

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO:

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

FAST TRACK CONTRACTING AFRICA (PTY) LTD

First Applicant

FAST TRACK CONTRACTING AFRICA (PTY) LTD

Second Applicant

BRIDGENUN MOHANLALL

Third Applicant

And

GROUP FIVE CONSTRUCTION (PTY) LTD

First

Respondent

(In Business Rescue)

CONSTANTIA INSURANCE COMPANY LTD

Second Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MAKUME, J:

[1] On the 15th March 2023 I granted the following orders in the judgement

- 1.1 That the second Respondent “Constatia” make payment of the amount of R219 9817.25 and R1 206 717.89 to the first Respondent (Group Five).
 - 1.2 That the second and third Applicants (Fast Track and Mohanlall) indemnify the first Respondent against the order referred to in 1.1 above
- [2] Constatia is not appealing the judgement in 1.1 above it is only the Applicants who are seeking leave to appeal against both orders.
- [3] The Applicants ground of appeal can be summarised as follows:
- 3.1 That this Court erred in accepting the validity of one composite payment certificate when in fact Group Five’s claim is comprised of three separate guarantee certificates
 - 3.2 That this Court erred in placing reliance on the judgements of Meyer J under case number 22474/2018 delivered on the 4 December 2018 and that of Matojane J under case number 39034/2018.
 - 3.3 That this Court erred in holding that Group Five had made a valid and lawful demand in terms of the first and second Guarantees.
 - 3.4 That this Court erred in concluding that Group Five did not commit fraud
 - 3.5 That this Court erred in holding that the second and third Applicants were under an obligation to indemnify, Constatia based on the indemnity and suretyship document.

THE TEST FOR LEAVE TO APPEAL

[4] The test for leave to Appeal is set out in Section 17(1) of the Superior Courts Act number 10 of 2013 and has been judiciously recited in various decisions of the Superior Courts it reads as follows:

“Leave to appeal may only be given where the judge or judges concerned are of the opinion that -

- (a)...
 - (i) The appeal would have a reasonable prospect of success; or
 - (ii) There is some other compelling reason why the Appeal should be heard including conflicting judgements on the matter under consideration
- (b) the decision sought on appeal does not fall within the ambit of Section 16 (2) (a) and
- (c) Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

[5] In their notice of appeal the Applicants place reliance on the provisions of Section 17(1) (a)(i) as well as Section 17(1) (a)(ii) namely that there are reasonable prospects of success and that there are compelling reasons for the matter to proceed on appeal specifically to have a declaratory issued that in the construction industry reliance on one composite payment certificate where there are multiple distinct guarantee certificates amounts to fraud.

[6] There are two judgements that the Applicants seek to appeal against the first is the judgement in favour of Group Five for payment of the total amount of R3 406 635.14. The second judgement is the one based on indemnity and suretyship in favour of Constantia (The third party proceedings) for this application to succeed it must comply not only with the provisions of Section 17 but also Rule 49(1) (b) of the Uniform Rules of Court.

THE THIRD PARTY PROCEEDINGS

- [7] In their application for leave to appeal the third party proceedings between Constantia and Fast Track and Mohanlall they say that this Court erred in holding that Fast Track and Mohanlall were under an obligation to indemnify Constantia based on the indemnity and suretyship agreement. The Applicants say nothing more both in the notice of motion as well as in their heads of argument.
- [8] Their heads of argument deal only with the validity of the guarantees and nothing is said why the indemnity and the suretyship should not be enforced. The only thing that they say is in paragraph 29 of their heads in which it is stated without further explanation that “the third parties prospects on appeal will obviously be inextricably linked to the outcome of this main issues.”
- [9] It is trite law as it was espoused by Olsen J in **Lombard Insurance Company Limited vs Steward and Others 2016 JDR 1912 (KZP)** that an indemnity is akin to a demand guarantee. The indemnity and the Suretyship do not concern themselves with any consideration whether the demand is good or bad or even whether the demand was fraudulent or not.
- [10] Constantia’s case is simply that the demand made by Group Five on it triggered the third party obligation it is not reliant on the validity of the guarantees it is a stand-alone liability.

THE GUARANTEE CLAIM

- [11] It is common cause that there were three separate portions of work to be executed in terms three separate sub-contract agreements. However, the work all related to the same project. Mr Van Rooyen in the Replying Affidavit explained that the guarantees related to the Kitchen Cupboards, Bic’s and vanities. He further explained that the work was completed late hence penalties were levied in respect of the project.

[12] The Applicants in this application maintain that two issues arise from my judgement which should be the subject of an appeal. The first is whether the terms of the guarantees were met secondly whether it was incumbent for the Applicants to prove fraud.

[13] Counsel for the Applicants in dealing with the second question submitted that Fast Track never tried to establish fraud as this cannot be done in motion proceedings. This accordingly puts paid to that question. It is only the first question which remains and in that respect Applicants say there was no compliance with the term of the guarantees for the simple reason that Annexure D2 being the payment advice is a composite payment advice instead of three payment advices in respect of each guarantee. It is on that basis that Applicants maintain that there are reasonable prospects of success on appeal.

[14] The issue of the composite payment certificate is the only issue that the Applicant relies on in this application and maintain that this Court omitted to deal with it. That is not correct on a reading of paragraphs 49, 60 and 63 of the judgement clearly sets out my reasons for accepting the composite payment certificate as valid. In particular, at paragraph 63 I stated as follows:

“Constantia itself in its reply letter dated the 31st May 2018 never raised any confusion or misunderstanding of the payment advice. It clearly in its reply identified the two payment guarantees separately.”

[15] In **MEC for Health Eastern Cape vs Mkhitha [2016] ZASCA 176 (25 November 2016) at paragraph 16 and 17** the Supreme Court of Appeal confirmed that an Applicant for leave to appeal must convince the Court on proper grounds that there are reasonable prospects of a realistic chance of success on appeal. There must be a sound, rational basis to conclude that there are such reasonable prospects on appeal. It is not enough to submit the case is not hopeless and is arguable.

[16] In the judgement by Meyer J and Matojane J it was found that Group Five had complied with the jurisdictional facts in respect of the guarantees. Those judgements still stand and have not been upset on appeal. I have no basis to deviate from those findings.

[17] The Applicants rely on a number of SCA judgements as set out in paragraph 8 of their heads and argue that the decisions are binding. I agree that the decisions are binding. What the Applicant does not state is in what respect has this Court not followed the findings or the law as espoused in those decisions. None of the decisions deal with composite payment advices. There is accordingly no precedent that composite payment advices are not valid and do not trigger an obligation to pay.

[18] The matter of **Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd 2012 (2) SA 537 SCA** payment was refused because the Respondent did not attach the Court order of liquidation when in fact it was a requirement. In this matter there is no prohibition that a composite payment advice is not acceptable to trigger payment.

[19] In the result I have come to the conclusion that the Applicants have failed to persuade me that there are reasonable prospects of success or that there are compelling reasons why the appeal should be heard.

In the result I make the following order:

ORDER

- i) The Application for Leave to Appeal is dismissed.
- ii) The Applicants Fast Track and Bridgenun Mohanlall are ordered to pay the taxed party and party costs of the Respondents being Group Five and Constantia which costs shall include costs of senior Counsel.

Dated at Johannesburg on this 12th day of December 2023

**M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

APPEARANCES

DATE OF HEARING : 12 DECEMBER 2023

DATE OF JUDGEMENT : 12 DECEMBER 2023

FOR APPLICANTS : ADV COLLINS
INSTRUCTED BY : MESSRS V CHETTY INC.
DURBAN

FOR 1ST RESPONDENT : ADV VOORMOLEN SC
INSRUCTED BY : MESSRS COX AND YEATS
DURBAN

FOR 2ND RESPONDENT : ADV PULLINGER
INSTRUCTED BY : MESSRS RYAN D LEWIS INC
RIVONIA