

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**



(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

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Case number: 2009/31971

In the matter between:

GROUP FIVE CONSTRUCTION (PTY) LIMITED

First Applicant

GROUP FIVE INTERNATIONAL LIMITED

Second Applicant

GROUP FIVE CONSTRUCTION (UK) LIMITED

Third Applicant

And

MEMBER OF THE EXECUTIVE COUNCIL FOR

PUBLIC TRANSPORT, ROADS AND WORKS GAUTENG

First Respondent

LOMBARD INSURANCE COMPANY LIMITED

Second Respondent

ILIMA PROJECTS (PTY) LIMITED

Third Respondent

MOTHEO CONSTRUCTION GROUP (PTY) LIMITED

Fourth Respondent

YIKUSASA BUILDING CONTRACTORS (SA) CC

Fifth Respondent

TTR GENERAL BUILDING CONSTRUCTION (PTY)

LIMITED

Sixth Respondent

and

Summary: Construction guarantee - must be clear and unequivocal letter of demand – particulars of claim do not set out cancellation of construction contract - tacit acceptance of repudiation cannot constitute a written notice of cancellation. Fraud or absence of honesty renders guarantee unenforceable – where grounds for demand made/calling up of guarantee in conflict with several documents explaining that construction contract was not cancelled for reasons set out in detail and merely ‘expired’ it is then not honest to claim, in the letter of demand, that the construction contract had been ‘cancelled due to default – absent cancellation the grounds for demand were fraudulently expressed – guarantee there found to be extinguished.

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. Appellants (‘Group Five’) are the signatories to an indemnity in favour of the second respondent (‘Lombard’) who signed a performance guarantee in favour of the first respondent (the MEC’).
2. Group Five’s case is that the guarantee has been extinguished or is of no force and effect and that the second demand issued by the MEC does not conform with the guarantee requirements and is therefore invalid and therefore that payment of the guarantee cannot be enforced against Lombard. Lombard also contends that it is not liable under the guarantee since the demand is not in conformity with the guarantee.
3. The facts may be simply stated. In July 2006 the MEC concluded a construction contract (‘the JV contract’) for the construction of Zola Hospital with Ilima/Motheo/Yikusasa and TTR Joint Venture (a partnership of which the partners were the third, fourth, fifth and sixth respondents) (‘the JV’). That contract required the JV to provide a variable construction guarantee in favour of the MEC which was done by Lombard on 9th October 2006 on request of the JV.
4. The relevant clause of the issued guarantee C0521102 reads as follows:

“ 5. Subject to the guarantors maximum liability... the Guarantor undertakes to pay the Employer the Guaranteed sum of the full outstanding balance upon receipt of a first written demand from the Employer to the Guarantor at the Guarantor’s domicilium citandi et executandi calling up this Construction Guarantee stating that:

5.1 The agreement has been cancelled due to the Contractors default and that the Construction Guarantee is called up in terms of 5.0 The demand shall enclose a copy of the notice of cancellation.”

5. By 19th January 2007, the JV partnership had dissolved. On 1st August 2008, the MEC signed a new construction contract for Zola hospital with one of the erstwhile partners (‘Ilima’).
6. On 18th December 2008 the MEC sent its first demand, to which was attached a letter of cancellation from MEC to the JV dated 4th September 2008, calling up the guarantee. That letter of demand was withdrawn.
7. It was followed by a further letter of demand to Lombard dated 30th September 2009 with which this application is concerned.

REFERRAL TO TRIAL

8. Group Five brought an interlocutory application for this matter to be referred to trial which was opposed.
9. I heard the application, did not grant the application and gave full reasons therefore.
10. The application proceeded.

RECUSAL

11. When I was first allocated this matter and received the papers in the last week of the 2014 court term, I emailed the attorneys for the parties advising that I had been the presiding judge in the trial matter of *Country Cloud Trading CC v MEC Transport, Case No 2010/34662* which matter involved Ilima Projects (third respondents in this application). At that stage I had not and did not read the papers since I was involved in other litigation but I advised the parties that I could then see no reason to recuse myself from this application.
12. Neither party advised that they took the view that I should recuse myself. That was confirmed and placed on record at the commencement of the hearing of this application. The parties were cognizant not only of my having presided over that trial

but also that the matter had gone on appeal to the Supreme Court of Appeal and the Constitutional Court.

13. However, in the course of counsel's argument on behalf of the MEC, I realized that I had recollection of the earlier matter and of certain facts led in evidence. I felt obliged to inform of such recollections¹. An adjournment led to an application for my recusal by the MEC.
14. It was submitted that there was a reasonable apprehension of bias on my part because much would turn on interpretation of one or more documents by the then HOD of the DPTWR (Buthelezi) who had not given evidence at the trial but whose behavior and documents had featured therein.
15. I declined to recuse myself. I did not give reasons at the time.
16. It has never been our law that a judge who has presided in one matter cannot preside in another matter involving some or all of the same parties or that a judge who has adjudicated on one dispute cannot adjudicate on a similar dispute. As was said in *Phillips v Hanau and Hoffa 1871 Supreme Court of the Cape of Good Hope* "This is a new action, and if judges are not to try an action because in a previous action, where the same facts have come before them they have expressed a particular opinion, there will be an end of many actions altogether."²
17. There would have to be something beyond the ordinary for a recusal by a judge who is cognizant of her duty to sit in a case³. That was not argued.
18. The main consideration which led to my decision not to recuse myself is the difference between a trial and motion court proceedings. In the current matter I am bound by that which is on the record – all affidavits and documents are set out for everyone to see and read. There is no room for assessment of witnesses, impressions, personal observations as there would be at a trial. I am not at liberty to diverge from the written word as is placed before myself and all parties to this application. Whatever I may think I recollect from the trial cannot feature in my judgment on the application unless it is placed before me and dealt with by counsel in this application.

NON-CONFORMITY OF DEMAND

19. The relevant portions of the demand of 30th September 2009 reads as follows:

¹ See the actions of Van Dijkhorst AJ in *General Council of the Bar of South Africa v Geach and Others 2013(2) SA 52* at par 94-95.

² See also *Rex v Cah Koo 1919 TPD 311*; *General Council of the Bar of South Africa v Geach and Others 2013 (2) SA 52 (SCA)*; Erasmus RS 45 2014 Act-A1-p14A.

³ See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC)*; see *Geach supra*.

“Kindly take note that the guarantee issued by you in terms of the construction guarantee number C05/21102 (‘the guarantee’) is hereby called up in terms of paragraph 5.0 of the guarantee. The Agreement (as defined in the guarantee) has been cancelled due to the Contractor’s default. The notice of cancellation is contained in the summons in case number 31971/09, a copy of which is annexed hereto.”

20. Group Five submitted that the guarantee specifically provides only for a “first written demand” which precludes any second or subsequent demand. As was succinctly stated – the employer has one bite of the cherry in a first and only demand. The MEC submitted that, since the first letter of demand was withdrawn as defective, there was no earlier demand and that this demand is therefore the ‘first’ demand. To which Group Five responded that the guarantee does not refer to a ‘first compliant demand’ which would allow numerous non-compliant demands suggesting that the furnishing of a demand is a moving target.
21. I do not understand the need for insertion of the word ‘first’ in the guarantee but accept that we must attempt to give all words a purposive meaning. However, I do not need to decide this case on this point and leave the issue over for decision on another occasion.

No Notice of Cancellation

22. It is now common cause that no notice of cancellation was attached to this letter of demand when it was served by hand. There was no summons attached to the letter of demand as claimed. It is also common cause that, in any event, the case number to which reference was made in the letter of demand does not refer to the litigation between the MEC and the JV.
23. Group Five and Lombard both argued that this purported notice of cancellation fails to meet the enunciated tests for compliance⁴ as set out by the Supreme Court of Appeal in *Compass Insurance Company Ltd v Hospitality Hotel Developments (Pty) Ltd* (756/10)

“It should not be incumbent on the guarantor to ascertain the truth of the assertion made by the beneficiary that the subcontractor had been placed under provisional liquidation. That is why Compass Insurance required a copy of the order itself. Similarly, the guarantor should not have to establish whether a contract has in fact been cancelled. That is why a copy of the notice of cancellation, if there has in fact been cancellation is required to be attached to the demand. The very

⁴ Group Five argued for the so-called doctrine of strict compliance as set out in the law relating to letters of credit. In South Africa, the SCA has refrained from deciding whether or not this doctrine of strict compliance is equally applicable to demand guarantees.

purpose of a performance basis is that the guarantor has an independent, autonomous contract with the beneficiary and that the contractual arrangements with the beneficiary and other parties are of no consequence to the guarantor. The guarantee in this case is an independent contract that must be fulfilled on its terms.” [para 14-15]

24. Lewis JA, held that ‘compliance’ with the ‘absolutely clear’ conditions of the guarantee was necessary. In the case before her, there was no compliance because firstly, the guarantor can only have recourse to the terms of the guarantee in order to ascertain whether or not it is liable (and for how much) and secondly, it is not incumbent on the guarantor to conduct its own investigation in order to determine whether or not and to what extent it is liable to the beneficiary. Absent the attached liquidation order (equivalent to the written notice of cancellation in this case) there was no compliance.
25. I am in no doubt that the liability of Lombard and the extent thereof must appear clearly from the demand made on it.
26. The MEC attempted to rectify this default some two weeks later. On 13th October 2009, a summons (with a different case number) was delivered to Lombard.
27. The MEC takes the view that this delivery rendered the demand complete and that the demand now complied with the requirements of clause 5 because Lombard was now in receipt of the summons containing or consisting of the notice of cancellation or confirmation thereof.
28. I have my doubts whether or not a demand composed of dribs and drabs, ebbing and flowing like the tides could possibly meet the requirements for compliance. After all, when would either the Employer or the Guarantor be permitted to conclude that the demand was now complete and compliant. However, I need not decide that point.

The Summons and Particulars of 3rd November 2008

29. What is questionable is whether the notice of cancellation is confirmed in or consists in the delivered summons.
30. Firstly, I note the extent of time and energy spent at the hearing of this application debating the content and meaning of this summons and particulars of claim. If the cancellation was easily apparent therefrom, this would not have been necessary. The particulars of claim hardly furnish a clear and unequivocal notice of cancellation.

31. Secondly, in those particulars the MEC pleaded that the JV partnership had become dissolved and had no intention of completing the building works. In the result the MEC “tacitly accepted the repudiation of the agreement”⁵ by entering into a new construction contract with another contractor.
32. It is clear that the guarantee requires a written notice of cancellation since the letter of demand “shall enclose a copy” thereof. I fail to see how and where a “tacit acceptance” can constitute a written notice of cancellation. The trigger to compliance of the guarantee must be a written document. Lombard cannot be expected to investigate conduct to see whether or not there was an oral cancellation or whether or not something else which constituted cancellation.
33. Thirdly, the MEC argued that the provisions of paragraph 19⁶ of the particular of claim which pleads that the MEC “became entitled to rescind both the contract and the subsequent contract alternatively [the MEC} hereby elects to rescind the contract” are not limited only to the subsequent Ilima contract and the complaints about tax certificates as set out in the alternate cause of action set out in paragraphs 16, 17 and 18. With this I cannot agree.
- a. First, paragraph 19 is the logical culmination to the alternate cause of action – without paragraph 19 clause 16, 17 and 18 are simply left hanging. Fortunately, paragraph 19 completes this alternate cause of action by concluding with the words “Accordingly” which indicates that paragraph 19 flows from 16, 17 and 18.
 - b. Second, paragraph 16 refers to tax clearance certificates prior to both the first and subsequent building contracts and paragraph 19 concludes that the MEC became entitled to rescind both contracts. Paragraph 19 therefore refers to the tax certificate issue.
 - c. Third, paragraph 19 states that rescission of ‘the’ i.e. only one) contract is contained in Annexure G to the particulars of claim. Annexure G dated 30th October 2008⁷ states that the first contract “officially expired” on 10th May 2008 and that the second building contract of 1st August 2008 is ‘null and void’ by reason of misrepresentations as to the tax clearance certificate. Annexure G therefore provides no assistance in delving for a “cancellation due to default” in respect of the first JV contract.
 - d. Fourth, the affidavit of Martins⁸ confirms that the first JV contract was repudiated which repudiation was accepted. He makes no mention of any written cancellation. He specifically confirms that any cancellation was in respect of the second building contract.

⁵ See p 675 and 1456 of Record.

⁶ See pages 677 onwards and 1458 of Record.

⁷ At page 1525 of Record.

⁸ At pages 246 and 263 of Record.

34. Counsel for the MEC argued that, where repudiation is made and orally accepted, subsequent notification confirming cancellation would be acceptable. This summons was therefore written communication of the cancellation which had taken place by conduct. When I enquired as to the location of such subsequent notification confirming cancellation I was referred to the particulars of claim already discussed. One of the difficulties with this argument is that the repudiation is claimed to have been tacitly accepted on 4th August 2008 when the second contract was concluded. The first contract therefore terminated on that date. The summons was issued out of court on the 3rd November 2008 and cannot therefore cancel an agreement which ceased to exist some months prior thereto.⁹
35. The summons indicates no more than a tacit acceptance of repudiation on 4th August 2008 when the second contract was concluded. Since paragraph 19 does not apply to the first JV contract, it cannot contain within itself a confirmation of cancellation. In any event, this summons could hardly constitute cancellation of a contract which no longer exists. Indeed, the summons could not constitute confirmation of an historical event because the guarantee requires the notice of cancellation itself¹⁰. Finally, this summons was withdrawn¹¹ - the entire action then being withdrawn- pending mediation and therefore could not constitute a notice of cancellation at time of the letter of demand in September 2009.
36. The summons and particulars of claim do not meet the requirements for a ‘clear and unequivocal’ notice of intention to cancel or notice of termination¹². The first demand was indeed “a futile, still-born communication’ and the second demand ‘must share the same fate’¹³.
37. It follows, that I cannot accept that the summons and particulars of claim contains within itself or constitutes a notice of cancellation or confirmation of cancellation in respect of the 2006 JV building contract which is the subject matter of this guarantee.

Fraud

38. The guarantee requires that the building agreement has been cancelled due to the default of the JV contractor. The letter of demand stated that the Agreement had been cancelled due to the Contractor’s default.

⁹ *Culverwell and Another v Brown 1990 (1) SA 7 (AD)* at 17B-C.

¹⁰ In *Compass* supra the actual Order of Liquidation was required to be attached.

¹¹ See the Martins affidavit at p 251 of Record.

¹² See the discussion at page 374 onwards on the difficulties of conditional demands and notices framed in the alternative in *Kragga Kamma Estates Cc and another v Flanagan 1995(2) SA 367 (AD)*.

¹³ To paraphrase the court in *Kragga Kamma* supra at page 375 B-F.

39. In its Notice of Motion, Group Five has asked for orders that the “so-called ‘second demand’ is further invalid and unenforceable on grounds of fraud”¹⁴ and that the “Guarantee ...dated 9 October 2006... is extinguished and/or of no force and effect”¹⁵.
40. The averments made by Group Five are that any demand made by the MEC which purport to be on the grounds of cancellation due to the contractors default would be “unjustified, unconscionable and could be classified as fraudulent”¹⁶. Group Five allege ‘fraud’ on the basis that the MEC presented a demand in full knowledge that the contract had not been called due to the default of the JV contractor.
41. More or less contemporaneous documents explicitly disavow any intention to cancel or actual cancellation of the first JV contract which is the subject matter of the guarantee:
- a. On 21st April 2008, the construction project manager appointed by the Department of Public Transport, Roads and Works (‘DPTRW’), Tsiya Developers (Pty) Ltd recorded that the “recommendation of the CPM to terminate the contract in terms of the JBCC requirements were not approved by the Department”¹⁷.
 - b. In a letter of 4th September 2008 to the second building contract contractor, Ilima from the HOD of DPTRW advising that the second building contract is ‘null and void’, the HOD records that the first JV contract “officially expired”¹⁸.
 - c. A memorandum written by the then HOD Gauteng DPTRW to MEC Gauteng DPTRW, the HOD and MEC Gauteng Treasury, HOD and MEC Gauteng Department of Health on 24th June 2009 sets out in detail that “the possibility of cancelling the 2006 contract was mooted.... However, the Department’s desire to mentor Ilima [the JV} as a black contractor company and the increased costs to secure another contractor were two of the factors which militated against this approach. Thus, subsequent to the expiry of the original contract in May 2008, the DPTRW engaged in further contractual negotiations....”¹⁹.
 - d. A further undated memorandum to the Gauteng Department of Health, Gauteng Treasury and the MEC of DPTRW by the HOD repeats that the possibility of cancellation of the JV contract was considered but decided against and that instead the contract was simply allowed to expire.²⁰

¹⁴ Amended Prayer 1.iii

¹⁵ Prayer 1.i

¹⁶ Para 125 of Founding Affidavit.

¹⁷ Page 543 of Record.

¹⁸ Page 76 and 1531 of Record.

¹⁹ Page 751 and 1250 of Record.

²⁰ Page 1262 onwards of Record.

- e. An undated memorandum²¹ from the HOD of DPTRW to the office of the MEC Department of Infrastructure Development was written subsequent to the cancellation of the second contract with Ilima. That memorandum refers to the ‘first Ilima contract’ and the ‘second Ilima contract’. It repeats that consideration had been given to cancellation of the first JV building contract but that various factors militated against such decision and action. It repeats that there was “expiry of the original contract”. The memorandum reports on mitigation of financial losses incurred by the Department. It is stated that, in respect of the second Ilima contract, “the Department acted decisively and cancelled the contract on 4 September 2008”. Insofar as claiming in terms of the reconstruction guarantee is concerned, the following is stated:

“Furthermore, it is the Department’s intention to obtain a legal opinion from senior counsel on the prospects of success if the Department decides to litigate against the insurer to compel the payment of the guaranteed sum. Such an opinion is required in light of the fact that the Department did not cancel the contract on the basis of Ilima’s non-performance, which is prerequisite before guarantees can be claimed. Furthermore, it appears that the insurer may contest that the Department did not follow certain procedures that are essential in calling up the guarantee as set out in the guarantee document and as per the requirements of the JBCC contract”.

42. I am in agreement with counsel for the MEC that the latest memorandum, contrary to argument by Group Five, does not pertain to the first building contract, the JV contract. The memorandum refers on its first page to its “subject” as the “appointment of Tau Pride and Maziya Construction for completion of the Zola Hospital Project” and the content is clearly directed to resolution of the second Ilima contract.
43. However, these documents all repeat that the first JV contract was not cancelled. The MEC of DPTRW did not challenge the content of these documents in this application. Nor did the other recipients thereof at Treasury or Department of Health. It does not assist counsel for the MEC to submit that the writer of these documents was not a legally trained person because that is not evidence before this court. In any event, these are not legal constructs. The writer specifically explains at least two occasions that the contract was not cancelled for reasons which were spelt out - delays occasioned by public tender processes, increased costs in preparing tender documentation and the desire of the Department to mentor and uplift” the Ilima JV as a ‘black’ construction contractor.
44. The first JV contract was not cancelled. What is meant by writing that this first JV contract ‘expired’ is not exactly known. It may be arrival of a practical completion

²¹ Pages 777 to 801 of Record.

date, death by inactivity, reaching a date specified in the original building contract or general exhaustion. It does not matter. We cannot speculate thereon.

45. However, the documents contrapose cancellation as against expiry. The two are not viewed as the same. There was no cancellation. There was no cancellation due to default.
46. The letter of demand is dated 30th September 2009. By that date, the Contract Project Manager had written to the MEC recording that it's recommendations to cancel had not been followed. At least two memoranda had been written by the HOD explaining why the contract had not been cancelled. The MEC has not pleaded that these documents were mislaid or unknown to the MEC. In fact, the MEC has not furnished any affidavit dealing with this issue. It is difficult to conclude other than that the letter of demand contained untruths which were known to be untruths at the time it was written.
47. Counsel for the MEC valiantly attempted to distinguish between default, cancellation and the notification. He argued that there was no fraud: there was indeed default on the part of the JV, there was repudiation, there was a breach and it was therefore not fraudulent to say that there was default and nor was it fraudulent to say that there was cancellation due to default.
48. I appreciate that the MEC always took the view that there was non performance by the JV and that this was repudiation or default or breach. But the MEC never took the view that the MEC had cancelled the JV contract. The default did not, in the mind of the MEC and the HOD result in cancellation. To then claim, in the letter of demand that there had been cancellation due to non performance is more than disingenuous - it was known to be untrue.
49. I am in agreement with counsel for Group Five that the version of cancellation due to default is an artificial construct long after the event.
50. Such a situation clearly accords with fraud as understood in English law in the context of letters-of-credit and guarantees. It is, in this case, 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 on the performance bonds"²². Absence of good faith as ground for declining enforcement of a guarantee has received support from the Supreme Court of Appeal in the minority judgment of Cloete JA in *Dormell Properties 282 CC v Renasa Insurance Company Ltd and Others 2011 (1) SA 70 (SCA)*, as also in *Guardrisk Insurance Company Ltd v Kentz (Pty) Ltd [2014] 1 All SA 307 (SCA)*, *Scatec Solar SA 163 (Pty) Ltd and another v Terrafix*

²² See *United Trading Corporation SA v Allied Arab Bank [1985] 2 Lloyd's Rep 554 (CA) 561*.

Suedafrika (Pty) Ltd [2014] ZAWCHC 24, Cargill International SA and Another v Bangladesh Sugar and Food Industries Corp [1996] 4 All ER 563 (QBD).

51. Accordingly, I am satisfied that the second demand incorporates a fraud and that the guarantee should be set aside.

COSTS

52. There was a postponement in February 2012 occasioned by Group Five's application (which was opposed) to introduce a supplementary affidavit. Costs of the application and postponement were reserved.
53. In the normal course, I would have ordered that Group Five pay wasted costs. However, where this entire series of litigation has been occasioned by a letter of demand upon a guarantee in circumstances as are set out above, I take the view that the court should mark its disapproval of the conduct of the MEC .
54. I do not intend to award costs against Group Five and in favour of the MEC in respect of that opposed application and resulting postponement. That is a mark of my disapproval of lack of honesty, absence of good faith, fraud on the part of the MEC.
55. Counsel for the MEC submitted that the MEC was justified until November 2011 when the only order sought was that the guarantee be extinguished and declared of no force and effect. That proposal might have had merit if I had not taken the view I have in respect of fraud and the guarantee.

ORDER

56. In the result an Order is made as follows:

- a. Guarantee No. C05/21102 dated 9 October 2006, issued by the Second Respondent is extinguished and of no force and effect, and/or unenforceable and that the Second Respondent is released from its obligations thereunder and that the Department of Public Transport, Roads and Works Gauteng, represented by the First Respondent must return the original guarantee to the Second Respondent; and/or
- b. The so-called "*second demand*" dated 30 September 2009, a copy of which appears at page 269 of the Papers, does not conform to the requirements of the guarantee in issue and is invalid and unenforceable; and
- c. The so-called "*second demand*" is further invalid and enforceable on grounds of fraud.

- d. The First Respondent is ordered to pay the Applicants' costs including those consequent upon the employment of two counsel, one being Senior Counsel.
- e. The First Respondent is ordered to pay the costs of Second Respondent/Third Party including the costs consequent upon the employment of two counsel.

DATED AT JOHANNESBURG 13th FEBRUARY 2015

SATCHWELL J

Counsel for Applicant: Adv. G D Harpur SC with him Adv. C F Hugo

Counsel for First Respondent: Adv. SC Vivian and with him Adv B Morris

Counsel for Third Party: Adv. C J McAslin with him P G Louw

Attorneys for Applicant: Norton Rose Fulbright South Africa

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Attorneys for Second Respondent and Third Party: Frese Moll & Partners

Dates of hearing of the Motion: 28-29th January 2015

Date of judgment: 13th February 2015