

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 1613 OF 2022

5 **(Arising from Civil Suit No. 0991 of 2022)**

OMEGA CONSTRUCTION LIMITED
APPLICANT

VERSUS

10 **1. ATTORNEY GENERAL }
2. CENTENARY RURAL DEVELOPMENT BANK LIMITED }**

RESPONDENTS

Before: Hon Justice Stephen Mubiru.

RULING

15. Background.

On or about 24th April, 2019 the applicant executed a contract with the Ministry of Works and Transport for the construction of the “Ssezibwa (Bulandi- Gyira) crossing,” between Kayunga and Nakasongola Districts, for a contractual sum of shs. 12,207,055,278/= Having achieved
20 substantial completion in the execution of the works, the applicant on 12th May, 2022 raised and submitted to the Project Manager, its last payment certificate due for payment within 30 days of the date of certification (29th June, 2022). Despite the applicant claiming that the road was already in use, the Ministry refused to issue a certificate of completion on grounds that the applicant; - had failed to deploy key personnel on site, to maintain valid securities (Advance
25 Payment Guarantee, Contractor’s all risk insurance policy), had submitted over-exaggerated and incomplete interim payment certificates had made slow progress toward completion of the works, failure to adhere to on-site instructions duly issued accordance with the contract and guidance by management meetings, and a deliberate failure of the applicant’s staff to participate in the conduct of a joint measurements of works as per the contract. Although on 31st October,
30 2022 the applicant had written to the Ministry a notice to refer the dispute to adjudication by the Uganda Institute of Professional Engineers, the Ministry instead on account of the specified applicant’s faults, terminated the contact on 7th November, 2022. The Ministry then went ahead

to make a call on the performance guarantee. The applicant applied for and on 28th November 2022, the Court issued an interim restraining order against both respondents.

b. The application.

5 This application by Chamber Summons is made under the provisions of Articles 28 and 126 of
The Constitution of the Republic of Uganda, 1995; sections 33 and 38 of *The Judicature Act*;
section 98 of *The Civil Procedure Act*; section 6 of *The Arbitration and Conciliation Act* and
Order 41 rules 1, 2, 3 and 9 of *The Civil Procedure Rules*. The applicant seeks a temporary
10 injunction order restraining the 1st respondent from making a call on a performance guarantee
Procurement Reference No. MoWT/WRKS/18-19/00408 being a contract for the construction of
the “Ssezibwa (Bulandi- Gyira) crossing,” between Kayunga and Nakasongola Districts. The
applicant seeks a further order restraining the 2nd respondent from honouring or otherwise
encashing the said guarantee upon the 1st respondent’s call. It is the applicant’s case that
15 encashment of the guarantee before the process of adjudication and the pending suit is concluded
is likely to render that process nugatory. It will also harm the applicant’s business reputation and
constrain its access to credit in future. The applicant will further be constrained to pay huge sums
of cash under its obligations in counter-guarantee to the 2nd respondent that will cripple it
financially.

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c. The affidavits in reply;

In the 1st respondent’s affidavit in reply, it is averred that the contract was extended on several
occasions, upon the application by the applicant, eventually specifying 16th June 2022 as the final
25 date for completion of all works. The applicant was notified, in accordance with clause 49 of the
Special Conditions of Contract (SCC) that liquidated damages would be applied at a daily rate of
0.05% of the contract sum, to a maximum of 1 0% of the contract sum. In the Contract
Management meeting No. 16 held on 19th July 2022, the applicant and the Ministry of Works and
Transport agreed on the outstanding works to be performed by the applicant by 20th August 2022,
30 to include; - a) Construction of 6 lines of steel culverts at Km 2+500, including the associated
reinforced concrete end structures; b) Completion of the gravel fill embankment, conforming to

geometric design standards both in terms of vertical, horizontal and cross section geometry; c) Construction of reinforced concrete end structures on 3 lines of concrete encased culverts that had previously been installed; and d) Installation of horizontal guard and handrails, including steel posts, as detailed in the drawings. The applicant committed to complete those works by 21st 5 November 2022.

Despite several interventions by the Ministry of Works and Transport, meetings and interactions with the applicant, the Ministry insisted that since 17th September 2022, there had been effectively no activities on the project site, and the applicant made no efforts to remedy this. On 10 7th November 2022, the applicant wrote to the Ministry of Works intimating that it had elected to terminate the contract due to alleged fundamental breach by the employer. The Ministry of Works and Transport elected to exercise its rights to make a call on the performance guarantee, considering that the applicant had failed to complete the works in accordance with the contract. The guarantee is subject to the Uniform Rules for Demand Guarantees, ICC Publication No. 758 15 which provides that the payment of the guaranteed sums is made on demand and is not subject to the parties' contract but the terms of the guarantee itself. Therefore the 2nd respondent ought to have complied with the guarantee immediately it received a complying demand for the same.

In the 2nd respondent's affidavit in reply, it is averred that on 9th November 2022, the applicant 20 notified the 2nd respondent that it had terminated the contract with the 1st respondent's Ministry of Works. On 16th November 2022, the Ministry of works wrote to the 2nd respondent, making a demand on the Performance Guarantee, and in response, the 2nd respondent informed the Ministry that the Applicant had notified it that it had terminated the contract. On 28th November 2022, the 2nd respondent was served with an Order of this Court made on the same day wherein, 25 *inter alia*, the 2nd respondent was stopped from "honouring the demand by the 1st respondent from paying out or encashing the performance guarantee." This current application is primarily to answer issues in contention between the applicant and 1st respondent and the 2nd respondent is merely a nominal party.

30. The affidavit in rejoinder;

The 1st respondent elected to file is affidavit in reply and serve it on 22nd December, 2022 in excess of ten (10) days of default from the schedule of filing directed by Court. The road constructed by the Applicant stretches through a swamp and River Ssezibwa for over four (4) Kilo meters and currently the road users utilise the said road to conveniently move between Kayunga and Nakasongola Districts. Before the applicant constructed this road pursuant to the contract which is in contest in the main suit, there was no road connecting the two districts. This means that the road the applicant constructed is being used for its intended purpose. The applicant's completed works were verified by the Director of Engineering and Works under the Ministry of Works and Transport. These were accordingly certified as completed works without any complaints raised by the 1st respondent. The 1st respondent does not state any particulars of what is over exaggerated or falsified in the interim payment Certificates No. 12 and 13 which were verified by Director of Engineering and Works under the Ministry of Works and Transport. The allegations of falsification are too general and unsubstantiated. The Claim that the works were not completed was due to the 1st respondent's failure to approve or provide the required contractual rates for placing Culverts. The applicant requested for extension of time to complete the subsidiary works on account of the difficulties it faced and this was unfairly denied by the 1st respondent. This prompted the applicant to refer the issue of extension of time to adjudication proceedings.

The applicant agreed to complete the construction by 21st November, 2022 on two pre-conditions which were abused by the 1st respondent but these included the following; a) the Employer made payment to the contractor; and b) the Employer provided the contractor with a comfort letter to the bank in addition to copies of the interim payment certificates No. 12 and 13 by 14th October, 2022 to enable the contractor /applicant source for financing and by 7th November, 2022, this was not done. The call to encash the performance guarantee was tainted with acts of fraud and bad faith because the 1st respondent failed to pay the applicant's Interim Payment Certificates No. 12 and 13 for completed works under the contract. Owing to the 1st respondent's breach of contract, the applicant terminated the contract on 7th November, 2022. This was long before the 1st respondent's attempt to enforce the performance guarantee by a letter dated 16th November, 2022.

e. Submissions of counsel for the applicant.

M/s KBW Advocates on behalf of the applicant submitted that the 1st respondent's affidavit in reply was filed inordinately out of time and in default of the directions issued by this Court and
5 the same ought to be struck out for being filed in abuse of the process of this Court. A party that ignores Court directions does so at their own peril and detriment. The dispute between the parties is pending adjudication before this Court and the Uganda Institute of Professional Engineers. The performance guarantee in issue has not been enforced or encashed by the 2nd respondent and this status quo ought to be maintained until the main suit is disposed of. Under clause 59.1 and 59.2
10 of the GCC either party, the Employer or the Contractor, was entitled to terminate the contract if the other party caused a fundamental breach of the contract which breach included inter alia "a payment certified by the Project Manager is not paid by the Employer to the Contractor within 84 days of the date of the Project Managers Certificate" and the Project Manager received the Contractor's Application for Payment Certificate on 12th May 2022 and the same was certified on
15 29th June 2022. The certificate had to be paid within 30 days pursuant to GCC 43 and the non-payment of the Certificate 95 days from the date of certification resulted in a fundamental breach on the part of the Employer as set out in GCC 59.2 (d). The 1st respondent fundamentally breached the contract by refusing or failing to pay the applicant for the completed works within the mandatory agreed time for which it is well aware of but on 16th November, 2022 and 24th
20 November, 2022 it acted in bad faith and malice by issuing letters demanding for payment of the performance guarantee under the said contract.

The 2nd respondent had extended the performance guarantee for the contract in dispute up to 20th November, 2022 and this would mean that the applicant is under threat of the 1st respondent's
25 unfair and oppressive actions since the first demand it made on 16th November, 2022 was made while the performance guarantee was still valid and in force. The applicant complained to the 2nd respondent in regard to the fundamental breaches of the contract due to non-payment of interim payment certificates No. 12 and 13 and a tripartite meeting was called but ignored by the 1st respondent. On the 31st October 2022, the applicant issued a notice referring the issue of
30 liquidated damages together with all the disputes in the matter to adjudication under the Uganda Institution of Professional Engineers (UIPE), the appointing authority designated in the contract.

On the 7th November, 2022, the applicant terminated the contract stating in its grounds for termination that “the termination of the contract is hereby made and effected within the terms of GCC 59.1 and 59.2, which *inter alia* states what constitutes a fundamental breach and provides that it includes and is not limited to the grounds stated therein. The termination is therefore
5 further grounded on your repudiatory conduct.” The applicant further reiterated all breaches previously notified to the Employer and laid them out in the notice.

The 1st respondent has acted fraudulently in an effort to defeat the applicant’s contractual rights and this fraud entitles Court to intervene and grant the temporary injunction prayed for. The
10 applicant acted fraudulently when it attempted to call the Performance Security while the dispute is under adjudication; and, while the Employer is hoodwinking the applicant that it wants to have amicable discussions and resolution of the dispute, yet at the same time calling the guarantees behind the applicant’s back; is fraudulent, high-handed, oppressive, unconscionable, and done in bad faith. The particulars of fraud are as follows; i. hoodwinking the applicant that the Employer
15 wants to have amicable discussions and resolution of the dispute while calling the guarantees behind the applicant’s back; ii. Seeking to encash the contract securities while at the same time refusing to pay for certified and completed works carried on the ground; iii. Using sharp practices by seeking hurriedly encash the Contract Security so as to render the decision of the dispute resolution process (adjudication) nugatory.

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The applicant’s main suit is also premised on fraudulent acts of the 1st respondent who has totally failed to pay the interim payment certificates No. 12 and No. 13 which were all respectively certified on 29th June, 2022 and 3rd October, 2022 but to date no letter of comfort or feasible payment in respect of these certificates has been made to the applicant. The 2nd respondent is
25 fully aware of the 1st respondent’s fraudulent acts. Under paragraph 8 of the supplementary affidavit in support to this application, the applicant deposes that it complained to the 2nd respondent in regard to the fundamental breaches of the contract. It has been proved that the 2nd respondent knew that any demand for payment already made or which may thereafter be made would clearly be fraudulent. The evidence is clear, both of fact of fraud and as to the bank’s
30 knowledge. The applicant has demonstrated a *prima facie* case since the main suit is premised on fraud which is apparent and the bank (2nd respondent) has notice of the same. The application

satisfies the condition of proving a *prima facie* case and that there is a status quo to maintain to prevent the main suit and adjudication proceedings from being rendered nugatory. Considering this condition alone, Court ought to grant the temporary injunction sought.

5 The injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and when court is in doubt, it will decide the application on the balance of convenience. The applicant shall find it more difficult and expensive to obtain unconditional bank guarantees in the current economic environment or in the future, consequently the applicant may find it difficult to obtain construction work, and it may even drive the applicant out of
10 business altogether. If payment is made under the guarantees, the 2nd respondent will invariably seek immediately to enforce its counter-security against the applicant whereby the applicant will then be required to obtain what is clearly a very large amount of money to repay the 2nd respondent yet that shall be very difficult for the applicant to do because its money is locked-up by the very Employer who has refused to certify, leading therefore to the foreclosure and sale of
15 the assets pledged by the Applicant as counter-security, and as such the calling up or encashment of the bank guarantee may have the effect of bringing the applicant to a state of insolvency. In case the call or encashment of the guarantee is not restrained, it will render both the applicant's case in the main suit and the adjudication already commenced (as per the dispute resolution procedure in Clauses GCC 24 and 25 of the contract) nugatory, which shall occasion a
20 miscarriage of justice. The balance of convenience does not favour the applicant.

f. Submissions of counsel for the 1st respondent.

Counsel from the Attorney General's Chambers, on behalf of the 1st respondent submitted that
25 the 1st respondent has already made a call on the performance guarantee on 16th November, 2022 and the 2nd respondent must, by law, honour the call. The applicant's desire to halt the encashing of the guarantee is misguided because the applicant is not privy to the guarantee contract between the 1st and 2nd respondents. The guarantor (2nd respondent) must pay the demand presented in compliance with the terms of the guarantee, irrespective of whether the principal
30 has, in fact committed a breach of the underlying contract with the beneficiary. The obligations of the guarantor are not affected by the disputes under the underlying contract between the

beneficiary and the principal. If the beneficiary makes an honest demand; it matters not whether as between himself and the principal he is entitled to payment. The guarantor must honour the demand, the principal must reimburse the guarantor and any disputes between the principal and the beneficiary, including a claim by the principal that the drawing was a breach of the contract
5 between them must be resolved in separate proceedings to which the bank will not be a party.

A cause of action relating to the guarantee which the applicant may have is distinct/ separate from any action for enforcement of the Contract for provision of construction services. The calling of the guarantee does not extinguish any cause of action which the applicant had over the
10 underlying contract. Therefore, the adjudication and the main suit in this matter would not be rendered nugatory by the dismissal of this application. There is no fraud proven by the applicant to meet the exception to the general rule that guarantee must be paid on demand. The cashing of the guarantee does not prejudice the applicant as they may lodge a cause of action against the 1st respondent for breach of the underlying contract, including calling of the guarantee if unjustified,
15 which can be duly assessed by the court and a remedy given. It does not render the adjudication process a nullity.

The alleged fraud lies in the claimed hoodwinking of the applicant that the employer wants to have amicable discussions, seeking to encash the guarantee while refusing to pay for the certified
20 works and hurriedly cashing the guarantee to make the adjudication process nugatory. The alleged failure to attend a meeting or respond to a letter of the Solicitor General cannot be sufficient evidence of fraud or a concerted effort to illegally call on a guarantee. The terms of the guarantee are clear and the guarantee is that the guarantee will be paid upon issuance of a complying demand. The applicant breached the contract in several ways elucidated in the
25 affidavit in reply, justifying a call on the guarantee. It is unconscionable to state that the 1st respondent should have let the guarantee lapse, and remain unprotected under the contract, simply because the parties were having discussions. The amicable discussions do not extinguish a contractual remedy.

30 Any loss that will be suffered by the applicant as a result of breach of contract or calling the performance guarantee is capable of monetary compensation, being that the claim relates to

construction works which have a monetary value, and for this reason, no temporary injunctive orders should issue. Counsel for the applicants has not demonstrated, in his submissions, that the 1st respondent does not have capacity to pay damages/ indemnify the applicant for expenses. Failure to honour the call constitutes breach of contract by the bank. Therefore, any injunction adversely affects the 1st respondent because an injunction would reverse the call already made by the 1st respondent, which is a grave injustice. Such injunction would have untold financial consequences on the 1st respondent and effectively on the Country at large, as the applicant failed in its obligation to provide the contracted services. Courts should be slow in granting injunctions against government projects which are meant for the interest of the public at large as against the private proprietary interest. The balance of convenience is in favour of the party conducting an economic/ public interest activity. An injunction in this case would disrupt the project which the 1st respondent is desperate to conclude.

g. Submissions of counsel for the 2nd respondent

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M/s Muhumuza- Kiiza Advocates & Legal Consultants, on behalf of the 2nd respondent submitted that the applicant and 1st respondent have a dispute for which the Bank cannot honour its obligations until a final decision or conclusion on who is in breach is reached. On 9th November, 2022 the applicant notified the 2nd respondent that it had terminated the contract with the 1st respondent's Ministry of Works and on 16th November, 2022 the Ministry of works wrote to the 2nd respondent, making a demand on the Performance Guarantee. In response to the demand, the 2nd respondent informed the Ministry that the applicant had notified it that it had terminated the contract for which the 2nd respondent clearly halted any further actions in regards to payment of the sums in the performance guarantee. Since there are substantial issues to be determined by Court as between the parties, most especially the applicant and the 1st respondent, it is only just and equitable that the status quo be preserved for which the Court's jurisdiction and exercise of its powers in considering this application shall be adhered to by the 2nd respondent.

h. Submissions in rejoinder by counsel for the applicant;

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The 1st respondent attempted to enforce the performance guarantee in bad faith by a letter dated 18th November, 2022 which was made after the applicant had already terminated the contract by letter dated 7th November, 2022. The applicant learnt that the Employer intended to call the Performance guarantee yet the dispute is under adjudication; and, while the Employer is hoodwinking the applicant that it wants to have amicable resolution of the dispute. This is fraudulent, high-handed, oppressive, unconscionable, and done in bad faith. The crux of the applicant's main suit is also premised on fraudulent acts of the 1st respondent who has totally failed to pay the interim payment certificates No. 13 and No. 12 which were all respectively certified on 3rd October, 2022 and 29th June, 2022 but to date no letter of comfort or feasible payment in respect of these certificates has been made to the applicant. Where a party has pleaded fraud, an injunction can be issued against enforcing a demand guarantee. The instant application and the suit is premised on fraud committed by the Ministry of works and Transport as an agent of the 1st respondent by fraudulently attempting to enforce a performance guarantee arising from an already terminated main contract by the applicant. The condition or risk for making the call on the performance guarantee is default by the contractor had not materialised because the road is complete and being utilised for its intended purpose.

i. The decision.

It has been established by the law and the decided cases that, the main purpose for issuance of a temporary injunction order is the preservation of the suit property and the maintenance of the *status quo* between the parties pending the disposal of the main suit. The conditions for the grant of an interlocutory injunction are now, well settled. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience (see *E.A. Industries v. Trufoods*, [1972] E.A. 420 *American Cyanamid Co v. Ethicon Limited* [1975] AC 396; *Geilla v. Cassman Brown Co. Ltd* [1973] E.A. 358 and *GAPCO Uganda Limited v. Kaweesa and another H.C. Misc Application No. 259 of 2013*). The conditions that have to be fulfilled before court exercises its discretion to grant an interlocutory injunction have been well laid out as the following:-

1. The Applicant has shown a *prima facie* case with a probability of success.
 2. The likelihood of the applicants suffering irreparable damage which would not be adequately compensated by award of damages.
 3. Where in doubt in respect of the above 2 considerations, then the application will be
- 5 decided on a balance of convenience (see *Fellowes and Son v. Fisher [1976] I QB 122*).

The applicant seeks to restrain payment under a performance guarantee. The independence of the demand guarantee from the underlying contract has the effect that, in principle, the guarantor must pay a demand presented in compliance with the terms of the guarantee, irrespective of whether or not the principal has, in fact, committed a breach of the underlying contract with the

10 beneficiary. Therefore Courts will very rarely order a bank not to pay a beneficiary who has made an apparently complying demand. With a demand guarantee payment is only conditional on the beneficiary serving a demand in the required form (although this can be made conditional on an event happening).

15 A demand guarantee can provide protection against non-performance, late performance, and even defective performance. It is separate and independent from the underlying contract between the parties in question (see article 5 (b) of the URDG 758). Demand guarantees, being a substitute for cash, are created to provide the beneficiary with a speedy monetary remedy against the principal to the underlying contract, and to that end they are primary in form and

20 documentary in character. This means that the demand guarantee is an abstract payment undertaking, which is expressed to be payable solely on presentation of a written demand and / or any other specified documents conforming to the terms of the undertaking, and is independent of the underlying contract. In view of this, any demand within the maximum amount stipulated in the demand guarantee must, in principle, be paid by the guarantor, irrespective of whether the

25 underlying contract has, in fact, been breached and irrespective of the loss actually suffered by the beneficiary.

The operative words of the performance guarantee Ref. No. CRDB/MAPEERA PLATINUM/TF/21.01/05/2019 for payment of a sum of shs. 1,220,705,528/= issued by the 2nd

respondent on 21st May, 2019 in favour of the Ministry of Works and Transport, with its validity period extended until 20th November, 2022, state that;

5 THEREFORE we hereby affirm that we are guarantors and responsible to you, on
behalf of the Contractor up to a total of UGX. 1,220,705,528/- (Uganda shillings One
billion two hundred twenty million seven hundred five thousand five hundred twenty
eight only), such sum being payable in the types and proportions of currencies in
which the contract price is payable, and we undertake to pay you, upon your first
10 written demand declaring the contractor to be in default under the contract; without
any cavil or argument any sum or sums within the limits of UGX. 1,220,705,528/-
(Uganda shillings One billion two hundred twenty million seven hundred five
thousand five hundred twenty eight only) as aforesaid without your needing to prove
or to show grounds or reasons for your demand of the sum specified therein.

15 We hereby waive the necessity of your demanding the said debt from the Contractor
before presenting us with the demand. We further agree that no change or addition to
or other modification of the terms of the contract or of the work to be performed
there under or of any of the contract documents which may be made between you
and the contractor shall in any way release us from any liability under this Guarantee,
20 and we hereby waive notice of any such change, addition, or modification. This
security shall remain in force up to and including 21st November, 2021 or a date
twenty eight (28) days from issue of a Certificate of Completion; whichever is
earlier. This guarantee is subject to the Uniform Rules for Demand Guarantees, ICC
publication No. 758, except that sub-paragraph (ii) of Sub-article 20 (a) is hereby
25 excluded.

This is a demand performance guarantee under which, subject to the fraud, illegality and
unconscionability exceptions, the 2nd respondent bank's obligations are autonomous from the
underlying contract between the Ministry of Works and Transport as beneficiary represented by
30 the 1st respondent on the one hand, and the applicant as principal. This means that, in principle,
the 2nd respondent bank must pay if proper complying documents are presented, even if the 1st
respondent as beneficiary has not stipulated that there is a default under the original underlying
contract, since it is not required "to prove or to show grounds or reasons for your demand of the
sum specified therein."

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Calling on the guarantee required Ministry of Works and Transport, as beneficiary, only to make a “written demand declaring the contractor to be in default under the contract.” The Ministry of Works and Transport by its letter dated 16th November, 2022 made a call of the said performance guarantee in the following terms;

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Please recall that on 21 May, 2019, Centenary Rural Development Bank issued a Performance Guarantee ref. No. CRDB/MAPEERA PLATINUM/TF/21.01/05/2019 (copy attached) to M/s Omega Construction Ltd as performance security for the above captioned contract.

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Whereas the Performance Guarantee was initially valid up to 21 November, 2021 the expiry date was later extended to 20 November, 2022 following award of Extension of Time No.1 of 143 days (copy of letter extending validity attached). However, in spite of several other extensions of time, the contractor has failed to complete the works. This is therefore to: -

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i) Inform you that the contractor, M/s Omega Construction Ltd. is in default of the captioned contract; and subsequently

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ii) Demand that you pay the Ministry of Works and Transport the amount of UGX 1,220,705,528 (Uganda Shillings: One billion, two hundred twenty million, seven hundred five thousand, five hundred twenty-eight only); in accordance with the terms in the Performance Guarantee ref. No. CRDB/MAPEERA PLATINUM/TF/21.01/05/2019;

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Responding to that call, the 2nd respondent by a letter dated 21st November, 2022 intimated that; “We would like to advise that on the 9th of November, 2022 Omega Construction Ltd notified us about termination of the Contract owing to non-payment of interim certificate Nos. 12 & 13, The purpose of this letter is to inquire if there are receivables owed to Omega Construction, and if any when they would be paid. We also request for a tripartite meeting to discuss way forward.”

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The question then is whether in light of the autonomy principle whereby the banks’ obligations, on the one hand, are held distinct from the rights and obligations of the parties to the underlying contract on the other, the response by the 2nd respondent satisfies the separate, more stringent, test in the case of injunctions sought against the payment of demand guarantees.

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Article 20 (a) of the International Chamber of Commerce (ICC) *Uniform Rules for Demand Guarantees (URDG 758)*, requires the guarantor upon a presentation of a demand which does not

indicate that it is to be completed later, within five business days following the day of presentation, to examine that demand and determine if it is a complying demand. The examination is based solely upon the documentary requirements expressed in the Guarantee. When the guarantor determines that a demand under the guarantee is not a complying demand, it may reject that demand (see article 24 (a) of the URDG 758). In case of rejection, the guarantor is required to give a single notice to that effect to the presenter of the demand. The notice should state: i. that the guarantor is rejecting the demand, and ii. each discrepancy for which the guarantor rejects the demand. When the guarantor determines that a demand is complying, it has the obligation pay (see article 20 (b) of the URDG 758).

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The conditions giving rise to the obligation to pay are found exclusively in the demand guarantee and the terms of the underlying contract are of no relevance. Guarantors are only concerned with whether the documents presented to call the demand guarantee are in accordance with the guarantee's terms and conditions and not whether the relevant goods and services conform to the underlying contract (see article 6 of the URDG 758). The exceptions are; (i) fraud affecting the documents presented by the beneficiary (for example if they have been forged). Fraud is not limited to dishonesty or fraudulent intent, but extends to an absence of objective good faith, as where no reasonable person would have considered the demand to be justified e.g. if the beneficiary had no honest belief in the validity of its demand, where it can be said that the beneficiary has no honest belief that the principal has failed or refused to perform its obligations. Evidence of "dishonest belief" on the part of the beneficiary is required to establish a case of "fraud"; (ii) illegality in the demand guarantee contract or underlying contract; (iii) the infringement of international obligations and express contractual derogation from the principle of autonomy; (iv) the total failure of the basis of the contract, i.e. the reason for its existence; and (v) unconscionability i.e. elements of unfairness, reprehensible conduct or acts lacking in good faith

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In the instant application, the applicant relies on the fraud and unconscionability exceptions. To prove that a demand under a performance guarantee is fraudulent, the applicant for an injunction must show that the beneficiary knows that the demand is fraudulent, or that the circumstances around the demand are such that the only reasonable inference is that the demand is

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fraudulent. To prove that a demand under a performance guarantee is unconscionable, the applicant for an injunction must show that the beneficiary has no honest belief that the principal has failed or refused to perform its obligations.

- 5 In the wider context, in order to obtain a temporary injunction, the applicant will be required to establish that: (i) there is a serious question to be tried as to whether the 1st respondent has a right to call on the guarantee; (ii) that if the application is not granted, the applicant stands to suffer irreparable damage; and (iii) the balance of convenience favours leaving the guarantee intact until the dispute is resolved. This will often be the case where the applicant can demonstrate that
10 the payment of damages in lieu of an injunction would be an inadequate remedy.

While it might appear that these requirements could be readily satisfied where there is a bona fide dispute, particularly where the applicant stands to suffer significant reputational damage if a call were to be made, in the context of demand performance guarantees, courts will typically
15 refuse an injunction unless there are special circumstances that suggest they should do otherwise. The rationale behind this is that, by agreeing that the applicant will provide the demand performance guarantee on the terms set out in the contract, the parties have also agreed to allocate the financial risk of any dispute to the applicant until it is finally resolved.

- 20 There are however at least three instances where courts will deviate from this position: (i) where there is compelling evidence of fraud on the part of the beneficiary; (ii) where there is compelling evidence of unconscionable conduct on the part of the beneficiary; or (iii) to ensure the beneficiary adheres to any contractual promise not to call on the performance guarantee (i.e. a negative stipulation). Unless the above circumstances are present, a court is likely to refuse an
25 injunction for the reasons set out above.

i. Whether the applicant has a *prima facie* case against the respondents.

First, a preliminary assessment must be made of the merits of the suit that has been filed against
30 the respondents, to ensure that there is a “serious question to be tried.” One of the criteria to be applied when considering whether or not to grant a temporary injunction is disclosure by the

applicant's pleadings, of a "serious triable issue," with a possibility of success, not necessarily one that has a probability of success (see *American Cyanamid v. Ethicon* [1975] AC 396; [1975] ALL ER 504; *Godfrey Sekitoleko and four others v. Seezi Peter Mutabazi and two others*, [2001–2005] HCB 80 and *Nsubuga and another v. Mutawe* [1974] E.A 487). There is no need to be

5 satisfied that a permanent injunction is probable at trial; the court only needs be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. A serious question is thus any question that is not frivolous or vexatious. As long as the claim is not frivolous or vexatious, the requirement of a *prima facie* case is met. The Court must be satisfied that there is a serious question to be tried as to whether the respondent has a right to call on the

10 guarantee (see *G&S Engineering Services v. MACH Energy Australia Pty Ltd* [2019] NSWSC 407).

The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried, and that there is at least a reasonable chance that the

15 applicant will succeed at trial. The applicant needs to show only a reasonable likelihood of success on the merits. The applicant's burden on this part of the test is relatively low, and in most cases an applicant will be able to show that there is a serious question to be tried. The applicant is required to provide reasonably available evidence to satisfy the court with a sufficient degree of certainty that the applicant is the rights-holder and that his or her rights are being infringed, or

20 that such infringement is imminent. The applicant must show a strong probability that the feared conduct and resulting damage will occur.

The applicant's claim in the underlying suit as against the 1st respondent is for breach of contract, whereupon it seeks specific performance and declarations. As against the 2nd respondent the

25 applicant's claim is to prevent the unlawful and / or wrongful enforcement of securities which is being perpetuated through fraud, in a way that will pre-empt resolution of the dispute under the dispute resolution mechanism stipulated in the contract, which dispute resolution has already commenced. The applicant seeks an Order for specific performance to invoke and respect the dispute resolution mechanisms of the contract and the certification provisions, thereof;

30

By its written statement of defence, the 2nd respondent as guarantor contends that since there were conflicting positions on who is in default as between the applicant and the 1st respondent, it halted payment and instead made inquiries as to any monetary demands between the applicant and the 1st respondent. It contends further that for as long as there is a dispute between the
5 applicant and the 1st respondent as to who is in default, it will halt the payment of the performance bond sum until a resolution on the same has been reached. Finally, that not being a party to the dispute between the applicant and the 1st respondent, it will abide the outcome of the decision of the Court.

10 Although the 1st respondent is yet to file a written statement of defence, on basis of those facts and the averments contained in its affidavit in reply to this application where it accuses the applicant of; - failure to deploy key personnel on site; failure to maintain valid securities (advance payment Guarantee, Contractor's all risk insurance policy); submission of over-exaggerated and incomplete interim payment certificates; slow progress of work; deliberate non-
15 participation/ failure by the applicant's staff to participate in the conduct of a joint measurements of works as per the contract; and non-adherence to site instructions duly issued in accordance with the contract and guidance by management meetings, the controversy between the parties seems to rotate around the following questions, among others; - whether or not the Ministry of Works and Transport's action to call the contract security is unconscionable, oppressive, and
20 amounts to equitable fraud and 'exploitation of a situational disadvantage; whether or not the applicant having terminated the contract, the Ministry of Works and Transport is entitled to call on the Performance Guarantee before the Adjudicator has determined the dispute relating to non-certification of the contractor's interim certificates; whether or not the 1st respondent's call on the guarantee is fraudulent, high-handed, oppressive, unconscionable, and done in bad faith in light
25 of its contemporaneous overtures to the applicant toward amicable discussions and resolution of the dispute.

I find these to be serious questions to be tried. They, and others that the parties may subsequently raise at the trial, are the basis upon which the court will determine whether the 1st respondent has
30 a right to call on the guarantee. To obtain an interlocutory injunction an applicant must show

only that its claim is not frivolous or vexatious, that is to say, it has a serious issue to be tried. The applicant has satisfied this requirement.

- 5 ii. Whether the applicant will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue.

Second, the applicant must show that it will suffer irreparable harm if the court refused to grant the injunction and the respondents were allowed to continue in their course of conduct. “Irreparable” in this context refers not to the size of the harm that would be suffered, but its
10 nature. If the harm could not be quantified by payment of money, or if the harm is not readily calculated or estimated, this part of the test will usually be satisfied. In some cases, the availability of damages often precludes such a finding.

Irreparable damage has been defined by *Black’s Law Dictionary*, 9th Edition page 447 to mean;
15 “damages that cannot be easily ascertained because there is no fixed pecuniary standard of measurement.” It has also been defined as “loss that cannot be compensated for with money” (see *City Council of Kampala v. Donozio Musisi Sekyaya C.A. Civil Application No. 3 of 2000*). The purpose of granting a temporary injunction is for preservation of the parties, legal rights pending litigation. The court doesn’t determine the legal rights to the property but merely
20 preserves it in its current condition until the legal title or ownership can be established or declared. If failure to grant the injunction might compromise the applicants’ ability to assert their claimed rights, for example when intervening adverse claims by third parties are created, there is a very high likelihood of occasioning a loss that cannot be compensated for with money.

25 The Court may grant a temporary injunction if it is apparent that the respondent is about to embark on a course of action that would infringe an applicant’s rights. The court will particularly be inclined to grant the injunction where there appears to be a *prima facie* breach of property rights, or where the potential harm that could flow should a court order not be granted is difficult or impossible to calculate and quantify at a later stage in the suit, or where the damages when
30 awarded may be irrecoverable (see *Itek Corp. v. First Nat. Bank of Boston, 566 F. Supp. 1210*

(*D. Mass. 1983*). The fact that damages may be reasonably calculable will provide an applicant with little consolation in the event those damages ultimately prove uncollectable.

As an injunction is an equitable and discretionary remedy, it is a general rule that an injunction
5 will not be granted where damages are an adequate remedy. Before an injunction is ordered, it
must be established that an award of damages is not an adequate remedy. That type of claim can
be made in exceptional cases involving breach of contract, akin to a breach of fiduciary duty,
where the normal remedies are inadequate and where deterrence of others is an important factor.
An injunction ought not to be granted where the respondent would be restored to the financial
10 position it would have been in had the injunction not been granted.

In order to establish that damages are not adequate, the innocent party will generally have to
evidence either that a) the subject matter of the contract is rare or unique or b) damages would be
financially ineffective. Damages may be found to be an inadequate remedy in the following
15 circumstances, among others: (a) the damage is impossible to repair; (b) the damage is not easily
susceptible to be measured in economic terms; (c) the harm caused is not a financial one; (d)
monetary damages are unlikely to be recovered; (e) an award of damages is inappropriate in light
of the importance of the interest in issue; and (f) the harm has not yet occurred or the wrong is
continuing. If there is an adequate alternative remedy, the claimant should pursue such remedy.

20

Examples of rare or unique subject matters might be the sale of an interest in land (as no two
pieces of land are the same) or a one-off antique vase. In both scenarios, damages may not be an
adequate remedy because no market substitute exists, and the innocent party would therefore be
unable to secure equivalent performance (no matter what the price). Examples of circumstances
25 where damages may be financially ineffective might be where the defaulting party is insolvent
and unable to pay; if damages would be difficult to quantify (e.g. a contract to indemnify); if an
order for the payment of damages would be difficult to enforce (e.g. because any enforcement
would need to be in a foreign country); or if an express term of the contract restricts or limits the
damages recoverable for that particular breach.

30

The calling up of a demand guarantee, especially if it is an unfair or fraudulent calling, often has the following severe consequences for the principal: irreparable damage to his commercial reputation; cash liquidity problems; and the risk that the cash will be misappropriated by the beneficiary and no longer recoverable. Courts have recognised on a number of occasions that

5 calls upon performance guarantees may cause significant damage to a contractor’s reputation and financial standing that is not readily curable by an award of damages (see for example *Barclay Mowlem Construction Ltd v. Simon Engineering (Aust) Pty Ltd* (1991) 23 NSWLR 451 at 461 – 462; *Reed Construction Services Pty Ltd v. Kheng Seng (Australia) Pty Ltd* (1999) 15 BCL 158 at 167; *Lucas Stuart Pty Ltd v. Hemmes Hermitage Pty Ltd* [2010] NSWCA 283 at [45]; *Austrak*

10 *Pty Ltd v. John Holland Pty Ltd* [2006] QSC 103 and *Structural Systems (Constructions) v. Hansen Yuncken Pty Ltd* [2010] FCA 1358.).

Calling of a guarantee tends to erode the confidence banks have in the contractor’s systems and project management. It tarnishes the business image of a contractor, especially where such

15 contractor has built its business on meeting its contractual obligations, meaning completing its obligations without the need for security ever being called upon. Irreparable damage will be done to its reputation as: (a) its clients may question its ability to meet its contractual obligations; (b) its prospects of future successful tenders will be diminished; and competitors will take advantage to the contractor’s detriment.

20

The fees payable in respect of the face value of each bank guarantee and the amount of the facility which the bank is prepared to advance to the contractor is directly referable to how the bank assesses the contingent risk that the bank guarantee will be called upon. As a result of a call on a guarantee, the bank will be likely to assess the contractor’s contingent liability risk as being

25 higher. If the bank were to assess that the contingent liability of the contractor in relation to bank guarantees is higher than in previous years as a result of the respondent calling the guarantee, then those fees may increase and the limit of the facility may decrease for the contractor specifically. Furthermore, in the world of commerce, a contractor’s reputation is paramount. A contractor’s “security” history (in the sense of whether any of its bank guarantees have ever been

30 cashed) is an important part of that contractor’s reputation, and is taken into account by prospective clients of the contractor when considering “Expressions of Interest” or tenders. If

loss is suffered, for example, through failure to obtain tenders, the assessment of damages would be a difficult and unsatisfactory process.

The calling up of a bank guarantee is a serious matter, with the potential to irreparably damage the contractor's reputation as a competent service provider, which might be taken advantage of in future projects by the contractor's competitors. It is in that context that Hunter J in *Abigroup Contractors Pty Ltd v. Peninsula Balmain Pty Ltd 2003] HCA Trans 688* opined:

The question of commercial reputation and the effect of a demand on a large contractor, with a record to date which has been evidenced in that context, should not be underestimated and there is a strong legitimate entitlement on the part of such a contractor to protect that reputation to the hilt.

Similarly Rolfe J in *Barclay Mowlem v. Simon Engineering (Australia) Pty Ltd (1991) 23. NSWLR 451* stated;

Once the evidence [of damage to reputation] is admitted...it demonstrates how inadequate a remedy in damages would be. The matter, so far as the plaintiff is concerned, which is detrimentally affected upon a performance bond being called up, is the perceived ability of the plaintiff to properly perform its obligations under a contract. If the plaintiff's ability in this regard is called in question, even improperly, it is not difficult to infer that there will be damage to its reputation in the industry in which it operates. Nor is it difficult to infer that its competitors would be quick to utilise such information in competing with the plaintiff. Finally, particularly as matters presently stand in the commercial world, questions may be raised as to the financial viability of the plaintiff ... This would be underlined if ... there has not previously been any call upon a performance bond. In other words people may be tempted to ask whether the plaintiff's business was "going downhill."

In the instant case though, it is unlikely that serious businessmen would question the applicant's capacity to do business or jump to the speculations described by Rolfe J, simply because a bank guarantee has been called on. In the same vein, its reputation is most unlikely to be seriously damaged by knowledge that one of its banker's undertakings had been called on.

That notwithstanding, irreparable damage may be occasioned to the commercial reputation of the principal by an abusive enforcement of a performance guarantee. Abusive enforcement arises

where the beneficiary of a demand performance guarantee has no right whatsoever insofar as the risk for which the guarantee was subscribed has not materialised.

5 While the beneficiary of a demand performance guarantee has the right to enforce such guarantee without having to worry immediately of what the debtor owes or does not owe, the beneficiary may not, on the other hand, knowingly exercise his/her/its right to enforce the guarantor's commitment with a view to receiving funds that are not due to him/her/it. For that reason a temporary injunction may be issued in order to prevent the abusive and imminent enforcement of a first demand guarantee, pending a decision of the main suit. The guarantor is not bound in case
10 of manifest abuse or fraud by the beneficiary or in case of collusion of the latter with the principal. As such, it is necessary to establish the existence of a manifest abuse or manifest fraud to prevent the enforcement of a demand performance guarantee. No other circumstance may suffice.

15 The injunction will be granted in case of a *prima facie* or manifest abuse or fraud by the beneficiary, or in case of collusion of the latter with the principal. The awareness of the lack of right by the beneficiary and the knowledge of such abuse by the guarantor must both be established. In such cases the fraud or the abuse merges with the bad faith of the beneficiary who seeks to enforce his/her guarantee while he/she/it is fully aware that the enforcement
20 requirements are not met. As such, a request for enforcement of a guarantee must be held manifestly abusive wherever there is a *prima facie* awareness of the lack of right by the beneficiary and the knowledge of such abuse by the guarantor, are both established.

Our legal system must of necessity entail mechanisms to prevent the wrongful, fraudulent and/or
25 otherwise unconscionable calling of bank guarantees, even on-demand bank guarantees, without compromising the independence or autonomy principle, the documents principle and the strict compliance principle underpinning their utility in commerce. The court will thus now proceed to determine whether the applicant has made out a case of an unfair or fraudulent calling of the guarantee, by considering the following sub-issues; (a) whether the applicant has made out a
30 *prima facie* case of fraud in the documents rather than the underlying transaction; (b) whether the 1st respondent could not honestly have believed in the validity of its demand under the guarantee;

(c) whether the 2nd respondent knew of the fraud at the time the 1st respondent sought payment under the guarantee.

a) Whether the applicant has made out a prima facie case of fraud in the documents presented, rather than the underlying transaction.

5

Three core principles underpin the International Chamber of Commerce (ICC) Uniform Rules for Demand Guarantees (URDG 758): the independence or autonomy principle, the documents principle and the strict compliance principle. By virtue of those principles, demand guarantees, standby letters of credit, and commercial letters of credit are all treated as autonomous contracts whose operation will not be interfered with by courts on grounds irrelevant to the guarantee or credit itself. Guarantors are concerned with documents, rather than with goods, services or performance of the underlying contract (see *Leonardo S.p.A v. Doha Bank Assurance Company LLC* [2019] QIC (F) 6; [2020] QIC (A) 1). Under the autonomy principle, an issuing bank must make payment under a demand guarantee on receipt of compliant documents irrespective of any dispute which may have occurred in respect of the underlying transaction.

The independence or autonomy principle, insulates the bond or guarantee from the terms in the underlying contract. This is important because the autonomous nature of the bond or guarantee means that conditions giving rise to the obligation to pay are found exclusively in the bond or guarantee. This independence principle is embodied in Article 5 (a) of the URDG 758. As discussed in by the Privy Council in *Alternative Power Solution Ltd v. Central Electricity Board* [2014] UKPC 3, there is a bias or presumption in favour of the construction which holds a performance bond to be conditioned upon documents rather than facts, but the presumption is rebuttable (see *IE Contractors v. Lloyd's Bank* [1990] 2 Lloyd's Rep. 496). However, the appropriateness of the distinction between letters of credit and demand guarantees had been doubted in a more recent English Commercial Court judgment with suggests that the intention of the URDG is that the principle of strict compliance should apply both to letters of credit incorporating UCP 600 and demand guarantees incorporating URDG (see *Teare J in Sea-Cargo Skips v. State Bank of India* [2013] EWHC 177 (Comm)).

30

Demand guarantee undertakings rest on two legal principles: the principle of documentary or strict compliance, and the independence principle. The first legal principle essentially means that the guarantor is obliged to pay if the documents submitted with the demand for payment comply with the terms of the demand guarantee. The second legal principle is that the guarantor's obligations against the beneficiary are determined in the instrument itself, and are independent, or abstract, of the underlying contract between the applicant for, and the beneficiary of, the guarantee, as well as the contract of mandate between the applicant and guarantor.

The essential characteristic of a demand guarantee is that it is independent of the underlying transaction between the applicant and the beneficiary that prompted the issuance of the guarantee. Further, a demand guarantee is also independent of the instruction relationship pursuant to the applicant having requested the guarantor to issue the guarantee in favour of the beneficiary. The conditions giving rise to the obligation to pay are found exclusively in the demand guarantee and the terms of the underlying contract are of no relevance (*see Edward Owen Engineering Ltd v. Barclays Bank International Ltd [1978] 1 All ER 976, [1978] 1 QB 159, [1977] 3 WLR 764, [1978] 1 Lloyds Rep 166*). A direct consequence brought about by the independence principle is the “pay first, argue later” rule; the beneficiary of a demand guarantee can expect payment under the guarantee as soon as it is able to tender the documents stipulated in the demand guarantee, irrespective of any dispute arising from any of the contracts other than the demand guarantee itself.

There are of course exceptions to the strict general rule that the court will not intervene to prevent a guarantor from making payment under a demand bond or guarantee following a compliant presentation of documents; the fraud exception that is more or less universally acknowledged, and illegality exception applied in some jurisdictions. In the United States of America (*see Intraworld Industries, Inc. v. Girard Trust Bank, 336 A.2d 316 (Pa. S.C. 1975); Sztejn v. J. Henry Schroder Banking Corp. - 177 Misc. 719, 31 N.Y.S.2d 631 (Sup. Ct. 1941); Asbury Park & Ocean Grove Bank v. National City Bank of New York 35 N.Y.S.2d 985 (N.Y. Sup. Ct. 1942) and New York Life Insurance Co. v. Hartford National Bank & Trust Co., 378 A.2d 562 (Conn. S.C. 1977) at p. 567*), and South Africa (*see Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v. South African National Roads Agency Soc*

Ltd and Another [2020] ZASCA 146), illegality in the underlying contract is also an exception. When the issuer of a demand guarantee knows that a document, although correct in form, is, in point of fact, false or illegal, he cannot be called upon to recognise such a document as complying with the terms of the demand guarantee. Where the documents or the underlying
5 transaction are tainted with intentional fraud, the guarantee need not be honoured by the bank, even though the documents conform on their face and the court may grant injunctive relief restraining such honour (see *NMC Enterprises v. Columbia Broadcasting System, Inc* 14 U.C.C. REP . SERV. 1427 (N.Y. Sup. Ct. 1974).

10 Where the beneficiary's fraud had been called to a bank's attention, before the documents have been presented for payment, the principle of the independence of the bank's obligation under the demand guarantee should not be extended to protect an unscrupulous beneficiary. The courts aver that when the issuer of a guarantee knows that a document, although correct in form, is false or illegal, it cannot be called upon to recognise such a document as complying with the terms of
15 the guarantee. A bank should be vitally interested in assuring itself that there is some exchange of value represented by the documents.

While the notion of fraud may elude precise definition, it is a concept well known to the law, connoting some aspect of impropriety, dishonesty or deceit. It is a generic term which covers all
20 manner of cheat, deceit and dishonesty. Fraud is not mistake, error in interpreting a contract; fraud is something dishonest and morally wrong, resulting in mischief or unnecessary pain. It is defined as the unlawful and intentional making of a misrepresentation that causes actual prejudice or is potentially prejudicial to another. The traditional approach of English courts to the calling of Bank Guarantees is to limit injunctions to situations where there is clear evidence of
25 "fraud," which under English law can only be proven if it is demonstrated that a false representation has been made (i) knowingly; or (ii) without belief in its truth; or (iii) recklessly without caring as to whether it be true or false (see *Derry v. Peek [1889] 14 App Cas 337*). Fraud in relation to the calling of Performance Bonds has been extensively discussed in cases such as *Enka Insaat Ve Sanayi v. Banca Popolare Dell'Alto Adige [2009] EWHC 2410*, which further
30 confirms the high threshold for proving fraud under English law.

Given that the purpose of the fraud rule is to stop dishonest beneficiaries from abusing the demand guarantee system, the test for fraud is met, not by showing breach or other non-compliance with the terms of the underlying contract, but when strong or compelling evidence is led to show that the documents presented to the guarantor are forgeries or contain any express
5 material misrepresentations. As in any other case, where fraud is alleged, it will not be inferred lightly and mere error, misunderstanding, non-compliance with the terms of a guarantee or oversight does not translate into fraud and will not amount to fraud. Courts will not permit a guarantee to be used for a purpose for which it was never generated. The facts of the case should depict that fraud committed by the beneficiary is of such nature that it destroys the entire
10 underlying transaction.

Fraud generally requires the applicant to show that the beneficiary called on the guarantee either with the knowledge that its demand was invalid; without belief in the validity of its demand; or with indifference to whether the demand was valid or not. In the instant case, no evidence has
15 been led to show that either in the guarantee itself or the call made on that guarantee, a false representation has been made as regards the existence of a breach of the underlying contract by the applicant. The call was based on the 1st respondent's contention that the applicant was in breach of its obligations in the underlying contract on account of its failure, despite its undertaking to do so by 21st November, 2022 to execute; - a) Construction of 6 lines of steel
20 culverts at Km 2+500, including the associated reinforced concrete end structures. b) Completion of the gravel fill embankment, conforming to geometric design standards both in terms of vertical, horizontal and cross section geometry. c) Construction of reinforced concrete end structures on 3 lines of concrete encased culverts that had previously been installed; and d) installation of horizontal guard and handrails, including steel posts, as detailed in the drawings.
25 Instead the applicant chose to terminate the contract on 7th November, 2022.

When there is completion of the contract by the principal and yet the beneficiary makes a call for payment, such call may be considered as fraudulent having regard to the circumstances of the underlying contract. The hurdle in this case of fraud is for the principal to prove that he has
30 perfectly performed his obligations under the contract (see *United Trading Corp. v. Allied Arab Bank [1985] 2 Lloyd's Rep. 554*). The applicant's response to the effect that currently the road

users utilise the said road to conveniently move between Kayunga and Nakasongola Districts where no road existed before, is not a conclusive rebuttal of those particularised accusations made by the 1st respondent. The applicant cannot contend that every party who breaches or repudiates his contract is for that reason culpable of fraud. Although the applicant alleges that the
5 1st respondent breached the contract fundamentally by failing to honour two of the interim certificates presented to it, it has not been shown that the performance guarantee was called upon with absolutely no basis in fact.

On basis of the evidence availed to court at this stage, the applicant has not furnished proof of
10 the absence of any colourable or plausible basis under the underlying contract, for the 1st respondent to call on the guarantee. Although the merits of the parties' respective cases and their relative strengths are not to be considered at this stage, the court is of the view that the applicant has not made out strong *prima facie* case of fraud. In any event, no injunction will issue if there is an adequate remedy at law. The applicant's claims in the suit are for monetary awards and
15 therefore the applicant may recover damages and other monetary relief in the event of succeeding in its claim in the suit, if it turns out that the 1st respondent should never have cashed the guarantee in the amount claimed or at all. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. Temporary loss of income or other alleged injury
20 involving only the loss of money is not irreparable injury.

b) Whether due to the applicant's termination of the underlying contract, the 1st respondent could not honestly have believed in the validity of its demand under the guarantee.

25 An injunction will only be granted against a guarantor if there is a seriously arguable case that the person calling on it, did not honestly believe the validity of the cause (see *United Trading v. Allied Arab Bank [1981] 2 Lloyds 256, at para 257*). When determining this in interlocutory proceedings, the Courts apply a two-stage test: (a) that the beneficiary could not honestly have believed in the validity of its demand under the guarantee and (b) that the bank knew of the fraud
30 at the time the beneficiary made the demand. It must be seriously arguable on the material

available that the only realistic inference is that 1st respondent could not honestly have believed in the validity of its demand under the guarantee.

The correct test is stated in *United Trading Corporation S.A. v. Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554, namely; whether it is seriously arguable that, on the material available, the only realistic inference is that the beneficiary could not honestly have believed in the validity of its demands and that the bank was aware of that fact. To successfully rely on fraud, a party has to go further and show that the beneficiary made the call in bad faith, knowing it to be incorrect. If a beneficiary makes a false representation without actual knowledge that it is false, but with no honest belief in its truth, this too could constitute a fraud in terms of the fraud exception. This is because fraud connotes the absence of an honest belief in either the entitlement to claim under the guarantee or in the amount claimed.

An injunction will be granted where, for the purpose of drawing on the guarantee, the beneficiary fraudulently presents to the bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue (see *United City Merchants (Investments) Ltd. v. Royal Bank of Canada*, [1983] 1 A.C. 168 at 183). A material fraudulent misrepresentation occurs where the beneficiary makes a false statement or representation, knowing the representation to be false, or without belief in its truth; or recklessly, careless whether it be true or false. The word "material" means "material to the bank's duty to pay, so that if the document stated the truth the bank would be obliged to reject the document.

Demanding payment in the knowledge of the absence of material entitlement, constitutes fraud. There must be no honest belief in the validity of a demand for the fraud exception to apply (see *Uzinterimpex JSC v. Standard Bank plc* [2007] 2 Lloyd's Rep 187 para 107; *Intraco Ltd v. Notis Shipping Corporation (The Bhoja Trader)* [1981] 2 Lloyd's Rep 256 and *National Infrastructure Development Co Ltd v. Banco Santander SA* [2016] EWHC 2990 Comm para 11). The fraud must be clearly illustrated, or it must be the only realistic inference that may be drawn from the available circumstantial evidence. Conduct whereby the beneficiary's submission of the demand rests on statements of fact which, to its own positive knowledge, are incorrect or contain misrepresentations, may translate into fraud. A demand is fraudulent if the applicant knowingly misrepresented the material facts when the demand was made. The evidence must irresistibly

points to the beneficiary aware of the fact that the applicant had not defaulted under the underlying agreement. The evidence adduced does not show that the 1st respondent as beneficiary, did not honestly believe it had a valid claim

- 5 Calls on on-demand Guarantees can be restrained on the account of “unconscionability” (see *Bocotra Construction Pte Ltd v. Attorney General (No. 2)* [1995] 2 SLR 523; *GHL Pte Ltd v. Unitrack Building Construction Pte Ltd* [1999] 4 SLR 604; *Dauphin Offshore Engineering & Trading Pte Ltd v. HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* [2000] SGCA 4 and *Shanghai Electric Group Co Ltd v. PT Merak Energi Indonesia* [2010] SGHC 2).
- 10 Unconscionability” stems from the “general underlying notion....of equity’s traditional jurisdiction to grant relief against unconscientious conduct namely, that a person should not be permitted to use or insist upon his legal rights to take advantage of another’s special vulnerability or misadventure for the unjust enrichment of himself...” (see *Sumatec Engineering & Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd* [2012] 3 CLJ 401).

15

- It is defined as “...unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party. Mere breaches of contract by the party in question ... would not by themselves be unconscionable” (see *Kiso (S) Pte Ltd v. Lum Chang Building Contractors Pte Ltd* [2013] SGHC 86). A contractor applying for an injunction on the basis of “unconscionability”
- 20 has to establish a “strong *prima facie* case of unconscionability,” in which case the parties’ conduct leading up to a call on a bond and the presence of notice are all relevant considerations (see *Tactic Engineering Pte Ltd (in liq) v. Sato Kogyo (S) Pte Ltd* [2017] SGHC 103). The Singapore courts have allowed the exception of unconscionability to cater for situations where
- 25 the conduct of the beneficiary was sufficiently reprehensible to justify an interdict in circumstances where the facts do not amount to fraud. Provisions in an underlying contract, which regulate calls on a bond, should only be considered with circumspection where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man. Resort to the underlying contract requires a certain and compelling case to be established; cases
- 30 where the demand on the guarantee can be said to be “clearly untrue or false,” or “utterly without justification,” or where it is apparent there is “no right to payment.” Cases in which proof is

furnished of the absence of any colourable or plausible basis under the underlying contract for the beneficiary to call the guarantee.

5 The contract is to be construed in its commercial context, namely, that performance guarantees are treated as providing the beneficiary thereof with a security which is only defeasible in such limited circumstances, that it is to be regarded as approximating cash. Considering that the doctrine of unconscionability is aimed at preventing oppression and unfair conduct, the test for unconscionability is higher than that usually adopted for misleading and deceptive conduct. It involves unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensible or
10 lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party, on basis of the notion that a person should not be permitted to use or insist upon his legal rights to take advantage of another's special vulnerability or misadventure for the unjust enrichment of himself. It should rise to the level of egregious conduct; meaning conspicuously, glaringly, or staggeringly or flagrantly bad, of a nature that would vitiate the very foundation of
15 the bank guarantee. A kind of outrageous conduct which shocks the conscience of the court, such as or where the guarantee is called upon with absolutely no basis in fact. There must be a lack of good faith that results in a very distinct unfairness to the other party.

Examples of when an injunction might be granted to restrain the call of a performance bond for
20 unconscionability include: - calls for excessive sums; calls based on contractual breaches that the beneficiary of the call itself is responsible for; calls tainted by "unclean hands" e.g. supported by inflated estimates of damages or based on incomplete disclosures; where the beneficiary's call was based on the account party's delay in construction works, but the delay had been caused by the beneficiary not having made timely interim payments (see for example *Royal Design Studio*
25 *Pte Ltd v. Chang Development Pte Ltd [1990] 2 SLR(R) 520*); calls made for ulterior motives; and calls based on a position which is inconsistent with the stance that the beneficiary took prior to calling on the performance bond. The beneficiary will also be restrained from calling on the full sum of the guarantee where the beneficiary owes the applicant substantial sums and the applicant's construction work was marred by merely "minor defects" (which cost far less to
30 rectify) than the inflated sums demanded by the beneficiary.

The unconscionability raised in this application is constituted by;- the applicant refusing to pay an amount certified by the Project Manager within the time stipulated by the contract and deceitfully proceeding to call on the performance guarantee; the 1st respondent hoodwinking the applicant that it wants to have amicable discussions and resolution of the dispute while calling the guarantees behind the applicant's back; seeking to encash the contract securities while at the same time refusing to certify and pay for works carried on the ground; and using sharp practices by seeking to hurriedly encash the Contract Security so as to render the decision of the dispute resolution process (Adjudication) nugatory. It has not been shown that the applicant's delay is attributable entirely or substantially to the 1st respondent's not having made timely interim payments or that the faults complained of by the 1st respondent constitute only minor defects in comparison to the value of the guarantee. It appears the delay in payment was caused by genuine dispute over the legitimacy of the impugned certificates, an issue to be determined in the suit.

Considering that the beneficiary of a demand performance guarantee does not need to prove a violation of the contract or the suffering of damage or any other risk against which the guarantee was to provide protection, a call is justified by a plausible claim of breach of the underlying contract, even though colourable. A dispute arising from the obligation in the underlying contract should not result in the ineffectiveness of a demand performance guarantee. The existence of unfulfilled obligations between the parties to a building contract are irrelevant to the bank complying with a demand to pay a call upon a demand performance guarantee (see *Wood Hall Ltd v. Pipeline Authority (1979) 141 CLR 443*). It is also irrelevant to the bank whether or not the demand is in breach of the applicant's contract with the beneficiary.

The validity of a demand performance guarantee continues after the termination of the underlying contract because it was established to secure due performance under the contract (see *Geraldton Building v. Christmas Island Resort Pty Ltd (1986) 12 BCL 6G; (1994) 11 WAR 40*). A guarantor cannot rely on the suspension or termination of the underlying obligations to object to the payment. The guarantor remains liable even if the underlying obligation is extinguished for any reason. The guarantor must pay upon demand, without making any objection or invoking any defence. On receiving a claim, the guarantor is required merely to check that it has been validly made, i.e. that the formal conditions laid down in the wording of the guarantee have been met. The guarantor will not examine the material justification for the claim. If the formal

conditions as set out in the guarantee are satisfied, the guarantor is obliged to make payment, regardless of whether or not the principal believes the payment is due. The beneficiary can demand immediate payment, and the guarantor and principal have no right to raise any objections or present any defence on the strength of the underlying transaction. Thus the
5 beneficiary is relieved not only of the risk of the principal becoming insolvent but also of the risk of having to enforce a claim through the courts.

The commercial utility of having the benefit of a performance guarantee would be rendered virtually nugatory if the proposition to the contrary was correct. A beneficiary's recourse to
10 unconditional security should remain truly unconditional unless it is affected by fraud or unconscionable conduct, or the contract contains a relevant negative stipulation. The purpose of this demand performance guarantee would be defeated if the 1st respondent is restrained from calling on it or the 2nd respondent from honouring the call, until the dispute concerning the accusations and counter-accusations of breach of the obligations imposed by the underlying
15 contract has been resolved by mediation, arbitration or adjudication as contended by the applicant.

c) Whether the 2nd respondent knew of any fraud by the 1st respondent at the time the 1st respondent sought payment under the guarantee.

20

It is necessary that at the time of the calling of the guarantee, the Bank should have notice of the fraud. Moreover, such fact of notice along with its evidence has to be averred in the application. A bank should not pay where a fraud by the beneficiary of the guarantee has been sufficiently brought to its knowledge before payment or demonstrated to a court called on by the customer of
25 the bank to issue an interlocutory injunction to restrain the bank from honouring the draft (see *Bank of Nova Scotia v. Angelica-Whitewear Ltd [1987] 1 SCR 59*). It is trite law in commercial practice that evidence of fraud must be clearly established and to a standard almost beyond doubt, both as to the fact of fraud and as to the guarantor's knowledge, without in depth investigations in the underlying contract. The proof must be clear and the fraud must be
30 established to an extent where there may not be another explanation which excludes fraud.

Consequently, if the beneficiary is able to give an arguable justification, there will not be a case of fraud.

In the instant case, the evidence neither supports a finding of fraud nor of unconscionability. It has not attained the required standard of a strong *prima facie* case. In conclusion therefore, having perused the pleadings of all parties and considered their submissions at length, I find that the applicant has not made out a strong *prima facie* case of an unfair or fraudulent calling of the guarantee.

10 iii. Balance of convenience (whether the threatened injury to the applicant outweighs the threatened harm the injunction might inflict on the respondents).

When the court is in doubt considering the outcome of its consideration of the first two factors, the third part of the test involves the court assessing which of the parties would suffer greater harm from the granting or refusal of the injunction pending trial. Unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the applicant has any real prospect of succeeding in his or her claim at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

20 This part of the test is referred to as the “balance of convenience.” Balance of convenience means comparative mischief or inconvenience that may be caused to the either party in the event of refusal or grant of injunction. It is necessary to assess the harm to the applicant if there is no injunction, and the prejudice or harm to the respondent if an injunction is imposed. The courts examine a variety of factors, including the harm likely to be suffered by both parties from the granting or refusal of the injunction, and the current *status quo* as at the time of the injunction. The court should then take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong.” It is thus necessary to weigh in the balance of convenience the public interest as well as the interest of the parties.

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The Court has the duty to balance or weigh the scales of justice by ensuring that the suit is not rendered nugatory while at the same time ensuring that a respondent is not impeded from the pursuit of his or her contractual rights. No doubt it would be wrong to grant a temporary injunction order pending disposal of the suit where the suit is frivolous or where such order
5 would inflict greater hardship than it would avoid. Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application, some disadvantages which his or her ultimate success at the trial may show he or she ought to have been spared and the disadvantages may be such that the recovery of damages to which he or she would then be entitled would not be sufficient to compensate him or her fully for
10 all of them.

The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his or her succeeding at the trial is always a significant factor in assessing where the balance of convenience lies. The governing principle is that the court should
15 first consider whether if the applicant were to succeed at the trial in establishing his or her right to a permanent injunction, he or she would be adequately compensated by an award of damages for the loss he or she would have sustained as a result of the respondent's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the
20 respondent would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the applicant's claim appears to be at this stage.

If, on the other hand, damages would not provide an adequate remedy for the applicant in the event of his succeeding at the trial, the court should then consider whether, on the contrary
25 hypothesis that the respondent were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated by the applicant for the loss he or she would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages would be an adequate remedy and the applicant would be in a financial position to pay them, there would be no reason upon this ground to refuse
30 an interlocutory injunction.

Even if a party is able to establish the fraud exception, it still faces an insuperable difficulty, in that it will have an adequate remedy against the bank in damages if it pays despite being on notice of fraud. By contrast, an injunction might cause greater damage to the bank than the party seeking the injunction could pay on their undertaking as to damages. In these circumstances, the
5 balance of convenience will almost always be in favour of allowing the bank to pay. The balance of convenience will almost always militate against the grant of an injunction. The reasons for this disinclination become readily understandable when one contrasts the uncertainty in which a court finds itself with respect to the merits at the interlocutory stage, with the sometimes far-reaching albeit temporary practical consequences of an injunction, not only for the parties to the litigation
10 but also for the public at large.

However in this case, having found that the applicant has not made out a strong *prima facie* case of an unfair or fraudulent calling of the guarantee, I find that the balance of convenience is not in favour of the applicant. The demand performance guarantee was provided to secure performance
15 of the contract and it operates autonomously, i.e., the beneficiary may make a call upon it unless: (i) the recourse is fraudulent; (ii) the recourse is unconscionable; or (iii) the recourse would breach an express or implied restriction in the contract. Once none of those violations arise and the documents presented by the beneficiary do comply with the requirements of the guarantee, as they do in the instant case, then payment must be made. Since the beneficiary can call on this
20 performance guarantee without any evidence or corroboration concerning the applicant's default or any entitlement of payment under the guarantee, all the 1st respondent had to do as beneficiary is to adduce a written demand of payment. Thereafter all the 2nd respondent was to do is to determine, based on the documents alone, whether they appeared on their face to comply with the terms and conditions of the guarantee without consideration whatsoever to the underlying
25 contract. This principle is generally known as "the doctrine of strict compliance" as embodied in Article 9 of the URDG.

In light of all the foregoing, the application lacks merit and is accordingly dismissed. Consequently the interim injunction order that was issued by this Court on 28th November, 2022
30 restraining the 1st respondent and its agents from encashing, and as against the 2nd respondent, restraining it from honouring the demand made by the 1st respondent, in respect of performance

guarantee Ref. No. CRDB/MAPEERA PLATINUM/TF/21.01/05/2019 for payment of a sum of shs. 1,220,705,528/= issued by the 2nd respondent on 21st May, 2019 in favour of the Ministry of Works and Transport, with its validity period extended until 20th November, 2022 is hereby set aside. The costs of this application will abide the result of the suit.

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Delivered electronically this 10th day of July, 2023
Mubiru.....

.....**Stephen**

Stephen Mubiru
Judge,
10th July, 2023.

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