

SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN SUPREME COURT OF APPEAL

FROM: The Registrar, Supreme Court of Appeal

DATE: 1 OCTOBER 2010

STATUS: Immediate

The Supreme Appeal of Appeal (SCA) today dismissed an appeal against the high court's refusal to enforce payment of a building guarantee. The employer constructing a regional shopping centre cancelled the building agreement with the contractor and called upon the guarantor to pay in terms of the contractor's building guarantee. Payment under the guarantee was dependent upon a proper claim being made by the employer on the grounds that the building contract had been cancelled due to the contractor's breach. The guarantor refused to honour the guarantee on the grounds that it had expired before the claim was made and that it had not been issued in the name of the employer. The high court upheld the guarantor's defences.

While the appeal was pending the building contractor and the employer engaged in an arbitration to resolve the disputes relating to the cancellation of the building contract. The arbitrator ruled, prior to the appeal being heard, that the employer had repudiated the building contract and that the contractor had validly cancelled that agreement. The award was final, not subject to appeal and was not reviewed evidence of the arbitration award was allowed to be introduced on appeal.

The Appeal Court was unanimous that the high court had erred in refusing to enforce the guarantee. The majority held, however, that once the arbitration determined that the employer was at fault regarding the cancellation of the building contract, the contractor's guarantee could no longer be validly enforced. If the guarantor were to be ordered to effect payment of the guaranteed sum, the employer would have to repay the same immediately. The issue had therefore, in the view of the majority, become academic.

The appeal was dismissed on this ground, while the order of the high court was set aside.