THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 173/09

In the matter between

KWIKSPACE MODULAR BUILDINGS LIMITED Appellant

and

SABODALA MINING COMPANY SARL First Respondent
NEDBANK LIMITED Second Respondent

Neutral citation: *Kwikspace Modular Buildings v Sabodala Mining Company* (173/09) [2010] ZASCA 15 (18 March 2010).

Coram: CLOETE, LEWIS, SHONGWE JJA, GRIESEL et THERON AJJA

Heard: **23 February 2010**

Delivered: **18 March 2010**

Summary: Building contracts; performance guarantees; whether a building contractor can rely on a term of the building contract to interdict the other contracting party from presenting unconditional performance guarantees to the issuing bank.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Victor J sitting as court of first instance):
The appeal is dismissed, with costs.

JUDGMENT

CLOETE JA (LEWIS, SHONGWE JJA, GRIESEL *et* THERON AJJA concurring):

[1] The present appeal concerns the right of a building contractor to interdict the other party with whom it contracted for the performance of the building works, from presenting a performance guarantee unconditional in its terms and furnished by a financial institution to the other party.

[2] On or about 30 December 2006 Kwikspace Modular Buildings Ltd, a South African company which is the appellant in these proceedings and to which I shall refer as the Contractor, entered into a written contract with Sabodala Mining Company SARL, a company incorporated in terms of the laws of Senegal which is the first respondent in these proceedings and to which (taking my cue from the contract between the parties) I shall refer as the Principal. The contract was for the supply and installation of an accommodation village at the Sabodala Gold Project Site in Senegal. The contract documents comprised a formal instrument of agreement; the special conditions of contract (SCs) and Appendix A thereto (the site specific conditions); the general conditions of contract (GCs), being the Australian Standard General Conditions of Contract AS 2124 ─ 1992, and annexures thereto; the contract schedules; the contract specification (Scope of Work); appendices, and drawings (to take precedence in that order). GC 23 provided

that the Principal was obliged to ensure that at all times there was a Superintendent and GC 24 made provision for the appointment by the Superintendent of representatives to exercise any of the functions of the Superintendent under the contract. Annexure A to the GCs provided that the law applicable to the contract would be that of the State of Western Australia.

[3] The appeal turns on the interrelationship of GC 5 and the guarantees provided pursuant thereto. It is necessary to quote extensively from both. GC 5 dealt with security, retention moneys and performance undertakings. It provided inter alia (amended as aforesaid) as follows:

'5.1 **Purpose**

Security, retention moneys and performance undertakings are for the purpose of ensuring the due and proper performance of the Contract.

. . .

5.3 FORM OF SECURITY

The security shall be in the form of cash or an approved unconditional irrevocable undertaking given by an approved financial institution. The costs (including stamp duty and other taxes) of and incidental to the provision of the security shall be borne by the party providing the security.

The party having the benefit of the security shall have the discretion to approve or disapprove the form of an unconditional undertaking from the financial institution giving the undertaking. The form of unconditional undertaking attached as Attachment 1 to the General Conditions of Contract is approved.

. . .

5.5 **Recourse to Retention Moneys and Conversion of Security**

A party may have recourse to retention moneys and/or cash security and/or may convert into money security that does not consist of money where ─

(a) the party has become entitled to exercise a right under the Contract in respect of the retention moneys and/or security; and

(b) the party has given the other party notice in writing for the period stated in the Annexure [which was two days] of the party's intention to have recourse to the retention moneys and/or cash security and/or to convert the security; and

(c) the period stated in the Annexure [two days] has or have elapsed since the notice was given.'

[4] Two performance guarantees, each in identical terms (save for their numbers and that one was dated 28 March 2007 and the other, 2 April 2007) and each for a maximum amount of R2 651 254, were issued by Nedbank Ltd, a well-known South African bank (which was cited as the second respondent in this appeal and in the court below, but which took no part in the proceedings in either court). The undertaking attached to the GCs was not used. In terms of the guarantees issued the Bank bound itself to the Principal for the due performance by the Contractor of all the Contractor's obligations in terms of the contract:

'and for the payment of all damages or other amount including interest due by the Contractor to the Principal whether in terms of the contract or consequent upon determination thereof, and also all charges and expenses of whatsoever nature, including, but without derogating from the generality of the aforesaid attorney and client legal costs incurred by the Principal in endeavouring to secure fulfilment of the obligations.'

There were 13 further clauses in the performance guarantees of which the following are relevant for present purposes:

'2. The Principal shall have the absolute right to arrange his affairs with the Contractor in any manner he deems fit and without advising the Bank, and the Bank shall not have the right to claim release on account of conduct alleged to be prejudicial to the Bank. Without derogation from the generality of the foregoing, no compromise, extension of time, indulgence, release, waiver of security, release of co-sureties or variation of the Contractor's obligation shall, in any manner, affect the Bank's liability under this guarantee.

3. The Bank undertakes to be bound to effect payment of the above-mentioned amount, or any lesser portion thereof, to the Principal upon receipt by the Bank at the abovestated address of the Principal's first written demand that the Contractor has committed a breach of the contract and/or has defaulted thereunder and/or has been provisionally or finally sequestrated or liquidated or placed under judicial management.

4. The Bank shall be bound by any admission of liability by the Contractor and by an award or judgement in arbitration proceedings or litigation between the Principal and the Contractor.

7. Notwithstanding anything to the contrary contained herein, the Bank's obligations hereunder shall be construed as principal and not as accessory to the obligations of the Contractor and compliance with any demand for payment received

by the Bank in terms hereof shall not be delayed, nor shall the Bank's obligations in terms hereof be discharged, by the fact that a dispute may exist between the Contractor and the Principal.

13. This guarantee shall be governed by South African Law and subject to the jurisdiction of South African Courts.'

[5] Various disputes arose between the parties during the performance of the contract. Matters came to a head when on Friday afternoon 24 October 2008 the Principal sent a notice to the Contractor in the following terms:

'Sabodala Gold Project

CONTRACT NO. 1519/520 – Supply & Installation of Accommodation Village

Notice of Conversion of Security

Notice is hereby given under clause 5.5 of the General Conditions of Contract of the Principal's intention to convert into money the security (Performance Guarantees No 288/27805905 and 288/27918718) lodged by the Contractor under the Contract.'

A request addressed on behalf of the Contractor to the Principal's attorney for an undertaking that the guarantees would not be presented to the Bank prior to an urgent application for an interdict preventing such presentation, was refused. The Contractor then approached the Johannesburg High Court as a matter of urgency for such an interim interdict pending an application for a final interdict. An interim interdict was granted by consent by Victor J on Monday 27 October 2008 that (apart from providing for dates for filing of further affidavits) interdicted the Principal 'from presenting a first written demand for payment for any amounts in terms of the performance guarantees . . . and from claiming or receiving payment from' the Bank 'in terms of the guarantees or pursuant to the presentation thereof' and interdicted the Bank from making any payments to the Principal pursuant to the guarantees ─ all pending the outcome of the Contractor's application for final relief. The final relief was refused by the same learned judge on 18 December 2008, but leave to appeal to this court was subsequently granted by her. Makhanya J thereafter issued an interdict in the same terms as the interim interdict save that the relief granted was pending the finalisation of all appeals. This appeal is against the order of Victor J refusing a final interdict.

[6] The argument on behalf of the Contractor before this court involved three propositions: (1) that the underlying building contract between the Contractor and the Principal could, as a matter of law, qualify the right of the Principal to present the guarantees for payment to the Bank, despite the unconditional wording of the guarantees; (2) that the building contract did indeed contain such a qualification, in particular, in GC 5.5(a); and (3) that GC 5.5 contained a tacit term so that GC 5.5(b) should be read as follows:

'The party has given the other party notice in writing for the period stated in the annexure [two days] of the party's intention to have recourse to the retention moneys and/or cash security and/or to convert the security, setting out the grounds on which the demand will be made.'

[7] Counsel on both sides were content to submit that there is a presumption[1] that the law of a foreign State is, in the absence of evidence to the contrary, presumed to be the same as the law of South Africa.[2] But as I believe the law in Australia on the points in issue in this appeal can be ascertained readily and with sufficient certainty, as contemplated in s 1(1) of the Law of Evidence Amendment Act 45 of 1988,[3] I propose applying Australian law to the interpretation of the building contract and in particular, GC 5. The High Court of Australia has not, so far as I have been able to ascertain, yet pronounced on the first proposition advanced by counsel for the Contractor. It was left open in *Wood Hall Ltd v Pipeline Authority & another*.[4] Gibbs J, with whom Barwick CJ and Mason J concurred, said:[5]

'For the reasons I have given, it seems to me clear that the Bank was obliged to the Authority to make payment when demand was made. It is unnecessary to consider whether it would be possible to grant to the contractor any relief against the Bank if it were established that the making of a demand by the Authority was a breach of its duty to the contractor, because, for the reasons which I am about to state, I consider

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[1] See the authorities collected in *Harnischfeger Corporation & another v Appleton & another* 1993 (4) SA 479 (W) at 486A-D.

[2] This view is challenged in *The South African Law of Evidence* by D T Zeffertt, A P Paizes and A Skeen (2003) p 313; and see also Kahn (1970) 87 SALJ 145.

[3] 'Any court may take judicial notice of the law of a foreign state . . . so far as such law can be ascertained readily and with sufficient certainty . . . .'

[4] 24 ALR 385.

[5] At 393 lines 1 to 8.

that the Authority was entitled, as between itself and the contractor, to make the demands when it did.'

Stephen J said:[6]

'Had the construction contract itself contained some qualification upon the Authority's power to make a demand under a performance guarantee, the position might well have been different. In fact the contract is silent on the matter.'

However, it seems well-established in Australian law that the first proposition advanced on behalf of the Contractor is correct. In *Clough Engineering Ltd (ACN 009 093 869) v Oil and Natural Gas Corporation Ltd & others*[7] the Federal Court of Australia said:

'[75] The principles under which a court will construe the terms of a bank's undertaking in a performance guarantee, and the contract between a contractor and an owner, have been stated in a series of authorities over the last 30 years. The seminal decision is that of the High Court in *Wood Hall Ltd v Pipeline Authority* (1979) 141 CLR 443, 24 ALR 385 (*Wood Hall*).

[76] Reference was made in *Wood Hall* to the commercial purpose of the guarantees, which in that case was that they be equivalent to cash . . .

[77] Nevertheless, the authorities have recognised three principal exceptions to the rule that a court will not enjoin the issuer of a performance guarantee, or bond, from performing its unconditional obligation to make payment. The exceptions were succinctly stated, with references to relevant authorities, by Austin J in *Reed Construction Services Pty Ltd v Kheng Seng (Aust) Pty Ltd* (1999) 15 BCL 158 at 164-5 (*Reed*):

First ─ the court will enjoin the party in whose favour the performance guarantee has been given from acting fraudulently: see, for example, *Wood Hall* per Gibbs J (at CLR 451; ALR 391-2). As the primary judge observed at [36] Clough does not assert that ONGC has made a fraudulent claim. Accordingly, the first exception has no application in the present case.

Second ─ the party in whose favour the performance bank guarantee has been given may be enjoined from acting unconscionably in contravention of s 51AA of the TPA [Trade Practices Act 1974]: *Olex Focas Pty Ltd v Skodaexport Co Ltd* [1998] 3 VR 380 (*Olex Focas*). On this point, different views have been expressed about the reach of s 51AA. The High Court has not determined which of these views is correct: *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd*

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[6] At 398 lines 18 to 23.
[7] 249 ALR 458.

(2003) 214 CLR 51; 197 ALR 153; [2003] HCA 18 at [44]-[45] (*CG Berbatis Holdings*). In any event, none of the categories of unconscionable conduct recognised in *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* (2002) 117 FCR 301; 189 ALR 76; [2002] FCA 62 at [48] (*Samton Holdings*) apply in this case. Accordingly, the second exception has no application.

Third ─ the most important exception for present purposes, is that, while the court will not restrain the issuer of a performance guarantee from acting on an unqualified promise to pay (*Reed Construction Services* at 164 per Austin J):

. . . if the party in whose favour the bond has been given has made a contract promising not to call upon the bond, breach of that contractual promise may be enjoined on normal principles relating to the enforcement by injunction of negative stipulations in contracts.

It may be preferable not to describe this as an exception but rather as an over-riding rule because it emphasises that the "primary focus" will always be the proper construction of the contract: *Bateman Project Engineering Pty Ltd v Resolute Ltd* (2000) 23 WAR 493; [2000] WASC 284 per Owen J at [30]. Stephen J recognised this in *Wood Hall* at CLR 459; ALR 398-9 by observing that the provisions of the contract may qualify the right to call on the undertaking contained in a performance guarantee.

[78] Numerous authorities have accepted the third proposition. Many were referred to in *Reed* at 165. Others include *Fletcher Construction* at 826-7;[8] *Bachman Pty Ltd v BHP Power New Zealand Ltd* [1999] 1 VR 420; [1998] VSCA 40 at [28] (*Bachmann*); *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd* [2000] FCA 672 at [10]; *Rejan Constructions Pty Ltd v Manningham Medical Centre Pty Ltd* [2002] VSC 579 at [37].'

[8] In *Bachmann (Pty) Ltd v BHP Power New Zealand Ltd*[9] the Supreme Court of Victoria Court of Appeal dealt with a building contract that contained a GC 5.5[10] in very similar terms to the contract which is the subject of this appeal, and two letters of credit issued to the party who corresponds to the Principal in this appeal. Brooking JA (with whom Tadgell and Ormiston JJA concurred) said:

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[8] *Fletcher Construction Australia Ltd v Varnsdorp Pty Ltd* 1998 3 VR 812.
[9] [1998] VSCA 40 (11 September 1998).
[10] Quoted in n 23 below.

'28. It is plain that clause 5.5 of the general conditions of the contract before us is an express, albeit qualified, contractual prohibition on the conversion of a security into cash. It is also plain that it is competent to the holder of a security provided by the other contracting party to promise as part of the contract under which the security is provided ─ the underlying contract ─ not to do some act in relation to the security except in a certain event. Such a contractual promise is efficacious, not in the sense, when the security is constituted by the obligation of a third person, that the third person can rely by way of defence as against the security-holder on a term of the underlying contract, to which he was not a party, but in the sense that relief can be afforded to the person who procured the security in an action brought against the security-holder on the promise contained in the underlying contract. No principle or rule of law would deny that a promise forming part of the underlying contract is in this sense efficacious, and the cases recognise this: *Wood Hall Ltd v Pipeline Authority* [1979] HCA 21; (1979) 141 CLR 443 at 452-4 per Gibbs J (with whom Mason J agreed) and at 459 per Stephen J; the *Pearson Bridge* case;[11] *Washington Constructions Company Pty Ltd v Westpac Banking Corporation* (1983) Qd.R. 179; *Hortico (Australia) Pty Ltd v Energy Equipment Co (Australia) Pty Ltd* (1985) 1 NSWLR 545 AT 554; *Tenore Pty Ltd v Roleystone Pty Ltd* (unreported, Supreme Court of New South Wales, Giles J 14 September 1990, at p 31); *J H Evins Industries (N.T.) Pty Ltd v Diano Nominees Pty Ltd* (unreported, Supreme Court of the Northern Territory, Kearney J, 30 January 1989); *Hughes Bros Pty Ltd v Telede Pty Ltd* (1989) 7 Building and Construction Law 210; *Barclay Mowlem Construction Ltd v Simon Engineering (Australia) Pty Ltd* (1991) 23 NSWLR 451 at 457; *Malaysia Hotel (Aust) Pty Ltd v Sabemo Pty Ltd* (1993) 11 Building and Construction Law 50; the *Fletcher Construction* case.[12]

29. I do not overlook the critical distinction between the effect of the underlying contract as between the parties to it and its effect (if any) as between the holder of the security and the third person whose obligation constitutes the security. One can for brevity speak of a contractual qualification upon the owner's powers in relation to the security where the underlying agreement between the owner and the contractor or supplier contains a term which restricts the exercise of those powers in some way.

30. In the present case the supplier, in trying to stop the purchaser demanding payment under the letter of credit, did not try to make any case of fraud on the purchaser's part: it relied solely on the contractual qualification upon the purchaser's

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[11] *Pearson Bridge (NSW) (Pty) Ltd v State Rail Authority of New South Wales* (1982) Aust Const LR 81.

[12] Above, n 8.

powers constituted by clause 5.5 of the general conditions. The present case appears to be novel so far as this country is concerned, in that it is clear, and is conceded, that clause 5.5 does constitute a contractual qualification on the purchaser's powers in relation to the security. In all the other Australian cases of which I am aware, the initial question was whether the underlying contract, on its proper construction, did contain a qualification on the owner's powers as regards the security. In particular, the question arose in other cases whether a stipulation not negative in form was negative in substance, in that it laid down the only circumstances in which something might be done. See: the *Pearson Bridge* case; *Selvas Pty Ltd v Hansen & Yuncken (SA) Pty Ltd* (1987) 6 Aust. Const. L.R. 36; the *Barclay Mowlem* case; *J H Evins Industries (N.T.) Pty Ltd v Diano Nominees Pty Ltd*; *Hughes Bros Pty Ltd v Telede Pty Ltd*; the *Fletcher Construction* case. But the present stipulation is negative in form; there is undoubtedly a contractual qualification on the purchaser's powers in relation to the security; the only question is that of the content of the qualification. This is the point of this appeal.'

[9] In *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd*[13] Callaway JA, in a concurring judgment in the Supreme Court of Victoria Court of Appeal, said:

'In *Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 WLR 1152 at 1161-2 Staughton L J said that the effect on the lifeblood of commerce is precisely the same whether the guarantor, typically a bank, is restrained from paying or the beneficiary is restrained from asking for payment. There is nevertheless an important difference between restraining a bank from honouring a guarantee and restraining the beneficiary from calling upon it. In the former case the moving party seeks to prevent the bank from performing its contract; in the latter case the moving party seeks to prevent the beneficiary from breaching a provision of the underlying contract. A moment's reflection will show that the beneficiary, unlike the bank, may be restrained if there is an express prohibition in the underlying contract against calling upon the guarantee. In theory an implicit or implied prohibition is just as good. The practical problem is that it is much harder to establish. That is not because of a requirement that an implicit or implied prohibition against calling upon a guarantee must be clear. It is because the implication cannot be made if it would stultify, or even if it would be inconsistent with, the purpose for which the guarantee was taken.'

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[13] Above, n 8.

[10] Other cases to the same effect as the three from which I have quoted are collected in *Ewing International LP v Ausbulk Ltd* 2008 WL 353205, [2008] SASC 25, a decision of Layton J given in the Supreme Court of South Australia on 8 February 2008.

[11] It therefore seems to me that it can be said with sufficient certainty that Australian law is to the following effect: a building contractor may, without alleging fraud, restrain the person with whom he had covenanted for the performance of the work, from presenting to the issuer a performance guarantee unconditional in its terms and issued pursuant to the building contract, if the Contractor can show that the other party to the building contract would breach a term of the building contract by doing so; but the terms of the building contract should not readily be interpreted as conferring such a right.

[12] I expressly refrain from considering whether, in view of the decision of this court in *Loomcraft Fabrics CC v Nedbank Ltd & another*[14] (which dealt with a letter of credit) and the English decisions referred to therein, in particular the decision of the English Court of Appeal in *Edward Owen Engineering Ltd v Barclays Bank International Ltd*[15] (where Lord Denning MR[16] and Browne LJ[17] both said that a performance guarantee is akin to a letter of credit), there is any room for a contention that the position in South Africa should be the same as in Australia. So far as Australian law is concerned, English authority to the contrary notwithstanding, the Federal Court of Australia held as recently as 2008 in *Clough Engineering*:[18]

'[81] In determining whether the underlying contract confers an unfettered right to call upon the performance guarantee, the importance of such instruments in the construction industry, both nationally and internationally, is a factor which bears upon the question of construction of the contract. A number of authorities support this proposition:

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[14] 1996 (1) SA 812 (A), and see also *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd & others* 2010 (2) SA 86 (SCA) especially para 20.
[15] [1978] QB 159; [1978] 1 All ER 976 (CA).
[16] At 171A-B (QB); 983b-c (All ER).
[17] At 172F (Ch); 984d-e (All ER).
[18] Above, n 7.

(1) In *Wood Hall* at CLR 457-8; ALR 396-7, Stephen J referred to English authority which described the performance guarantee as standing on a similar footing to a letter of credit.

(2) In the passage from the judgment of Callaway JA in *Fletcher Construction* at 827 quoted above, his Honour emphasised the importance of commercial practice in construing the contract. The reference in the judgment of Charles JA at 822 to the passage from Hudson's Building and Engineering Contracts, is to similar effect.

(3) In *Bachmann*, Brooking JA referred at [51] to the practice in the United States. He said that the generally accepted view in that country is that standby letters of credit (and hence, performance guarantees) are intended by the parties to the underlying contract to require the supplier or contractor to:

> [51] ... stand out of the amount of the credit in favour of the buyer pending resolution of the underlying dispute.

(4) This approach is supported by the observations of Hobhouse LJ in *Toomey v Eagle Star Insurance Co Ltd* [1994] 1 Lloyd's Law Rep 516 at 520, that parties to a commercial contract are to be taken to have contracted against a background which includes the earlier authorities on the construction of similar contracts.

[82] Notwithstanding the importance of commercial practice, the statements in these authorities do not suggest that the court should depart from the task of construing the terms of the contract in each case. What the authorities emphasise is that the commercial background informs the construction of the contract . . . .'

[13] The next question is whether the Contractor is correct in asserting that GC 5.5 in fact qualified the Principal's right to present the guarantees. The Contractor submitted that the clause required that an actual enforceable right be vested in the Principal before it would be entitled to present the guarantees for payment, and that it was not sufficient for the Principal to assert that it bona fide believed that it did have such a right; and accordingly, the right could only be enforced, if it were disputed, once the dispute had been finally settled by arbitration or a court. This contention is wrong in fact and in Australian law. As a matter of law, it is contrary to the decisions in *Clough Engineering*,[19] *Fletcher Construction*[20] and *Bachmann*.[21] In *Bachmann* the

[19] Above, n 7 paras 85-112.
[20] Above, n 8 para 53.
[21] Above, n 9 particularly in the judgments of Charles JA and Callaway JA.

court held[22] (in respect of general conditions indistinguishable in their terms from GC 5.5 and GC 42.11 in the contract at issue in this appeal):

'53. In the present case the matters of conversion of and recourse to the security are dealt with by two general conditions, which should if possible be construed so as to work in harmony. Clause 5.5[23] prohibits conversion into money until the purchaser becomes entitled to exercise a right under the contract in respect of the security. Clause 22.4[24] entitles the purchaser to deduct from moneys otherwise due to the supplier any moneys due from the supplier to the purchaser and, if those moneys are insufficient, entitles the purchaser to have recourse to the security. Like clause 3.13(b) in *Fletcher*, it confers a right of recourse against the security to obtain the balance if the exercise of the right of set-off which it also confers leaves a balance outstanding in favour of the purchaser. It would, as Charles JA said in *Fletcher*, be strange if the clauses concerned in that case and this ─ clause 3.13(b) and clause 22.4 ─ conferred the practical right of recourse only where moneys were "due" from the supplier to the purchaser in some such sense as actually or indisputably due. I would treat clauses 5.5 and 22.4 of the present contract, read in conjunction, as entitling the purchaser, as between itself and the supplier, to have recourse to the security where according to a bona fide claim made by the purchaser moneys are due to it from the supplier which exceed any moneys due from it to the supplier.

54. The fact that one of the forms of security recognised by clause 5.3, when regard is had to the approved undertaking which is attached, is cast in the now familiar form of an unconditional promise to pay on demand without reference to the supplier and notwithstanding any notice by it not to pay supports the view that the parties contemplated that it was the supplier who should be out of pocket pending the resolution of any dispute.'

The cases to which I have just referred, although they come to the same conclusion, are not harmonious in their reasoning. I therefore propose dealing with the Contractor's contention on the facts. In order to explain why the Contractor cannot succeed on the facts either, it is necessary to examine several provisions in the GCs.

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[22] In paras 53 and 54.

[23] 'A party shall not convert into money security that does not consist of money until the party becomes entitled to exercise a right under the Contract in respect of the security.' Cf GC 5.5 in para 3 above.

[24] 'The Purchaser may deduct from monies otherwise due to the Supplier any monies due from the Supplier to the Purchaser and if those monies are insufficient, the Purchaser can have recourse to the security under the Contract.' Cf GC 42.11 quoted in para 14 below.

[14] GC 42 deals with certificates and payments. GC 42.1 begins:

'**Payment claims, certificates, calculations and time for payment**

At the times for payment claims stated in the Annexure and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.7, the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then due to the Contractor arising out of or in connection with the Contractor or for any alleged breach thereof.

Within 14 days after receipt of a claim for payment, the Superintendent shall issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor or by the Contractor to the Principal. The Superintendent shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference. The Superintendent shall allow in any payment certificate issued pursuant to this Clause 42.1 or any Final Certificate issued pursuant to Clause 42.8 or a Certificate issued pursuant to Clause 44.6 [adjustment on completion of the work taken out of the hands of the Contractor], amounts paid under the Contract and amounts otherwise due from the Principal to the Contractor and/or due from the Contractor to the Principal arising out of or in connection with the Contract including but not limited to any amount due or to be credited under any provision of the Contract.

If the Contractor fails to make a claim for payment under Clause 42.1, the Superintendent may nevertheless issue a payment certificate.

Subject to the provisions of the Contract, within 28 days after receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent's payment certificate, whichever is the earlier, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in the Certificate as due to the Contractor or to the Principal as the case may be, or if no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim. A payment made pursuant to this Clause shall not prejudice the right of either party to dispute under Clause 47 [the dispute resolution clause] whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable, the

Principal or Contractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable.
. . .'

GC 42.11 provides:

'Recourse for Unpaid Moneys

Where, within the time provided by the Contract, a party fails to pay the other party an amount due and payable under the Contract, the other party may, subject to Clause 5.5, have recourse to retention moneys, if any, and, if those moneys are insufficient, then to security under the Contract and any deficiency remaining may be recovered by the other party as a debt due and payable.'

GC 47.1 provides inter alia:

'Notwithstanding the existence of a dispute, the Principal and the Contractor shall continue to perform the Contract, and subject to Clause 44 [default or insolvency of either party], the Contractor shall continue with the work under the Contract and the Principal and the Contractor shall continue to comply with Clause 42.1.'

[15] The Superintendent on 3 October 2008 issued a certificate, certificate 10, which was in part based on variations 17 to 20 ordered by him (which the Contractor's counsel accepted in oral argument had been competently ordered)[25] and the amount certified in this regard considerably exceeded the total amount of the guarantees. No part of the amount certified has been paid. Accordingly, unless the Contractor can advance some valid reason for not doing so, the Principal would (in the words of GC 5.5) have 'become entitled to exercise a right under the contract in respect of the . . . security', the right being that envisaged in GC 42.11 to 'have recourse to . . . security under the contract' (the guarantees) because the Contractor 'failed to pay . . . an amount due and payable under the contract', in terms of GC 42.1; and the existence of a dispute is not a valid reason because of the provisions of GC 47.1.

[16] Several reasons were advanced in argument as to why the Contractor was not obliged to make any payment under certificate 10. The first was that the person who issued it, Mr Patterson, was not the Superintendent's

[25] I do not seek to imply that there was anything wrong with the remainder of the certificate which dealt with liquidated damages arising from the Contractor's failure to reach practical completion by the required (extended) date; it is simply unnecessary to have regard thereto, or the disputes that have arisen in this regard, for the purposes of the appeal.

representative at the time he did so. That argument is not open to the Contractor because the allegation by the Principal in the answering affidavit filed on its behalf and deposed to by Patterson, that the latter was indeed the Superintendent's representative at all material times, was not disputed by the Contractor in its replying affidavit;[26] and lack of authority of an agent must be specifically alleged: *Durbach v Fairway Hotel Ltd*.[27]

[17] The second argument was that it would be improper for the Contractor to rely on certificate 10 because it did not contain a valuation of the works performed subsequent to the previous certificate. Reliance was placed on GC 23 which provides inter alia:

'The Principal shall ensure that at all times there is a Superintendent and that in the exercise of the functions of the Superintendent under the Contract, the Superintendent ─

(a) acts honestly and fairly;

. . .

(c) arrives at a reasonable measure or value of work, quantities or time.'

The short answer to this argument is that after the previous certificate had been issued, the Contractor made no claim for payment as required by the first paragraph of GC 42.1 (quoted in para 14 above) and the Superintendent was accordingly not obliged to value the work.

[18] The final submission on this point was that reliance on the certificate would be fraudulent. As appears from the quotation in para 7 above from para 77 of the judgment of the Federal Court of Australia in *Clough Engineering*, fraud (in the sense of lack of good faith) is a recognised exception in Australia (as it is in other countries)[28] to the rule that a court will not enjoin the issuer of a performance guarantee (in this case, Nedbank) from performing its unconditional obligation to make payment. But it would not be fraud for the Principal to present the guarantees based on the Contractor's failure to pay

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[26] *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) para 28.
[27] 1949 (3) SA 1081 (SR) at 1082.
[28] See *Loomcraft Fabrics*, above n 14, at 823C-D for the position in South Africa and *Team Telecom International Ltd & another v Hutchinson 3G UK Ltd* [2003] 1 All ER (Comm) 914, [2003] EWHC 762 (TCC) paras 29–37 for the position in England and Singapore. It is not necessary for the purposes of this appeal to consider other exceptions.

certificate 10, which the Superintendent validly and properly issued (at least in regard to variations 17 to 20), when the Principal knows that the Contractor might or even did have other claims that would have reduced the amount payable under the certificate had they been made, but which the Contractor had not advanced to the Superintendent, which had accordingly not been certified and which were therefore not due for payment. The Principal was fully entitled to rely on the indebtedness created in its favour by certificate 10 and to look to the guarantees when this debt was not paid. In other words, it has not been demonstrated that the Principal would be acting in bad faith were it to present the guarantees for payment.

[19] I accordingly find that the Contractor has no defence to its failure to pay at least that part of certificate 10 which depends upon variations orders 17 to 20, and that its failure to pay entitles the Principal to present the guarantees for payment ─ unless the notice it gave the Contractor in terms of GC 5.5 was invalid because there was a tacit term of the nature for which it contended, the question to which I now turn.

[20] I see no good reason for incorporating the tacit term for which the Contractor contends (set out in para 6 above), that would require the Principal to furnish to the Contractor its grounds for converting the guarantee into cash. First, to do so would run contrary to the position adopted in the last part of the passage quoted in para 9 above from the judgment of Callaway JA in *Fletcher Construction*. Second, the term is not necessary to give the contract business efficacy. The law in this regard was succinctly stated by the High Court of Australia in *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd, Elastic Rail Spike Co (Aust) Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd.*[29] In that matter the court rejected the argument that terms for which one of the parties contended were incorporated into the contract by custom or usage, and then dealt with the argument that similar terms should be implied to give business efficacy to the contract. The court said in this latter regard:

[29] 64 ALR 481 at p 489.

'The appellant suggested that an alternative basis on which to imply terms of the kind just described is that they are necessary to give business efficacy to the contract. For this argument to succeed, the term sought to be implied must be necessary to make the contract work and must be so obvious that it goes without saying: *The Moorcock* (1889) 14 PD 64 at 68; *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at 227; *Reigate v Union Manufacturing Co (Ramsbottom)* [1918] 1 KB 592 at 605; *BP Refinery Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20 at 26; 16 ALR 363 at 376; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 26 ALR 567; 144 CLR 596 at 605-6; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 41 ALR 367; 149 CLR 337 at 354, 404.

Neither of the implied terms alternatively urged by the appellant satisfy these requirements. Neither term is so obvious that both the insurer and the assured would clearly have agreed to its inclusion in the contract of insurance had they directed their minds to it at the time they concluded their bargain. This will commonly be the situation where the term sought to be implied is adverse to the interests of one of the parties, as they are adverse to the interests of the insurer here. An implication which may be regarded as obvious to one party may not be so regarded by the party detrimentally affected: *Scanlan's New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169 at 197; Treitel: *The Law of Contract* (1983) 6th ed, at 159. Unless it can be said that both parties would have consented to its inclusion, a term cannot be implied.'[30]

In the present appeal it may be convenient to include the term for which the Contractor contends; but it is not necessary to do so. If a contractor really was unaware of the basis on which the principal would rely to present the guarantee and the contractor was of the view that there could not be any valid basis, it could swear an affidavit to this effect ─ and, absent an undertaking by the principal, it could obtain an interim interdict to prevent presentation of the guarantee pending determination of the application. The principal's case would then have to be made out in its answering affidavit to which the contractor would be able to reply. This may necessitate an application by the principal for leave to file a fourth set of affidavits. But it is not unusual for a party to be unaware of the details of the case of its adversary. In an application to restrain publication of a defamatory article, the applicant will seldom be able to attach a copy of what a newspaper intends publishing. In

[30] See also *Codelfa Construction (Pty) Ltd v State Rail Authority of New South Wales* 41 ALR 367, a decision of the High Court of Australia, at 370-1 (per Mason J); 392-3 (per Aickin J) and 417-8 (per Brennan J).

applications for the enforcement of a restraint of trade, the applicant is not obliged to set out in its founding affidavit the reason why it contends the restraint is necessary for its protection. And certainly at least before the advent of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 when an owner brought a *rei vindicatio*, it was not obliged to say why it alleged that the defendant/respondent was in unlawful occupation of its property. Therefore although the term sought to be incorporated would lead to efficiency in litigation, it is not essential and it is therefore not necessary to provide business efficacy to the contract.

[21] And finally on this point, the term is not so obvious that both the Contractor and the Principal would clearly have agreed to its inclusion in the contract had they directed their minds to it at the time that the contract was concluded. All that the purchaser was obliged to inform the issuing Bank was that 'the Contractor has committed a breach of the contract and/or has defaulted thereunder' (or has been declared insolvent or put under judicial management). It is not obvious at all that the Principal would have agreed to the inclusion of a term in the building contract requiring it to give sufficient details to the Contractor of the basis on which it intended presenting the guarantee, to enable the Contractor to challenge that basis before the guarantee was presented ─ which is the ambit of the tacit term for which counsel for the Contractor contended. Nor is it necessary for the term to be included so as to enable the Contractor to remedy its breach (the alternative reason relied upon for including the term) both because two days is manifestly too short a time for this purpose and because the term would be irreconcilable with GC 5.5(a).

[22] To sum up: as a matter of law in Australia, a building contract can contain provisions enforceable at the suit of the contractor which amount to preconditions to, and therefore limit, the right of the beneficiary of an unqualified performance guarantee to present it to the issuer. But even assuming in favour of the Contractor in this case that GC 5.5 requires the Principal to have an enforceable right under the contract before it is entitled to present the guarantees issued by Nedbank, it had such a right which it was

entitled to assert; and no tacit term is to be incorporated into GC 5.5 obliging the Principal, in its notice to the Contractor required by that clause, to set out the grounds on which the demand will be made.

[23] The appeal is dismissed, with costs.

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T D CLOETE
JUDGE OF APPEAL

APPEARANCES:

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