THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No: 5021/2015

GRANBUILD (PTY) LTD **APPLICANT**

And

MINISTER OF TRANSPORT AND PUBLIC WORKS, WESTERN CAPE **FIRST RESPONDENT**

COMPASS INSURANCE COMPANY (PTY) LTD **SECOND RESPONDENT**

Coram: ROGERS J

Heard: **27 MAY 2015**

Delivered: **5 JUNE 2015**

JUDGMENT

ROGERS J:

Introduction

[1] The applicant ('Granbuild') seeks an interdict to prevent the second respondent ('Compass') from making payment of R13 285 053,45 to the first respondent in terms of a construction guarantee. The first respondent is the Minister of Transport and Public Works, Western Cape but for convenience I shall refer simply to the Department.

[2] During 2011 and pursuant to a tender process a building contract was concluded between the Department and Granbuild for the construction of extensions to the Vredenburg Hospital. Work started in January 2012. For some reason the building contract was only signed in February 2013. In the intervening period Granbuild engaged a number of so-called selected subcontractors on the instructions of the Department. The signed building contract, however, made provision for nominated subcontractors rather than selected subcontractors. The main contractor carries less risk in respect of nominated subcontractors than selected subcontractors. After February 2013 Granbuild adopted the position that the Department was not entitled to instruct it to appoint selected subcontractors. The Department's view was that the building contract required rectification to bring it in line with the common intention of the parties.

[3] In March 2014 Granbuild issued an application ('the first application') for a declaration that the Department was not entitled to instruct Granbuild to engage selected subcontractors. The Department opposed and brought a counter-application for rectification. In May 2014 an order was made referring the matter to oral evidence. The oral evidence was heard by Schippers J. On 2 March 2015 he delivered judgment, dismissing the main application and granting the counter-application. Granbuild applied for leave to appeal which the learned judge dismissed on 15 April 2015. There is currently pending before the Supreme Court of Appeal a petition for leave to appeal.

[4] On 29 October 2014, and while the first application was pending, the Department's principal agent gave Granbuild notice that it was in default of its obligation to proceed with the works with due skill, diligence, regularity and expedition and afforded it ten working days to remedy the default. Granbuild's response, set out in a letter dated 11 November 2014, did not satisfy the Department, and on 13 November 2014 the Department cancelled the building contract.

[5] Granbuild disputed the validity of the cancellation. In December 2014 it delivered an urgent application ('the second application') for an order, inter alia, that the building site be restored to it and that the Department and principal agent be interdicted from interfering with Granbuild's right to conduct the works. Granbuild contended that the purported cancellation was a repudiation which it did not accept. Granbuild's case in the founding papers was that the delays were a result of the Department's insistence on giving instructions for the appointment of selected subcontractors, instructions which Granbuild said were invalid in the light of the signed building contract. In its answering papers the Department sought to demonstrate that Granbuild's delays were unrelated to the disputed selected subcontracts. Granbuild in reply contended for the first time that the Department's insistence on instructing Granbuild to appoint selected subcontractors was a repudiation.

[6] The second application was to have been heard on 9 March 2015. However, and in the light of Schippers J's judgment in the first application, Granbuild decided to withdraw the second application and tendered the Department's costs.

[7] On 10 March 2015, about one week after Schippers J's judgment, the Department gave written notice to Compass that it required payment in terms of the guarantee on the basis that the building contract had been duly cancelled. In a letter to the Department dated 17 March 2015 Granbuild's attorneys expressed the view that the Department could not assert its alleged rights until the appeal process had run its course. They said that in any event the circumstances entitling the Department to call up the guarantee were not present. They sought an undertaking

from the Department by 23 March 2015 to withdraw the demand failing which urgent relief would be sought.

[8] The undertaking was not forthcoming, and the present application followed on 23 March 2015. At that stage the application for leave to appeal in the first application was pending before Schippers J.

The grounds advanced and relief sought

[9] Granbuild advances two grounds for interdicting payment under the guarantee: (i) In terms of the building contract the Department is not entitled to cancel if it is itself in breach. The Department's insistence on the appointment of selected subcontractors was a repudiation which resulted in the Department's being in breach. It was thus not entitled to cancel. Although the foundation for this assertion was rejected by Schippers J, Granbuild is entitled to an interim interdict pending the finalisation of the appeal process, since otherwise an appeal would be rendered nugatory. (ii) In any event, and even if the Department was entitled to cancel the contract, the guarantee cannot be called up merely because the contract has been cancelled. The necessary precondition for payment under the guarantee is that the Department should have a 'right of recovery against' Granbuild in terms of clause 33 of the contract. The Department has no such right of recovery at the present time.

[10] The interdict sought in the notice of motion is expressed as an interim interdict pending the finalisation of the appeal process. However, Mr Fitzgerald SC, who led Mr Traverso on behalf of Granbuild, submitted that if the second of its grounds for relief were sound Granbuild would be entitled to a final interdict. Mr Jacobs SC, leading Ms Cornelissen on behalf of for the Department, did not object to an amendment of the notice of motion. Compass, I should add, has not participated in the proceedings and abides the result.

The guarantee

[11] The guarantee, which Compass signed on 9 February 2012, is headed 'Variable Construction Guarantee' and as being a guarantee for the execution of a contract in terms of a JBCC Principal Building Agreement (Edition 4.1 of March 2005). The first clause of the guarantee states, 'with reference to' the contract between Granbuild and the Department arising from an identified tender, that Compass held at the Department's disposal the sum of R13 285 053,45, being 10% of the contract sum excluding VAT, 'for the due fulfilment of the contract'. Clause 2 stated that from the date of issue up to the date of payment of the amount in the practical completion certificate Compass would be liable 'to the maximum amount of 10% of the contract sum (excluding VAT)'; that from the day following the last certificate of practical completion and up to the date of the last final completion certificate Compass's liability would be reduced to 3% of the value of the works excluding VAT; that from the day following the date of the last final completion certificate and up to the date of settlement of the amount in the last final payment certificate Compass's liability would reduce to 1% of the value of the works excluding VAT; and that the guarantee would expire on the date of payment of the amount in the last final payment certificate.

[12] Clauses 3 to 7 read thus:

'3. The guarantor hereby renounces the benefits of the exceptions *non numeratae pecunia; non causa debiti*; and all other exceptions which could be pleaded against the enforcement of this guarantee, with the meaning and effect whereof I/we declare myself/ourselves to be conversant, and undertake to pay the employer the amount guaranteed, during the period when the claim is received by the guarantor, on receipt of a written demand from the lawyer to do so, and which demand the employer may make if the employer has a right of recovery against the contractor in terms of clause 33.0 of the contract.

4. Subject to the above, but without in any way detracting from the employer's rights to adopt any of the procedures provided for in the contract, the said demand can be made by the employer at any stage prior to the expiry of this guarantee.

5. The amount paid by the guarantor in terms of this guarantee may be retained by the employer on condition that upon the issue of the last final payment certificate, the

employer shall account to the guarantor showing how this amount has been expended and refund any balance due to the guarantor.

6. The employer shall have the absolute right to arrange his affairs with the contractor in any manner which the employer deems fit and the guarantor shall not have the right to claim his release on account of any conduct alleged to be prejudicial to the guarantor. Without derogating from the aforegoing, any compromise, extension of the construction period, indulgence, release or variation of the contractor's obligation shall not affect the validity of this guarantee.

7. This undertaking is neither negotiable nor transferable, and:

   7.1 must be surrendered to the guarantor at the time when the employer accounts to the guarantor in terms of clause 5 above, or

   7.2 shall lapse in accordance with clause 2 4 above; and

   7.3 shall not be interpreted as extending the guarantor's liability to anything more than the payment of the amount guaranteed.'

The building contract

[13] Although the building contract had not been signed at the time the guarantee was issued, it is a JBCC contract of the kind contemplated in the guarantee.

[14] Clause 2 of the guarantee makes reference to three stages. These are dealt with in the building contract in clause 24.3.1 (practical completion certificate), clause 26.2.1 (final completion certificate) and clause 34.3 (final payment certificate).

[15] Clause 14 of the building contract states that the contractor will have the right to select whether to provide security in the form of a variable construction guarantee in terms of clause 14.3 or a fixed construction guarantee in terms of clause 14.4. In the schedule Granbuild chose a variable construction guarantee. Clause 14.3 provides that the variable construction guarantee, to be equal in value to 12,5% of the contract sum, will come into force, be administered and expire in terms of the JBCC Construction Guarantee Form and that the Department will return the guarantee to Granbuild within 14 calendar days of its expiring. Clause 14.3.4 provides as follows:

'Where the employer has a right of recovery against the contractor in terms of clause 33.0, the employer may issue a written demand in terms of the variable construction guarantee.'

Although clause 14.3 requires a guarantee of 12,5%, the guarantee accepted by the Department was for 10%. This is at least one of the respects in which the guarantee issued by Compass differed from the guarantee envisaged in clause 14.3

[16] It is convenient next to refer to clause 36, dealing with cancellation. In terms of clause 36.1.1 the Department is entitled to cancel if Granbuild fails to comply inter alia with clause 15.3, which requires Granbuild to proceed with due skill, diligence, regularity and expedition. Clauses 36.2 and 36.3 make provision for the principal agent to give a ten day notice to remedy an alleged default. Clause 36.6 states that the employer may not cancel if it is itself in material breach of the agreement. Clause 36.5 sets out what must be done if the employer cancels. The contractor must cease work and vacate the site. The principal agent must compile a status report. On completion of the status report the principal agent must 'commence forthwith and complete a final account within a reasonable time'. Where applicable the employer may apply the penalty stated in the schedule up to the date of cancellation and thereafter recover damages from the contractor. The principal agent may not issue further payment certificates until the quantum of damages has been determined and the final account completed. Thereafter the final payment certificate must be issued.

[17] Clauses 31 and 34 make provision for interim and final payments. Ordinarily one would expect these payments to be made by the employer to the contractor. However, and because inter alia of adjustments to the contract value over time, an interim or final payment certificate might reflect that it is the contractor who must pay the employer (clauses 31.12 and 34.13). If the amount which the one party owes the other is not paid within seven calendar days,[1] the former is liable to pay default interest, and the amount of such default interest must be included in the recovery statement referred to in clause 33. Where it is the contractor who must make

[1] This is on the basis that clause 41, which varies certain of the standard provisions where the employer is an organ of State, is not applicable in the present case. One of the rectifications granted by Schippers J was that clause 41 did not apply. If clause 41 had applied, the seven-day period would have been substituted with a 21-day period.

payment to the employer, such payment is 'subject to the employer giving the contractor a tax invoice for the amount due' (clauses 31.12 and 34.13).

[18] Clause 33 is headed 'Recovery of Expense and Loss'. Clause 33.1 states that the principal agent must issue a monthly recovery statement simultaneously with that month's payment certificate. In broad terms the recovery statement sets out the penalties, default interest, losses and the like owing by the one party to the other. Amounts due to the employer under a recovery statement may include penalties levied in terms of clause 30, default interest in terms of clause 31.12 and expense and loss referred to in clause 33.2. The latter sub-clause provides that the employer may 'recover expense and loss incurred or to be incurred resulting from' various listed causes, including cancellation of the agreement in terms of clause 36. The amount owing by the one party to the other in terms of the recovery statement must be included in the accompanying payment certificate. If, as a result, the payment certificate reflects an amount owing to the employer and the contractor has not paid it within seven calendar days, clause 33.3 provides that the amount may be recovered by the employer 'from all or any of the following in no specific sequence', namely from subsequent payment certificates, from the security provided in terms of clause 14 (in the present case, Compass' variable construction guarantee) or from the contractor 'as a debt'.

[19] Clause 33.6 reads as follows:

'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 clause 36.0, the employer may issue a demand to the guarantor in terms of the construction guarantee … held as security.'

[20] Clause 40 contains procedures for dispute settlement by way of mediation, adjudication and arbitration. Clause 40.9 stipulates that notice of a dispute 'shall not relieve the parties from liability for the due and timeous performance of their obligations'.

[21] Clause 41 of the standard JBCC contract form varies certain of the preceding clauses in cases where the employer is an organ of State. Clause 41 deletes provisions in the standard contract relating to selected subcontractors. The Department's claim for rectification, which Schippers J granted, included a claim for the deletion of clause 41 as a whole, the result of which was to leave intact the preceding clauses of the contract relating to selected contractors.

The counter-indemnity

[22] Granbuild's obligations to Compass in respect of guarantees furnished on its behalf, including the guarantee in the present case, are set out in a counter-indemnity dated 17 April 2009.

[23] In terms of clause 1.2 of the counter-indemnity, Granbuild undertakes to pay Compass on demand any sum which Compass may be called upon to pay under a guarantee, whether or not Compass at such date shall have made payment thereunder and whether or not Granbuild admits the validity of the claim. If Granbuild disputes the validity or amount of a claim, it must nevertheless deposit the amount thereof with Compass, on demand, pending the adjudication or settlement of the dispute. Clause 5.1 provides that Compass may in its sole discretion, and even if it is not obliged so to do, pay the employer (referred to in the counter-indemnity as the 'creditor') such sum as may be required to release Compass from its obligations, contingent or otherwise, in which event an equivalent sum shall become immediately due and payable by Granbuild to Compass.

Demand or conditional guarantee?

[24] A distinction is drawn between demand guarantees and conditional guarantees. I was referred to the leading authorities on the subject, including: *Lombard Insurance Co Ltd v Landmark Holdings Pty Ltd & Others* 2010 (2) SA 86 (SCA); *Dormell Properties 282 CC v Renasa Insurance Co Ltd & Others NNO* 2011 (1) SA 70 (SCA) (the dissenting judgment of Cloete JA was vindicated by later authority); *Minister of Transport and Public Works, Western Cape, & Another v Zanbuild Construction (Pty) Ltd & Another* 2011 (5) SA 528 (SCA); *Guardrisk*

Insurance Company Ltd & Others v Kentz (Pty) Ltd [2014] 1 All SA 307 (SCA); and *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association* 2014 (2) SA 382 (SCA).

[25] The essential difference between the two kinds of guarantees is this. In the case of a demand guarantee the guarantor's obligation to pay is subject only to delivery by the holder of a demand in due form. In the case of a conditional guarantee the guarantor's obligation to pay is subject to the occurrence of some underlying event or the existence of some underlying state of affairs, the presence or absence of which is a matter for objective determination. Beyond this, the precise circumstances in which a guarantee becomes payable depend on the interpretation of the guarantee. In the case of a demand guarantee, the guarantee will determine what it is that the demand must state and enclose in order for the demand to be in due form. In the case of a conditional guarantee the guarantee will determine what occurrence or state of affairs must exist in order for the guarantee to be payable. A conditional guarantee may, of course, also contain provisions as to the form of the demand.

[26] There is no doubt that the guarantee in the present case is a conditional guarantee. The Department can only make demand if the employer has a right of recovery against the contractor in terms of clause 33 of the contract. It is not sufficient, and perhaps not even necessary, that the demand should state that the employer has a right of recovery against the contractor in terms of clause 33. The right of recovery must exist as an objective fact.

[27] The real dispute, insofar as the interpretation of the guarantee is concerned, is whether a right of recovery within the meaning of the guarantee exists merely because the Department has cancelled the contract or whether there is such a right only if the principal agent has issued a final account reflecting that Granbuild is indebted to pay an amount of money to the Department. Granbuild's first ground for an interdict addresses the possibility that the first of these interpretations is the one preferred by the court. On that assumption, Granbuild contends that it is entitled to interim protection because it may be found through the appeal process that the Department was not entitled to cancel the contract. The second ground of review

urges that the second interpretation is correct. It is common cause, in that event, that the principal agent has not issued a final account or final payment certificate.

First ground – disputed cancellation and pending appeal

[28] Although Mr Jacobs on behalf of the Department raised a question of locus standi, it is convenient to defer a discussion of that point until after a consideration of the grounds for the interdict. The first ground proceeds on the assumption (against Granbuild) that the Department is entitled to call up the guarantee if its cancellation of the building contract on 30 November 2014 was valid. Granbuild says that, if it is granted leave to appeal and if the appeal succeeds, it will be established that the Department was in breach of the contract as at November 2014 by insisting on the appointment of selected subcontractors, with the result that clause 36.6 precluded the Department from cancelling the contract. Although the foundation for this argument was rejected by Schippers J, another court might reach a different conclusion.

[29] The question whether a court can grant an interim interdict pending an appeal, when the court has already found the alleged right does not exist, has been dealt with in several cases. In *Plettenberg Bay Entertainment (Pty) Ltd v Minister van Wet en Orde en 'n Ander* 1993 (2) SA 396 (C) Brand J (as he then was) had dismissed an urgent application for an interdict to prevent the respondents from closing the applicant's casino pending the determination of an action. The applicant's alleged prima facie right was its right to conduct a casino under certain legislation. Brand J found that the conducting of the casino business was, on the applicant's own version, unlawful and that the applicant thus had no prima facie right. The applicant thereafter brought an urgent application for an interim interdict pending a proposed appeal against Brand J's decision. This urgent application also came before Brand J. He dismissed it on the basis that the interim interdict depended on the same prima facie right that he had already found not to exist and that there was thus no jurisdiction to grant the interdict. He found authority for this view in several earlier judgments.

[30] Mr Fitzgerald referred me to the criticism of this decision by the learned authors of *Herbstein and Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th Ed at 1485-1486. The learned authors regard the *Plettenberg Bay Entertainment* decision as in conflict *with Airoadexpress (Pty) Ltd v Local Road Transportation Board, Durban, & Others* 1986 (2) SA 663 (A) where Kotze JA referred to a 'general power' or 'inherent jurisdiction' to grant interim relief 'to avoid injustice and hardship'. This power was described as a salutary one 'which should be jealously preserved and even extended where exceptional circumstances are present and where, but for the exercise of such power, a litigant would be remediless' (at 676B-D). Joubert JA concurred as did Grosskopf JA who delivered his own judgment. That case was concerned with an interim mandatory interdict in terms whereof the relevant road transportation board was to issue certain permits to the applicant pending the final determination of a review application. The court considered that there was a strong prima face case that the permits had been wrongly refused.

[31] Mr Fitzgerald also referred me to *Indwe Aviation (Pty) Ltd v Petroleum Oil and Gas Corporation of South Africa Pty Ltd & Another (No 2)* 2012 (6) SA 110 (WCC) where Baartman J distinguished *Plettenberg Bay Entertainment*. In *Indwe Aviation* an interim interdict was granted by Blignault J on the basis that the applicant had inter alia established a prima facie right. On the return day Baartman J discharged the interim interdict, finding that the right had not been established in accordance with the test for final interdicts. She granted leave to appeal. The applicant then brought an application for an interim interdict pending the determination of the appeal. Baartman J distinguished *Plettenberg Bay Entertainment* on the basis that there Brand J had already found there to be no prima facie right. In *Indwe Aviation*, by contrast, Blignault J had found there to be a prima facie right and Baartman J's dismissal of the application for a final interdict did not show that there had not been or still was not a prima facie right (paras 22-25). She said that in any event it would be at odds with our constitutional dispensation if one were to hold that a court, in the circumstances of the matter before her, did not have a discretion. She proceeded to apply the principles pertaining to interim interdicts and granted the relief prayed.

[32] It will be appreciated that in *Indwe Aviation* the applicant not only established a prima facie right; it had also been granted leave to appeal, an indication that Baartman J thought there were reasonable prospects of another court differing from her. I should add that where a final interdict is refused on a point of law rather than because of factual disputes, the court's finding would be equally dispositive of an application for an interim interdict. It is in cases of factual disputes that one may encounter cases, of which *Indwe Aviation* seems to be an example, where on the papers the applicant has a prima facie case but nevertheless fails in obtaining final relief.

[33] The most recent relevant authority in this division is the judgment of Schippers J in *Quality Labels Solutions CC & Others v Head of Department of Culture, Sports and Recreation, Mpumalanga Province, & Others* [2013] ZAWCHC 193, to which neither side made reference. Schippers J discussed *Plettenberg Bay Entertainment* and *Indwe Aviation*. He assumed without finally deciding that there was jurisdiction to grant an interim interdict even where the court has found the right not to exist. In regard to the test to be applied, he found the discussion of the question by the English Court of Appeal in *Novartis AG v Hospira UK Ltd* [2013] EWCA Civ 583 to be helpful. After a discussion of that case, Schippers J expressed his conclusions as follows:

'[18] Bearing in mind the differences between the English law relating to injunctions and our law, I consider that the concept of a prima facie right is sufficiently flexible to accommodate the standard of "a real prospect of success on appeal", as the degree of proof required of an applicant to establish a prima facie right in an interdict pending an appeal. This standard posits a higher threshold than a prima facie right although open to some doubt, and is likely to be more difficult to meet, mainly because different considerations apply to the grant or refusal of interim relief once a trial has taken place or an application has been decided.

[19] It follows that the requirement of a reasonable prospect of success on appeal which must be satisfied before leave to appeal is granted, must not be equated with the requirement of a real prospect of success on appeal. Otherwise it would mean that a party granted leave to appeal would automatically establish a *prima facie* right for the purpose of an interdict pending appeal.

[20] As in the case of an ordinary interim interdict, the establishment of a prima facie right – a real prospect of success on appeal – should not be treated as a threshold requirement. Instead, it is related to the other requirements, such as irreparable harm, the balance of convenience and the absence of an ordinary remedy; and remains an element of the balancing process which a court undertakes in the exercise of its discretion whether or not to grant a temporary interdict pending an appeal, after considering the affidavits as a whole.'

[34] It seems to me, if I may respectfully say, that the ground on which Baartman J distinguished *Plettenberg Bay Entertainment* is sound and that there is much to be said for Schippers J's conclusions regarding the approach to be followed once a prima facie right is being assessed in the context of a pending appeal. From this it would follow that there would in principle be jurisdiction in the present case to grant an interim interdict since there has been no prior determination by this court that Granbuild does not have at least a prima facie case. Schippers J, in his judgment of 2 March 2015, was concerned with questions of final relief.

[35] However, to establish a prima facie right pending an appeal, Granbuild would need, in accordance with the test laid down by Schippers J, to satisfy me that it has a 'real prospect of success' on appeal. Since Schippers J has already found that Granbuild has no reasonable prospects of success on appeal, Granbuild does not get out of the starting blocks unless it can persuade me that Schippers J's assessment of its prospects of success on appeal were wrong. Granbuild's deponent, Mr Donough, said that he would ensure that the papers in the first and second applications were placed before the court hearing the present matter. Mercifully Mr Donough did not make good on his promise. The papers in the first application, I should add, would include a transcript of the oral evidence which Schippers J heard. Granbuild's founding papers in the present application did not even summarise the key features of the evidence and main points on which it believed it had reasonable prospects of success on appeal.

[36] In argument Mr Fitzgerald did not elaborate upon Granbuild's bald assertion that it had a prima facie right. He realistically accepted, I think, that it would not be a profitable use of judicial resources (even if it were a profitable enterprise for counsel) to expect me to immerse myself in the previous applications with a view to forming

an opinion on Granbuild's prospects of success. What I can say is that I have read Schippers J's main judgment and his judgment dismissing the application for leave to appeal. These judgments contain nothing which would suggest to my mind, as a person not steeped in the papers and the evidence, that the learned judge obviously went wrong in some respect. I should add that he made strong adverse credibility findings regarding Mr Donough, who was one of the persons who gave oral evidence on Granbuild's behalf. The applicant has not, in the present proceedings, identified any alleged misdirections by the learned judge in his assessment of the evidence or summarised how his factual findings might be impeached on appeal.

[37] Mr Fitzgerald urged upon me a passage from the judgment of Megarry J in *Erinford Properties Ltd v Cheshire County Council* [1974] 2 All ER 448 (Ch) where the judge reminded the reader that no human being is infallible and that a judge who feels no doubt in dismissing a claim for an interlocutory injunction may, perfectly consistently with that decision, recognise that his decision might be reversed. However, the mere notional possibility that Schippers J might have erred is not enough. Unless interim interdicts pending appeals are to be had as of right (which nobody could suggest is the law), the applicant needs to persuade the court of at least some threshold level of prospects of success.

[38] Even if Granbuild had persuaded me that its prospects of success rose to some relevant threshold, I would not – when balancing all the factors relevant to the grant of an interim interdict – come down in its favour. Granbuild said in its founding papers that because of the counter-indemnity it will have to pay Compass on demand any sum which the latter is called upon to pay to the Department. In this event there would be 'inevitable prejudice and loss' to Granbuild. Mr Donough added that as a result of the Department's demand Granbuild has been unable to obtain similar guarantees from other insurers and banks, which has had a significant adverse effect on its ability to comply with its obligations in terms of other contracts. Granbuild was thus at risk of losing those contracts and of being exposed to significant claims for damages.

[39] However, Granbuild does not allege that it does not have the money to make good on the counter-indemnity pending the determination of an appeal. If Granbuild

ultimately gets leave to appeal and succeeds in the appeal, and if its further contentions are sound, it will be entitled to recover the money. At least if it makes good on the counter-indemnity, Granbuild should not have difficulty in procuring guarantees from other insurers and banks. The refusal of an interim interdict would thus not render an appeal nugatory.

[40] Mr Fitzgerald submitted in argument that payment of the guarantee would cause Granbuild cash flow problems. Granbuild's papers do not say this. However, an assumption that Compass's payment of the guarantee would place Granbuild in financial difficulty and possibly lead to its demise cuts both ways, because it raises the distinct possibility that the proposed appeal and the present application are not concerned so much with preserving a right in which Granbuild has genuine belief but with buying time through meritless proceedings. This is all the more reason for requiring Granbuild to establish a real prospect of success on appeal as a prerequisite for interim relief.

[41] It follows that I reject Granbuild's first ground for an interdict.

The second ground – a 'right of recovery'?

[42] The second ground raises a narrow point of interpretation, namely the meaning of the following words in clause 3 of the guarantee: '… if the employer has a right of recovery against the contractor in terms of clause 33.0 of the contract'.

[43] The contract referred to in the condition is obviously the JBCC building contract between the Department and Granbuild. The 'right of recovery' is a right of recovery by the Department against Granbuild in terms of the building contract, not a right of recovery by the Department against Compass in terms of the guarantee.

[44] If the guarantee were co-extensive with the guarantee contemplated in the building contract, the Department could call up the guarantee upon cancellation in terms of clause 33.6, even though the principal agent had not yet prepared the final account. Clause 33.6 says so in plain terms.

[45] Clause 14.3.2 of the building contract states that the variable construction guarantee shall be administered and expire in terms of the JBCC Construction Guarantee form. It is a reasonable assumption that the said form provides for a guarantee tailored to the provisions of the JBCC building contract. However, I cannot assume in the present case that the guarantee is in the standard JBCC form. No evidence to that effect was adduced. Insurance companies and employers may have their own reasons for using forms which depart from the standard JBCC form; or there may be negotiated changes in specific instances. My reading of the cases suggests that guarantees linked to JBCC building contracts vary considerably in content.

[46] I referred counsel during argument to an unreported judgment of a full bench of the KwaZulu Natal Provincial Division (Hurt J, with Theron and Ntshangase JJ concurring) in *Federated Insurance Guarantee Brokers Pty Ltd v Johannesburg Development Agency (Pty) Ltd* [2007] ZAKZHC 58, upholding a decision of Niles-Dunner J enforcing payment of a variable construction guarantee. The JBCC building contract (the 3rd edition) contained clauses 14, 33 and 36 in terms similar, for relevant purposes, to the clauses in the contract between the Department and Granbuild. The variable construction guarantee, which read as follows, was clearly designed to ensure that the employer could call up the guarantee in all the circumstances envisaged in the building contract:

'4.0 Subject to the guarantor's maximum liability referred to in clause 1.0 and *2.*0 above, the guarantor hereby binds itself in favour of the Employer (for?/ to pay?) the certified sum upon receipt of the documents identified in clauses 4.1 to 4.3, below:

4.1. A copy of the first written demand issued by the Employer to the Contractor stating that payment of a sum certified by the Principal Agent has not been made in terms of the agreement, and failing such payment within seven (7) calendar days, the Employer intends to call upon the Guarantor to make payment in terms of 4.2;

4.2. A first written demand issued by the Employer to the Guarantor at the Guarantor's *domicilium citandi et executandi* with a copy to the Contractor stating that a period of seven (7) calendar days has elapsed since the first written demand in terms of 4.1 and that the sum has still not been paid therefore the Employer calls up this Construction Guarantee and demands payment of the sum certified from the Guarantor.

4.3. A copy of the payment certificate which entitles the Employer to receive payment in terms of the Agreement of the amount certified in clause 4.0 above.

5.0. Subject to the Guarantor's maximum liability referred to in clauses 1.0 and 2.0 above, the Guarantor undertakes to pay the Employer the Guaranteed sum or the full outstanding balance upon receipt of the first written demand from the employer to the Guarantor at the Guarantor's *domicilium citandi et executandi* calling up this Construction Guarantee stating that

5.1 The Agreement has been cancelled due to the Contractor's default and that the Construction Guarantee is called up in terms of 5.0. The demand shall enclose a copy of the notice of cancellation;

…

7.0. Where the Guarantor is a registered insurer in terms of the Short Term Insurance Act No. 53 of 1998 and has made payment in terms of 5.0, the Employer shall, upon the date of issue of the final payment certificate, submit an expense account to the Guarantor showing how all monies received in terms of the Construction Guarantee have been expended and shall refund to the Guarantor any resulting surplus. All monies refunded to the Guarantor in terms of this Construction Guarantee shall bear interest at Standard Bank of South Africa Limited's prime overdraft rate compounded monthly and calculated from the date payment was made by the Guarantor to the Employer until the date of refund.'

[47] A guarantee in the above form is a demand guarantee because it is concerned with what the demand must state and enclose rather than with the occurrence or existence of the underlying event or state of affairs as an objective fact. Importantly, clauses 4 and 5 recognise the two distinct circumstances in which the JBCC contract envisages that payment of the guarantee can be demanded, namely where there is an amount owing to the employer pursuant to a payment certificate issued by the principal agent and where the contract has been cancelled in terms of clause 36.[2] Niles-Dunner J found, and the full bench agreed, that where the guarantee was called up following cancellation it was not necessary for the employer to wait until a final account was prepared. The employer could insist on

[2] The rest of clause 5 of the guarantee in *Federated Insurance* was not quoted in the judgment because it was not relevant. In all likelihood that it regulated the calling up of the guarantee on the other grounds mentioned in clause 33.6 of the JBCC contract, namely sequestration, liquidation etc.

immediate payment of the guarantee, with adjustments to follow later in terms of clause 7 of the guarantee.

[48] The construction guarantee considered by Gauntlett AJ in *MIS Maintenance CC t/a NM Construction v Africon Infrastructure Projects Pty Ltd & Another* [2008] ZAWCHC 304 was, except for being fixed rather than variable, identical to the one in *Federated Insurance*.[3] The same is true of *Petric Construction CC t/a AB Construction v Toasty Trading t/a Furstenberg Property Development & Others* 2009 (5) SA 550 (ECG) (see para 14).[4]

[49] The guarantee furnished by Compass in the present case is unlike the above guarantees in two material respects. Firstly, it is not a demand guarantee. It does not, as Gauntlett AJ put in *MIS Maintenance*, 'proclaim its autonomy'. Second, it does not contain express language to the effect that the guarantee may be called up simply upon cancellation or upon a statement that the contract has been cancelled.

[50] A right on the part of the Department to recover money from Granbuild in terms of a payment certificate as envisaged in clause 33.3, which might be an interim payment certificate in terms of clause 31 or a final payment certificate in terms of clause 34 or clause 36.5, would undoubtedly be a 'right of recovery against the contractor in terms of clause 33.0' within the meaning of the guarantee. Certificates of this kind have been held to give rise to a distinct cause of action for payment of the amount certified (see *Thomas Construction (Pty) Ltd (In Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) at 514I-J and cases there collected; cf on appeal at 1988 (2) SA 546 (A) at 562E-F). In terms of clause 31.12 Granbuild would be obliged, within seven calendar days of the issue of the payment certificate, to pay the certified amount to the Department, subject to the Department's giving Granbuild a tax invoice for the amount due. In terms of clause 40.9 the recording of a dispute by Granbuild would not relieve it of its obligation to

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[3] Although the terms of the guarantee are not quoted in Gauntlett AJ's judgment, I have examined the court file to ascertain its terms. It may also be noted that the building contract was, as in the present case, the JBCC contract (4th edition).

[4] In *Petric* clause 4 of the guarantee is not quoted but one can infer from clause 6.0 that clause 4 made provision for demand to be made under the guarantee if there was an amount certified for payment. Clause 5, which is quoted in the judgment, deals with the calling up of the guarantee upon cancellation.

make payment (see *Basil Read (Pty) Ltd v Beta Hotels (Pty) Ltd & Others* 2001 (2) SA 760 (C) at 766J-767F). Clause 33.3 states that where the payment certificate reflects an amount in favour of the Department and it has not been paid by Granbuild, the amount 'may be recovered by the employer from' inter alia the construction guarantee.

[51] Clause 33.6, by contrast, does not itself make provision for a 'right of recovery'. It simply states that if the agreement is cancelled in terms of clause 36 or liquidation proceedings are commenced against the contractor, the employer may issue a demand to the guarantor. The reason the employers were entitled to enforce the guarantees in *Federated Insurance*, *MIS Maintenance* and *Petric Construction* was not because the cancellation per se constituted a 'right of recovery' but because the guarantees accorded with clause 33.6 in stating that payment could be demanded from the guarantor if the employer cancelled the contract (or, more accurately, if the employer delivered a demand to the guarantor stating that the contract had been cancelled and attaching a copy of the notice of cancellation)

[52] The cancellation of a contract may but does not necessarily give rise to a claim for damages. Whether damages are recoverable depends on whether the cancelling party has suffered loss (see Van der Merwe et al *Contract General Principles* 4th Ed at 355 -358). The high watermark of the Department's case on that score in the answering affidavit is an assertion that the Department 'is entitled to be compensated for the losses which it has suffered or any potential losses that it may suffer'.[5] This falls well short of asserting an existing right to recover a monetary amount from Granbuild, even if one assumes that upon investigation it will emerge that the Department has suffered recoverable losses.

[53] More importantly, though, the mere existence of a right to claim damages for breach of contract in a presently unquantified amount is not, in my view, what is envisaged by the phrase used in the guarantee, namely 'a right of recovery … in terms of 33.0'. The machinery which the building contract creates for the coming into existence of rights of recovery is the process of payment certificates issued by the

[5] Para 82.2 record 150.

principal agent. That the guarantee should be construed consistently with this machinery is important for the practical implementation of the guarantee and for the protection of the rights of the employer and guarantor. If one were to hold that 'right of recovery' in the guarantee refers not to the existence of a payment certificate entitling the employer to recover a certified amount but to the notional underlying contractual right to which a certificate is intended to give effect, the guarantor would only be obliged to pay if the underlying contractual right were established. Put differently, the contractor would be entitled, even where there has been a certificate, to go into the underlying merits. A guarantee on those terms would be conceivable but unbusinesslike, at least from the perspective of the employer and guarantor, who are the immediate parties to the guarantee.

[54] This conclusion would be fortified if one were to construe the guarantee in the present case as entitling the Department to make repeat demands from Compass of so much as is from time to time certified as recoverable by the Department from Granbuild. The guarantee is not as explicit on this score as, for example, in the *Federated Insurance* case, where the guarantee provided (in cases apart from demand following cancellation or liquidation) that the employer could make demands for certified amounts up to the maximum of the guarantee. Nevertheless, I do not think it would be a reasonable and businesslike interpretation of the guarantee to say that the Department could demand payment from Compass of the full guaranteed sum of R13 285 053,45 merely because a payment certificate reflected that Granbuild owed the Department (say) R75 000 (cf *Granbuild* para 21). Conversely, it would not be reasonable or businesslike to conclude that the Department could only ever make one demand. Clause 2.1 states that the guarantor will be liable 'to the maximum amount of 10%' (a maximum limit which produces in accordance with clauses 2.2 and 2.3) which necessarily implies, in my view, that its liability may be less than the full guaranteed amount. It thus seems to me that the Department can make demands under the guarantee from time to time subject to the (reducing) limits specified in clause 2. This makes it all the more important that the expression 'right of recovery' in clause 3 should be understood as a right on the part of the Department from Granbuild to recover a specific amount of money, whether payable during the subsistence of the contract or following cancellation.

The contractual machinery by which a right to claim a specific amount of money is established is the principal agent's interim or final payment certificate.

[55] The provisions of clause 5 of the guarantee do not warrant a different conclusion. That clause recognises that from time to time during the subsistence of the contract Granbuild might become indebted to the Department in terms of interim payment certificates, whether because of adjustments in the value of the works or recoveries in terms of clauses 33.1. Pursuant to such interim certificates, calls might be made on the guarantee. (It should be emphasised that recoveries by the employer in terms of clause 33.1 read with clause 33.3 may arise during the subsistence of the contract. They are not dependent on cancellation.) Because payments pursuant to interim certificates would be subject to adjustment in the final payment certificate, there would need to be a final accounting between the Department and Compass. That is the function of clause 5 of the guarantee. I accept that if the guarantee in the present case had entitled the Department to claim the full guaranteed sum upon cancellation, clause 5 would also have operated to require a final accounting in such a case but that is no ground for interpreting clause 3 of the guarantee as extending to cases not reasonably covered by its language.

[56] I thus consider that Granbuild's second ground for an interdict must be upheld.

Locus standi

[57] Mr Jacobs submitted that Granbuild did not have locus standi to seek the interdict because it is not a party to the guarantee. I disagree. In *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) Botha JA said that locus standi is not a technical concept with inflexible boundaries. It is common to speak of a direct interest in the requested relief or a real interest and not an academic one. Whether an interest is sufficiently direct on the one hand or too far removed on the other depends on the particular facts of each case, in regard to which no rule of general application could be laid down (at 534B-E).

[58] Naturally Granbuild is not entitled to object to payment by the guarantor merely because there are contractual disputes between the contractor and the employer but one must not confuse locus standi with the grounds on which a party in Granbuild's position may object to payment. If, on a proper interpretation of the guarantee, the circumstances entitling the employer to demand payment and obliging the guarantor to make it do not exist, the contractor has a clear interest in interdicting payment, because the guarantor will invariably have some right of recovery against the contractor (here the counter-indemnity). That this is an interest worthy of protection by way of an interdict has been taken for granted in a number of cases, including by the Supreme Court of Appeal in *Zanbuild* supra, where an interdict granted at the instance of the contractor was upheld on appeal.[6] In the court a quo in *Zanbuild* Louw J stated in para 2 of his judgment that the contractor's locus standi had correctly not been challenged.[7] Reference may also be made, by analogy, to cases dealing with irrevocable documentary credits. The issuing bank is required to make payment to the beneficiary upon presentation of the documents specified in the credit unless the beneficiary's demand is fraudulent. It is recognised that the bank's customer (typically a purchaser of goods in an international sale) may interdict payment if the beneficiary makes a fraudulent demand (see *Loomcraft Fabrics CC v Nedbank Ltd & Another* 1996 (1) SA 812 (SCA)). Fraud is, in such cases, the ground for the interdict, not the basis of locus standi. The standing of the bank's customer in such a case must derive from its recognised financial interest in preventing payment of the credit contrary to the bank's legal obligation.

[59] Furthermore, a construction guarantee is normally furnished pursuant to the terms of a building contract. The contractor has a direct contractual right against the employer to prevent the latter from making demand under the guarantee contrary to the terms of the building contract. As will be apparent from my analysis of Granbuild's second ground for an interdict, the building contract in this particular instance envisaged a guarantee in wider terms than the one actually furnished, indeed on terms which would have entitled the Department to call up the guarantee

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[6] For other recent cases to similar effect, see, for example, *KNS Construction (Pty) Ltd v Genesis on Fairmont & Another* [2009] ZAGPJHC 39 paras 12-16 (where the question of standing was specifically discussed) and *Group 5 Construction (Pty) Ltd & Others v MEC for Public Transport Roads and Works Gauteng & Others* [2015] ZAGPJHC 55.

[7] The judgment is not reported and is not on SAFLII but I have obtained a copy from the court file.

forthwith upon cancellation without waiting for a final payment certificate. Nevertheless, there can be no doubt that the guarantee issued by Compass was procured by Granbuild pursuant to its obligations under clause 14 of the building contract as read with the schedule and that the terms of the guarantee, to the extent that they differed from those envisaged by the building contract (as they did, for example, in regard to the amount of the guarantee), were as between Granbuild and the Department regarded by the latter as acceptable. In terms of clause 14.3.4 as read with 33.3 the Department had the right to make written demand in terms of the guarantee if there was a 'right of recovery' in terms of payment certificate. The guarantee which the Department accepted in discharge of Granbuild's obligation to procure a guarantee did not include the additional right, envisaged by clause 33.6 of the standard JBCC terms, to make demand merely because the contract had been cancelled.

[60] One knows in the present case that if Compass were to make payment to the Department, Granbuild would be liable to Compass in terms of the counter-indemnity. It is true that in terms of the counter-indemnity Compass is entitled to make payment even though Granbuild disputes the validity or amount of the Department's claim. This does not appear to me to disbar Granbuild from disputing that the circumstances entitling the Department to make demand under the guarantee have been met; what it precludes Granbuild from doing is refusing to make good on its counter-indemnity merely because there is a contractual dispute between itself and the Department on the underlying merits of the claim, something which is usually irrelevant as between the employer and the guarantor. It is also so that Compass is entitled in its discretion to pay the Department to obtain its release but Compass has not claimed in these proceedings that it wishes in its discretion to obtain its release and it is thus unnecessary to consider the scope of that provision.

[61] I thus find that Granbuild has locus standi to seek an interdict.

Conclusion

[62] It follows that Granbuild is entitled to a final interdict. This does not mean that the Department will never be entitled to demand payment of the guarantee. It means

only that the Department was not entitled to make demand for payment in its letter of 10 March 2015. The effect of this judgment is that it will only be entitled so to do once the principal agent has certified an amount as owing by Granbuild to the Department in terms of clause 36.5.3 read with clause 33.3.

[63] Mr Jacobs, who submitted (contrary to my conclusion) that I should dismiss the application, asked for a special costs order against Granbuild because of a statement made by Mr Donough in the founding affidavit that the Department's conduct in calling up the guarantee with knowledge of the pending application for leave to appeal was 'tantamount to fraud, is in bad faith and is unjust'. This was effectively an allegation directed at the senior official of the Department who signed the demand, Mr Gibbs. In his answering affidavit Mr Gibbs stated that these allegations were reckless and would be dealt with in argument. Mr Donough denied this in reply. The imputation of fraud and bad faith was not retracted.

[64] In my view Mr Donough's imputations against Mr Gibbs were completely unjustified. Indeed, I have rejected Granbuild's first ground for an interdict, which is the only ground to which the pending application for leave to appeal might have been relevant. If I had dismissed the application on its merits, I might well have acceded to Mr Jacobs's request for a special costs order. In the event, I will be granting an interdict, but as a mark of the court's displeasure, and having regard to the fact that Granbuild has only succeeded on one of two distinct issues and obtained what is likely to be a relatively brief respite, I intend to order that the parties pay their own costs.

[65] I make the following order:

(a) The second respondent is interdicted and restrained from making payment to the first respondent pursuant to the first respondent's demand to the second respondent dated 10 March 2015 for payment of the amount of the guarantee issued by the second respondent to the first respondent on 9 February 2012.

(b) The parties shall bear their own costs of the application.

ROGERS J

APPEARANCES

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