



THE SUPREME COURT OF APPEAL 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

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Millenium Aluminium and Glass Services CC and Others v Group Five Construction (Pty) Ltd and Another (693/2021) [2022] ZASCA 180 (14 December 2022)

The Supreme Court of Appeal (SCA) dismissed an appeal with costs against the judgment of the Gauteng Division of the High Court, Johannesburg (the high court), which ordered that the second respondent, Constantia Insurance Company Limited (Constantia), pay an amount of R1 490 364.09 plus interest and costs, to the first respondent, Group Five Construction (Pty) Ltd (Group Five Construction), in terms of a construction guarantee. The high court had further ordered the first appellant, Millenium Aluminium and Glass Services CC (Millenium), the second appellant, Mr Mohanlall Bridgenun, and the third appellant, Fast Track Contracting Africa (Pty) Ltd (Fast Track), to pay Constantia, on the basis of the indemnity and the deed of suretyship signed by these parties in favour of Constantia.

The issue before the SCA was whether Group Five Construction, in making a demand on the guarantee, complied with its requirements.

The facts of the matter were the following. During or about 26 May 2015, Group Five Construction was appointed as a building contractor to carry out a project in Durban known as Pearls of Umhlanga – Pearl Sky. Group Five Coastal (Pty) Ltd (Group Five Coastal), acting as an agent of Group Five Construction, appointed Millenium as a subcontractor to carry out the design, supply and installation of the residential windows and shopfronts at the sub-contract sum of R20 750 937 excluding VAT. In terms of the letter of appointment, it was agreed that the contractual relationship between Group Five Construction and Millenium would be governed by the provisions of the JBCC Series 2000 Nominated/Selected Sub-contract Agreement, edition 5.0, 2007. As part of Millenium's contractual obligations, it was required to provide and maintain performance guarantees in favour of Group Five Construction. Millenium obtained and provided a guarantee from Constantia.

On 25 April 2018, Group Five Coastal issued a payment statement to Millenium confirming that it was indebted to it in the sum of R12 239 967.24 and called upon it to pay the certified sum within twenty-one days. Millenium failed to pay. Pursuant to the terms of clause 4.1 of the guarantee, on 18 May 2018, Group Five Coastal sent a written demand to Millenium calling on it to make payment within seven days. The email sent to Millenium on 25 April 2018 was attached to this written demand. The payment certificate and reconciliation statement which accompanied the demand was issued by Group Five Coastal under its previous trading name, Group Five KZN (Pty) Ltd (Group Five KZN). When payment was not forthcoming pursuant to

the written demand, Group Five Coastal, on 28 May 2018, and in terms of clause 4.2, made a demand on Constantia. Constantia refused to pay and in consequence, on 22 October 2018, Group Five Coastal approached the high court seeking payment in terms of the guarantee.

The SCA found that the issue was about the interpretation of the demand guarantee, and the question was whether there was compliance with the terms of the guarantee in circumstances where an entity which made a demand on guarantee was not the same as an entity that issued a payment certificate and the reconciliation statement.

In this regard, the SCA found that the payment advice was issued by Group Five KZN (Group Five Coastal), which was in terms of the guarantee the appointed Group Five Construction's agents. As required by clauses 4.2 and 4.3, the payment advice which entitled Group Five Construction to receive payment accompanied a demand on guarantee that was made on Constantia by Group Five Coastal. The SCA found further that Constantia was in no doubt about the identity of the Contractor, because that was easily ascertainable from the guarantee itself, which it had issued. The demands for payment were made to Millenium and to Constantia on the basis of the payment advice which identified the contract in respect of which it related, namely Pearls of Umhlanga – Pearls Sky. Millenium was identified as a subcontractor in the payment advice. The purpose of the guarantee was to enable Group Five Construction to obtain payment from Constantia in the event of default by Millenium.

Accordingly, the SCA held that the high court was correct to find that Group Five Construction had properly presented the demand to Constantia and that it had met all the jurisdictional requirements set out in clause 4 of the guarantee. The demand triggered Millenium obligations to Constantia to indemnify it against Group Five Construction's demand and to pay to Constantia an amount equal to Group Five Construction's demand.

However, the SCA also found that in the high court Group Five Construction had abandoned orders sought in prayers 1 and 2 of the notice of motion, and thus they should not have been granted. Accordingly, the SCA held that the high court erroneously granted paragraphs 1 and 2 of the order, and they would not be confirmed in the appeal.

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