IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 19577/2019

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED **Applicant**

and

SASTRI GOUNDEN **First Respondent**
EVERTON GRANVILLE SEPTEMBER **Second Respondent**

Coram: Justice J I Cloete
Heard: 7 September 2020
Delivered electronically: 28 October 2020

JUDGMENT

CLOETE J:

Introduction

[1] The applicant (*'the Bank'*) applies for money judgments against the first and second respondents (unless otherwise indicated *'Gounden'* and *'September'*). The claims are based on written guarantees executed by them in favour of the Bank on 15 July 2016, in which they each undertook to pay a maximum of

R10 million plus interest as security for all sums owing by Chem Source SPV (Pty) Ltd (*'Chem Source'*) to the Bank as principal debtor, arising from a written overdraft facility agreement concluded on the same date. Gounden and September are also the only directors of Chem Source.

[2] It is undisputed that monies were loaned and advanced, in the form of drawdowns, to Chem Source over the period July 2016 to March 2017 in the aggregate amount of R69 478 441.59. It is also common cause that the written facility agreement was amended from time to time (and finally on 2 March 2017); its purpose was to provide funding to Chem Source to deliver procurement services to a third party; the facility could immediately be suspended or withdrawn in the event of a material deterioration in Chem Source's financial position in the reasonable opinion of the Bank; and that it was a fixed term facility expiring on 22 March 2017.

The Bank's case

[3] The deponent to the Bank's founding affidavit, Ms Georgina Brand (*'Brand'*) stated that she has personal knowledge of the Bank's claims and the facts upon which they are based, due to the execution of her functions as a legal advisor in its employ *'…and as a result of having studied and considered the* [Bank's] *documents and records in respect of the claim, including but not limited to the annexures to this affidavit'*.

[4] Chem Source was established in 2016 as a special purpose vehicle (*'SPV'*) to provide procurement services to Le-Sel Research (RF) (Pty) Ltd (*'Le-Sel'*),

which is a major chemical supplier. According to her, Chem Source was introduced to the Bank by the Industrial Development Corporation of South Africa (the *'IDC'*) which had provided funding to Le-Sel for its operations.

[5] The IDC told the Bank that it was actively involved in the business of Le-Sel and had identified a weakness in Le-Sel's procurement processes. It had thus recommended the establishment of an SPV to address this weakness in the form of Chem Source, and that Chem Source should in turn approach the Bank to secure the required funding facility.

[6] During April 2016 Chem Source approached the Bank for an overdraft facility and *'*[f]*ollowing the relevant enquiries and due diligences'* the facility was granted in July 2016, initially for R20 million but increased on 2 March 2017 to R40 million.

[7] In February 2017 a procurement services agreement was concluded between Chem Source and Le-Sel (this is common cause). Although the facility expired on 22 March 2017, the Bank *'…without derogating from* [its] *rights and remedies'* in terms thereof allowed the facility to continue and further drawdowns were made.

[8] In about July 2017 it became apparent to the Bank that Chem Source's turnover *'into the facility'* had reduced significantly which caused the Bank concern. Without prejudice discussions followed between *inter alia* the Bank, IDC and Chem Source regarding the facility and its settlement. Nothing came of this.

[9] On about 10 August 2017 Brand, together with other Bank representatives, met with Gounden and September, whereafter Brand sent an email recording the discussions at that meeting. These included the Bank seeking clarity on various issues, such as how the facility had been utilised; recording that drawdowns of more than R20 million were wrongly appropriated by Chem Source to pay Le-Sel's suppliers and other creditors in breach of the facility; and Chem Source's suggested business model to address how the facility would be used going forward, which included its proposal that Le-Sel would make payment of the facility arrears.

[10] According to Brand, the proposed model *'became unviable'* when Le-Sel placed itself in voluntary business rescue pursuant to a resolution passed by its directors on 15 December 2017. On 14 May 2018 a statutory s 345 demand[1] was despatched by the Bank's attorneys to Chem Source and letters of demand to Gounden and September. They were simultaneously notified that the facility was terminated with immediate effect.

[11] Upon receipt of the letters of demand Gounden and September requested certain documents from the Bank through its attorneys. On 4 June 2018 Chem Source's attorneys responded to the s 345 demand. In that letter it was denied that any amount was due; the Bank was aware of the *'most unusual circumstances'* in which the facility was granted as well as the extensive involvement of the IDC; Chem Source had been established on the initiative of the IDC to support its own turnaround strategy for Le-Sel, of which the IDC was

[1] In terms of the Companies Act 61 of 1973.

not only a shareholder but three of its representatives (including the CEO) served on Le-Sel's board; and this had occurred at a time when Le-Sel was substantially indebted to the IDC.

[12] It was further alleged by Chem Source that, pursuant to the sole purpose for which it was established, it sourced products and materials from suppliers which were delivered to Le-Sel and for which it was invoiced. However, despite numerous undertakings to pay by both Le-Sel and the IDC, these were not honoured, and in fact discussions took place between the IDC and the Bank about the facility in the absence of Chem Source's representatives.

[13] Chem Source also contended it had been persuaded by both the IDC and the Bank not to pursue legal action against Le-Sel despite already having despatched a letter of demand under threat of instituting action. Chem Source was considering instituting proceedings to recover the amount owing to it plus damages from the IDC and Le-Sel's implicated directors. Chem Source's attorney proposed a meeting to attempt to resolve these issues.

[14] Brand recorded in the founding affidavit that the Bank was aware of the IDC's involvement in Le-Sel (including its shareholding and representation on the board); certain without prejudice discussions had taken place *'during the tenure of Le-Sel's operating business, regarding a potential financing deal in respect of the business of Le-Sel, however none of these discussions came to fruition'*; the Bank was unaware of undertakings made by the IDC for payment of monies owing by Le-Sel to Chem Source; and the Bank expressly denied having persuaded Chem Source not to pursue legal action against Le-Sel.

[15] After receipt by the Bank's attorneys of the June 2018 letter, there were further discussions between the attorneys for the Bank and Chem Source as well as an exchange of correspondence. It would seem that these also came to nought. In September 2018 Chem Source instituted action against the IDC and the implicated directors of Le-Sel in the Gauteng High Court (according to Gounden and September, pleadings have closed and a trial date is awaited). In broad terms the cause of action is carrying on business with the intention to defraud creditors.

[16] The Bank's case, in a nutshell, is the fact that Chem Source has been unable to obtain payment from Le-Sel does not detract from its own indebtedness to the Bank. The latter has called up collateral security and the total indebtedness now stands at R35 613 989.52 excluding interest. Accordingly, Gounden and September remain fully exposed under their respective guarantees.

The respondents' case

[17] Gounden and September maintain that from inception the Bank acted in a manner highly prejudicial both to Chem Source and to them as guarantors. They contend that in the circumstances they should be exempted from liability, including on the grounds of public policy.

[18] According to them, during about September 2015 Gounden was told by his brother-in-law, Reuben Naicker, of a deal in which he was involved as a senior employee of the IDC relating to Le-Sel, including the IDC's concerns about Le-

Sel's procurement processes, a field in which both Gounden and September have expertise.

[19] Shortly thereafter it became known that the IDC had invested approximately R157 million to obtain a stake in Le-Sel. On about 14 September 2015 it was reported in the press that the IDC's investment in Le-Sel signalled the former's long term intention to develop a globally competitive consumer products manufacturing industry in South Africa, to serve both local and multi-brand owners in the home and personal care industries.

[20] At the time Gounden and September had an existing relationship with the Bank through a company known as Glenblue Africa Holdings (Pty) Ltd (*'Glenblue'*) which provided procurement services to global oil companies. They dealt primarily with two individuals employed by the Bank, namely Eldon Pillay (*'Pillay'*) who held the position of Head: Growth and Acquisition Finance, and Luke Kirsten (*'Kirsten'*) who was Head of Credit in Pillay's portfolio.

[21] In the course of this relationship the Bank afforded overdraft facilities to Glenblue in accordance with a model developed by the Bank to enhance the growth of BEE enterprises. In particular this model made provision for the Bank to obtain guarantees from an entity known as the Tshwaranang Trust, which enabled the Bank to meet its BEE obligations under the Banking Charter. This made it possible for the Bank to grant credit facilities to these enterprises which did not otherwise have access to suitable security.

[22] Given the potential opportunity discussed with Naicker and reported in the press, Gounden and September mentioned this to Pillay and Kirsten, who in turn expressed interest in building a relationship between the Bank and the IDC. Gounden facilitated the exchange of contact details between the IDC representatives, Pillay and Kirsten *'…so that they could come into contact at their own initiative'*.

[23] In about early November 2015, Naicker confirmed the information about the IDC's interest in and concern about Le-Sel. He also told Gounden and/or September that the IDC had acquired a 25.1% shareholding in Le-Sel as well as an option (which it intended to exercise) to increase that shareholding to become the majority shareholder up to 75%. The IDC was, alternatively would be, entitled to appoint directors to the board of Le-Sel. An SPV which would be owned and controlled by Gounden and/or September had been identified by the IDC as suitable for securing the procurement outsourcing function for Le-Sel. The SPV would be required to obtain funding from a commercial bank, and the IDC had already identified the Bank as a suitable potential source. The purchase of raw materials required by Le-Sel would be funded using a credit facility to be obtained by the SPV from the Bank. The business opportunity would be profitable, and low risk.

[24] On about 5 November 2015 a first meeting (initiated by the IDC) took place between Gounden and representatives of Le-Sel, at which the proposed outsourced procurement function, to be undertaken by Gounden and September, as well as its potential benefits, were discussed.

[25] Shortly thereafter and on about 16 November 2015, Gounden and September became aware of a meeting which took place on about 13 November 2015 in their absence, between representatives of the IDC (including Naicker) and the Bank (Pillay and Kirsten). According to them, it appeared that detailed discussions took place thereat as to how the IDC and the Bank could co-operate in achieving the IDC's purpose with regard to Le-Sel and their possible involvement (i.e. Gounden and September) through a suitable entity.

[26] After this meeting Gounden and September were informed by Pillay and Kirsten that a trial procurement transaction, to a maximum value of approximately R7 million, could be channelled through Glenblue. If successful, an entity, to serve as an SPV, would need to be formed to take the model further.

[27] During the period November 2015 to July 2016 the IDC actively promoted the SPV to be appointed to perform the outsourced procurement function for Le-Sel. The IDC took the lead in the development and establishment of the business plan and model. On 13 January 2016 Naicker distributed a preliminary business model prepared by the IDC, which represented that the proposed venture would be economically viable and profitable to the SPV over a three year period.

[28] On the same day Naicker despatched a further email to Le-Sel and Gounden in which *inter alia* it was recommended that a round table discussion take place so that Le-Sel, Glenblue and the IDC could approach the Bank to address the funding of the SPV. This resulted in the conclusion of a written memorandum of understanding on 10 March 2016, followed by a letter dated 14 March 2016

from Naicker to Pillay supporting the application for credit by the SPV. It concluded with the following:

> *'The IDC is hopeful that these considerations will weigh favourably in your evaluation of financial support for GB* [i.e. Glenblue].
>
> *Please feel free to engage with IDC and LE-SEL to finalise your evaluation.'*

[29] During April 2016, and to the knowledge of all concerned including the Bank, Chem Source was formed for the purpose of performing the function in question. In the interim, initial overdraft facilities were granted by the Bank to Glenblue, limited in amount, for a test period, through a selected number of purchase orders for the financing of raw materials procured for Le-Sel. It is against this background that Chem Source proceeded to make application to the Bank for an overdraft facility of up to R20 million.

[30] On either 13 or 14 June 2016, Pillay and Naicker met to discuss the project, without either Gounden or September being invited to attend. According to Gounden and September, it appears from correspondence that the meeting was also attended by Selwyn Grimsley, the financial director of Le-Sel.

[31] On 14 June 2016 Pillay followed up on the meeting by despatching an email to Naicker. Pillay wrote that he took *'a lot of comfort'* from the fact that the IDC and Le-Sel had decided to strategically support Glenblue/Chem Source in the manner described and was *'now comfortable'* to propose an extension and increase of the current facilities for Glenblue to bring the Bank's exposure up to R5 million in the short term. He continued:

'Once I can have the cash pledge of R3m to R4m as discussed I will apply for a facility of between R15m to R20m for Glenblue/Chem Source for the medium term.

I will also work in parallel on an application for R40m to R50m subject to a cash pledge of around R10m to R15m from the funds that are going to be invested into Le-Sel by the IDC…

Please may I ask that in order to support my application for the current increase in facilities to R5m for the short term, that the IDC write me a letter confirming that the IDC is in the process of increasing their shareholding and will invest a further R80m into Le-Sel of which approximately R10m to R15m will be pledged as collateral for Glenblue/Chem Source facilities.

Please may I also ask that Le-Sel also writes me a letter confirming their intention to outsource their key procurement to Glenblue/Chem Source and provide us a schedule of the planned orders for the next 2 months. They should also confirm that they will formalise this arrangement through a contract with Glenblue/Chem Source…'

[32] The requested letter from the IDC was despatched by Naicker to Pillay on 15 June 2016. The requested letter from Le-Sel was sent to Pillay on 24 June 2016. This resulted in Chem Source concluding the written overdraft facility with the Bank on 15 July 2016 in an amount of R20 million with R4 million to be pledged as security by Le-Sel, and the guarantees in question by Gounden and September.

[33] They maintain it is clear that the facility, as had been envisaged by the IDC, was to provide funding and cash flow to Le-Sel with the knowledge of the Bank. Chem Source had no other business, no other assets and no previous business history. The only advantage it would obtain from being used as a conduit for the flow of monies to the suppliers of Le-Sel was to receive commission. In the

event of Le-Sel failing to reimburse Chem Source what had been paid for its benefit to these suppliers, the entire outsourced procurement concept initiated and developed by the IDC would collapse. Further, the only reason why the Bank was prepared to advance the money through the vehicle of Chem Source was because the latter had the requisite BEE credentials to obtain leveraged finance to be used for the benefit of Le-Sel, which itself lacked these credentials.

[34] On 20 July 2016, just five days after conclusion of the written overdraft facility and execution of the guarantees, Naicker despatched a further email to Pillay for the purpose of motivating an increase in the facility up to an amount of R40 million. Naicker stated that the IDC *'investment proposal'* was premised on funding from the Bank to Chem Source of R50 million, based upon a R10 million pledge to be provided to the Bank by Le-Sel. The Bank was asked whether it would give consideration to granting Chem Source a R75 million facility, based upon a R15 million pledge. Gounden and September maintain these pledges were not to be provided by Le-Sel in isolation (given its financial position) but clearly through funding made available to Le-Sel by the IDC. Gounden and September were not asked for any input. Thereafter the IDC continued to pursue the issue of further funding from the Bank on an increasingly "urgent" basis.

[35] On 8 February 2017 the written outsourcing agreement was concluded between Chem Source and Le-Sel. According to Gounden and September, as a result of the repeated representations made by the IDC that it was committed

to support Le-Sel, and accordingly that Chem Source was not exposed to risk, the outsourcing agreement made no provision for Le-Sel (or the IDC) to provide any form of security to Chem Source.

[36] Both the IDC and Le-Sel then proceeded to place further pressure on the Bank, by contacting it directly, for the urgent release of the further facility up to R40 million to meet the pressing need to pay suppliers of raw materials to Le-Sel. On 2 March 2017 the facility was increased up to R40 million. It is apparent from a letter confirming the facility increase that the IDC had persuaded the Bank to waive the increased pledge requirement (i.e. from R4 million to R10 million).

[37] The respondents assert this left Chem Source, and in particular themselves as guarantors, increasingly exposed and prejudiced. Gounden claims that when he signed the document indicating acceptance of the increased facility he did not read it (nor was it read or explained to him) and he did so on the basis that it contained the terms previously agreed. He only later realised that the pledge had not been increased, and also that the overdraft facility was still to expire on 22 March 2017, a mere 20 days after signature, which made no commercial sense. According to him:

> *'I still do not understand the reason why the increased facility would only be available for 20 days, as this was contrary to the entire model, and all concerned would have been aware how the facility was to be utilised, and that there was no prospect ... of the amount of the entire facility being repaid to Standard Bank a mere 20 days thereafter.'*

[38] By 7 March 2017, just 5 days after the increased facility was made available, and after drawdowns were made to pay Le-Sel's suppliers, the latter advised Chem Source of alleged cash flow difficulties and that it was unable to make payment of a particular amount of R5 956 077 due to it. According to Gounden and September, this was the first indication, after monies had been disbursed by Chem Source to suppliers of Le-Sel, that the latter would default on payment.

[39] Gounden wrote to the IDC on 11 May 2017 expressing his concerns. He had also established the previous day that the IDC was in fact not yet the main shareholder of Le-Sel. He stated that it appeared to Chem Source that in truth Le-Sel saw no value in Chem Source beyond short-term finance, and that the procurement contract had been concluded with Chem Source solely to raise additional funding for Le-Sel and no more. Chem Source accordingly wished to exit from the Le-Sel agreement as early as June 2017 unless these issues could be satisfactorily resolved. On 13 May 2017 Chem Source addressed a letter of demand to Le-Sel in respect of amounts owing which at that stage totalled R16 308 297.79.

[40] The respondents allege that on 18 May 2017 a meeting took place in South Korea, attended by representatives of the Bank and the IDC without their knowledge. The Bank was represented at the meeting not only by Pillay and Kirsten, but also by Sibongiseni Ngundze (*'Ngundze'*), the latter being Head: Retail and Business Banking. An agreement was then concluded between the Bank and the IDC without any involvement by Chem Source, Gounden or

September. They maintain that the discussion document which followed (emanating from the IDC) reveals that the real relationship was not in fact one between Chem Source and Le-Sel at all, but rather the Bank and the IDC, with Chem Source and Le-Sel as secondary players.

[41] They contend this is evident from the following in that document. First, the relationship between the IDC and the Bank was described as a *'joint project'* to stabilise Le-Sel and support black entrepreneurs (being a reference to Chem Source). Second, specific reference was made to the funding given by the Bank and IDC being at risk. Third, it had been agreed that no further action would be taken by Chem Source on its letter of demand, which should be withdrawn once a payment was made by Le-Sel. (Gounden made mention of other aspects but these are the most salient for present purposes).

[42] On 7 June 2017 a telephone conversation took place between Gounden, September and Pillay. They claim it was apparent from this conversation that the Bank was acting in a manner far different to an ordinary lender of money, and was intimately involved in negotiations with the IDC with a view to restructuring Le-Sel. In a further telephone conversation between Gounden and Pillay on 9 June 2017, Pillay advised Gounden that the IDC wanted the Bank to instruct Chem Source to halt legal action against Le-Sel. Gounden refused.

[43] Pillay then informed him that *'an extensive agreement'* had already been reached between the IDC and the Bank with respect to the agreement between Chem Source and Le-Sel. Pillay had told the IDC he would not instruct Chem

Source what to do because of what was envisaged in the *'extensive agreement'*.

[44] A meeting took place on 14 June 2017 between representatives of the Bank (Pillay and Kirsten), the IDC, Chem Source and Le-Sel. Gounden detailed what was discussed at that meeting, which essentially appears to have amounted to a restructuring agreement and payment plan by Le-Sel. As part of the deal, Chem Source was to withhold legal action against Le-Sel.

[45] Despite further meetings and other communications which followed, all of which are detailed in Gounden's affidavit, by December 2017 there was still no resolution, and as previously stated, Le-Sel was placed in voluntary business rescue on 15 December 2017. Although September approached the business rescue practitioner on 28 December 2017 with the request that the restructuring agreement nonetheless be implemented until Le-Sel was able to fully settle the debt owing to Chem Source, the request was ignored.

[46] This history, according to Gounden and September, resulted in the institution of action against the IDC and implicated Le-Sel directors in the Gauteng High Court. They submit that in all the circumstances the conduct of the Bank, and its involvement with the IDC even prior to Chem Source being established, resulted in their rights (as guarantors) being severely prejudiced:

> *'From the outset, this was no normal or at arm's length business transaction as between Chem Source and Le-Sel, but the two "players" were clearly the IDC and Standard Bank, with little or no regard for Chem Source and in*

particular the two sureties, September and myself, who were required to stand surety to Standard Bank in the amount of R10 million each.'

[47] They submit that the present matter cannot properly be determined without the entire dispute being referred to trial, subject to discovery and the like, so that the nature and extent of involvement by the relevant Bank employees along with those of the IDC can be fully canvassed.

[48] Although they accept that Brand (the deponent to the Bank's founding affidavit) was actively involved in at least some of the meetings pertaining to the facility during the course of 2017, they maintain she has no personal knowledge of the events which occurred when the Bank was represented by Pillay and Kirsten. This is supported by Brand's averments in the replying affidavit that Pillay and Kirsten are no longer employed there, and it has not been able to consult with them in relation to the respondents' version. She submits that for this reason, where Gounden and September refer to interactions with Pillay and/or Kirsten, the Bank has no knowledge thereof unless confirmed by documentary evidence in its possession and the other allegations are specifically not admitted. However according to her nothing turns on this, since on the common cause facts the Bank is entitled to the relief claimed on motion.

Discussion

[49] *Mr Engelbrecht*, who appeared for the Bank, argued that while the material facts upon which the Bank relies are undisputed, the respondents ask for the matter to be referred to trial on the basis of defences which have no merit.

[50] He relied on *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others*[2]:

> *'[56] Where a respondent makes averments which, if proved, would constitute a defence to the applicant's claim, but is unable to produce an affidavit that contains allegations which prima facie establish that defence, the respondent should in my view, subject to what follows, be entitled to invoke… Uniform Rule of Court 6(5)(g)… In the situation presently being considered the respondent may not dispute the facts alleged by the applicant, but does seek an opportunity to prove allegations which would constitute a defence to the applicant's claim… the respondent in effect says: given the opportunity, I propose showing that even if the facts alleged by the applicant are true, I can prove a defence. (It is no answer to say that motion proceedings must be decided on the version of the respondent even when the onus of proving that version rests upon the respondent, because* ex hypothesi *the respondent is unable to produce evidence in affidavit form in support of its version). It would be essential in the situation postulated for the deponent to the respondent's answering affidavit to set out the import of the evidence which the respondent proposes to elicit (by way of cross-examination of the applicants' deponents or other persons he proposes to subpoena) and explain why the evidence is not available. Most importantly (and this requirement deserves particular emphasis), the deponent would have to satisfy the court that there are reasonable grounds for believing that the defence would be established. Such cases will be rare, and a court should be astute to prevent an abuse of its process by an unscrupulous litigant intent only on delay or a litigant intent on a fishing expedition to ascertain whether there might be a defence without there being any credible reason to believe that there is one. But there will be cases where such a course is necessary to prevent an injustice being done to the respondent.'*

[51] *Mr Engelbrecht* argued that, as a matter of law, the "prejudicial conduct" upon which the respondents rely is no basis to find that enforcement of the guarantees would be contrary to public policy. In addition, the respondents' own

---

[2] 2008 (2) SA 184 (SCA).

version contradicts their assertion that the Bank's conduct caused them any harm. It instead demonstrates that: (a) it was them who introduced the Bank to the IDC as the potential funder for the venture; (b) from the outset they "expressly" invited the IDC and the Bank to deal directly with one another; (c) they were kept informed of all "material" discussions; (d) after Le-Sel failed to pay Chem Source the Bank tried to arrange payment by Le-Sel; and (e) they were aware of the IDC's request to forego the pledge increase.

[52] He submitted that in any event, given the quantum of the debt, even if the pledge had been increased to R10 million, it would not have reduced the respondents' liability and accordingly there was no resultant prejudice. Furthermore Chem Source agreed to Le-Sel's proposed repayment plan of June/July 2017; there is no evidence to suggest that had Chem Source instituted action against Le-Sel for payment of the arrears it would have recovered them; and the Bank made clear it was unwilling to instruct Chem Source to hold off recovery proceedings with the result that the decision to do so was Chem Source's alone.

[53] He argued that of further significance is the "undisputed fact" that at all material times the respondents were the sole directors of Chem Source and in "absolute control" of its affairs. He thus submitted that the respondents have neither established nor alleged any fact which, if proved, could sustain the assertion that the Bank acted in a manner prejudicial to them as guarantors. They have thus failed to make out a prima facie case to sustain their purported defence and should not be permitted to do so by way of a fishing expedition.

[54] He also referred to *Absa Bank Ltd v Davison*[3] where the Supreme Court of Appeal held that our law of suretyship does not recognise a general prejudice defence, and a surety can only be released where proven prejudice on the part of the creditor is due to a breach of a legal duty or obligation.

[55] As far as the public policy argument advanced by the respondents is concerned, *Mr Engelbrecht* correctly submitted that such considerations play no self-standing role in the contractual context: *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others.*[4] There the Constitutional Court set out the test (albeit in the context of considering a particular clause in a contract) as follows:

> *'[37] The first stage involves a consideration of the clause itself. The question is whether the clause is so unreasonable, on its face, as to be contrary to public policy. If the answer is in the affirmative, the court will strike down the clause. If, on the other hand, the clause is found to be reasonable, then the second stage of the enquiry will be embarked upon. The second stage involves an inquiry whether, in all the circumstances of the particular case, it would be contrary to public policy to enforce the clause. The onus is on the party seeking to avoid the enforcement of the clause to "demonstrate why its enforcement would be unfair and unreasonable in the given circumstances" … particular regard must be had to the reason for non-compliance with the clause.'*

[56] And further:

> *'[80] …Our law has always, to a greater or lesser extent, recognised the role of equity (encompassing the notions of good faith, fairness and*

---

3 2000 (1) SA 1117 (SCA) at paras [14] and [19].
4 2020 (5) SA 247 (CC)

reasonableness) as a factor in assessing the terms and the enforcement of contracts. Indeed, it is clear that these values play a profound role in our law of contract under our new constitutional dispensation. However, a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, self-standing status as contractual requirements. Their application is mediated through the rules of contract law, including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it.'

[57] After re-emphasising that the *'enforcement of contractual terms does not depend on an individual judge's sense of what fairness, reasonableness and justice require'*[5] the Constitutional Court referred to *Pridwin*,[6] where the Supreme Court of Appeal set out the principles governing judicial control of contracts through the instrument of public policy, namely that:

'(i) Public policy demands that contracts freely and consciously entered into must be honoured;

(ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;

(iii) Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;

(iv) The party who attacks the contract or its enforcement bears the onus to establish the facts;

(v) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;

---

5 Ibid at para [81].
6 *AB v Pridwin Preparatory School* 2019 (1) SA 327 (SCA).

(vi) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.'[7]

[58] The Constitutional Court continued:

'[82] …There are, however, two principles listed by the Supreme Court of Appeal in Pridwin *which require further elucidation.*

[83] The first is the principle that "[p]ublic policy demands that contracts freely and consciously entered into must be honoured". This Court has emphasised that the principle of pacta sunt servanda *gives effect to the "central constitutional values of freedom and dignity". It has further recognised that in general public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken…*

[84] Moreover, contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships…

[88] The second principle… is that of "perceptive restraint", which has been repeatedly espoused by the Supreme Court of Appeal… It is encapsulated in the phrase that a "court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases"…

[90] However, courts should not rely upon this principle of restraint to shrink from their constitutional duty to infuse public policy with constitutional values. Nor may it be used to shear public policy of the complexity of the value system created by the Constitution. Courts should not be so recalcitrant in their application of public policy considerations that they fail to give proper weight to the overarching mandate of the Constitution. The degree of restraint to be exercised must be balanced against the backdrop of our constitutional rights and values. Accordingly, the "perceptive restraint" principle should not be blithely invoked as a protective shield for contracts that undermine the very

---

7 *Pridwin* at para [27].

> *goals that our Constitution is designed to achieve. Moreover, the notion that there must be substantial and incontestable "harm to the public" before a court may decline to enforce a contract on public policy grounds is alien to our law of contract.'* (my emphasis)

[59] On the other hand *Mr Gess*, who appeared for the respondents, argued that the matter is not as simple and clear cut as contended by the Bank. He highlighted the following. First, neither Pillay nor Kirsten, who were key to the events that took place and who were party to the *'due diligence'* relied upon by the Bank as well as extensive interactions with the IDC and Le-Sel, deposed to any affidavit. Despite their obvious intimate involvement, all the Bank has indicated in the replying affidavit is that neither of these individuals are still employed by it and therefore it has not been able to consult with them. He pointed out that the Bank chose not to disclose in its papers why Pillay and Kirsten are no longer in its employ; and why it is not possible for the Bank to nonetheless consult with either of them.

[60] He submitted that because neither Pillay nor Kirsten have deposed to any affidavit for the Bank, it has put up no version at all as to what they were party to or had knowledge of. In particular, the Bank is not in a position to deny that the conduct that is alleged to amount to a fraud on Gounden and September by the IDC and implicated Le-Sel directors took place with the full knowledge of these two Bank officials. It is therefore also unable to deny the Bank's participation and/or involvement in such alleged fraud through Kirsten and Pillay which, if proven, would constitute a breach of a legal duty or obligation falling outside the category of general prejudice referred to in *Davison*.

[61] *Mr Gess* argued that in addition, after the default by Le-Sel, negotiations took place between representatives of the IDC and the Bank in South Korea. As previously stated, the respondents allege that the Bank was not only represented by Pillay and Kirsten but also Ngundze. Despite Brand having denied Ngundze was present at that meeting, and having undertaken that a confirmatory affidavit would be filed by him to confirm it, this was not done. Moreover, as is apparent from the answering affidavit, the respondents were not present at certain material discussions between representatives of the IDC and the Bank which occurred both before and after the overdraft facility and guarantees were concluded.

[62] He submitted that the Bank now seeks to enforce the guarantees against the respondents *inter alia* in the following circumstances, all of which were to the knowledge of the Bank at the time: (a) the IDC held shares in Le-Sel and had appointed directors to its board; (b) the IDC was not prepared to advance any further funding to Le-Sel; (c) the Bank conducted *'the relevant enquiries and due diligences'* into Chem Source, an empty shell, before granting the overdraft facility without disclosing the nature or outcome thereof; (d) Le-Sel was in a dire financial state and apparently unable to pay its suppliers for raw materials; (e) the Bank itself was not willing to advance any funds directly to Le-Sel; and (f) the Bank was aware that Chem Source would be purchasing raw materials for Le-Sel without any form of security, in circumstances in which neither the Bank nor the IDC were themselves prepared to provide a facility for this purpose directly to Le-Sel.

[63] He also argued that should it be established through the discovery and trial processes that Pillay and/or Kirsten were aware of, or party to, the alleged fraud by the IDC and implicated Le-Sel directors, this would in itself be sufficient ground for the respondents to be released as guarantors, either on the basis that they would never have signed the guarantees had they known the truth, or alternatively that it would be contrary to public policy in the circumstances for the Bank to be permitted to enforce the guarantees against them. Given the Bank's concession that it conducted due diligences, including by way of direct discussions with Le-Sel and the IDC, these (and what was established) should also be discovered and canvassed at trial. This is particularly so in light of the allegations of the parlous financial state of Le-Sel at the relevant time.

[64] The question which must thus be answered is whether Gounden and September have persuaded me that there are reasonable grounds for believing that their defence(s) would be established if the matter were referred to trial. Mindful of the warning in *Minister of Land Affairs* to be astute to prevent an abuse of process by an unscrupulous litigant intent only on delay or a fishing expedition, I have come to the conclusion that for the reasons advanced by *Mr Gess*, the present case is one of those rare instances where a referral to trial is warranted to prevent what may transpire to be an injustice to the respondents.

[65] The Bank on its own version was aware of the unusual circumstances in which this failed business venture evolved. It was also aware, before instituting proceedings, of serious allegations made by the respondents (or more

accurately, Chem Source) against the IDC and implicated Le-Sel directors in the pending action in Gauteng. Perusal of the particulars of claim in that action, annexed to the Bank's founding affidavit, reveals that they are replete with references to the Bank despite no relief being sought in that action against it.

[66] While it was proper for the Bank to disclose that litigation in these proceedings, it must surely have anticipated a dispute of fact in relation to the guarantees which it seeks to enforce in this application. It nonetheless elected to proceed by way of motion, and not summons. Of course, it may turn out once the issues are fully ventilated at trial that the respondents indeed have no defence. However, to my mind, it would be premature and may result in an injustice to the respondents to refuse a referral to trial in the particular circumstances. In reaching this conclusion I have also had careful regard to what the Constitutional Court said in *Beadica.*

[67] That being said, I make it clear that, in my view, this is one of those "knife edge" cases in finding that a referral to trial is warranted. At least for this reason, I do not believe that a costs award is appropriate at this stage and indeed *Mr Gess* did not suggest that there should be one.

[68] In *Lekup Prop Co No 4 v Wright*[8] the Supreme Court of Appeal had the following to say about the manner in which a dispute on motion should be referred to trial:

---

[8] 2012 (5) SA 246 (SCA).

'[32] Before making the appropriate order, I wish to say something about the manner in which the trial was conducted. It will be recalled that the appellant initiated motion proceedings and that the matter was referred to trial after the respondent had filed his answering affidavit. At the trial the respondent was allowed to read from that affidavit and did so, extensively. That was not the correct procedure. A witness who gives evidence in trial proceedings must do so in the ordinary way. In our practice, lay witnesses are not usually permitted to read from pre-prepared statements even if those statements have been prepared by themselves. The learned judge a quo was under a misapprehension as to the status of the affidavits, as appears from what he said whilst Legh was being cross-examined, namely: "I will accept that the affidavits in this application are proper evidence before this court." Affidavits filed may of course be used for cross-examination and also as proof of admissions therein contained, but (save to the extent that they contain admissions) they have no probative value; and in the absence of agreement, they do not stand as the witness's evidence-in-chief, or supplement it. And if, by agreement, they are to be treated as such, it is unnecessary and a waste of time and costs for them to be read into the record. A referral to trial is different to a referral to evidence, on limited issues. In the latter case the affidavits stand as evidence, save to the extent that they deal with dispute(s) of fact; and once the dispute(s) have been resolved by oral evidence, the matter is decided on the basis of that finding together with the affidavit evidence that is not in dispute.'

[69] **The following order is made:**

1. ***The matter is referred to trial;***
2. ***The notice of motion shall stand as a simple summons and the answering affidavit as the notice of intention to defend;***
3. ***The applicant shall deliver its declaration within fifteen (15) days from date of this order and the uniform rules dealing with further pleadings, discovery and the like shall thereafter apply; and***
4. ***The costs incurred to date shall be costs in the cause at the trial.***

_____

J I CLOETE