FILING SHEET FOR EASTERN CAPE JUDGMENTS

ECJ NO: **123/09**
ECD: 423/09

IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

PARTIES: **PETRIC CONSTRUCTION CC t/a A B CONSTRUCTION** **Plaintiff**

And

TOASTY TRADING t/a FURSTERBURG PROPERTY DEVELOPMENT 1ST RESPONDENT

CONSTANTIA INSURANCE COMPANY LTD 2ND RESPONDENT

SGI GUARANTEE ACCEPTANCES (PTY) LTD 3RD RESPONDENT

REFERENCE NUMBERS -

Registrar : **CASE NO: 123/09**
ECD: 423/09

DATE HEARD: **17 March 2009**

DATE DELIVERED: **3 March 2009**

JUDGE(S): **SANDI J**

LEGAL REPRESENTATIVES -
Appearances:

- for the Applicant: **Adv. Schultz**
  for the Respondent: **Adv. Lowe SC**
  Adv. Cole

Instructing attorneys:

- Applicant: **Allams Attorneys**
- Respondents**:** **Gravet Schoeman van Ransburg & Moodley**

IN THE HIGH COURT OF SOUTH AFRICA
EAST LONDON CIRCUIT LOCAL DIVISION

CASE NO: 123/09
ECD: 423/09
Date heard: 17/03/09
Date delivered:3/04/09

In the matter between:

PETRIC CONSTRUCTION CC t/a A B CONSTRUCTION APPLICANT

And

TOASTY TRADING T/A FURSTERBURG PROPERTY DEVELOPMENT 1ST RESPONDENT

CONSTANTIA INSURANCE COMPANY LTD 2ND RESPONDENT

SGI GUARANTEE ACCEPTANCES (PTY) LTD 3RD RESPONDENT

JUDGMENT

SANDI J:

[1] On 30 March 2009 I issued an order in the following terms:

> "The Rule is discharged with costs, such costs to include the costs of two counsel."

I intimated that my reasons would follow. These are the reasons.

[2] By agreement between the parties, on 17 February 2009 the following order was issued by a Judge of this division:

> "1. That a Rule Nisi issues herewith calling upon the Respondents to show cause on 17th March 2009, why a final order should not be made in the following terms:
>
> 1.1 The Second Respondent and Third Respondent be and are hereby interdicted and restrained from paying the First Respondent any amount claimed by the First Respondent from the Second and/or Third Respondent in terms of construction guarantee number 813550J, issued by the Second Respondent on 30th August 2007 pending the final determination of the dispute between the Applicant and the First Respondent, relating to the validity and legality of the First Respondent's purported termination of the principal building agreement entered into between the Applicant and the First Respondent on 16th May 2007.
>
> 1.2 The First Respondent pays the costs of suit.
>
> 1.3 That the provisions of paragraph 1.1 above shall operate as an interim interdict with immediate effect."

[3] The applicant seeks confirmation of the *Rule,* which is opposed by the first respondent.

[4] The applicant, Petric Construction CC t/a AB Construction, is a building contractor, and the first respondent is a property developer. The second respondent, Constantia Insurance Company Ltd, is the company that issued a construction guarantee in favour of the first respondent. The third respondent, SGI Guarantee Acceptance (Pty) Ltd, carries on business as management underwriters to the second respondent.

[5] The applicant seeks no order against the second and third respondents and these respondents are not opposing the relief sought herein.

[6] On 16 May 2007 the applicant and the first respondent entered into a written agreement for the construction of a residential development

known as Furstenburg Grand on a site situated at Nahoon Mouth in East London. The agreement is embodied in a document known as the Joint Building Contracts Committee series 2000, Principal Agreement ("the JBCC agreement"). As required by the JBCC agreement, on 30 August 2007 the applicant furnished a construction guarantee in the sum of R1 673 019. 43 issued on applicant's behalf by the second respondent. The guarantee was issued in terms of clause 14 of the JBCC agreement.

[7] In the course of the building operations disputes arose between the applicant and the first respondent. On 19 January 2009 the first respondent issued a default notice to the applicant in terms of the JBCC agreement. On 4 February 2009 the first respondent gave notice to the applicant cancelling the JBCC agreement. Thereafter, and on 9 February 2009 the first respondent demanded payment of the construction guarantee from the second respondent. Annexed to the letter of demand was the notice of cancellation which stated that the cancellation of the JBCC agreement was due to default on the part of the applicant. On 11 February 2009 the applicant disputed the first respondent's entitlement to cancel the contract and to obtain payment in terms of the construction guarantee. The dispute was communicated by the applicant to the second respondent in writing. The applicant advised the second respondent that it had issued two notices of default to the first respondent and that the first respondent had committed a material breach of the contract and that because of the breach the first

respondent was not entitled to cancel the agreement and to receive payment in terms of the construction guarantee.

[8] The second respondent advised the applicant that, unless an interdict was obtained to prohibit payment of the construction guarantee, the second respondent would be obliged to make payment to the first respondent. It was for this reason that the present application was launched.

[9] Prior to the obtaining of the interim order the applicant and the first respondent had agreed that all issues in dispute between them would be referred to arbitration.

[10] The first respondent has raised four points *in limine*. The first point, relating to the *locus standi* of the deponent to the applicant's founding affidavit, has been abandoned. In view of the conclusion reached by me in this matter I have decided to limit this judgment to one of the points raised because it is, in my view, determinative of the whole case.

[11] The point raised is that the first respondent is entitled to payment by the second respondent of the construction guarantee by virtue of the fact that it has complied with the conditions specified in the construction guarantee for receiving such payment.

[12] It was submitted by counsel that once the specified conditions set out in the construction guarantee have been complied with, the disputes raised by the applicant become irrelevant and do not constitute a ground for non-payment or delaying of payment. It was submitted that the second respondent is obliged to comply with the first respondent's demand for payment.

[13] The construction guarantee number 813550J on which the applicant and the first respondent rely had been extended to expire on 31 March 2009. The Guarantee was given in terms of the JBCC Contract 4.1: March 2005. In terms of clause 14.1 of the JBCC contract the applicant was obliged to furnish a construction guarantee to the first respondent equal to 7.5% of the contract sum.

[14] Clause 5 of the construction guarantee provides as follows:

> "5.0 Subject to the guarantor's maximum liability referred to in 1.0 or 2.0, *the Guarantor undertakes to pay the Employer the Guaranteed Sum or the full outstanding balance upon receipt of a first written demand from the Employer to the Guarantor at the Guarantor's physical address calling up this construction Guarantee, stating that*:
>
> 5.1 *The Agreement has been cancelled due to Contractor's default and that the Construction Guarantee is called up in terms of 5.0. The demand shall enclose a copy of the notice of cancellation; or*
>
> 5.2 A provisional sequestration or liquidation court order has been granted against the Contractor and the Construction Guarantee is called up in terms of 5.0. The demand shall enclose a copy of the court order.
>
> 6.0 It is recorded that the aggregate amount of payments required to be made by the Guarantor in terms of 4.0 and 5.0 shall not exceed the Guarantor's maximum liability in terms of 1.0 or 2.0.
>
> 7.0 Where the Guarantor is a registered insurer and has made payment in terms of 5.0, the Employer shall upon the date of issue of the final payment certificate submit an expense account to the Guarantor showing how all monies received in terms of the Construction Guarantee have been expanded and shall refund the guarantor any resulting surplus. All monies refunded to the Guarantor in terms of this

> Construction Guarantee shall bear interest at prime overdraft rate of the Employer's bank compounded monthly and calculated from the date payment was made by the guarantor to the Employer until the date of refund."

[15] Further, clause 11.0 of the Construction Guarantee provides that:

> "The Construction Guarantee is neither negotiable nor transferable and shall expire in terms of either 1.1.4 or 2.1, or payment in full of the Guaranteed Sum or on the Guaranteed expiry date, whichever is the earlier, *whereafter no claims will be considered by the Guarantor*. The original of this Construction Guarantee shall be returned to the Guarantor after it has expired.
>
> 12.0 This Construction Guarantee, with the required demand notices in terms of 4.0 or 5.0, shall be regarded as *a liquid document for the purpose of obtaining a court order*."

[16] Mr Lowe SC, who together with Mr Cole appeared for the first respondent, submitted that the first respondent complied with the provisions of clause 5 above: a written demand was served on the second respondent stating that the first respondent had cancelled the agreement due to the applicant's default; that the construction guarantee was called up and a copy of the notice of cancellation was enclosed.

[17] Mr Lowe submitted that the construction guarantee is analogous to the system of "irrevocable documentary credits" as applied by the banks generally. Counsel submitted that the essential feature of irrevocable documentary credits is the establishment of a contractual obligation on the part of the bank to pay the beneficiary under the credit which is wholly independent of the underlying contract (often between the buyer and seller which assures the seller of payment of the purchase price before he parts with the goods, the subject-matter of the sale).

[18] Mr Lowe referred to *Loomcraft Fabrics CC v Nedbank Ltd and Another 1996 (1) SA 812 (A)*. In that judgment it was held at 815 H-J that:

> "The unique value of a documentary credit, therefore, is that whatever disputes may subsequently arise between the issuing bank's customer (the buyer) and the beneficiary under the credit (the seller) in relation to the performance or, for that matter, even the existence of the underlying contract, by issuing or confirming the credit, the bank undertakes to pay the beneficiary provided only that the conditions specified in the credit are met. The liability of the bank to the beneficiary to honour the credit arises upon presentment to the bank of the documents specified in the credit, including typically a set of bills of lading, which on their face conform strictly to the requirements of the credit. In the event of the documents specified in the credit being so presented, the bank will escape liability only upon proof of fraud on the part of the beneficiary.

At page 816C-D the following was said:

> "An interdict restraining a bank from paying in terms of a credit will accordingly not be granted at the instance of the buyer (the bank's customer) save in the most exceptional cases."

However, if it is established that the beneficiary was a party to fraud, the interdict will be granted.

See also *Phillips and Another v Standard Bank of South Africa Limited and others 1985 (3) SA 301 (W); Ex Parte Sapan Trading (Pty) Ltd 1995 (1) SA 218 (W) at 224I to 225G.*

[19] Counsel also submitted that, unlike a suretyship agreement, the construction guarantee is not accessory to a principal obligation. He submitted that in the present matter the construction guarantee is independent of the JBCC Contract.

[20] In *Basil Reed (Pty) Ltd v Beta Hotels (Pty) Ltd and others 2001 (2) SA 760 (C)* the court also dealt with an application involving the

interpretation of the 1991 edition of the standard form building contract recommended by the Joint Building Committee. In that matter the court held that the construction guarantee was analogous to a suretyship. However, a reading of the court's judgment in that matter shows that the court was dealing with a different construction guarantee from the one referred to in this matter.

[21] Mr Schultz, for the applicant, referred to clause 14.8 of the JBCC contract which provides as follows:

> "A security held by the employer in terms of 14.3 or 14.4 and 14.5 shall be for the due fulfilment of the contractor's liability only and the employer hereby waives all common law rights to recover from or set-off against such security".

Mr Schultz submitted that whether or not there had been "due fulfilment" could only be determined once an enquiry has been held and a determination made that the applicant is in default. He submitted that because the applicant and first respondent have agreed to refer their dispute to arbitration, the first respondent should await the determination of the dispute by that tribunal.

[22] I agree with the submission made by Mr Lowe, namely that clause 14.8 deals with the "contractor's liability only" and that the clause says the contractor's rights are governed by the contract and not the common law.

[23] In the present matter the construction guarantee excludes the concept of an accessory obligation. Paragraph 3.0 thereof states the following:

3.0 The Guarantor hereby acknowledges that:

3.1 Any reference in this Guarantee to the agreement is made for the purpose of convenience and shall not be construed as any intention whatsoever to create *an accessory obligation or any intention whatsoever to create a suretyship.*

3.2 Its obligation under this guarantee is restricted to the payment of money."

[24] A further submission made by Mr Schultz was that the first respondent was barred by the provisions of clause 36.6 of the JBCC contract from cancelling the agreement because it had itself committed a material breach of contract.

[25] I have already referred to the provisions of clause 7.0 of the construction guarantee which places an obligation on the first respondent to account to the second respondent (the guarantor) in respect of payments received in terms of the construction guarantee. Surplus funds must be refunded to the second respondent with interest.

[26] In the unreported case of *Federated Insurance Guarantee Brokers (Pty) Ltd v Johannesburg Development Agency (Pty) Ltd NPD Case no AR 9/8* a similar argument was raised, but it failed. The Full Bench of that division held that compliance with the provisions of clause 5 of the construction guarantee rendered the guarantor liable to pay the guaranteed sum. The clause referred to is similar to the clause quoted in paragraph 14 above.

[27] The alleged disputes between the applicant and the first respondent are irrelevant to the construction guarantee. Irrelevant too is clause

36.6 of JBCC Contract which prohibits cancellation of the agreement by the respondent on the ground of a material breach of the JBCC agreement. The second respondent, the guarantor, is not taking part in these proceedings and has not alleged any reason why it should not pay the guarantee to the first respondent. It is the applicant that invites the court to go behind the terms of the guarantee. The court cannot do so. The parties to the guarantee are the first and second respondents. The applicant plays no part in it. In the *Federated Insurance* case the following was said at para 13:

> "As to the contention that the Applicant could not call up the guarantee in terms of clause 5 while there was a dispute about the Applicant's entitlement to cancel the Contract in terms of clause 36, the conclusion by Niles-Duner J that such a dispute was not relevant to the right to invoke clause 5 is also plainly correct. The parties to the Guarantee are not the same as those to the Contract. Once it is accepted that clause 5 of the Guarantee contemplates immediate payment to the Applicant once it has notified the Guarantor that it has cancelled, it is clear that, if after applying the provisions for dispute resolution in the Contract, it is found that the Applicant's cancellation was unjustified, the Applicant will have suffered no loss and will be obliged to refund the whole amount paid to it."

[28] The first respondent complied with the provisions of clause 5 of the construction guarantee, and there being no evidence that the first respondent committed fraud, the second respondent is obliged to comply with the terms thereof.

[29] The guarantee expires on 31 March 2008 and, if the respondent is not paid on or before that date the guarantee "expires whereafter no claims will be considered by the Guarantor".

[30] In view of the issues involved in this matter the employment of two counsel was a wise and reasonable precaution.

[31] It was for these reasons that I granted the order referred to in paragraph 1 above.

B. SANDI
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant:	Adv. Schultz
Attorneys for the Applicant:	Allams Attorneys 6 Sanson Road Vincent 043 721 1018 5214 East London
Counsel for the Respondents:	Adv. Lowe SC Adv. Cole
Attorneys for the respondents:	Gravet Schoeman van Rensburg & Moodley Inc. 4 Derby Road Berea 5214 East London 043 721 1001