remedy available to them and that unless the order sought is granted, Hollard will proceed to make payment to Blue Waves, pursuant to its demand and all serious and non-reversible consequences would follow.

Submissions of the second respondent

[30] Blue Waves contends that the guarantees are a binding and absolute commitment on Hollard to pay Blue Waves on demand. It was argued that Innova has no legal basis to interfere with Hollard's contractual obligation, on any grounds, except fraud, misrepresentation and non-compliance, particularly on the ground that the underlying disputes between Innova and Blue Waves are subject to arbitration. It was argued that Innova has not established a right to interfere on the basis of any of the above-mentioned exceptions.

- [31] It was further contended that although Innova has framed its application as a final interdict, it has failed to demonstrate a *prima facie* right for a final interdict or the criteria for an interim interdict.
- [32] It was argued that this Court should reject the interdict application entirely and respect the integrity of the guarantees, which are distinct and independent contracts from the building agreement that gave rise to the dispute between the parties.

EVALUATION

- [33] The purpose of an interim interdict is to maintain the status *quo* pending the determination of the rights or the dispute between the parties.¹
- [34] The requirements for an interim interdict are a *prima facie* right, an apprehension of irreparable harm, a balance of convenience favouring the granting of the interim interdict and no other satisfactory or adequate remedy in the circumstances.²
- [35] An on-demand guarantee, such as in the matter *in casu*, ensures the quality of construction or building projects.
- [36] The fraud exception and the autonomy principle were first recognised and addressed by the Courts in the matter of *Loomcraft Fabrics v Nedbank* ('*Loomcraft*').³
- [37] The Court in *Loomcraft*⁴ 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 bank (guarantor) could only avoid payment in rare cases, such as when the employer or beneficiary committed fraud.⁵ The Court ruled that the beneficiary's fraud must be proven beyond doubt. It also said 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. It added that simple

¹ see *National Gambling Board v Premier, Kwa-Zulu Natal and Others* 2002(2) SA 715 CC at para 49.

² see *Setlogelo v Setlogelo* 1914 AD 221, as endorsed in *National Treasury v Opposition to Urban Tolling Alliance* 2012 (11) BCLR 1148 (CC).

³ *Loomcraft Fabrics v Nedbank* 1996 (1) SA 812(A) at 815–816).

⁴ *Ibid.*

⁵ *Ibid* at 815 F–J.

mistakes, confusion or negligence, no matter how unreasonable, did not amount to fraud.⁶

[38] In light of the decision of *Loomcraft*,⁷ the fraud exception would only apply when the documents submitted under the demand guarantee are falsified. The Court did not address if fraud relates only to fraud in the documents or also to fraud in the underlying contract or relationship. *Loomcraft*⁸ did not settle on the exact standard of proof that would be required, except to say that the burden of proof required was the ordinary civil one that had to be discharged on a balance of probabilities. *Loomcraft*⁹ stated that it would apply the fraud exception and withhold payment in cases of interdicts if the documents showed clear evidence of falsification.

[39] 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 payment and, similarly, in interdict proceedings. Therefore, an on-demand guarantee must be honoured in accordance with its terms, without reference to the underlying contract.

[40] In the matter of *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd & others*¹⁰ ('*Lombard*') 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.¹¹ [my emphasis]

⁶ Ibid at 822 G-H.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd & others* 2010 (2) SA 86.

¹¹ Ibid para 20.

- [41] Courts should not focus on the underlying contract when ruling on interdict cases about payment under an on-demand guarantee. The on-demand guarantee has its own rights and obligations that are different, separate, and distinct from the underlying contract.¹²
- [42] The guarantor should not concern itself with the relationship between the contractor and the employer or beneficiary under the underlying contract or interrogate whether the contractor has fulfilled its obligations under the underlying contract.¹³
- [43] In the matter of *Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd*¹⁴ 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.’¹⁵
- [44] An on-demand guarantee is payable on demand, which means that the guarantor, namely Hollard, has to pay the employer or beneficiary, namely Blue Waves, as soon as they demand payment, subject only thereto that the demand meets the particular requirements of the guarantee. Hollard is not entitled to interrogate whether Innova, or Blue Waves actually breached the underlying contract or not.¹⁶
- [45] The Supreme Court of Appeal in the matter of *State Bank of India and another v Denel Soc Limited*¹⁷ stressed the importance of allowing banks to honour their obligations and irrevocable undertakings without judicial interference and that interdicting banks from paying in terms of a guarantee ‘will not usually be granted save in most exceptional cases’.¹⁸
- [46] Fraud on the part of the employer or beneficiary is a well-established exception to the autonomy principle.¹⁹ Our Courts will only intervene when they conclude that payment should be refused on the grounds of such fraud.

¹² see Juta's *Business Law* 127 at 128.

¹³ see *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 QB 159 (CA) at 171A–B and *Coface South Africa Insurance v East London Own Haven* [2013] 202 ZASCA paras [10] and [11].).

¹⁴ *Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd* 2012 (2) SA 537 (SCA).

¹⁵ *Ibid* para 14.

¹⁶ see G Penn ‘On-demand bonds—primary or secondary obligations?’ [1986] 4 *Journal of International Banking Law* 224 at 224.

¹⁷ *State Bank of India and another v Denel Soc Limited* [2015] 2 All SA 152 (SCA).

¹⁸ *Ibid* para 7.

¹⁹ see *Casey v First National Bank Ltd* 2013(4) SA 370 (GSJ) para [17].

- [47] Innova has not claimed fraud as a ground for interference. As a result, as per the above-mentioned case law, the guarantor must follow the terms of the on-demand guarantee strictly.²⁰
- [48] In the matter of *Dormell Properties 282 CC v Renasa Insurance Company Ltd and Another*²¹ ('Dormell') 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.'²²
- [49] The learned Cloete JA, who handed down the dissenting judgment in the matter of *Dormell*,²³ repeated what had been held in the matter of *Lombard*²⁴ 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]
- [50] 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*²⁵ ('Coface') followed the dissenting judgment in the matter of *Dormell*.²⁶

²⁰ see Bennett 'Performance bonds and the principle of autonomy' 1994 Journal of Business Law at 575.).

²¹ *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).

²² Ibid para 39.

²³ Ibid.

²⁴ *Lombard* (note 3 above).

²⁵ *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association* 2014 (2) SA 382 (SCA).

²⁶ *Dormell* (note 21 above).

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

[52] In the matter of *Guardrisk Insurance Company Ltd and Others v Kentz (Pty) Ltd*²⁷ the guarantor of two demand guarantees (a performance and an advance payment guarantee), refused to make payment. It alleged that the demands were made fraudulently by the employer or beneficiary. In dealing with the fraud exception the Supreme Court of Appeal simply relied on and endorsed the *Loomcraft*²⁸ judgment. It unfortunately did not elaborate on the exact meaning and scope of the fraud exception or resolve any of the uncertainties surrounding the fraud exception for example, if it relates only to documentary fraud or also includes fraud in the underlying contract. The Court simply followed the fraud rule in the narrow sense. In *Guardrisk*²⁹ the guarantor failed to prove that the demands were made fraudulently. 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’.³⁰

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 been met, be an ‘accounting’ between the parties to finally determine their rights and obligations.’³¹

[53] The Courts distinguish between ‘fraud’, on the one hand, and ‘innocent breach of contract’, on the other. In the matter of *Phillips v Standard Bank of South Africa Ltd*,³² the Court illustrated that 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.

[54] The Courts have clearly shown that they are prepared, when the fraud exception applies, and, of course, when fraud has been clearly established, not only to interdict

²⁷ *Guardrisk Insurance Company Ltd and Others v Kentz (Pty) Ltd* (94/2013) [2013] ZASCA 182; [2014] 1 All SA 307 (SCA) (14 November 2013).

²⁸ *Loomcraft* (note 3 above).

²⁹ *Guardrisk* (note 27 above).

³⁰ *Ibid* para 28.

³¹ *Ibid*(note 15 above) para 27.

³² *Phillips v Standard Bank of South Africa Ltd* 1985 (3) SA 301 (W) at 304A–B and 304E–F.

the beneficiary from receiving payment or making a demand but also to interdict the bank from paying. But they have also shown that they are willing to go to great lengths to protect the integrity and autonomy principle of letters of guarantees performance.

[55] In the matter of *Kwikspace Modular Buildings Ltd v Sabodala Mining Company Sarl and Another*³³ 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.'³⁴ [my emphasis]

[56] In the matter of *Joint venture Aveng v Sanral*,³⁵ 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*.³⁶

[57] The Supreme Court of appeal in the matter of *Joint Venture*³⁷ did however caution that: '...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.'³⁸ [my emphasis]

[58] *Joint venture*³⁹ held further 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.'⁴⁰ [my emphasis]

³³ *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).

³⁴ *Kwikspace* (note 33 above) para 11.

³⁵ *Joint venture Aveng v Sanral* 2021 (2) SA 137.

³⁶ *Ibid.*

³⁷ *Joint Venture* (note 35 above).

³⁸ *Ibid* para 17.

³⁹ *Ibid.*

⁴⁰ *Joint Venture* (note 35 above) para 27.

- [59] The Constitutional Court in the matter of *National Gambling Board v Premier, Kwa-Zulu Natal and Others*⁴¹ 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, however, the Court cannot interfere with the contractual obligations of parties.⁴²
- [60] From the cases of *Lombard*,⁴³ the dissenting judgment of *Dormell*,⁴⁴ the judgment of *Coface*⁴⁵ and *Guardrisk*,⁴⁶ whatever disputes may subsequently arise between contractor and employer is of no moment insofar as Hollard's obligation is concerned. Hollard's liability is to honour the guarantee when the demand is made.
- [61] In terms of the decisions of *Kwikspace*,⁴⁷ 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, it also stated the following:
 '...The Principal was fully entitled to rely on the indebtedness created in its favour by certificate 10 and to look to the guarantees when this debt was not paid. In other words, it has not been demonstrated that the Principal would be acting in bad faith were it to present the guarantees for payment'.⁴⁸
- [62] In the matter *in casu*, the principal agent allegedly issued no less than three iterations of interim certificate 11 certificate. In line with the decision of *Loomcraft*,⁴⁹ simple mistakes, confusion or negligence, no matter how unreasonable, does not amount to fraud. Even if the calculations are incorrect, it does not prevent Hollard from paying. There are no claims made by Innova that Blue Waves acted dishonestly or with malice in asserting that the applicant was in breach of paying amounts certified by the principal agent.

Prima facie right

⁴¹ *National Gambling Board v Premier, Kwa-Zulu Natal and Others* 2002 (2) SA 715 CC.

⁴² *Ibid* para 49.

⁴³ *Lombard* (note 10 above).

⁴⁴ *Dormell* (note 21 above).

⁴⁵ *Coface* (note 25 above).

⁴⁶ *Guardrisk* (note 27 above).

⁴⁷ *Kwikspace* (note 33 above).

⁴⁸ *Ibid* para 18.

⁴⁹ *Loomcraft* (note 3 above).

- [63] The interdict is final in effect as there is no provision in the relief sought by the applicants for a re-hearing of any aspects of this application by a Court. As a result, the applicants would have to establish a clear right that it will suffer irreparable harm and that it has no alternative remedy if the order is not granted.
- [64] Innova seeks to protect its rights to pursue a dispute concerning issues between itself and Blue Waves relating to the underlying agreement, with specific reference to whether the amounts certified and the manner of certification is correct. Furthermore, whether Blue Waves is in breach of its contractual obligations entitling Innova to terminate the agreement.
- [65] As stated *supra*, these disputes relate to the underlying agreement. None of these disputes or the right to enter into arbitration, provide an adequate basis for interference with the guarantor's obligation to make payment under the guarantees. A demand on the guarantee is valid, regardless of any contractual disputes.
- [66] The issue raised by Innova that the agreement has been terminated, resulting in the expiry of the construction guarantee, is an issue in dispute to be determined by another forum.
- [67] This Court does not find that the applicants have shown that they have a clear, alternatively, a *prima facie* right.
- [68] As a result, this Court sees no purpose in granting the interdict to the applicants, as demand was correctly made by Blue Waves.
- [69] Even if this Court is wrong in this regard, Innova has not made out a case premised on the fraud exception.
- [70] In line with the decision of *State Bank of India*⁵⁰ this is not one of those exceptional cases where an interdict should be granted to stop the calling up of the guarantee.

Irreparable harm

⁵⁰ *State Bank of India* (note 14 above).

- [71] It appears as if Innova does not fully appreciate the purpose and commercial reality of an on-demand guarantee, to which it freely agreed as security against its breaches on the terms set out in the guarantees.
- [72] There could be no harm to Innova, or the other applicants, for Hollard to make payment under the advance payment guarantee. Innova is allegedly currently in breach of its material obligations under the agreement and if Hollard is prohibited from making payment under the guarantees, Blue Waves would be out of pocket for expenses incurred to the sole benefit of Innova. These expenses would be in respect to an advance payment aimed at assisting with mobilizing resources and materials for commencement of the works and direct payments to subcontractors that Innova could not pay itself.
- [73] If the interdict is granted, Blue Waves would be prevented from relying on securities which the parties had specifically agreed on and which can be executed against even where there is an underlying dispute between the parties.
- [74] Irrespective which of the two parties are in breach, the guarantees are independent from any breaches which Blue Waves may or may not have committed. Due to the demand for payment being properly made by Blue Waves, it is entitled to claim an on-demand guarantee.

Alternative remedy

- [75] Innova has at least four alternative remedies available to it.
- [76] Firstly, if Blue Waves unjustly receives the pay out, it will have to repay Innova for any amount unjustly received under the guarantee, with interest. This is in terms of clause 7 of the construction guarantee.
- [77] Secondly, Innova has a right in terms of clause 30 to refer the underlying contractual disputes, such as the certification to adjudication and arbitration.
- [78] Thirdly, Innova can suspend the works under clause 28 where Blue Waves is said to be in breach of its contractual obligations.

[79] Fourthly, Innova can terminate the agreement in terms of clause 29.14 of the agreement.

[80] In accordance with the matter of *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), the applicant will have a satisfactory alternative remedy against Hollard for honouring an unlawful demand.

[81] Even if this Court is wrong and the interim is not final, but interim in effect, this Court finds that the balance of convenience favours Blue Waves as the effect of the interdict is to stay the payment by Hollard indefinitely, pending the outcome of the arbitration proceedings which may take a considerable amount of time to finalise.

Costs

[82] The counsel for Blue Waves 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.

[83] 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

[84] The application is dismissed.
Costs to follow the result including the costs of two counsel.

D DOSIO
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 9 February 2024.

Appearances:

On behalf of the first to fourth applicant: Adv. J.W. Steyn

Instructed by:

MULLER GONSOIR INC C/O GOODES & CO
ATTORNEYS

On behalf of the first respondent:

Adv. K.T Ramela

Instructed by:

MOLL QUIBELL AND ASSOCIATES

On behalf of the second respondent:

Adv. J Wasserman SC

Adv. D.L. Meyer

Instructed by:

BOWMANS ATTORNEYS