



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

Case No:43891/19

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES:
~~YES~~/NO
(3) REVISED: NO

2 February 2024

In the matter between:

DR SOMADODA PATRICK MAYIBONGWE FIKENI N.O.	1 st Applicant
DR GCWALISILE CYNTHIA KABANYANE N.O.	2 nd Applicant
MOROKA ISAAC BUTCHER MATUTLE N.O.	3 rd Applicant
ZANDILE QUEENETTE LAVINIA MDHLADHLANA N.O.	4 th Applicant
MZAMO MICHAEL MLENGANA N.O.	5 th Applicant
MATSHIPSANA MERIAM MOLALA N.O.	6 th Applicant
TLHOTSE ENOCH MOTSWALEDI N.O.	7 th Applicant
NANDISELE FLAVOUR THOKO MPUMLWANA N.O.	8 th Applicant
PHELISA NKOMO N.O.	9 th Applicant
RASHID AMOD SADECK PATEL N.O.	10 th Applicant
ZAKHELE ALEX TUNNY ZITHA N.O.	11 th Applicant

And

LOMBARD INSURANCE COMPANY LIMITED.	1 st Respondent
GROUP FIVE CONSTRUCTION (PTY) LTD <i>(In Business Rescue)</i>	2 nd Respondent

JUDGMENT

NOKO J

Introduction

[1] The first respondent issued a variable construction guarantee¹ (*construction guarantee*) on 23 October 2013 in favour of Independent Development Trust (IDT) for the due fulfilment of the construction work undertaken by the second respondent. The applicants sued out papers for an order directing the first respondent to pay the guaranteed sum of R16 132 194.77² (including vat) as result of the second respondent having committed acts which triggered the calling up of the construction guarantee.

[2] The applicants contend that the construction guarantee is being called up since the second respondent was placed under business rescue alternatively on the basis that IDT incurred expenses as a result of the appointment of another contractor to rectify

¹ Titled: "Variable Guarantee JBCC Principal Building Agreement".

² The construction guarantee was for the sum of R53 773 982.58 which was 10% of the contract value being R537 773 982.58. The guaranteed amount is reduced in accordance with clause 2(a) and (b) of the construction guarantee in terms of which guarantee would be reduced to amount equal to 3% of the contract value (excluding vat) within 21 calendar days of the date of practical completion of the works and further be reduced to amount equal to 1% within 21 calendar days of the final completion of the works. The amount was as the time of hearing reduced to 1% being R5 377 398.25.

some defects and complete the construction work (*outstanding work*) which the second respondent failed to complete.³ The first respondent having refused to effect payment of the guaranteed amount IDT then launched these proceedings on 12 December 2019.

[3] At the initial stage the suit was between the applicant and the first respondent, and the second respondent brought an application for joinder which was granted by Carrim AJ on 6 October 2022.

Parties

[4] The applicants are the trustees for the time being for IDT (also referred to an employer), which is a schedule 2 Major Public Entity in terms of the Public Finance Management Act, with its principal place of business situated at Glenwood Office Park, cnr Oberon and Sprite Streets, Faerie Glen, Pretoria.

[5] The first respondent is Lombard Insurance Company Limited, a public company duly registered in terms of the laws of the Republic of South Africa (registration number 1990/001253/06) with its principal place of business situated at Ground Floor, Building C, Sunnyside Office Park, 2 Carse, O’Gowrie Road, Parktown, Johannesburg.

[6] The second respondent is Group Five Construction (Pty) Ltd (also referred as the contractor) a private company duly incorporated in terms of the laws of the Republic of South Africa (registration number 1974/003166/07) with its principal place of business situated at 2 Eglin Road, Sunninghill, Johannesburg.

³ The nature and details hereof are not in dispute between the parties.

[7] The second respondent is placed under business rescue and its participation in this *lis* is sanctioned by the business rescue practitioners, Petrus Francois Van Den Steen and Dave Lake in terms of section 133 of the Companies Act 17 of 2008.⁴

Background

Prologue

[8] On 1 November 2013 IDT and the second respondent entered into a Principal Building Agreement (*PBA*) for the construction of the Nelspruit High Court building in Mbombela, Mpumalanga Province. The construction contract was for the sum of R537 739 825.76 (vat exclusive).

[9] IDT contended during the proceedings that the anticipated date of opening of the court was on 8 November 2019.

[10] Focus Project Management (Pty) Ltd (*principal agent*) was appointed by IDT as its principal agent to manage and supervise the implementation of the construction work on behalf of IDT. The agent would, *inter alia*, issue monthly interim payment certificates⁵ which will reflect the amount due to the second respondent and also issue recovery monthly statement⁶ to the employer or contractor for any sum recoverable from the other party. In addition, the principal agent would issue practical completion certificate, works completion certificate and final completion certificate.

⁴ See the resolution of the Business Rescue Practitioners at 0018-23. The second respondent having been placed under business rescue through a special resolution taken on 1 March 2019.

⁵ Clause 31.1. provides that '*The principal agent shall issue an interim payment certificate every month until the issue of the final payment certificate. The payment certificate shall be based on a valuation prepared within seven (7) calendar days before the stated date in the schedule which may be for a nil negative amount.*'

⁶ Clause 33.1 provides that '*The principal agent shall issue a recovery statement monthly to the employer and contractor simultaneously with payment certificates. Explanatory documentation as may be necessary to support the calculation of the amounts stated shall accompany the recovery statement. ...*'

[11] The second respondent and its sub-contractors were, towards the anticipated date of opening of the court as set out above, locked into dispute resolution over payments of invoices due to sub-contractors, including CIS (Pty) Ltd (*CIS*).⁷ As a result of this dispute CIS refused to complete portion of the work assigned to it by the second respondent. In view of the looming date of the opening IDT entered into a direct contract with CIS to complete the outstanding the work. IDT paid CIS the amount which was due to it by the second respondent (which was the subject of the dispute with second respondent referred to above) and also paid invoices rendered by CIS for the outstanding work executed pursuant to the direct contract with the IDT. The total amount paid was R2 831 372.91⁸.

[12] Meanwhile the principal agent issued a certificate of practical completion on 3 May 2019 which was followed by the works completion certificate/letter on 12 May 2019. The certificate of works completion was accompanied by a list of defects which would have to be rectified before achieving final completion. The said defects included, '*cracks between copings and waterproofing to roofs*'⁹, (*sic*).

[13] IDT subsequently sent a letter of demand dated 30 October 2019 calling up the guarantee on the basis of the submission that the PBA provided that the construction guarantee would be called up once the court issued an order placing the second respondent under *inter alia*, liquidation or having a similar effect.¹⁰ The letter of demand

⁷ CIS was a sub-contractor to Edison Power Gauteng (Pty) Ltd (*Edison*) and the latter was a sub-contractor to the second respondent.

⁸ See para 75 of the Applicant's Founding Affidavit at 0001-24. The amount was constituted by R1 234 572.50 which was due to CIS by the second respondent and invoices for outstanding work in the sums of R1 463 035.84 and R133 572.50.

⁹ See para 124 of the Applicant's Heads of Argument at 0021-38.

¹⁰ Clause 33.6 of the PBA provides that '*Where a provisional sequestration or provisional liquidation order has been granted or where an order has been granted which commences sequestration, liquidation, bankruptcy, receivership, winding up or any similar effect against the contractor or this agreement is cancelled in terms of 36.0. the employer may issue a demand to the guarantor in terms of the construction guarantee held as security.*'

in addition, sought to call up the guarantee on the basis of the payments effected by IDT to CIS.

[14] The first respondent declined the demand for payment as the letter of demand does not comply with the provisions of the construction guarantee and PBA as the recovery statement setting out the loss or expenses claimed as envisaged by clause 3 of the construction guarantee was not attached. In return IDT submitted a statement of recovery dated 28 November 2019. IDT subsequently proceeded to launch these proceedings on 12 December 2019.

[15] On 31 August 2021 the principal agent issued a final completion certificate which stated that *'[T]herefore, the requested FC (Final Completion) certificate is hereby issued in terms of clause 26.2.1 and the latent defects liability period shall continue from the FC date in terms of clause 27.0. The contractor will be required to complete the latent defects during construction and defects liability period as well as the defects identified during the latent defects period after FC. The following defects are the latent defects identified at FC: 1. Waterproofing; and 2. Potential structural cracks observed in walls.'* The certificate was accompanied by a final account which reflect the amounts due by IDT, which includes amount of R1 728 534.00, payable to the second respondent. The principal agent having deducted the amount which IDT paid to CIS.

[16] The construction guarantee provides that once the certificate of final completion has been issued all payments (if any) effected in favour of IDT would have to be accounted for and further that IDT would then return the original guarantee to the first respondent.¹¹ Now that the certificate of final completion has been issued indicating that

¹¹ See clause 5 of the Construction Guarantee.

IDT is indebted to the second respondent, the first respondent contends that the purpose of IDT's suit is moot.

[17] The second respondent launched a counter application against IDT seeking an order that the amount of R1 728 534.00 stated in the certificate of final completion be paid by IDT. IDT resisted the counter application on the basis that it is irregular and further that on the proper reading of the final certificate of completion the second respondent would have to rectify the defects before the said sum is paid.

Issues

[18] Issues for determination in a truncated format are, first, whether the guarantee is an on-demand or conditional guarantee. Secondly, whether IDT made out a case to call up the guarantee. Thirdly, whether the relief sought by IDT is moot in view of the certificate of final completion is issued. Fourthly, whether the counter application launched by the second respondent is sustainable. These issues will not be dealt with in any specified order.

Relevant clauses.

[19] As a prelude to the parties' submissions, it is imperative to set out clauses germane to this *lis* as specified in both the construction guarantee and PBA.

Construction guarantee.

[20] Clause 3 provides that the first respondent shall pay the guaranteed amount to IDT “... *during the period when a claim is received by the guarantor, on receipt of a written demand from the employer to do so, and which demand the employer may make if the employer has a right of recovery against the contractor in terms of 33.0 of the contract.*”¹²

[21] Clause 2(d) provides that ‘*On the date of payment of the amount in the final payment certificate, the employer shall refund the remaining of the guarantee to the contractor.*’ (Underlining added).

[22] Clause 7 provides that the guarantee would lapse on the date of payment of the amount in the final payment certificate and further that the guarantor’s liability is limited to the guaranteed amount.

PBA

[23] Clause 17.4¹³ provides that IDT would be entitled to enter into an agreement with a third party to complete the work which the second respondent failed to complete. Clause 30.0 provides for circumstances under which IDT would be entitled to demand payment for loss and expenses incurred. Clause 33.1 provides that the principal agent shall issue a monthly recovery statement to the contractor simultaneously with the interim payment certificate. Clause 33.2.2 provides that expenses and loss incurred for having employed another contractor (in terms of clause 17.4) may be claimed from the

¹² Contract in this regard refers to PBA.

¹³ In accordance with clause 17.4 of the PBA which provides that: “*should the contractor fail to proceed with due diligence with a contract instruction, the principal agent may notify the contractor to proceed within five (5) working days from receipt of the notice. Without further notice, on default by the contractor, the employer may employ other parties to give effect to such contract instructions in addition to any other rights that the employer may have. The employer may recover expenses and loss in terms of clause 33.0 resulting from such employment.*”

first respondent. Clause 33.6 provides that IDT would be entitled to call up the guaranteed sum if the second respondent is placed under, *inter alia*, liquidation¹⁴ through an order of court.

Parties' submissions and contentions.

Applicant's Main Claim.

[24] IDT contends that it is entitled to the reduced¹⁵ guaranteed sum on the basis that the second respondent failed to complete its work pursuant to which IDT had to appoint CIS to complete same. The claim is based on clause 17.4 read with clause 33.2.2 of the PBA as referred to above.

[25] The first respondent contends that the claim is for the recovery of expenses and loss claimed in accordance with clause 17.4. of the PBA and was preceded by a letter of demand, dated (30 October 2019) which was not compliant with the provisions of clause 3 of the construction guarantee. The said letter of demand should have been based on the recovery statement¹⁶ issued by the principal agent reflecting the amount due by the contractor for the demand to comply with clause 3 of the construction guarantee.

[26] Further that the attempt by IDT to regularise the defect in the letter of demand by submitting a recovery statement only on 28 November 2019 cannot cure the defect on the demand, which was issued, almost a month earlier on 30 October 2019. In the end this claim should be dismissed.

IDT's alternative claim

¹⁴ See note 10 above.

¹⁵ The applicant averred that the stage as contemplated in clause 2(b) has been reached and the guarantee amount is reduced to R5 377 398.25.

¹⁶ Together with payment certificate for the payment effected to the third party in terms of clause 30.1 of PBA.

[27] IDT's alternative claim is premised on the contention that the second respondent was placed under business rescue and IDT is therefore entitled to call up the guarantee in terms of clause 33.6 of the PBA. IDT contends that an error was made by stating that the second respondent was placed under business rescue through an order of court instead of the director's special resolution. Further that the argument by the first respondent that such a mistake is material and not condonable is unsustainable.

[28] In addition, so the argument continued, clause 33.6 made specific reference to the court order for, *inter alia*, liquidation or an order of similar effect. To this end IDT contends that being placed under business rescue has similar effect with, *inter alia*, liquidation since the status of the entity is changed and further that there is a moratorium on the legal proceedings once such an entity is placed under business rescue.

[29] The first respondent contends that the alternative claim is bound to fail since the second respondent was placed under business rescue through a special resolution and not as per court order as alleged by IDT. In addition, being placed under business rescue is not included in clause 33.6 as a circumstance which will trigger IDT's right to call up the guarantee. The first respondent stated, so argument continued, that clause 33.6 is triggered by an order of court and since there was no court order the demand by IDT predicated on this clause should be construed as *pro non scripto*.

Mootness of IDT's relief.

[30] The first respondent contends that relief sought by IDT is moot as IDT's principal agent has issued a final completion certificate which indicates that IDT is indebted to the second respondent. In the premises any amount which the first

respondent may be ordered by this court to pay, IDT would have to be pay it back to the first respondent since IDT is required to account for all monies which may have not been expended during construction.

[31] Though clause 27 of the PBA provides that the defects liability continues for 5 years after date of final completion, clause 2(d) of the construction guarantee states that it lapses on the date of payment of the amount in the final payment certificate.

[32] The liability of the second respondent, so the argument continued, in relation to IDT now relates to latent defects and construction guarantee does not cover same.

[33] First respondent referred to *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 CC where the court held that the courts should avoid giving advisory opinions on abstract propositions of law. Further that the court adjudicate over matters which are moot where the interest of justice so demands¹⁷ and IDT's case fails to make the cut.

[34] In retort IDT contends that the final completion certificate listed the defects which requires rectification and to this end there are still obligations on the second respondent for the defects outstanding during the construction and defect liability period which cannot be construed as the latent defect incurred after the final completion certificate.

Second Respondent's Counter application

¹⁷ See *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd* 2014 (2) SA 603 (CC) quoted on para 93 of the Respondent's Heads of Argument at 0020-25.

[35] IDT raised two issues contending that the second respondent embarked on a deliberately curated process for it to be joined in these proceedings which is irregular. First, ordinarily a counter application is launched when responding to a claim and it was irregular for the second respondent to launch a counter application which creates an impression that there was a claim against the second respondent. Secondly IDT contends the second respondent did not follow the correct procedure which is prescribed in terms of Rule 13 of the Uniform Rules of Court in its claim. In retort the second respondent contends that Rule 13 of the Uniform rules finds no application in this *lis* and furthermore issues relating to the alleged defects in the application for the intervention/joinder should have been raised before the order was granted.

[36] With regard to the final completion certificate the IDT contends that the principal agent has erroneously issued the certificate of final completion since the said certificate listed the defects which were identified before the certificate was issued and which should have been rectified first.

[37] The second respondent on the other hand contends that IDT's principal agent has issued a final payment certificate which indicates that the work is completed. The certificate indicates that the amount due and payable to the second respondent is R1 728 534.00. In addition, the second respondent further contends that the listed defects have been attended to¹⁸ and principal agent having '*determined that the final completion had occurred on 11 August 2021*'.¹⁹ Furthermore, the report by its own

¹⁸ See para 14 of the Second Respondent's Notice of Counter Application at 0018-10 where it is stated that the second respondent has '*...in fact achieved practical completion on 3 May 2019, thereafter works completion on 12 May 2021 and then final completion of the building works on 11 August 2021 at the Nelspruit High Court*'.

¹⁹ See para 15 of Second Respondent's Notice of Counter-application at 0018-11.

engineer stated that the defects complained of are as a result of lapses in maintenance for which the second respondent is not responsible.²⁰

[38] In any event, so argument continued, the value of the said defects have not been quantified (*illiquid claim*) to justify the basis for IDT to contend that it is entitled to retain the whole sum. To this end the second respondent contends that IDT's attempt to argue set off is unsustainable as '*... the IDT has failed to quantify or provide an expert who is able to demonstrate what the nature of the defect is*'.²¹

[39] IDT resists this claim on the basis that there is still work not completed by the second respondent and as such IDT is entitled to retain the amount aforesaid until the outstanding work is completed or defects being rectified.

Other issues

[40] There is a dispute between the parties as to whether the construction guarantee is a conditional guarantee or a demand bond. Ordinarily, so argues IDT, as the definition of a guarantee policy set out in the definition in terms of section 1(1) of the Short-Term Insurance Act 53 of 1998 means '*a contract in terms of which a person, other than a bank, in return for a premium, undertakes to provide policy benefits if any event relating to the failure of a person to discharge an obligation, occurs*'²². (underling added). IDT has also referred to the definitions of the construction guarantee in the PBA as a guarantee on call and it submits it exist independent of the PBA.

²⁰ See para 23 of the Second Respondent's Replying Affidavit, 0004-12.

²¹ See para 66 of the Second Respondent's Replying Affidavit at 0004-20.

²² See para 48 of the Applicant's Heads of Arguments- at 0021-13.

[41] IDT contends that the contention by the first respondent that the construction guarantee is a conditional guarantee is unsustainable. This was in response to the first respondent having stated that the amount claimed should have been captured in a recovery statement and must be first claimed from the second respondent.

[42] IDT further contended that the guarantee was an on-demand and not conditional guarantee. As such the guaranteed sum was payable once a demand has been made and not dependent on the contract entered into with the second respondent.

[43] The first respondent on the other hand, contends that in interpreting the guarantee IDT incorrectly made reference to the definitions in the PBA and not the terms as set out in the guarantee itself. The respondent further drew a distinction between on demand and conditional guarantee and submitted that *'...where the guarantee, or a bond, is unconditional the liability of the guarantor is established by the demand alone – hence, an “on-demand bond”; assuming, of course, that demand is compliant with the requirements of the guarantee. However, where the guarantee, or bond, is conditional then the liability of the guarantor is not established by the demand alone, but also by compliance with the condition set out in the guarantee'*.²³

[44] In this case, the first respondent argued, the guarantee was conditional to what is set out in clause 3 of the guarantee in terms of which IDT was required to demand in writing the amount which is recoverable from the second respondent in terms of clause 33.0 of the PBA. Further that the letter of demand dated 30 October 2019 did not reflect recoverable amount due by the second respondent. The attempt to regularise the demand through a recovery statement prepared a month later cannot cure the defect lest applicant

²³ See para 10 of the First Respondent's Heads of Argument at 0020-5.

would be entitled to make a demand for the amount due in future as the demand was made in October and liability only arose in November, through the recovery statement.

Legal principles and analysis

Applicants main claim

[45] It is self-evident that the letter of demand is silent with regard to the recovery statement from the principal agent. The argument by IDT seems to be that the requirement for a recovery statement was not necessary since the claim is for the guaranteed sum and not necessarily the expenses incurred. This argument is unsustainable as the claim for the loss and expenses in terms of clause 17.4 read with 33.2.2 would require that the expenses to be listed.

[46] In any event, it appears that in the final calculation by the principal agent, account has been taken of the sum already paid to CIS before determining the total sum due the second respondent. To the extent that the amount claimed by IDT is for the amount which IDT paid to CIS as set out in the recovery statement the IDT's claim would be unsuccessful as there is no longer amount due to IDT. I make this assessment subject to the outcome of this *lis* as is set out below.

Applicant's Alternative claim

[47] The first respondent correctly stated that calling up the guaranteed would have been triggered by an order of court having been issued for, *inter alia*, liquidation or order having a similar effect. In this instance there is no court order to that effect. Secondly, I am not persuaded that the consequences between liquidation and business rescue are similar, and IDT has failed to present an authoritative argument in support of the submission that they are the similar. The fact that the agreement between IDT and second respondent is still valid and enforceable makes an important difference between liquidation and business rescue process.

[48] The situation would be different if the business rescue practitioner has decided to cancel the contract²⁴ in which case IDT would be entitled to call up the guarantee for cancellation as contemplated in terms of clause 33.2.3. of PBA.²⁵ In addition, the suspension of the legal proceedings is not absolutely barred since legal proceedings may be launched with, *inter alia*, consent of the business rescue practitioner alternatively through an order of the court.²⁶ The IDT's alternative claim is, subject to what is set out below, also unsustainable.

Second respondent's claim and mootness of the relief sought

[49] First respondent contends that since the final completion certificate has been issued which reflect that the IDT is indebted to the second respondent there is no longer a valid basis to claim any monies from the first respondent. Final completion is defined

²⁴ In terms of section 136(2) of the Companies Act 71 of 2008.

²⁵ 33.2. 'The employer may recover expense and loss incurred resulting from:
33.2.3. Cancellation of a nominated subcontract in terms of 20.10.'

²⁶ Section 133 of the Companies Act 71 of 2008.

as ‘the stage of completion where in the opinion of the principal agent, the works are free of all defects.²⁷ In addition, clause 26.2 of the PBA provides that where the agent is satisfied that the works has reached final completion stage he shall forthwith issue a certificate of final completion but where same has not been reached the agent shall forthwith issue a defect lists which must be rectified to achieve final completion.

[50] The principal agent went and proceeded to identify latent defects as at issuance of the final completion certificate which are ‘*waterproofing*’ and ‘*potential structural cracks observed in walls*’. (Sic). These defects, as correctly argued by IDT, were already identified in the works completion certificate as they appear on the list reflected on the agent’s certificate of 12 May 2019. In support of the understanding that the defects were identified prior the issuing of the said final completion certificate, the second respondent contends firstly that attempt was made to refer the dispute regarding the said defects for arbitration but was unsuccessful. Further that the issue of the dispute has been noted and mentioned by the second respondent who stated that ‘*[T]he source of the defects has consistently been a matter of contention*’.²⁸ Secondly, the second respondent’s position has always been that the defects are due to lack of maintenance and the second respondent is therefore not liable for their rectification.

[51] The final completion certificate speaks to two aspects, first, latent defects which were identified during the construction and defects liability period which must be completed or rectified by the second respondent. These defects were existing as at date of issuing of the final certificate. Secondly, the certificate further refers to the latent

²⁷ See PBA’s definition and interpretations at 0001-325

²⁸ See para 50 of the second Respondent’s Replying Affidavit at 0004-17. See also para 70 where the Second Respondent contends that the ‘... *none of the reports relied upon are able to identify what the source of the leaks is. In the absence of the identification of the source, there is nothing to be fixed ad there can be no liability on the part of Group Five for a latent defect.*

defects which may be identified during the latent defects period after the *FC* (referring to Final Certificate).

[52] In view of the fact that the principal agent identified those defects before the date of the final certificate and the said finding by the principal agent has not been challenged by the second respondent the latter is liable to rectify them. In addition, the fact that they were identified before the final certificate also implies that the construction guarantee remain extant though limited to the rectification of the defects alternatively until the second respondent has successfully challenged the principal agent's findings that the defects are for the second respondent's account. To this end, IDT is entitled to withhold payment until the defects which were listed before the completion certificate and still existing at the issuance of the final completion certificate have been rectified. It is noted that since the work has not been quantified it is possible that the quantum may even exceed the amount now claimed by the second respondent.

[53] In the premises it also follows that the argument advanced by the first respondent that the issuance of the final certificate brings to finality and the lapsing of the guarantee is unsustainable as the certificate clearly identified defects which must be completed by the second respondent. Noting also that clause 27.1 of the PBA states that '*Defects that appear up to the date of final completion shall be addressed in terms of 24.0 and 26.0*' and the process set herein has to be embarked upon. To this end the contention that the relief sought by IDT is moot is unsustainable and cannot be upheld.

Other issues

[54] The contentions raised by IDT that the joinder application was defective cannot be argued before me as that argument should have been raised before the application for joinder was granted. The proceedings serving before me are not for a review or appeal of the order granted by Carrim AJ.

[55] There are merits in IDT's contention that it is ingenious that a party against whom no claim is made can bring a counter application. Be that as it may IDT did not raise an irregular proceedings and instead opted to engage with the issues raised in the counter application as if there was a claim against the second respondent. Such conduct is construed as condoning the alleged irregularity in the process followed by the second respondent. It is indeed correct that Rule 13 finds no application in these proceedings and the fact IDT has failed to launch irregular proceedings thwarts the wherewithal to take issue with the process undertaken.

[56] IDT further raised the contention by the first respondent that the claim for expenses and loss should first be submitted to the second respondent and be referred to the first respondent only when second respondent is unable to pay in baseless. This is informed by the fact that the PBA states that the principal agent should on monthly basis submit the recovery statement to the parties. It follows that if at the time when the claim was lodged with the first respondent and the second respondent having not paid for whatever reason there would not be any excuse for the first respondent to refuse to pay the guaranteed sum. The payment is not conditional on the second respondent's ability to pay, though if the second respondent pays the recovery amount no further amount would be due to IDT to warrant calling up the guarantee.

[57] Regarding the argument whether the construction guarantee in this instance is an on-demand guarantee or not, it appears that the construction guarantee read with PBA has both demand and conditional guarantee characteristics. It appears that claims set out in clauses 33.1 till 33.5 need to be read in conjunction with the work or performance by the second respondent and therefore construction guarantee cannot be enforced independent of the PBA clauses. On the other hand, the claim to call up the guarantee as contemplated in clause 33.6 is not dependent on the performance of the second respondent and the guaranteed sum would be paid once the second respondent is, as an example, liquidated. The circumstances under clause 33.6 are characteristics of an on-demand guarantee. That notwithstanding the terms and /or conditions set out in the construction guarantee will always prevail.

[58] It was held by the SCA in *Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd* 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 consequences to the guarantor.

[59] In the interpretation of the guarantees by the court IDT referred to several judgments which did not speak directly to the issue at hand. It is noted however that the reference was made to the SCA in *Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd* 2012 (2) SA 537 (SCA) where it was stated that ‘...the requirements of the particular constructions guarantee was absolutely clear and that it had to be fulfilled on its terms.’ IDT further contending that where [T]he formal requirement for payment under the guarantee was not complied with at all, and the appellant was held entitled to refuse making payment under the guarantee’.

[60] It was also held in *Standard Bank of India and Another v Denel SOC Ltd* [2015] 2 All SA 152 at para 7 that a bank issuing an on-demand guarantee is only obliged to pay where a demand meets the terms of guarantee. Such a demand, which complies with the terms of the guarantee, provides conclusive evidence that payment is due.

Epilogue to the analysis

[61] In summing up, the claim by IDT for the payment of the guaranteed amount relative to amount paid to CIS is unsustainable since the demand to call up the guarantee was not accompanied or preceded by the recovery statement. In any event the calculation of the final amount payable to the second respondent the principal agent took into account the amount paid by applicant to CIS.

[62] The claim predicated on clause 33.6 is also unsustainable since there was no order by the court as contemplated in that clause. In addition, being placed under business rescue is not similar to being placed under, *inter alia*, liquidation.

[63] The second respondent's counter application is also bound to fail since the principal agent identified defects in the final completion certificate which existed as at final certificate (and not after the final certificate) which must be rectified by the second respondent. Since the said defects were identified before the final certificate²⁹ the construction guarantee remain extant though limited to those defects. Noting further that clause 7 of the construction guarantee states that the guarantee would lapse on the date of payment of the amount in the final payment certificate.

Costs

²⁹ Or as at *FC* as stated by the principal agent in the certificate.

[64] There is no reason why the costs should not follow the results.

Order

[65] I make the following order:

1. Application against Lombard Insurance Company Ltd for the payment of R5 377 398.25 is dismissed with costs.
2. The second respondent's application against IDT for the payment of R1 728 534.00 is dismissed with costs.

Mokate Victor Noko
Judge of the High Court

This judgement was prepared and authored by Noko J and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **2 February 2024.**

Date of hearing: 4 September 2023

Date of judgment: 2 February 2024

Appearances

For the Applicants:

Adv SJ Bekker SC

Attorneys for the Applicants:

Sikunyana Incorporated.

For the First Respondent:
Attorneys for the First Respondent

Adv CJ Mc Aslin SC
Frese Gurovich Attorneys.

For the second Respondent
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Adv JP Boster
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