

SOUTH AFRICA / JUDGMENT

## KNS Construction (Pty) Limited v Genesis on Fairmount and Another (08/31859) [2009] ZAGPJHC 39 (21 August 2009)

[2009] ZAGPJHC 39

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mokgoatlheng

CASE / FILE NUMBER

08/31859

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IN

THE SOUTH GAUTENG HIGH COURT  
(JOHANNESBURG)

CASE

NUMBER: 08/31859

In

the matter between:

KNS  
CONSTRUCTION (PTY) LIMITED  
Applicant  
and  
GENESIS  
ON FAIRMOUNT  
First  
Respondent  
LOMBARD  
INSURANCE COMPANY  
Second Respondent

**JUDGMENT**

MOKGOATLHENG J

**INTRODUCTION**

- (1) This application is instituted by the applicant against the respondents for an order interdicting the second respondent from effecting payment to the first respondent under a Construction Guarantee pending the final resolution of arbitration proceedings to be commenced between the applicant and the first respondent.

**FACTUAL****BACKGROUND**

- (2) A consideration of the materiality of the factual matrix predicated the application is necessary to determine whether the applicant has succeeded in showing that the first respondent's invocation of the Construction Guarantee was legally impermissible.
- (3) In November 2006 the applicant and the first respondent concluded a written building agreement in terms whereof the applicant as the principal contractor agreed to construct a retail and residential development at Erf 219, Fairmount, Extension 2, No 3 Bradfield Drive, Fairmount, for the first respondent.
- (4) The applicant furnished the first respondent with security in the form of a variable Construction Guarantee issued by the second respondent. By mutual consent the Construction Guarantee was replaced by a similar one expiring on the 31 December 2008.
- (5) The Construction Guarantee is a typical unconditional "demand guarantee" similar to an irrevocable letter of credit issued by a bank and utilized in international trade. Its essential feature is to establish a contractual obligation not accessory to any underlying contract, and ensures that the second respondent's liability to the first respondent under such Construction Guarantee is not dependent upon any claims that the first respondent may have against the applicant.
- (6) In terms of the agreement the applicant was obliged to achieve practical completion of the entire works on the 28 February 2008. Subsequently the agreement was varied and the practical completion dates in respect of the retail and residential sections were extended to the 14 May 2008 and 9 June 2008 respectively.
- (7) The applicant did not achieve practical completion of the residential section on the 9 June 2008. It achieved practical completion of the retail section on the 10 July 2008.

- (8) On the 15 July 2008 the first respondent addressed a notice in terms of clause 36.2 of the agreement to the applicant notifying it of its alleged breach of the contract, namely, that it had failed to proceed with the execution of the residential section with due skill, diligence, regularity and expedition, and to bring same to practical completion

in terms of clause 15.3 and 24 of the agreement. The applicant was also notified that should it not purge its default within a period of 10 working days after the date of the notice, the first respondent intended to cancel the agreement.

- (9) On the 12 September 2008 the first respondent cancelled the agreement due to the applicant's failure to extirpate its default and achieve practical completion of the residential section on the 25 July 2008.
- (10) The first respondent alleges that it has complied with the provisions of clauses 5.0 and 5.1 of the contract and is entitled to make a call on the second respondent to effect payment in terms of the Construction Guarantee as it has "lawfully and properly cancelled its agreement with the applicant."
- (11) In contradistinction the applicant alleges that the cancellation of the contract was invalid because in terms of clause 38.6 thereof, the first respondent was precluded from cancelling the contract in that it was in breach of the material terms thereof, consequently its invocation for payment under the Construction Guarantee being fully aware of its misrepresentation, rendered such cancellation unlawful and its conduct fraudulent.

#### LOCUS STANDI

- (12) Mr. Cook on behalf of the first respondent argued that the Construction Guarantee is an independent contract between the first and second respondents; consequently, the applicant had no privity of contract entitling it to locus standi to institute these proceedings.
- (13) Counsel contended further that the applicant had failed to establish a clear right or the requisites for an interim interdict, consequently, such failure rendered the application nugatory.
- (14) Although the applicant seeks relief in the form of an interim interdict, in substance the order ought is in effect final. I am thus obliged to approach this application as being substantially an application for final relief and am consequently enjoined to apply the principles enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) [1984] ZASCA 51; 1984 (3) SA 623 at 634H-638* and *Carrara and Lecuona (Pty) Ltd v Van der Heever Investment Ltd and Others 1973 (3) SA 716 (T)* in determining the application.
- (15) It is trite that where there is a fraudulent call on a Construction Guarantee the applicant having secured the guarantee, has a protectable proprietary interest. In the unreported case of *Stafanutti and Bressan (Pty) Ltd v Nedbank Limited* and Another case NO (5311/2008) ZAKZH50 (30 August 2008), even without fraud being alleged, locus standi was found to exist because there was a proprietary interest worthy of protection by way of an interdict.

- (16) The second respondent at the applicant's behest issued a variable Construction Guarantee in favour of the first respondent. The underlying agreement between the applicant and the first respondent vis-a-vis such procurement invests the applicant with a protectable proprietary interest.

#### THE JUSTICIABLE ISSUE

- (17) The justiciable issue is whether the first respondent was entitled to cancel the agreement and correlatively, whether its invocation of the Construction Guarantee was lawful and not fraudulent.
- (18) The applicant's contention that first respondent's cancellation of the contract was invalid is premised on the following factors:
- (a) failed to pay an Interim Payment Certificate in terms of the agreement;
  - (b) issued three Interim Payment Certificates numbers 16, 17 and 18 late, and also deducted and or "recovered" amounts from payments due to the applicant;
  - (c) failed to provide explanatory documentation to support the amounts of the unilateral "recoveries" deducted from Interim Payment Certificates;
  - (d) Unlawfully made deductions from amounts certified as due to the applicant;
  - (e) unlawfully levied and deducted penalties from Interim Payments Certificates;
  - (f) continues to withhold funds unlawfully deducted; and
  - (g) fraudulently made a demand on the second respondent to make payment of the "full outstanding balance of the guaranteed sum in the amount of R7 937 952.82."

#### THE FIRST RESPONDENT'S ALLEGED FRAUD

(19). The applicant alleges that first respondent's fraud resides in its invocation of the Construction Guarantee in making a representation to the second respondent that the agreement between itself and the applicant "has been lawfully and properly cancelled," notwithstanding the fact that it was aware that it was in material breach thereof. The applicant contends therefore that such cancellation was unlawful thus rendering the first respondent's invocation for payment fraudulent. In support of this proposition Mr. Jordaan on applicant's behalf referred me to the unreported case of *Basil Read v Government of Uganda*, 2006 (WLD) case number 4790/2005 and *Deutsche Ruchversicherung v Walbrook Ins* [1994].

#### THE APPLICANT'S SUBMISSIONS

- (20) Mr. Jordaan argued that there was no lawful basis predicating the first respondent's cancellation of the contract consequently the notice of cancellation was invalid because "there was in fact no prescribed time within which practical completion was to be achieved."

- (21) He submitted that a notice of cancellation issued post facto the agreed practical completion date to purge a default cannot found a ground for cancellation because “a notice requiring compliance with a time clause cannot be validly issued after the date of performance has been exceeded.” In support of this proposition Mr Jordaan referred me to the case of *Jacobs v Tenner* 1971 (1) SA 263 (T).
- (22) Counsel further contended that delayed performance in not achieving practical completion did not per se entitle the first respondent to cancel the contract because clause 30 of the agreement prescribes an exclusive and specific remedy in the form of penalties; contextually counsel submitted that clause 30 is inconsistent with the notion of cancellation. In support of this contention counsel referred me to the cases of *Nel v Cloete* 1972 (2) SA 150 (AD) at 160D; *Goldberg v Buytendag Boerdery Belegings*, 1980 (4) SA 775 (AD) at 782G-H, and *Ponisammy and Another v Versailles Estates (Pty) Ltd* 1973 (SA) 372AD.
- (23) Mr. Jordaan contended that delayed performance is not a ground for cancellation because it is not a material breach of the contract. In support of this proposition Mr. Jordaan referred me to the case of *Stefanutti and Bressan (Pty) Ltd v Nedbank Limited and Another* (5311/2008) ZAKZ HC 50 (30 JULY 2008).

He submitted that the right to resile from a contract does not arise simply by virtue of the fact that a contracting party has failed to carry out an obligation under the contract timeously after having being placed in mora in terms of a notice of rescission. In addition, he argued an essential requirement was that the default should relate to a vital or material term of the agreement.

- (24) Mr. Jordaan argued that the contract did not have a *lex commissoria* or forfeiture clause prescribing a right to rescission; he contended that clause 15.3 read with clause 24 only required the applicant to commence the works within the stated time, and proceed with due skill, diligence, regularity and expedition and bring the works to practical completion. No time for practical completion was stipulated consequently “the contract is not concerned with the time of completion or its consequences.”

#### THE FIRST RESPONDENT’S SUBMISSIONS

- (25) Mr. Cook argued that the crux of the matter was whether the first respondent had a bona fide belief that is was entitled to cancel the contract. He contended that the second respondent was obliged to honour the behest of the Construction Guarantee on presentment of the demand by the first respondent; he submitted that such payment was not dependant on the first respondent’s entitlement to cancel the contract. In support of this proposition he relied on the case of *Loomcraft Fabric CC v Nedbank Ltd and Another* [1995] ZASCA 127; 1996 (1) SA 812 (AD).
- (26) Mr. Cook submitted that the cancellation of the contract in terms of clause 36.1 was based upon the failure by the applicant to proceed with due skill and diligence and reach practical completion in terms of clause 15.3 and 24 of the contract respectively. The first respondent’s cancellation was not necessarily predicated on a date. Before cancelling the contract the

first respondent on the 15 July 2008 had issued a notice in terms of clause 36.3 through the principle agent notifying the applicant to purge its default. The applicant's failure to rectify the breach entitled the first respondent to cancel

the contract.

- (27) Counsel's further argument was that, because the applicant had not in terms of clause 24.3 given timeous notice to the principal agent of the anticipated date of practical completion to enable the latter to inspect the works, there could be a deemed practical completion.
- (28) Mr. Cook submitted that, there is no merit in the applicant's contention that the first respondent was in material breach of the contract when it cancelled the contract. The cancellation was lawful and proper; consequently, there is no basis that the invocation of the Construction Guarantee was fraudulent.

#### THE APPLICABLE LEGAL PRINCIPLES

- (29) Before analysing the parties submissions it is apposite to restate the applicable legal principles. The civil law onus of proving fraud is on the applicant. In Lawsa 2nd edition Vol 6 Criminal Law it is stated that although mere civil fraud is not necessarily equivalent to criminal fraud, it must still be established that when a person through misrepresentation, that is "the perversion of the truth" alleges that a set of facts exist when it does not, he or she has the intention to commit fraud (for purposes of civil law) which results in actual or potential prejudice to the representee.
- (30) The requisites of fraud were authoritatively stated by then Appellate Division in *R v Myers* 1948 1 SA 375 (A), a case where the issue was whether a person was guilty of fraud or was merely negligent. Greenberg AJ, expressed himself thus at 382-383:

*"In English law the house of Lords decision in Derry v Peek (14 AC 337) is the locus classicus on the question of the state of mind of a person who makes a false representation which justifies a finding*

*that he has been fraudulent in making such representation. I think it can be summed up, for the purposes of the present case, by saying that if the maker of the representation which is false has no honest belief in the truth of his statement when he makes it, then he is fraudulent.....*

At page 374 of the report in *Derry v Peek*, Lord Herschell said:

*'...fraud is proved when it is shown that a false representation has been made(1) knowingly or (2) without belief in its truth, or (3)recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in its truth.'*

*'To prevent a false statement being fraudulent, there must, I think, always be an honest belief in the truth.....*

For one who knowingly alleges that which is false, has obviously no such honest belief.'

- (31) The significance of allowing banks to honour their obligations under irrevocable letters of credit or Construction Guarantees without judicial interference is settled in our law.

See *Phillips and Another v Standard Bank of South Africa Ltd and Others* 1985 (3) SA 301 (W).

- (32) IN LOOMCRAFT FABRIC CC *supra* at 817E it was held

*"Nonetheless it is now well established that a Court will grant an interdict restraining a bank from paying the beneficiary under a credit in the event of it being established that the beneficiary was a party to fraud in relation to the documents presented to the bank for payment. For, as was observed by Lord Diplock in the United City Merchants (Investment's) Ltd and Others v Royal Bank of Canada and Others, (1982) 2 All ER 720 (HL) case supra at 725j*

*"...fraud unravels all". The courts will now allow their process to be used by a dishonest person to carry out a fraud.*

But the fraud on the part of the beneficiary will have to be clearly established. *Tukan Timber Ltd v Barclays Bank plc* [1987] 1 Lloyd's Rep 171 (QB) at 175. The onus, of course, remains the ordinary civil one which has to be discharged on a balance of probabilities but, as in any other case where fraud is alleged, it will not lightly be inferred.

See *Gates v Gates* 1939 AD 150 at 155; *Gilbey Distillers & Vintners (Pty) Ltd and Others v Morris NO and Another* 1990 (2) SA 217 (SE) at 226A.

- (33) In *Loomcraft Fabrics CC supra* 815 Scott A.J.A restated the principle that:

*"The liability of the bank of the beneficiary to honour the credit arises upon presentment to the bank to the document specified in the credit, including typically a set of bills of lading, which on their face conform strictly to the requirements of the credit."*

- (34) It is therefore clear that the second respondent is only entitled to honour the Construction Guarantee, if the presented documents conform strictly to the requirements of the Construction Guarantee. What must be presented to the second respondent is a written demand for payment, together with the Construction Guarantee, accompanied by any letters of amendment.

## THE CONCEPT OF MORA

- (35) Mora occurs when a date for performance is fixed and the debtor fails to perform on or before such date. Even where the guilty party culpably fails to perform on due date it does not automatically fall into mora, a demand is necessary for the guilty party to be placed in mora.

- (36) Where no date has been fixed or agreed upon for performance, a demand is a prerequisite for mora. Where time is made of the essence of a contract, a notice of rescission which incorporates a *lex commissoria* entitles the innocent party to exercise a right to cancel the contract.

See *Repinz v Dacombe* 1994 (3) SA 756 (E) at 760.

#### THE CONCEPT OF A MATERIAL BREACH

- (37) A material term underpins a contract and defines its essence; the breach thereof undermines and negates such essence. A material breach entitles an innocent party to cancel a contract.
- (38) A *lex commissoria* may be implied *ex consensus* if the objective facts are indicative of a tacit agreement to that effect.

See *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 (2) SA 565 (A) at 569.

- (39) Delayed performance does not *per se* give rise to an entitlement to cancel. The innocent party must show that time is of essence and that the guilty party is in mora, because an innocent party acquires a right to cancel after issuing a notice encapsulating a *lex commissoria* affording the guilty party an opportunity to purge its default.
- (40) A notice of rescission should afford the guilty party reasonable time to purge its default having regard to the nature of the contract and the surrounding circumstances.

See *Nel v Cloete* 1972 (2) SA 150 A at 165-166.

#### EVALUATION AND ANALYSIS OF EVIDENCE

- (41) I turn to consider *ad seriatim* the applicant's contentions regarding the first respondent's alleged breach of contract, regarding the "Failure to pay an Interim Certificate in terms of the agreement," clause 38.1.4 entitles the applicant to cancel the contract if the principal agent has failed to issue a Payment Certificate. The objective facts show that the principal agent issued all Payment Certificates. Although issued late, Payment Certificates were issued. The applicant's argument that because the Payment Certificates were issued late, and consequently were not issued in terms of the contract has no merit. Because a Payment Certificate is issued late it does not follow that it is not issued in terms of the contract.
- (42) The consequence of the late issuing of a Payment Certificate entitles the applicant to issue a notice to the principal agent informing it to purge its default within (7) days. The late issuing of a Payment Certificate does not *per se* without a notice to purge entitle the applicant to cancel the contract on the basis that it has been repudiated. The late payment of a certified amount in the Payment Certificate by the first respondent does not amount to a repudiation of the contract. The applicant's remedy is the invocation of the clause 33.1.1 which in the event of the first respondent's failure to pay an amount due in terms of an interim certificate

timeously entitles the applicant to claim interest in respect of such default. Only on failure by the first respondent to remedy the default of paying the amount certified in the Payment Certificate does the applicant acquire a right of cancellation.

- (43) The contention that each of the Interim Payment Certificates were not accompanied by explanatory documentation to support the recoveries is unsustainable. The objective facts show that all the explanatory statements are attached to the founding affidavit.
- (44) The applicant's argument that it was impermissible for the principal agent to have made deductions for expenses and loss in the Payment Certificates it issued is unsustainable. Clause 31 and 33 expressly empower the principal agent to include amounts deducted in terms of the recovery statements in the accompanying Payment Certificates.
- (45) The applicant is incorrect when it contends that the first respondent cannot deduct future expenses, indeed the first respondent in terms of clause 33.2 is empowered to recover expenses and loss incurred or to be incurred.
- (46) In each instance where the principal agent issued a recovery and loss statement, it did so on the basis of a calculation made by the quantity surveyors. The applicant did not object to these deductions.
- (47) The applicant's contention that there was an unlawful deduction of penalties misconceives the application of Clause 30; this clause entitles the first respondent to impose penalties from the date scheduled if practical completion has not been achieved or on cancellation of the contract.
- (48) The principal agent's letter of 23 April 2008 addressed to the applicant confirms that the date for practical completion was extended as a result of its concession and on condition "penalties will be levied against you by us should you exceed the above extension".
- (49) When the parties agreed to revise the practical completion dates of the two sections, they expressly reiterated that penalties would be paid if practical completion was not achieved as agreed. It does not mean that because they did not divide the penalties into two proportionate shares in respect of the two sections that liability for penalties was abrogated.
- (50) The applicant by its failure to achieve practical completion of the entire residential section on the 9 June 2008 it repudiated its duty to perform its obligation in terms of the contract, that is to achieve practical completion of the residential section on the 9 June 2008 consequently, it was in breach of the contract.
- (51) The first respondent was entitled to issue a notice placing the applicant in mora and on its failure to rectify the default, to cancel the contract.

See *Erasmus v Pienaar* 1984 (4) SA 9 (t) 20H -21C and *Nel v Cwete* 1972 (2) SA 150

- (a) 160-161 and 5 LAWSA Contract paragraph 224.

- (52) It is illogical for the applicant to contend that because there was no specified practical completion date therefore it was entitled to achieve practical completion of the works at any unspecified undetermined future date. Clause 15.3 provides that the contractor shall commence the works within the period stated in the schedule and proceed with due skill and diligence and bring the works to practical completion in terms of clause 24. It logically follows that time is of the essence of the contract.
- (53) I proceed to consider whether the first respondent was entitled to cancel the contract, correlatively whether its invocation of the Construction Guarantee was lawful. Clause 2.1 provides that the objective of the agreement is the execution of and payment for the works for which there has been an offer by the contractor and an acceptance thereof by the employer (my underlining).
- (54) The main objective of the contract is the building and the completion of the works by the applicant and the correlative reciprocal payment for the works by the first respondent. This forms the material term of the contract. Practical completion of the works is a material term of the contract, delayed performance, inability to perform, defective performance, inadequate or in complete performance are material breaches which constitute grounds for cancellation by the first respondent.
- (55) The *raison d'être* of a building contract is that at some stage the applicant has to achieve practical completion of the works. If the applicant fails despite due notice to achieve practical completion the first respondent acquires the right to cancel the contract.
- (56) The applicant's contention that delayed performance does not in terms of the contract found a right to cancel because the achievement of practical completion after the 9 June 2008 was not predicated on a fixed date or that delayed performance is not a material breach is consequently unsustainable.
- (57) The applicant's contention that because no date after the 9 June 2008 was mutually agreed upon for practical completion of the residential section, that the first respondent was not entitled to cancel the contract because the applicant after the 9 June 2008 could not possibly be in mora, misconceives the behest of the concept of mora being continuous in nature until the default is purged. See Contract General Principles 3rd Edition by Van Der Merwe Hyssteen Reinecke and Lubbe, Under the Heading Nature and Form of Mora Debitoris at Page 337 et seq.
- (58) The applicant was in mora as at the 9 June 2008, and despite the fact that through delayed performance it was possible according to the applicant's contention to achieve practical completion, legally the applicant was in breach of the contract and remained in mora in spite of the first respondent's indulgence in not having exercised its right of cancellation as a result of the applicant's default on the 9 June 2008. The first respondent by affording the applicant an indulgence after 9 June 2008 did not thereby waive its right of cancellation.

- (59) Mora is a continuous phenomenon. Even if, the applicant could eventually through delayed performance have achieved practical completion of the residential section; its delayed performance cannot and does not cure its breach of the contract as at the 9 June 2008.

See *Minister of Public Works and Land Affairs v Group Five Building Ltd* [1996] ZASCA 63; 1996 (4) SA 280 at 289 (f)

- (60) The fact that the date for practical completion has passed, does not mean that the first respondent forfeits the right to cancel the contract. If the applicant is in default of its obligations under clause 15.3, in that it had failed to achieve practical completion on the 9 June 2008, the first respondent was entitled to issue a notice to the applicant to purge its default. The right to cancel accrued because the default was not purged.
- (61) It follows that the applicant's proposition that after the date for practical completion had expired the applicant's sole and exclusive remedy is the entitlement to penalties in terms of clause 30 is unsustainable. So too is the applicant's contention that the first respondent's other remedy in respect of delayed

performance is in terms of clause 29.9 which accelerates practical completion obliging the first respondent to pay additional building costs. These remedies can never be a substitute to the first respondent's right of cancellation; they are subservient to such right.

- (62) There was no legal obligation on the first respondent to engage the applicant and renegotiate the date of practical completion. The first respondent was entitled after the 9 June 2008 to unilaterally place the applicant on terms to achieve practical completion of the residential section. The only legal requirement reposing on the first respondent after the applicant's failure to perform its obligation to achieve practical completion of the residential section by the 9 June 2008 was to give notice to the applicant to rectify its default within a reasonable time and bring the retail section to practical completion.
- (63) Even if, the applicant's contention is that the contract did not stipulate a date for practical completion or conversely stated, no time was agreed in respect thereof after the 9 June 2008, it was still within the first respondent's right to determine the date for practical completion unilaterally through the juristic act of demanding practical completion within a reasonable time.

See *Brytenbach v Van Wyk* 1923 Ad 541, *Repinz v Dacombe* 1994 (3) 756 (E) 760 (C); *Lawsa 'Contract'* paragraph 220.

- (64) The applicant has not contended that the period afforded it to rectify its default was unreasonable under the prevailing circumstances, consequently, having regard to the fact that the parties initially fixed the 28 April 2008 as the date for practical completion of the works and subsequently varied same to 9 June 2008 regarding the practical completion in respect of the entire residential section, it cannot be cogently argued that the 25 July 2008 was not a reasonable time within which the applicant was to achieve practical completion.

See Van Elst v Sabena Belgian World Airline 1983 (3) SA 637 (A)

- (65) There is no merit in the applicant's contention that the first respondent's cancellation of the contract predicated on the applicant's failure to bring the residential section to practical completion on the agreed date did not in law constitute a valid basis for a valid cancellation.
- (66) The objective facts show that the first respondent was not in breach of a material term of the contract when it cancelled same; consequently it was entitled to invoke payment under the Construction Guarantee.
- (67) Nothing in law precluded the first respondent from exercising its contractual rights when pursuant to the cancellation of the agreement it demanded payment from the second respondent in terms of clause 5.0 of the Construction Guarantee.
- (68) Loomcraft Fabrics CC v Nedbank & Another [1995] ZASCA 127; 1996 (1) SA 812 (SCA) at 815I Scott A.J.A restated the principle that:
- "The liability of the bank to the beneficiary to honour the credit arises upon presentment to the bank of the document specified in the credit, including typically as a set of bills of lading, which on their face conform strictly to the requirements of the credit."*
- (69) It is therefore clear that the second respondent is only entitled to honour the Construction Guarantee, if the presented documents conform strictly to the requirements of the Construction Guarantee.
- (70) The first respondent's counsel referred me to the unreported judgment of Lombard Insurance Company Limited v Landmark and Others (343/08) [2009] ZASCA delivered on the 1 June 2008. The parties lodged supplementary heads of argument as a consequence of the said judgment. Although the facts in Lombard's case are distinguishable from the present matter, it adumbrates the fact that the principles enunciated therein relating to letters of credit as well a Construction Guarantee are the same.
- (71) The written demand in the instant case contains the following statement "We hereby confirm and state that the principle building agreement between us and the Contractor, KNS Construction (Pty) Ltd has been lawfully and properly cancelled due to the Contractor's default." (emphasis added)
- (72) No misrepresentation can be imputed to this statement. No fraud has been shown by the applicant. When regard is had to the agreement it is manifest that, on the objective facts, the statement is not false. The contract permits cancellation for a failure to achieve practical completion. The first respondent was not precluded by clause 36.6 from exercising its right of cancellation because that it was not in material breach of contract.
- (73) The second respondent is under no obligation to investigate the merits of a demand which is prima facie in order; it consequently is not precluded from making payment on demand by the first respondent.

- (74) Proper demand was made as required by the Construction Guarantee a copy of the notice of cancellation was attached. The applicant has not shown that the first respondent knowingly presented to the second respondent documents that misrepresented the material facts.
- (75) In all the prevailing circumstances I am satisfied that the applicant has not clearly established, as it must, that the first respondent was acting fraudulently when it invoked the Construction Guarantee for payment by the second respondent. Consequently that being the case the application falls to be dismissed.

#### THE ORDER

- (74) The application is dismissed with costs, including the costs consequent upon the employment of two counsel.

Signed at: Delmas

on the 21 August 2009.

.....

JUDGE OF THE HIGH COURT

DATE OF HEARING:

DATE OF JUDGMENT: 21st AUGUST 2009

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