



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
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STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

***Eskom Holdings Soc Limited v Hitachi Power Africa (Pty) Ltd & another
(139/2013) [2013] ZASCA 101 (12 September 2013)***

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Today the Supreme Court of Appeal (SCA) delivered a judgment upholding the appeal by Eskom against an order of the South Gauteng High Court, Johannesburg, refusing to allow Eskom to demand payment of certain guarantees.

The issue before the SCA was whether the demand guarantee issued in favour of Eskom was, on a proper interpretation of its terms, an on demand guarantee or a conditional guarantee.

Mizhuo Corporate Bank Limited of Japan (the Bank) issued guarantees in favour of Eskom to secure performance by the respondents, Hitachi, under a construction contract it concluded with Eskom. This construction contract pertained to the construction of certain of the Works at the Medupi Power Station in the Limpopo Province. In terms of the construction contract, Hitachi provided six guarantees drawn on the Bank. Three of these guarantees were in the sums of R300 384 946.13, £21 273 236.13 and US\$445 838.25 amounting to a total South African Rand value of over R600 million.

Eskom presented these three guarantees to the Bank for payment. Before the presentation of the guarantees a number of disputes had arisen between the parties concerning the performance by Hitachi of its obligations under the construction contract. Eskom alleged that Hitachi had been guilty of material and ongoing breaches of the construction contract and that Hitachi had failed to perform

their contractual obligations timeously. Eskom also claimed that in view of the said material breaches, Eskom was entitled to demand payment under the guarantees. Hitachi then launched an urgent application in the high court seeking a final order (a) interdicting Eskom until 28 February 2013 from demanding payment of the guarantees; and (b) to the extent that the guarantees may have been paid, directing Eskom to revoke the said demand and instructing the Bank accordingly and ancillary relief. Hitachi further relied on the contention that prior to making demand; Eskom was first required to give them notice.

The SCA held that on a plain meaning, the demand guarantee in question had all the characteristics of an 'on demand' or 'call guarantee', which is independent of the construction contract. This essentially entailed that the Bank's guarantee to pay the beneficiary was an independent obligation and whatever disputes arose between the appellant and the respondents did not affect the Bank's obligation to make the requisite payment to Eskom.

The SCA held further that in terms of the contract Eskom was not required to give notice nor was the Bank required to investigate whether notice was given and whether the appellant had complied therewith.

The SCA found that the high court had misread the demand guarantee and imposed the requirement of notice which was not provided for in the contract. Consequently Eskom's appeal was upheld and it was found to be entitled to demand payment of the guarantee issued by the Bank at the instance of Hitachi.

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