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CONSTRUCTION LAW BULLETIN

CONSTRUCTION GUARANTOR ESCAPES

Introduction

The Supreme Court of Appeal (“SCA”), towards the end of last year, dealt with an interesting case involving a JBCC construction guarantee.¹

At issue was whether in the circumstances of the case the guarantor, Renasa Insurance Company Ltd (“Renasa”), was entitled to avoid liability under the guarantee vis-à-vis a claim by the employer.

The Facts

In February 2007 a JBCC Building Agreement was concluded between Dormell Properties 282 (Pty) Ltd (“the Company”) and Synthesis Projects Cape (Pty) Ltd (“Synthesis”) as contractor for the construction of a shopping centre known as Cobble Walk in Durbanville. At the time the Company had already been converted to a close corporation, Dormell Properties 282 CC (“the CC”). As such the contract should have reflected the name of the

¹ [Dormell Properties 282 CC v Renasa Insurance Company Ltd and Others](#) SCA Case No 491/09, Judgment date 1 October 2010.

CC.

Perpetuating the error, in March 2007 a fixed amount JBCC guarantee was issued by Renasa in relation to the contract in favour of the Company. The error was again perpetuated in December 2007 when a replacement guarantee was issued in favour of the Company following expiry of the first guarantee. This replacement guarantee specified an expiry date of 28 February 2008.

The construction of the shopping centre did not go according to plan. It was apparent at the beginning of February 2008 that practical completion would not be achieved before the expiry date of the guarantee, namely 28 February 2008. In light of this the principal agent demanded that Synthesis arrange for the construction guarantee to be extended until 15 April 2008, failing which the CC would cancel the contract.

Synthesis took the view that it was not obliged to extend the guarantee. Consequently, acting on behalf of the CC, the principal agent cancelled the contract on 28 February 2008 and submitted a demand on the same day to Renasa for payment of the amount available under the guarantee, some R6,6m.

The basis for this demand was the fact of the cancellation of the contract by the CC. In terms of the standard JBCC construction guarantee, one of the grounds for calling up the guarantee is the cancellation by the employer of the contract.

Synthesis disputed the CC's right to cancel the contract which it treated as a repudiation of the contract on the basis of which it terminated the contract on 28 February 2008.

Renasa rejected the claim under the guarantee on the grounds that:

- the guarantee had expired at midnight on 27 February 2008; and
- the CC was not entitled to claim under the guarantee as it had been issued in favour of the Company.

Synthesis made common cause with Renasa and also disputed that it had been in breach of the contract so as to entitle the CC to have cancelled it.

The CC countered with an application for the rectification of the guarantee contending that it was the intention of all concerned that it (the CC) should be the beneficiary of the guarantee.

In our law if a written contract does not reflect the true intention of the parties to it but has been signed by them in the mistaken belief that it does, it may be corrected by a court to reflect the true intention.

The issue initially came before the Johannesburg High Court. It held that the CC was not entitled to rectification of the guarantee and that in any event the guarantee had expired at midnight on 27 February 2008 before it had been called up. The CC appealed this decision to the SCA.

In the meantime the dispute between the CC and Synthesis regarding the validity of the CC's cancellation of the contract had been referred to arbitration. Along the way Synthesis was placed into liquidation but the liquidators continued with the arbitration.

The arbitrator found that the CC had had no right to cancel and that the termination of the contract by Synthesis was valid.

Renasa asked the SCA to admit this new evidence for purposes of adjudicating the appeal despite the events having occurred after the decision of the Johannesburg High Court which was the subject matter of the appeal.

In appropriate cases Appeal Courts can admit new evidence provided there is an acceptable explanation for the fact that the evidence was not adduced in the first court and if the evidence is material.

The CC did not object to this new evidence and the SCA proceeded with the appeal in light of the new information.

Appeal Court Findings

On the issue of the expiry of the guarantee the SCA held that where time has to be computed in accordance with a contract, one looks firstly at the terms of the contract. In this case the contract clearly expressed the expiry date of the guarantee as being 28 February 2008 and there was accordingly no warrant for construing the guarantee as having expired prior to that date. In the SCA's view the CC would have had the whole of 28 February 2008 within which to make a claim under the guarantee.

The SCA held that the court of first instance was wrong to apply what is known as the civil method of computation of time which provides for one to include the first day but exclude the last day. It held that this only applies where something must be done within a certain number of days from a stated event which was not the case with the guarantee in question.

On the issue of rectification, the SCA held that it was obvious to all of the parties that the beneficiary of the guarantee was intended to be the employer under the contract. As the CC was as a matter of law the employer, it was the one entitled to the benefits of the guarantee and the guarantee fell to be rectified accordingly.

The SCA however held that the effect of the arbitrator's award in favour of Synthesis was to destroy the basis upon which the CC had called up the guarantee, namely the CC's cancellation of the contract, and as such the CC had lost the right to enforce the guarantee.

The court nonetheless affirmed the nature of the JBCC guarantee as being a demand guarantee akin to a letter of credit. In other words all that is required ordinarily to obtain payment is compliance with the formalities specified in the guarantee.

In this case, giving effect to the guarantee, the court held, would merely mean that the CC would be obliged to immediately refund the money to Renasa as it is an accepted principle of

such guarantees that where it is subsequently shown that the call on the guarantee was unjustified, the recipient must refund the money.

In the light of this, the SCA took the view that it would be an exercise in futility to allow the CC to claim payment under the guarantee but at the same time be obliged to refund the money. The court accordingly ruled that Renasa was not obliged to pay out under the guarantee and dismissed the CC's appeal.

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