THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 94/2013
Reportable

In the matter between:

GUARDRISK INSURANCE COMPANY LTD First Appellant

BROSEAL PROPERTIES (PTY) LTD Second Appellant

KAIROS INDUSTRIAL HOLDINGS (PTY) LTD Third Appellant

THEODOR WILHELM VAN DEN HEEVER NNO Fourth Appellant

& OTHERS

and

KENTZ (PTY) LTD Respondent

Neutral citation: *Guardrisk Insurance Company Ltd* v *Kentz (Pty) Ltd* (94/2013) [2013] ZASCA 182 (29 November 2013)

Coram: Navsa ADP, Shongwe, Theron, Saldulker JJA and Meyer AJA

Heard: 14 November 2013

Delivered 29 November 2013

Summary: **Construction guarantee - similar to letter of credit - obligation independent of underlying contract - payment to be made if conditions in guarantee met - guarantor can only escape liability on proof of fraud on part of beneficiary.**

ORDER

On appeal from: South Gauteng High Court, Johannesburg (De Wet AJ sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel, which costs are to be paid jointly and severally by the appellants, the one paying the others to be absolved.

JUDGMENT

THERON JA (NAVSA ADP, SHONGWE, SALDULKER JJA and MEYER AJA concurring):

[1] This appeal, with the leave of the court below, turns on the interpretation and application of two construction guarantees that were issued by the first appellant, Guardrisk Insurance Company Ltd (Guardrisk), in favour of the respondent, Kentz (Pty) Ltd (Kentz), at the behest of Brokrew Industrial (Pty) Ltd (Brokrew). The factual background to the dispute between the parties is set out hereafter.

[2] Kentz was one of the contractors involved in the construction of a new power generation plant, the Medupi Power Station, for Eskom, a state-owned electricity public utility company. During September 2008, Kentz entered into a written construction contract (the construction contract) with Brokrew (the contractor) relating to the supply of ducting at Medupi. In terms of clause 4.2 of the construction contract, Brokrew was obliged, at its own cost, to secure 'an irrevocable, on demand bank guarantee or a demand guarantee from a recognised financial institution' for proper performance. This guarantee was referred to as the performance guarantee. Clause 14.2 of the construction contract, which relates to the advance payment guarantee, contains words almost identical to that of clause 4.2 already referred to. It was common cause that Kentz had paid Brokrew an amount of R17 million after the advance payment guarantee had been issued by Guardrisk and submitted to Kentz. The advance payment was to facilitate commencement of the works by Brokrew, under the contract. This is typical of what is commonly referred to as construction guarantees.

[3] It was common cause that Brokrew experienced severe financial difficulties which impacted on its ability to perform its obligations under the construction contract. As at 31 January 2010, Brokrew's liabilities exceeded its assets by more than R44 million. On 5 March 2010, Brokrew advised Kentz that unless the terms of the contract were renegotiated, it would not be in a position to perform its obligations in terms thereof.

[4] On 24 February 2010 Kentz addressed a letter to Brokrew, relevant portions of which read:

> '1. You have plainly demonstrated your intention not to continue with performance of your obligations under the Contract and/or your intention to abandon the Contract and have admitted that you have become insolvent .... Alternatively, by your conduct, you have repudiated the contract and we are entitled to accept same and cancel the Contract. *Our rights in this regard are reserved.*
>
> 2. Furthermore in clauses 4.1(a) and (*b*) of the Contract you warranted that you have the finances to perform the work and that you have a sufficient number of appropriately qualified [staff] .... You are insolvent by your own admission, are clearly unable to finance the performance of the Works, are in the process of reducing the personnel that are necessary for the execution of the Works in accordance with the contract and within the date of completion and have advised that you intend ceasing production. *Without prejudice to our right to cancel* as aforesaid, unless you remedy these material breaches of clause 4.1 of the contract within 7 (seven) calendar days we intend exercising our right to cancel in terms of clause 15.2 (g) ….
>
> 4. In terms of clause 4.1 of the Contract you are required to execute and complete the Works in accordance with the Contract. You advised us on 23 February 2010 that you intend suspending deliveries pending the finalisation of an audit. You have now suspended deliveries which constitutes a further material breach of the Contract. *Without prejudice to our rights to cancel* as aforesaid, unless you remedy this material breach of clause 4.1 of the Contract within 7 calendar days, we intend exercising our right to cancel in terms of clause 15.2(g)....' [Emphasis added.]

[5] On 9 March 2010 Kentz addressed a further letter to Brokrew in terms whereof it cancelled the contract, with immediate effect. On 11 March 2010 Brokrew's attorneys addressed a letter to Kentz, in which it disputed Kentz's entitlement to cancel the contract, recorded its contention that Kentz thereby repudiated the contract and accepted Kentz's repudiation of the contract whereupon *it* purported to cancel the contract. It also alleged that Kentz's call on the guarantees was fraudulent given the latter's knowledge that it was not entitled to cancel the contract.

[6] On 3 and 9 March 2010, respectively, Kentz made demand for payment in terms of the guarantees. Guardrisk resisted Kentz's claims on the basis that the claims were fraudulent. In April 2010, and in consequence of the non-payment, Kentz instituted motion proceedings against Guardrisk in the South Gauteng High Court, Johannesburg, in which it claimed payment in terms of the guarantees. In May 2010, Brokrew applied for and was granted leave to intervene as a second respondent in the proceedings in the high court. Guardrisk subsequently issued third party notices against Brokrew and the second and third appellants, Broseal Properties (Pty) Ltd (Broseal) and Kairos Industrial Holdings (Pty) Ltd (Kairos), respectively. Guardrisk relied upon a counter indemnity in its favour executed by Brokrew for its claim against the latter and an indemnity and deed of surety for its claim against Broseal and Kairos. The third party notices were not opposed and Broseal and Kairos were subsequently joined as third parties in the proceedings in the high court.

[7] Prior to the hearing of the matter in the high court, Brokrew was finally liquidated and at the hearing it was represented by its liquidators. The high court (De Wet AJ) found that the evidence had failed to establish that Kentz, in making demand for payment under the guarantees, had acted fraudulently. It further found that Guardrisk was obliged to make payment in terms of the guarantees and accordingly granted

judgment in favour of Kentz. It also made an order in favour of Guardrisk in terms of the indemnities and deed of suretyship. It is that order that is before us.

[8] Shortly before the hearing of this appeal, the liquidators of Brokrew applied to this court, in terms of SCA rule 11(1), for an order, inter alia, that they be joined as the fourth appellant in these proceedings. That application was not opposed and was granted.

[9] It was contended on behalf of the second, third and fourth appellants that the guarantees were in the nature of payment guarantees rather than performance guarantees. It was argued that what Guardrisk had secured was payment of the amounts payable to Kentz by Brokrew under the construction contract and that the guarantees were thus inextricably linked to the construction contract. For this reason, so the argument went, the guarantees required an allegation of liability on the part of Kentz. The nub of the argument was that the guarantees were 'conditional' rather than 'on demand' guarantees. English authorities refer to unconditional guarantees as 'on demand' bonds and our courts have sometimes used the same terminology.[1] Guardrisk did not associate itself with these arguments.

[10] The essential difference between these two types of bonds was described by Brand JA in *Minister of Transport and Public Works, Western Cape & another* v *Zanbuild Construction (Pty) Ltd & another* as follows:

'... [A] claimant under a conditional bond is required at least to allege and - depending on the terms of the bond - sometimes also to establish liability on the part of the contractor for the same amount. An "on demand" bond, also referred to as a "call bond",

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[1] *Minister of Transport and Public Works, Western Cape & another v Zanbuild Construction (Pty) Ltd & another* 2011 (5) SA 528 (SCA) para 14.

on the other hand, requires no allegation of liability on the part of the contractor under the construction contracts. All that is required for payment is a demand by the claimant, stated to be on the basis of the event specified in the bond.'[2]

[11] In order to determine the nature of the guarantees in this matter, regard must be had to their terms[3]. I therefore turn now to that enquiry. In terms of both guarantees, Guardrisk bound itself as principal in favour of the employer (Kentz). It confirmed that it held the guaranteed sums 'at the disposal of the Employer, as security for the proper performance by the Contractor of all its obligations in terms of and arising from the contract'. Guardrisk undertook to pay to Kentz the guaranteed sums, upon demand from the latter. Such demand had to be in writing and contain a statement that the demand amount was payable to the employer in terms of the contract and that the contractor was in breach of its obligations under the contract. Further relevant terms of the guarantees are the following:

> '4. Notwithstanding the reference herein to the Contract the liability of the Financial Institution in terms hereof is [as] principal and not as surety and the Financial Institution's obligations to make payment:
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> a) Is and shall be absolute and unconditional in all circumstances; and
> b) Is not, and shall not be construed to be, accessory or collateral on any basis whatsoever.'

[12] Clause 5(c) is of importance as it provides that compliance by the Financial Institution with any demand for payment made in terms of the guarantee 'shall not be delayed, by the fact that a dispute may exist between the Contractor and the Employer'.

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[2] Ibid, para 13.

[3] Ibid,para 14

The two guarantees are identical in their material provisions.

[13] The terms of the guarantees are clear. They create an obligation on the part of the guarantor (Guardrisk) to pay Kentz (the employer) on the happening of a specified event.[4] It was recorded in the guarantees that notwithstanding the reference to the construction contract, the liability of the bank as principal is absolute and unconditional, and should not be construed to create an accessory or collateral obligation. The guarantees go further and specifically state that the bank may not delay making payment in terms of the guarantees by reason of a dispute between the contractor and the employer. The purpose of the guarantees was to protect Kentz in the event that Brokrew could not perform its obligations in terms of the construction contract.

[14] In *Lombard Insurance Co Ltd* v *Landmark Holdings (Pty) Ltd & others,* Navsa JA described a guarantee very similar to the performance guarantee in this matter as:
'... 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 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.'[5]

[15] In the circumstances, the argument advanced by Broseal and Kairos regarding the conditional nature of the guarantees must fail. The guarantees in this matter are

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[4] *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd & others* 2010 (2) SA 86 (SCA) para 19.
[5] *Lombard Insurance*, supra, para 20.

unconditional and must be paid according to their terms. The only basis upon which Guardrisk can escape liability is to show proof of fraud on the part of Kentz.

[16] The argument presented on behalf of Guardrisk, can be summarised as follows. Each of the guarantees relied upon by Kentz requires the latter to, inter alia, state that the amount claimed was payable to the employer in terms of the contract and that the contractor was in breach of its obligations under the contract. Guardrisk argued that the statements by Kentz in each of its demands to Guardrisk, to the effect that the amount claimed was payable to Kentz in terms of the construction contract with Brokrew, were material, knowingly false and constituted a fraud on both Kentz and Brokrew.

[17] It would be useful to briefly consider the legal position in relation to the fraud exception. It is trite that where a beneficiary who makes a call on a guarantee does so with knowledge that it is not entitled to payment, our courts will step in to protect the bank and decline enforcement of the guarantee in question. This fraud exception falls within a narrow compass and applies where:

> ‘ ... the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his (the seller’s) knowledge are untrue.’[6]

[18] Insofar as the fraud exception is concerned, the party alleging and relying on such exception bears the onus of proving it. That onus is an ordinary civil one which has to be discharged on a balance of probabilities, but will not lightly be inferred.[7] In

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[6] Per Lord Diplock in *United City Merchants (Investments) Ltd & others v Royal Bank of Canada & others* [1982] 2 All ER 720 (HL) at 725g. See also *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd & others* 2010 (2) SA 86 (SCA) para 20.

[7] *Loomcraft Fabrics CC v Nedbank Ltd & aonth*er 1996 (1) SA 812 (A) at 817E-F.

Loomcraft Fabrics CC v *Nedbank Ltd & another*[8] it was pointed out that in order to succeed in respect of the fraud exception, a party had to prove that the beneficiary presented the bills (documents) to the bank knowing that they contained material misrepresentations of fact upon which the bank would rely and which they knew were untrue. Mere error, misunderstanding or oversight, however unreasonable, would not amount to fraud. Nor was it enough to show that the beneficiary's contentions were incorrect. A party had to go further and show that the beneficiary knew it to be incorrect and that the contention was advanced in bad faith.[9]

[19] This court was referred to the remarks made by Lord Denning MR in *Edward Owen Engineering Ltd* v *Barclays Bank International Ltd*[10] to the effect that performance guarantees are virtually promissory notes payable on demand, very similar to letters of credit. In that case, Lord Denning added:

'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.'[11]

That this is the legal position was restated by this court in *Lombard Insurance*[12]*.* At the hearing of this matter, it was accepted by the respective legal representatives, that our

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[8] Ibid at 815G-816G

[9] *Loomcraft* at 822G - 823C.

[10] *Edward Owen Engineering Ltd* v *Barclays Bank International Ltd* [1978] 1 All ER 976 (CA).

[11] At 983.

[12] Para 20

law and English law accord in this regard.

[20] Guardrisk contended that the demands under the guarantees were fraudulent as Kentz had not given Brokrew adequate notice within which to remedy the breaches alleged by it. It was argued that Kentz had elected not to rely on its right to summarily terminate the construction contract. Instead, and in terms of the letter dated 24 February 2010, it gave Brokrew seven days written notice to remedy its alleged breaches, when it was, in terms of clause 15.2(d)[13] of the contract, obliged to provide 28 days written notice to Brokrew. Furthermore, so the argument went, Kentz had failed to comply with the provisions of clause 2.5[14] of the construction contract in that it had not given notice to Brokrew of the clause it intended to rely upon and the amount that was to be paid to it in terms of clause 2.5. For these reasons, it was contended that the termination of the contract by Kentz was premature and unlawful.

[21] It was common cause that during March 2010, Brokrew had informed Kentz that unless the terms of the building contract were renegotiated, it could not perform its obligations in terms of the building contract. Clause 15 of the building contract regulates the termination of the contract by the employer. It also sets out different notice periods in respect of various breaches. Clause 15.2(b) states that the employer shall be entitled

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[13]Clause 15.2(d) provides that the employer shall be entitled to terminate the contract if the contractor:
'commits a material breach of the Contract and fails to remedy same within 28 days after the Employer giving
written notice requiring it to be remedied

[14]Clause 2.5:
'If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, the Employer or the Engineer shall give notice and particulars to the Contractor. However, notice is not required for payments due under Sub-Clause 4.19 *[Electricity, Water and Gas],* under Sub-Clause 4.20 *[Employer's Equipment and Free-Issue Material*] or for other services requested by the Contractor.
The particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount to which the Employer considers himself to be entitled in connection with the Contract.'

to terminate the contract if, inter alia, the contractor:

> ‘abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract ... the Employer may, on notice to the Contractor, terminate the contract immediately.’

In my view, Brokrew had clearly demonstrated its intention not to continue performing its contractual obligations and Kentz was entitled to cancel the building contract immediately. That is exactly what it did on 9 March 2010 and the letter of that date records the following:

> ‘ ... we [Kentz] hereby give you [Brokrew] notice of the termination of the Contract in terms of clause 15.2 thereof with immediate effect.’

This letter makes cancellation immediate. The earlier letter of 24 February 2010, referred to in para 4 above, expressly records that Kentz was entitled summarily to cancel the building contract and that it reserved its rights in that regard. The letter went on to record certain specific breaches which Brokrew was called upon to remedy within seven days. It is clear from the terms of the letter that in respect of each breach enunciated therein, Kentz expressly recorded that it was without prejudice to its right to cancel the building contract summarily.

[22] In my view, Guardrisk has not established the fraud exception. In fact, what it has sought to do is to have this court determine the rights and obligations of the parties in relation to the construction agreement, which on the authorities, this court is precluded from deciding. The finding by the high court that the appellants had not discharged the onus resting on them to establish fraud on the part of Kentz cannot be faulted. I agree with the reasoning of the high court that:

> ‘The evidence before court clearly demonstrates that Kentz held the view that it was entitled to lawfully pursue its claims under the guarantees. The mere fact that it pressed its claims knowing that Brokrew held a contrary view about the cancellation with which it disagreed is not fraudulent.’

[23] As already pointed out, a valid demand on an unconditional performance guarantee creates an obligation on the bank to make payment in accordance with the terms of the guarantee. Mindful of that principle, the appellants nevertheless urged this court to have regard to the decision of the majority in *Dormell Properties 282 CC* v *Renasa Insurance Co Ltd & others NNO.*[15] It was submitted that the principles of practicality enunciated by the majority in that decision ought to be applied to the present matter and the issues concerning the rights and obligations of the parties to the construction contract should be determined as all the parties are before the court and the disputes between Kentz and Brokrew have been crystallised and are capable of determination.

[24] In *Dormell*, this court considered whether or not Dormell was entitled to persist in claiming payment of a guarantee notwithstanding the fact that it had subsequently been found (after the trial in the high court) during an arbitration between it and the contractor that it had not been entitled to cancel the contract and that its cancellation constituted a repudiation thereof. The majority of this court held that Dormell had lost the right to enforce the guarantee and that there remained no legitimate purpose for which the guaranteed sum could be applied and that ordering Renasa (the guarantor) to honour the guarantee in such circumstances would amount to an academic exercise without practical effect in as much as Dormell would have to repay the full amount to Renasa

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[15] *Dormell Properties 282 CC v Renasa Insurance Co Ltd & others NNO* 2011 (1) SA 70 (SCA).

immediately thereafter.[16]

[25] This court in *FirstRand Bank Ltd* v *Brera Investments CC* [17]stated that the better approach is that of the minority in *Dormell.* I agree. Malan JA, writing for the court in *Brera Investments*, supported the reasoning of Cloete JA who wrote the minority judgment, and quoted the following passage of that judgment with approval:

'Once the appellant [the beneficiary] had complied with clause 5 of the guarantee, the first respondent [the guarantor] had no defence to a claim under the guarantee. It still has no defence. The fact that an arbitrator has determined that the appellant was not entitled to cancel the contract, binds the appellant - but only *vis-á-vis* the second respondent [the employer]. It is *res inter alios acta* so far as the first respondent is concerned. As the cases to which I have referred above make abundantly clear, the appellant did not have to prove that it was entitled to cancel the building contract with the second respondent as a precondition to enforcement of the guarantee given to it by the first respondent. Nor does it have to do so now. (para 64)

For these reasons, it is not in my view bad faith for an employer, who has made proper demand in terms of a construction guarantee, to continue to insist on payment of the proceeds of the guarantee, when the basis upon which the guarantee was called up has subsequently been found in arbitration proceedings between the building owner and the contractor to have been unjustified. I would add that the fact that the arbitrator's award is final as between the appellant and the second respondent does not mean that it is correct, or that the appellant would have to set it aside before calling up the guarantee, much less that the appellant is acting in bad faith in seeking to enforce payment under the guarantee against the first respondent, (para 65)'[18]

[26] The reasoning of the majority in *Dormell* is flawed. In reaching the conclusion

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[16] *Dormell Properties 282 CC v Renasa Insurance Co Ltd*, paras 41 and 45.

[17]FirstRand Bank Ltd v Brera Investments CC *2013 (5) SA 556 (SCA) para 10.*

[18]

that ordering Renasa to honour the guarantee would amount to an academic exercise without practical effect, the majority referred to and relied upon the following passage from I N D Wallace *Hudson's Building and Engineering Contracts* 11 ed (1994) vol 2 para 17.078, quoted in *Cargill International SA & another* v *Bangladesh Sugar and Food Industries Corp*[19] which reads:

'It is generally assumed, and there is no real reason to doubt, that the Courts will provide a remedy by way of repayment to the other contracting party *if a beneficiary who has been paid* under an unconditional bond is ultimately shown to have called on it without justification. . . . In cases where there has been no default at all on the part of the contractor, there would additionally be a total failure of consideration for the payment.' [Emphasis added.]

The majority misconstrued the import of that passage and its relevance to the facts in *Dormell.* The plaintiff in *Cargill* had successfully tendered for the supply of sugar to the defendant. The tender offer was accepted subject to the receipt of a performance bond covering ten per cent of the total cost and freight value. One of the clauses of the sugar contract provided that the plaintiffs bond was liable to be forfeited if they failed to fulfil any of the terms of the sugar contract. In consequence of an alleged breach by the plaintiff, the defendant made a call on the bond. The plaintiff thereafter applied for injunctive relief against the defendant. The court in *Cargill* identified one of the issues before it as whether the defendant was entitled to make a call for the full amount of the performance bond, if the breach of contract had caused it no loss. This question was answered in the affirmative. The court in essence held that the terms of the guarantee had to be met pending the determination of contractual disputes between the parties. The court affirmed the principle that a performance bond is as 'valuable as a promissory note' and its beneficiary is entitled to payment pending the resolution of any

[19] *Cargill International SA & another v Bangladesh Sugar and Food Industries Corp* [1996] 4 All ER 563 (QB) at 570ft-/

contractual disputes that may arise[20]. An important distinction is that in *Cargill* the disputants before the court were the parties to the sugar contract. It was not a dispute between the financial institution and the beneficiary in relation to a guarantee.

[27] The court in *Cargill* stated that it is perhaps implicit in the nature of a guarantee, 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.[21]

It is important to note that at the stage when demand is being made on the guarantee, all other disputes between the beneficiary and the seller (contractor) are irrelevant. The court in *Cargill* emphasised this principle and found support *for it in State Trading Corp of India Ltd v E D & F Man (Sugar) Ltd (1981), where Lord Denning MR said:* 'I may say that performance bonds fulfil a most useful role in international trade. If the seller defaults in making delivery, the buyer can operate the bond. He does not have to go to far away countries and sue for damages, or go through a long arbitration. He can get the damages at once which are due to him for breach of contract. The bond is given so that, on notice of default being given, the buyer can have his money in hand to meet his claim for damages for the seller's non-performance of contract. If he receives too much, that can be rectified later at an arbitration. The courts must see that these performance bonds are honoured.'[22]

[28] Our courts, in a long line of cases and also relying on English authorities, have strictly applied the principle that a bank faced with a valid demand in respect of a

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[20]Cargill International SA v Bangladesh Sugar and Food Industries Corp, *supra at 569d-e.*

[21] Ibid at 568h-569f

[22]*Cargill International SA v Bangladesh Sugar and Food Industries Corp, supra at 569d-e.*

performance guarantee, is obliged to pay the beneficiary without investigation of the contractual position between the beneficiary and the principal debtor[23]. 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 an on demand or unconditional performance guarantee, is because of the principle that to do so would undermine the efficacy of such guarantees[24]. This court in *Loomcraft* referred to the fact that the autonomous nature of the obligation owed by the bank to the beneficiary under a letter of credit 'has been stressed by courts both in South Africa and overseas'[25]. The learned judge referred to a number of authorities, both local and English to illustrate this point.[26] Similarly, this court in *Lombard Insurance*, confirmed that the obligation on the part of the bank to make payment on a performance guarantee is independent of the underlying contract and whatever disputes may arise between the buyer and the seller are irrelevant as far as the bank's obligation is concerned.[27]

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[23]*Loomcraft Fabrics CC v Nedbank Ltd & another* 1996 (1) SA 812 (A); *Lombard Insurance Co Ltd v*
Landmark Holdings (Pty) Ltd & others 2010 (2) SA 86 (SCA); *Minister of Transport and Public Works,*
Western Cape & another v Zanbuild Construction (Pty) Ltd & another 2011 (5) SA 528 (SCA); *Compass*
Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd 2012 (2) SA 537 (SCA); *FirstRand Bank Ltd v*
Brera Investments CC 2013 (5) SA 556 (SCA); *Casey & another v Firstrand Bank Ltd* (608/2012) [2013]
ZASCA 131; *Eskom Holdings Soc Ltd v Hitachi Power Africa (Pty) Ltd & another* (139/2013) [2013] ZASCA
101.

[24]*Loomcraft* supra at 817B; *Lombard Insurance*, supra*,* para 20.

[25]At 816B-C.

[26]These authorities, cited at 816B-H of the judgment include: *Phillips & another v Standard Bank of South Africa Ltd & others* 1985 (3) SA 301 (W); *Ex parte Sapan Trading (Pty) Ltd* 1995 (1) SA 218 (W) at 2241- 225G; *R D Harbottle (Mercantile) Ltd & another v National Westminster Bank Ltd & others* [1977] 2 All ER 862 (QB) at 870b-d; *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 All ER 976 (CA) at 983. *Intraco Ltd v Notts Shipping Corporation (The Bhoja Trader)* [1981] 2 Lloyd's Rep 256 (CA) at 257; *Power Curber International Ltd v National Bank ofKuwait SAK* [1981] 3 All ER 607 (CA)at613b.

[27]*Lombard Insurance*, supra, para 20.

[29] In my view this principle is based on sound reason. It underscores the commercial nature of performance guarantees. In determining whether payment should be made on such a guarantee, accessory obligations are of no consequence. The very purpose of the guarantee is so that the beneficiary can call up the guarantee without having to wait for the final determination of its rights in terms of accessory obligations. To find otherwise, would involve an unjustified paradigm shift and defeat the commercial purpose of performance guarantees.

[30] For these reasons, the appeal is dismissed with costs, including the costs of two counsel, which costs are to be paid jointly and severally by the appellants, the one paying the others to be absolved.

L V THERON

JUDGE OF APPEAL

APPEARANCES

For First Appellant: MA Chohan with MJA Costa

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