Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE HIGH COURT, KIMBERLEY

Case No: 1791/2022
Heard on: 27/10/2022
Delivered on: 13/01/2023

In the matter between:

ABEINSA EPC KAXU (PTY) LTD **APPLICANT**

and

KAXU SOLAR ONE (RF) (PTY) LTD **FIRST RESPONDENT**
ABSA BANK LIMITED **SECOND RESPONDENT**

JUDGMENT

MAMOSEBO J:

[1] The applicant, Abeinsa EPC Kaxu (Pty) Ltd (the applicant), is seeking interim interdictory relief against the respondents, Kaxu Solar One (RF) (Pty) Ltd (the first respondent) and Absa Bank Limited (second respondent) to prevent the first respondent (Kaxu) from demanding payment under the performance bond issued by the second respondent, Absa Bank Limited, in favour of the

first respondent. Absa Bank is cited and joined as a party having a potential interest in the outcome of the application but no substantive relief is sought against it. Absa Bank has played no role in these proceedings.

Issues to be determined

[2] The issues that stand for determination are the following:

2.1 Whether the applicant has met the requirements for the interdictory relief sought; and

2.2 Whether Clause 29.9F of the EPC (Engineering Procurement and Construction) contract restricts Kaxu's right to demand payment under the performance bond issued by Absa Bank in its favour.

[3] On 09 September 2022 the applicant launched an urgent application seeking interim relief interdicting Kaxu from calling on the performance bond with guarantee number 175-02-0170412-G issued by Absa Bank Limited on 25 January 2018 in favour of Kaxu with the last amendment thereto on 03 February 2022. The order was meant to operate as interim relief pending the final determination of the dispute between the applicant and Kaxu as declared in the applicant's notice dated 31 August 2022 as contemplated in Clause 44 of the EPC contract amended and restated on 16 February 2018 and ancillary relief.

[4] The application for an interdict was founded on three propositions:

4.1 first, an underlying contractual dispute, as to whether a defect as contemplated in Clause 29.9F exists, must first be decided in terms of the dispute resolution mechanisms provided for in the contract;

4.2 secondly, Kaxu has no contractual right to call on the performance bond; and

4.3 finally, the applicant has a contractual right to the interdictory relief sought.

[5] The facts in sum are the following. On 02 November 2012 the applicant (contractor) and Kaxu (owner) concluded an EPC contract for the Kaxu Solar One Parabolic Through Power Project (the EPC contract). The applicant was required to construct a 100MW parabolic through a solar power plant at Pofadder, South Africa (the plant). Simply put, to supply and install two Heat Exchangers which form part of the Thermal Energy Storage system referred to by the acronyms “Hex 1” and “Hex 2” and “TES” and collectively referred to as the “HEX Equipment”.

[6] It is common cause that the EPC contract was amended on three occasions: 05 November 2012, 05 March 2015 and 16 February 2018. The terms of the contract are as restated in the 16 February 2018 amended contract. The parties agree that practical completion of the contract was achieved in January 2015 whereas there is a divergence of views pertaining to the date of final completion. According to the applicant, final completion was achieved in February 2018, but Kaxu contends that it was achieved on 01 November 2019 as reflected on the final certificate dated 06 December 2019 annexed to the papers marked “AA5”.

[7] The parties are *ad idem* that the obligations relevant to this application post final completion of the EPC contract pertain to the following:

7.1 specific equipment, termed a HEX;
7.2 the performance bond; and
7.3 alternative dispute resolution.

[8] On 25 January 2018 the applicant procured a performance bond in favour of Kaxu under guarantee number 175-02-0170412-G. The amended performance bond constitutes security in favour of Kaxu in respect of the applicant’s performance of its EPC contractual obligations in the sum of R210,000,000.00 (Two Hundred and Ten Million Rand). In terms of the

guarantee, the only requirement to trigger Absa Bank's obligations is a demand issued by Kaxu to the Bank. Any breach by the applicant of its obligations in terms of the EPC contract would entitle Kaxu to issue such a demand to the Bank and once a demand has been made the Bank must pay Kaxu.

[9] On 21 February 2022 Kaxu addressed correspondence to the applicant alleging that the technical intervention of Alfa Laval was required to remedy the defect in and to the HEX as provided for in Clause 29.9F. Kaxu alleged the following defects and reserved its rights:

9.1 December 2020, remote intervention, a leak on the HTF side in the HEX1;

9.2 March 2021, remote intervention, a leak on the salts side in the HEX 1;

9.3 September 2021, remote intervention, a leak on the salts side in the HEX 1;

9.4 November 2021, on site intervention, internal and external reinforcement; and

9.5 January 2022, remote intervention, a leak on the salts side in the HEX 1.

[10] On 11 August 2022 Kaxu demanded that applicant replace each HEX to its (Kaxu's) satisfaction as provided for in Clause 29.9F(d) and provide proof of such purchase and payment by no later than 12 September 2022. The applicant's contention is that the defects alleged by Kaxu are imaginary and do not accord with Clause 29.9F or at all. Even if they were, so the argument went, they did not require the technical assistance of Alfa Laval because a Reasonable and Prudent Contractor would not have determined that such alleged defects required the technical assistance of Alfa Laval.

[11] In response to the aforesaid demand the applicant declared a dispute on 31 August 2022 and called for the parties' representatives to attempt to resolve the dispute as contemplated in Clause 44 and proposed the dates 08 and 09 September 2022 for the dispute resolution process. The applicant further requested a written undertaking that Kaxu would not call up the performance bond until the dispute for the existence of a defect has been finally determined. That was not done and triggered this application that Kaxu has not met certain conditions in the underlying contract which limited its rights to call up the bond.

[12] It is common cause between the parties, as noted in para 8.1 of Kaxu's answering affidavit and para 13.2 of the applicant's replying affidavit, that performance bond No 175-02-0170412-G constitutes a demand bond. The parties, however, hold divergent views with regards to the calling of the bond. Whereas the applicant is of a firm view that Clause 29.9F of the EPC contract restricts Kaxu's entitlement to call on the performance bond, Kaxu maintains that the performance bond is a standalone agreement between Kaxu and the Bank and that the applicant's right to intervene in Kaxu's rights and obligations under the performance bond are limited. It was argued, on behalf of the applicant, that it is necessary to interpret the provisions of the EPC contract correctly to determine whether a defect existed that requires the intervention of Alfa Laval.

[13] The applicant concedes that the performance bond is a self-contained agreement between Absa Bank Limited and Kaxu and exists independently of the underlying agreement (the EPC contract). The terms of the performance bond[1] quoted in relevant part are the following:

> *"1. Subject to the terms of the Bond, the Issuer irrevocably and unconditionally undertakes to pay to the Beneficiary or its assigns, within 2 Business Days (being a day other than a Saturday or Sunday or official public holiday on which banks are open for general business in Johannesburg) of receipt of the first and all subsequent written demands to the issuer ("Demand(s)") including a*

[1] Annexed to the papers and marked FA3.1 at page 72

statement in the form attached in the Schedule hereto that the Contractor is in breach of its obligation(s) under the Contract, the sum stated in such Demand(s).

2. The Demand(s) shall be prima facie evidence of the Issuer's liability and the amount of the sum or sums which it is liable to pay to the Beneficiary, notwithstanding any objection made by the Contractor or any other person.

3. The Issuer's obligation to make payment under this Bond shall be a primary, independent and absolute obligation and, subject to the Beneficiary having complied with the requirements of clause 7 below, it shall not be entitled to delay or withhold payment for any reason.

…

7. All Demands to be made in accordance with clause 1 of this Bond must be in writing and substantially in the form set out in the Schedule to this Bond and sent by personal delivery, post, airmail post, special courier or facsimile to the Issuer at 15 Alice Lane, Sandton, Johannesburg, 2196 (Marked for the attention of …….[2]); and

(a) any Demand(s) sent by airmail, post or special courier will be deemed (in the absence of evidence of earlier receipt), to have been delivered 5 days after dispatch, it is sufficient to show that the envelope containing such notice was properly addressed, stamped and conveyed to the postal authorities or courier service for transmission by airmail or special courier;

(b) any Demand(s) sent by facsimile is deemed to have been delivered on the date of its dispatch on receipt by the sender of the delivery confirmation report; and

(c) the Issuer may by 5 days written notice to the Beneficiary change its postal or facsimile address or addressee for receipt of such Demand(s).

10. This Bond and any non-contractual obligations arising out of or in connection with it are governed by and are to be interpreted in accordance with South African law….."

[14] Navsa JA, writing for a unanimous court in *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others*[3], had occasion to discuss the nature of an 'on demand' or 'call guarantee', where he said the following:

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[2] I do not deem it necessary to include the name of the person

[3] 2010 (2) SA 86 (SCA) at 90 para 20

'The guarantee by Lombard is not unlike irrevocable letters of credit issued by banks and used in international trade, the essential feature of which 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*** *of sale and assures the seller of payment of the purchase price before he or she parts with the goods being sold.* ***Whatever disputes may subsequently arise between buyer and seller is of no moment in so far 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."* (Emphasis added)

[15] Taking cue from *Lombard* I find that the performance bond and the EPC contract are independent of each other. It is noteworthy that the contracts are concluded by different parties in that in the EPC contract the parties are the applicant and Kaxu whereas in the performance bond the parties are Kaxu and Absa Bank, excluding the applicant. Absa bound itself to pay Kaxu upon demand and the applicant cannot interfere with this obligation. Of significance is that there was no suggestion of fraud on the part of Kaxu. The fact that the EPC contract provides for a dispute resolution mechanism is no *carte blanche* for interference with the calling of the demand guarantee as the two contracts are independent of each other.

[16] The applicant further bases its case on the underlying contract exception. Put differently, that where the underlying contract restricts or qualifies a beneficiary's right to call up the guarantee, a contractor is entitled to interdict a beneficiary from doing so until the conditions in the underlying contract have been met. The Supreme Court of Appeal (the SCA) considered the underlying contract exception in *Kwikspace Modular Buildings Ltd v Sabodala Mining Co*[4] where Cloete JA, considering the Australian law reached this conclusion:

"[11] It therefore seems to me that it can be said with sufficient certainty 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

[4]2010 (6) SA 477 (SCA) at paras 11 and 12

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.

[12] I expressly refrain from considering whether, in view of the decision of this court in Loomcraft Fabrics CC v Nedbank Ltd and Another (which dealt with a letter of credit) and the English decisions referred to therein, in particular, the decision of the English Court of Appeal in Edward Owen Engineering Ltd v Barclays Bank International Ltd (where Lord Denning MR and Browne LJ both said that a performance guarantee is akin to a letter of credit), there is [no] room for a contention that the position in South Africa should be the same as in Australia."

[17] Makgoka JA, writing for a unanimous court, in *Joint Venture Aveng (Africa) (Pty) Ltd/Strabag International GMBH v South African National Roads Agency SOC Ltd*[5] *(SANRAL)* restated our jurisprudence on the nature and effect of letters of credit applicable to performance guarantees to the same effect as follows:

"[7] Our law is well settled, and firmly recognises the autonomy principle, i.e the autonomy of the performance guarantee from the underlying contract. The principle is best expressed in the oft-quoted passage from Lord Denning MR's speech in Edward Owen:

'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 of conditions. The only exception is where there is a clear fraud of which the bank has notice.'

[8] Thus, in Loomcraft, with reference to Edward Owen and other decisions, Scott AJA explained at 815G – J:

'The unique value of a documentary credit, therefore, is that whatever disputes may subsequently arise between the issuing bank's customer (the buyer) and the beneficiary under the credit (the seller) in relation to the performance or, for that matter, even the existence of the underlying contract, by issuing or confirming the credit, the bank undertakes to pay the beneficiary provided only that

[5] 2021 (2) SA 137 (SCA) at 142 paras 7 and 8

the conditions specified in the credit are met. The liability of the bank to the beneficiary to honour the credit arises upon presentment to the bank of the documents specified in the credit, including typically a set of bills of lading, which on their face conform strictly to the requirements of the credit. ***In the event of the documents specified in the credit being so presented, the bank will escape liability only upon proof of fraud on the part of the beneficiary****.'"*

The learned Judge continued at para 17 to state:

"[17] For present purposes, I am willing to assume that there is room in South African law to follow the same path as that taken in Australian and English law, with the clear caveat expressed at the end of para 11 in Kwikspace. The caveat will often provide the basis to resolve the inherent tension between a performance guarantee, framed without conditionality, and usually required in circumstances such as these, and an underlying contract that contains some asserted restriction. Furthermore, 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."

Despite the SCA having considered the underlying contract exceptions in *Kwikspace* and *SANRAL* it has left the door open in respect of an underlying contract exception by not expressly incorporating it as our law. The facts in this case are not of such a nature as to readily accept the underlying contract exception into our law. It is prudent to rather leave the position that each case depends on its own circumstances. Should I be wrong in this finding, I proceed to consider the contention whether Clause 29.9F of the EPC restricts Kaxu of its entitlement to call on the performance bond.

[18] Clause 29.9F, quoted in full, reads:

"29.9F If at any time during the period referred to in GC 29.9E(a), a defect arises or is discovered relating to a HEX, which requires the technical intervention of Alfa Laval (or which a Reasonable or Prudent Contractor would determine requires the technical intervention of Alfa Laval), the Contractor shall:

(a) as soon as reasonably practicable but in any event within 15 Days of such date, deliver to the Owner a surety bond or bond, substantially in the form of Schedule 27 (Form of security) from

an Approved Provider and for an amount equal to 100% of the greater of:

i. the estimated cost to the Owner if it were required to procure a third party to replace and install each HEX and safely isolate the replaced HEX; and

ii. 210 million ZAR, and the Contractor shall ensure that such security is maintained until the later of the expiry of the guarantee referred to in GC 29.9E(a) and the date of completion of any replacement referred to in GC 29.9F. The parties agree that following the completion of the replacement referred to in GC 29.9F(d) below, the amount of this security may be reduced by an amount equal to the actual proven amount which the Contractor has paid in respect of the replacement HEX pursuant to GC 29F(d) below, if(i) such amount is in excess of 14 million ZAR; and (ii) the Owner has received and approved, in writing, proof to the satisfaction of the Owner, that such expenditure is reasonable, exclusively, and directly related to the replacement of the HEX pursuant to the obligations of the Contractor under GC29F(d) below. This reduction of the security is subject to the condition that the value of the security shall never be less than 42 million ZAR. The provisions of GC 10.2 and GC 10.8 shall apply mutatis mutandis to any security provided pursuant to this GC 29,9F as though reference in those clauses to "Security" were references to security provided under this GC29.9F;

(b) immediately repair and/or make good such defect or defects in order to minimise any disruption in the operation or production of the Facility;

(c) immediately procure, in respect of each HEX, replacement HEX which comply with the requirements of this Contract and is otherwise acceptable to the Owner and LTA, and shall promptly provide evidence to the Owner and LTA of such procurement; and

(d) promptly replace each HEX to the satisfaction of the Owner within a reasonable period of time notified by the Owner to the Contractor, including ensuring that the replaced HEX are safely isolated, in each case at its own cost, at times reasonably approved by the Owner and in a manner that causes as little disruption as is reasonably possible to the operation or production of the Facility."

[19] Unlike Clause 5.5 in the *Kwikspace* judgment and Clause 4.2 in the *SANRAL* judgment Clause 29.9F does not deal with any demand under the

performance bond. There is also no provision in clause 29.9F stipulating that the defect in the HEX must first be established by an arbitral tribunal before the applicant can comply with its obligations. In actual fact, there is not even a reference in Clause 29.9F of a dispute resolution process relied upon in Clause 44. A proper interpretation of Clause 29.9F should be contextual and lead to a sensible meaning – see *Natal Joint Municipal Pension Fund v Endumeni Municipality*[6]*.*

[20] The applicant's submission that the existence of a defect must be established prior to the performance bond can be called up defeats the purpose of its existence. Clause 29.9F*bis* stipulates:

> *"Notwithstanding the provisions of GC29.9F above, the parties agree that in the event that such does not occur prior to final completion, the contractor shall deliver to the owner the security pursuant to the provisions of GC 29.9F(a) as a condition to final completion, as more fully described in paragraph (f) of the definition of final completion.*

[21] It must be borne in mind that the communication (of the performance bond) was scheduled for completion by 01 November 2019. There is a requirement that the performance bond should be kept valid until October 2024. It is incomprehensible why the applicant would provide the performance bond unless the parties agreed to the performance bond to cater for a situation where the applicant's breach of the PEC Contract is in dispute and the respondent needs to replace the HEX.

[6]2012 (4) SA 593 (SCA) at 603 para 18

[22] Clauses 10.8 and 29.7 of the EPC contract annexed as RA1 to the papers[7] entitled Kaxu to call up the performance bond in the event of a breach without requiring Kaxu to first resort to resolving the dispute as contemplated under Clause 44. The contention by the applicant that the parties do not have to perform their obligations until the dispute has been resolved through arbitration does not accord with Clause 44.36 which states that *'despite the existence of a dispute, the parties must continue to perform their respective obligations under the contract'.* It therefore means that the interpretation that the applicant attached to the Clause is misplaced. A close scrutiny of Clause 29.9F (at para 18 above) postulates a measure of expedition or promptness as implicated by the words used in clauses:

(a) In clause 29.9F(a): *"as soon as reasonably practicable but in any event within 15 days……";*
(b) In clause 29.9F(b): "*……..immediately repair…."*
(c) In clause 29.9F(c): "…..*immediately procure.."*
(d) In clause 29.9(d): "…..*promptly replace….."*

Counsel for Kaxu argued that if the contention by the applicant is correct that the correct interpretation of clause 29.9F is that it should first be determined through arbitration whether there is a defect in the HEX before any of the obligations can be performed then all the emphasised words in the aforementioned clauses would lose their plain meaning. It is also not part of the Australian law nor South African law that a dispute must first be determined through arbitration before a respondent can demand payment under a performance bond.

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[7] Clause 10.8 The owner has the right to draw down, and, at the owner's discretion, apply he proceeds in remedying any breach of this contract:
10.8.1 all or part of the value of the Security in GC 10.1 and/or the cash retention in GC10.5 where a contractor default has occurred and such contractor default has not been waived or cured (to the satisfaction of the owner); and
10.8.2 all of the value of the Security in GC 10.1 and/or the cash retention in GC 10.5 in the event of the occurrence of a Warranty Claim Trigger Event or Performance Trigger Event.
29.7 If the contractor fails within a reasonable time to commence the work necessary to remedy the defect or omission or any damage to the facility caused by the defect or omission, the owner may proceed to do the work or engage another party to do the work, and the costs, including incidental costs, incurred by the owner as a result will be debt due and payable to the owner on demand and may be deducted from any payments otherwise due from the owner to the contractor. The owner may also have recourse to the Security provided under this contract.

[23] The remarks by Cloete JA in *Kwikspace*[8] are relevant:

> *"[13] The next question is whether the contractor is correct in asserting that GC 5.5 [the equivalent of Clause 29.9F in that case] in fact qualified the principal's right to present the guarantees. The contractor submitted that the clause required that an actual enforceable right be vested in the principal before it would be entitled to present the guarantees for payment, and that it was not sufficient for the principal to assert that it bona fide believed that it did have such a right; and accordingly, the right could only be enforced, if it were disputed, once the dispute had been finally settled by arbitration or a court. This contention is wrong in fact and in Australian law."*

It is not for Kaxu to prove its entitlement to demand payment under the performance bond. The only requirements are for Kaxu to be *bona fide* in its statement when making the demand and that the applicant is in breach, which approach accords with *SANRAL*[9].

I therefore find that the applicant's interpretation of Clause 29.9F would lead to insensible or unbusinesslike results or undermines the apparent purpose of the contract[10].

The requirements for interdictory relief

[24] The applicant is seeking interim interdictory relief. It is trite that in an application for an interdict, an applicant must show that the following requirements have been met:

(a) a *prima facie* right;

(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

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[8]Ibid para 13
[9]Ibid at paras 22 and 27
[10]Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at 603 para 18

(c) a balance of convenience in favour of the granting of the interim relief; and

(d) the absence of any other satisfactory remedy. See *Setlogelo v Setlogelo*[11] .

[25] However, the relief sought by the applicant is, in my view, final in effect and demands that it must establish, on a balance of probabilities, not only that it has a clear right as opposed to a *prima facie* right but also a real injury committed or reasonably apprehended one and an absence of any satisfactory remedy available to such applicant. Save for the applicant claiming to have declared a dispute to be dealt with through a dispute resolution mechanism it has not made provision for any aspects of this application being heard by a Court. It is not discernible from the papers which right the applicant is seeking to protect. Further, the issue for determination is not whether the defect in the HEX exists but rather whether Clause 29.9F restricts the respondent's right to demand payment under the performance bond. This issue is not before the arbitral tribunal but before this Court.

[26] The contention by the applicant in dealing with the aspect of irreparable harm is found at para 58 of the founding affidavit where this averment is made:

> *"58. As stated above, the second respondent [Absa] will upon the call, pay the first respondent R210 000 000.00. The applicant will thereafter (and immediately) be indebted to the second respondent in the same amount. This will have a devastating impact on the applicant's business operations and, indeed, on the applicant's ability to carry on business."*

Notwithstanding that Kaxu challenged this averment in its answering affidavit on the basis that those were merely bald assertions without any evidence to substantiate any prejudice, in its reply the applicant only states that Absa did not and will not donate R210 million to the applicant. This leaves the attack

[11] 1914 AD 221 at 227

on lack of prejudice unanswered. The applicant could and should have advanced some form of evidence or explanation to support the assertion that a debt of R210 million would impact on its ability to carry on its business. It is not for this court to speculate on the potential irreparable harm. Counsel for the applicant submitted that the calling up of the bond will essentially amount to "pay now and argue later" is in itself prejudicial to the applicant. This submission loses sight of the fact that this is a demand guarantee in accordance with *Lombard.* Whatever disputes may subsequently arise between the applicant and Kaxu is of no moment in so far as the bank's obligation is concerned. The bank's liability to Kaxu is to honour the credit. The bank's obligation is wholly independent of the underlying contract.

[27] Pertaining to the requirement of no alternative remedy available the applicant has not made out a case either. Our law recognises that where a party receives monies under a performance bond to which it is not entitled, that party will be obliged to refund the party that is out of pocket. See *Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others NNO*[12]*; FirstRand Bank Ltd v Brera Investment CC*[13]*; Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association*[14]*.* The SCA in *Eskom Holdings SOC Ltd v Hitachi Power Africa*[15]

[28] The applicant declared a dispute it wishes to have resolved as contemplated in Clause 44 of the EPC contract. That dispute pertains to whether or not the leaks experienced in the HEX Equipment from December 2020 to January 2022 were defects and whether or not the manufacturer of the HEX Equipment, Alfa Laval, was technically required to repair the leaks. It is noteworthy that the applicant neither dispute the leaks and that the HEX Equipment leaked nor that Alfa Laval attended to the leaks. I am not called upon to decide whether the HEX leaked or whether the leak was a defect that warranted technical intervention of the manufacturer. I am further not called upon to make a finding in relation to a breach of the EPC contract by

[12]2011 (1) SA 70 (SCA) at paras 64 and 65
[13]2013 (5) SA 556 (SCA)
[14]2014 (2) SA 382 (SCA)
[15]2013 JDR 2011 (SCA) at 23

the applicant. It is significant to note that Kaxu has not made any demand under the performance bond to the bank and at this stage the relief sought is merely based on assumptions.

[29] In *Eskom Holdings SOC Limited v Hitachi Power Africa (Proprietary) Ltd and Another*[16] Mthiyane AP remarked:

> *"[12] Construction guarantees have been the subject of discussion in a number of decisions of this Court and the high court. It is necessary to establish at the outset the nature of the guarantee involved in the present matter. In Minister of Transport and Public Works, Western Cape, & another v Zanbuild Construction (Pty) Ltd & another 2011 (5) SA 528 (SCA) paragraph 14 [also reported at [2011] JOL 26880 (SCA) – Ed], Brand JA noted that our law is English law as 'conditional bonds' and 'on demand bonds' respectively). There are differences between the two. A claimant under a conditional guarantee is required, not only to allege but sometimes also to establish liability on the part of the contractor for the amount claimed. An on demand guarantee requires no allegation of liability on the part of the contractor under construction contracts. All that is required for payment is a demand stating the claimant's compliance with the terms of the guarantee."*

[30] The applicant relies on the express terms of Clause 29.9F, properly interpreted, in asserting that the contract is restraining Kaxu from calling up the bond. I have already found that the interpretation suggested by the applicant would lead to unbusinesslike results. The importance of allowing banks to honour their obligations under irrevocable credits without judicial interference was stressed in *Loomcraft* where it was stated that an interdict by the buyer to restrain a bank from paying under a letter of credit would not be granted save in the most exceptional cases.[17]

[31] I am not persuaded that the applicant has shown a right which emanates from a contract. Neither has it substantiated the potential of irreparable harm it would suffer. I therefore come to the conclusion that the applicant has not made out a case for interim relief as stated in the notice of motion. This application stands to fail.

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[16][2016] JOL 37713 (SCA) at para 12
[17]Ibid at 816D-H

[32] On the question of costs. There is no reason why costs should not follow the result.

[33] In the result, the following order is made:

The application is dismissed with costs, such costs to include the employment of two counsel.

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M C MAMOSEBO

JUDGE: NORTHERN CAPE HIGH COURT

On behalf of the Applicant:	Adv Jasper Daniels SC (with him Adv Chérie de Villiers-Golding)
Instructed by:	Cox Yeasts Attorneys c/o Duncan & Rothman Inc
On behalf of the Respondent:	Adv CJ Mc Aslin SC (with him Adv A Botha)
Instructed by:	Bowman Gillfillan Inc c/o Engelsman Magabane Inc