THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 491/09

In the matter between:

DORMELL PROPERTIES 282 CC Appellant

and

RENASA INSURANCE COMPANY LIMITED First Respondent
STEPHEN MALCOLM GORE NO, TREVOR PHILIP GLAUM NO
AND MOGAMAT IGSHAAN HIGGINS NO (In their capacities as
the joint liquidators of SYNTHESIS PROJECTS CAPE (PTY) TD)
(in liquidation) Second Respondents

Neutral citation: Dormell v Renasa (491/09) [2010] ZASCA 137 (1 October 2010)

Coram: Mpati P, Cloete, Cachalia, Mhlantla JJA and Bertelsmann AJA

Heard: **13 SEPTEMBER 2010**

Delivered: **1 OCTOBER 2010**

Summary: Building guarantee – rectification of in absence of antecedent agreement – expiry date – whether civil method of computation applicable to date determined in guarantee – whether payment of guarantee issued to employer to provide cash fund to complete building project in case the building contract is cancelled because of contractor's default, can be enforced against insurer who issued guarantee by employer after the latter has been held in arbitration proceedings against contractor to have repudiated the building contract – contract validly cancelled by contractor – whether order enforcing guarantee would be academic.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Gildenhuys J sitting as court of first instance).

1. The appeal is dismissed.
2. The respondents' application to place new evidence relating to the arbitration award before the court is granted.
3. The appellant is to pay the respondents' costs, including the costs of two counsel, incurred in respect of the appeal from 16 October 2009.
4. The respondents are to pay the appellant's costs, jointly and severally, the one paying the other to be absolved, of the appeal until 15 October 2010.
5. The order of the court a quo is set aside and substituted with the following: 'The respondents are to pay the applicant's costs, jointly and severally, the one paying the other to be absolved, including the costs of two counsel.'

JUDGMENT

BERTELSMANN AJA

INTRODUCTION

[1] The appeal, leave having been granted on petition by this court, concerns the validity, the terms and the enforceability of a building guarantee described in the papers as a 'JBCC Construction Guarantee for use with the JBCC Principal Building Agreement'.

[2] The appellant, or its predecessor, embarked upon a development project known as the Cobble Walk Retail Development Regional Shopping Centre. The second respondent ('Synthesis') was engaged as building contractor to construct and complete the project. The guarantee was issued by the first respondent (Renasa), an insurance company, in favour of a company that was converted into the appellant close corporation ('Dormell').

[3] The guarantee was intended to provide the employer with a ready cash fund for the completion of the development project in the event of the building contract having to be cancelled by the employer prior to its finalisation by Synthesis. Synthesis was liquidated prior to the launching of the appeal, but was represented by its joint liquidators.

[4] Dormell applied for the rectification of the guarantee so as to reflect it as the employer, but the court below refused this relief. It also held that the guarantee had expired when the appellant attempted to enforce it. Because of these findings, the court below did not have to deal with the terms of the guarantee, its enforceability or with any dispute relating to the cancellation of the building contract.

THE GUARANTEE

[5] The guarantee, printed on Renasa's letterhead, is couched in the standard terminology of a JBCC Series 2000 contractor's guarantee.[1] The clauses relevant to this judgment read as follows:

'GUARANTOR DETAILS AND DEFINITIONS

Guarantor means	Renasa Insurance Company Limited
Employer means	Messrs Dormell Properties 282 (Pty) Ltd
Contractor means	Synthesis Projects (Cape) (Pty) Ltd
Principal Agent means	André Van Der Merwe Associates cc

1 The Joint Building Contracts Committee Inc. is composed of representatives of the Association of Construction Project Managers, the Association of South African Quantity Surveyors, the Building Industries Federation South Africa, the South African Association of Consulting Engineers, the South African Institute of Architects, the South African Property Owners Association and the Specialist Engineering Contracts Committee. It prepares and updates standardised contracts for the building industry.

Works means	Cobble Walk Retail Development Regional Shopping Centre
Site means	ERF 15330, Durbanville
Agreement means	The JBCC Series 2000 Principal Building Agreement
Contract Sum means	The accepted amount inclusive of tax of R89 221,957.08
Guaranteed Sum means	The maximum aggregate amount of R6 691,646.78
Amount in words	Six Million, Six Hundred and Ninety One Thousand, Six Hundred and Forty Six Rand and Seventy Eight Cents
Construction Guarantee	(insert Variable or Fixed) Fixed (insert expiry date) 28/02/08

AGREEMENT DETAILS

Sections:	Total Sections (No or n/a) N/A Last section (no/identification or n/a) N/A
Principal Agent issues:	Interim payment certificates, Final payment certificate, Practical completion certificate/s

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2. FIXED CONSTRUCTION GUARANTEE

2.1 Where a fixed Construction Guarantee in terms of the Agreement has been selected in this 2 with 3 to 13 shall apply. The Guarantor's liability shall be limited to the amount of the Guaranteed Sum as follows:

GUARANTOR'S LIABILITY	PERIOD OF LIABILITY
Maximum Guaranteed Sum (not exceeding 7.5% of the contract sum) in the amount of:	From and including the date of issue of this Construction Guarantee and up to and including the date of the only practical completion certificate or the last practical completion certificate where there are sections, upon which this Construction Guarantee shall expire.

R6,691,646.78

Amount in words: Six Million, Six Hundred and Ninety One Thousand, Six Hundred and Forty Six Rand and Seventy Eight Cents

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3. The Guarantor hereby acknowledges that:

3.1 Any reference in this guarantee to the Agreement is made for the purpose of convenience and shall not be construed as any intention whatsoever to create an

accessory obligation or any intention whatsoever to create a suretyship.

3.2 Its obligation under this Guarantee is restricted to the payment of money.

4. Subject to the Guarantor's maximum liability referred to in 1 or 2, the Guarantor hereby undertakes to pay the Employer the sum certified upon receipt of the documents identified in 4.1 to 4.3:

4.1 A copy of a first written demand issued by the Employer to the Contractor stating that payment of a sum certified by the Principal Agent in an interim of final payment certificate has not been made in terms of the Agreement and failing such payment within seven (7) calendar days, the Employer intends to call upon the Guarantor to make payment in terms of 4.2.

4.2 A first written demand issued by the Employer to the guarantor at the Guarantor's physical address with a copy to the Contractor stating that a period of seven (7) calendar days has elapsed since the first written demand in terms of 4.1 and that the sum certified has still not been paid therefore the Employer calls up this Construction Guarantee and demands payment of the sum certified from the Guarantor.

4.3 A copy of the said payment certificate which entitles the Employer to receive payment in terms of the Agreement of the sum certified in 4.

5. Subject to the Guarantor's maximum liability referred to in 1 or 2, the Guarantor undertakes to pay the Employer the Guaranteed Sum or the full outstanding balance upon receipt of a first written demand from the Employer to the Guarantor at the Guarantor's physical address calling up on this Construction Guarantee stating that:

5.1 The Agreement has been cancelled due to the Contractor's default and that the Construction Guarantee is called up in terms of 5. The demand shall enclose a copy of the notice of cancellation; or

5.2 A provisional sequestration or liquidation court order has been granted against the Contractor and that the Construction guarantee is called up in terms of 5. The demand shall enclose a copy of the court order.

6. It is recorded that the aggregate amount of payments required to be made by the Guarantor in terms of 4 and 5 shall not exceed the Guarantor's maximum liability in terms of 1 or 2.

7. Where the Guarantor is a registered insurer and has made payment in terms of 5, the Employer shall upon the date of issue of the final payment certificate submit an expense account to the Guarantor showing how all monies received in terms of the Construction guarantee have been expended and shall refund to the Guarantor any resulting surplus. All monies refunded to the Guarantor in terms of this Construction Guarantee shall bear interest and (sic) the prime overdraft rate of the Employer's bank compounded monthly and calculated from the date payment was made the Guarantor to the Employer until the date of refund (sic).

8. Payment by the Guarantor in terms of 4 and 5 shall be made within seven (7) calendar days upon receipt of the first written demand to the Guarantor.

9. The Employer shall have the absolute right to arrange his affairs with the Contractor in any manner which the Employer deems fit and the Guarantor shall not have the right to claim his release from this Construction Guarantee on account of any conduct alleged to be prejudicial to the Guarantor.

10. The Guarantor chooses the physical address as stated above for all purposes in connection herewith.

11. The Construction Guarantee is neither negotiable nor transferable and shall expire in terms of either 1.1.4 or 2.1 of payment in full of the Guaranteed Sum or on the Guarantee expiry date, whichever is the earlier, where after (sic) no claims will be considered by the Guarantor. The original of this Construction Guarantee shall be returned to the Guarantor after it has expired.

12. This construction Guarantee, with the required demand notices in terms of 4 or 5, shall be regarded as a liquid document for the purpose of obtaining a court order.

Signed at Johannesburg on this 5th day of December 2007.'

THE RELEVANT FACTS

[6] On 14 February 2007, a JBCC 2000 Series Principal Building Agreement was signed by Mr Efstathiou, ostensibly acting for a company Dormell Properties 282 (Pty) Ltd (‘the company'). In this contract, the

contractor undertook to construct a shopping centre development known as Cobble Walk in Durbanville. The signing of this agreement was preceded by the acceptance of Synthesis' tender by the employer's principal agent. Synthesis' representative, Mr Reid, signed the JBCC contract on 16 December 2006, while Mr Efstathiou did so on the later date. The capacity in which he signed was indicated as 'director'.

[7] The planning of the shopping centre development had been undertaken by the company. This entity was still in existence when Synthesis' tender was accepted. The company was converted to Dormell on 26 January 2007.

[8] Notice was given by Dormell of this conversion to interested parties in writing on 13 February 2007. Dormell alleges that Renasa was included in the list of recipients to whom this information was disseminated, but Renasa denies any knowledge thereof. Synthesis was informed of the change of identity of the employer.

[9] On 23 January 2007 Renasa received an application form for a JBCC 2000 guarantee to be issued in favour of the company. Renasa did not then, or at any later stage, have sight of the building contract. It issued a guarantee on 24 January 2007, sufficient securities having been provided by Synthesis for that purpose.

[10] On 27 March 2007, this guarantee was replaced with a new guarantee because the first had incorrectly described the company and Synthesis as contractor and sub-contractor respectively rather than as employer and contractor. The guarantee issued on 27 March 2007 expired on 25 October 2007 and the guarantee in dispute, quoted above, was issued at Dormell's request on the 5 December 2007. Each of these guarantees indicated the company as being the employer.

[11] The construction of the shopping centre did not go according to plan and considerable delays occurred in the building process. The completion

date envisaged by the building contract had to be extended. At the beginning of 2008, Synthesis informed the appellant that practical completion of the project would not be attained before 13 March 2008.

[12] Dormell thereupon demanded, through its attorneys, an extension of the guarantee until 15 April 2008. Synthesis refused to provide further security.

[13] On 11 February 2008 the principal agent sent a written demand to Synthesis, threatening on behalf of Dormell to cancel the agreement if the former failed to provide an extended guarantee. The contractor was formally placed on terms by another letter dated 13 February 2008, demanding an extended guarantee on or before 27 February 2008 if cancellation of the contract and calling up of the guarantee was to be avoided.

[14] Synthesis' attorneys reacted by letter disputing the existence of any obligation to extend the guarantee, whereupon the appellant through its principal agent cancelled the agreement on 28 February 2008. On the same day, Dormell demanded payment of the sum secured by the construction guarantee from Renasa by delivering a letter to its offices, informing the guarantor of the cancellation of the building contract and of its consequent obligation to honour its undertaking. Renasa rejected the demand on the same day, its attorneys denying any obligation to pay as, according to their view, the guarantee had already expired when demand was made.

[15] Synthesis regarded the purported cancellation of the building agreement as repudiation thereof which it accepted on 29 February 2008 and cancelled the contract in turn.

[16] Dormell launched an application in the court below for a declaratory order that the guarantee was valid for the full day of 28 February 2008, that payment was demanded timeously and that Renasa was obliged to honour the guarantee. Renasa raised two defences: That the guarantee had expired on midnight of 27 February 2008; and that Dormell was not entitled to claim under the guarantee as it had been issued in favour of the company and not of Dormell. Synthesis, having been joined because of its interest in the

proceedings, denied that the close corporation was the beneficiary of the guarantee and disputed any allegation that it had been in breach of the building contract.

[17] Dormell, as I have mentioned, countered with an application for the rectification of the guarantee on the basis that all three parties always intended to procure and issue a guarantee in favour of the employer. The identity of the employer was not material to Renasa once Synthesis provided sufficient securities to protect the former's position. The parties' true intention would be honoured by reflecting the appellant as the beneficiary of the guarantee. Renasa and Synthesis disputed these assertions.

[18] The court below concluded that no case for the rectification of the guarantee had been established and that it had in any event expired at midnight on 27 February 2008. It dismissed the application on these grounds. Leave to appeal was refused on 19 June 2009, but was granted on petition to this court on 27 August 2009.

[19] In the meantime Dormell and Synthesis referred the dispute concerning the cancellation of the building contract to arbitration. Synthesis was liquidated before the arbitration was concluded, but was represented by its liquidators thereafter.

[20] The arbitrator held that Synthesis had not been in breach of any term of the building contract and that Dormell had repudiated the agreement by its purported cancellation, which repudiation was validly accepted by Synthesis which thereafter cancelled the contract as it was entitled to do. The arbitrator's award is not subject to appeal and has not been reviewed.

NEW EVIDENCE ON APPEAL

[21] A court of appeal may admit new evidence, which power is given to it by s 22(a) of the Supreme Court Act 59 of 1959. This power should be exercised sparingly and only if the further evidence is reliable, 'weighty and material and presumably to be believed' (per Wessels CJ in *Colman v Dunbar*

1933 AD 141 at 162). In addition, there must be an acceptable explanation for the fact that the evidence was not adduced in the trial court.

[22] Renasa applied for leave to introduce the arbitrator's award as evidence on appeal. This request was not opposed by Dormell, although the latter adopted the stance that events that occurred after the date of the judgment appealed against were irrelevant to the outcome of the appeal.

[23] In the unusual circumstances of this case it is clear that evidence of the arbitration and its outcome did not exist at the time the judgment of the court below was given. The award's authenticity and reliability are not in issue. The arbitration award was indeed common cause. The application to present further evidence relating to the arbitration award on appeal was granted. Its effect upon the appeal is dealt with below.

THE APPEAL

[24] Dormell attacks the judgment of the court below on the grounds that the court erred in holding that the guarantee expired at midnight on 27 February 2008 and also erred in refusing the prayer for its rectification. It insists that it is entitled to enforce the guarantee.

[25] Renasa and Synthesis support the judgment appealed against. In addition, they rely on the arbitration award for the submission that the guarantee is no longer enforceable as a competent tribunal has found that the employer was in breach of the building contract and Synthesis was entitled to cancel the same. Dormell is therefore no longer bona fide when it insists on payment of the guarantee. Any entitlement to call for payment has fallen away, they submit.

THE GUARANTEE'S EXPIRY DATE

[26] The guarantee is a written agreement. There is no suggestion of any ambiguity of any of its provisions. The words used by the parties must be given their ordinary meaning. The expiry date is determined as 28 February 2008. It may expire earlier at the happening of a specified event. The court

below concluded that the civil method of calculation had to be applied to determine the expiry date and found this to be at midnight of 27 February 2008. The terms of the contract are the decisive criterion by which any potential expiry of a deadline has to be determined:

'These passages show, I think, that where time has to be computed under a contract, we must look primarily at the terms of the contract, in order if possible, to discover from them what the parties intended, and that it is only, when the contract is not decisive upon the point, that it is admissible to introduce the rules of law with regard to computation of time.' Per Solomon JA in *Joubert v Enslin* 1910 AD 6 at 46.

[27] In Roman Law, which our law has retained in this respect, the expiry of a period of time could be calculated either by the natural or the civil method. The natural method calculates 'de momento in momentum', from the exact moment of the first day upon which the period to be calculated commences to the exactly corresponding moment of the last day. The civil method of computation includes the first day of the period to be calculated and excludes the last day, see: *Cock v Cape of Good Hope Marine Assurance Company* 3 Searle 114 C, in which a marine insurance policy that was taken out for the period or one year from 14 August 1857 to 14 August 1858, was held to have expired at midnight of 13 August 1858. Compare: Windscheid, Pandects, 4th ed 1875 para 103(1). Gane, The Selective Voet, Book XLV, Title 1, Section 19.

Lee and Honoré *The South African Law of Obligations,* 2nd ed p49 state:

'141 Calculation of Period If a contract provides that something shall be done within a stated number of days from the date of its conclusion or from any other event, in the absence of expression to the contrary, in calculating the number of days the day on which the contract was concluded or the event took place is understood to be the first day of the period and the last day is excluded.

The same applies if the period is reckoned, not by days, but by months or years.'[2]

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2 (An illustrative example of such a calculation is *Kleynhans v Yorkshire Insurance Co. Ltd* 1957 (3) 544 (A), where Schreiner ACJ said at 550A-B:'Coming back to the words "upon the expiration of a period of two years" or "na verloop van 'n tydperk van twee jaar", the reason why I cannot draw from them an inference that the ordinary civil rule is to be excluded is that they seem to mean nothing more than that the period of prescription is to be two years from the date when the claim arose. Different expressions having identical meanings would be "at

[28] With respect to the learned Judge a quo, it is difficult to discern why the expiry date of the guarantee, which appears clearly from the guarantee itself should have to be determined by a method designed to calculate a period of days.

[29] The guarantee does not contain a term calling for such a calculation. The printed form makes provision for a variable and for a fixed construction guarantee. Synthesis chose a fixed construction guarantee. Different clauses of the guarantee apply to each of the two alternatives, and clauses 3 to 13 thereof apply to both. In respect of the period of liability that applies to the fixed guarantee, clause 2 provides that it should run '[f]rom and including the date of issue of the Construction Guarantee and up to and including the date of the only practical completion certificate or the last practical completion certificate where there are sections, upon which this Construction Guarantee shall expire.' The only other clause dealing with the expiry date of the guarantee is clause 11, which says: 'The Construction Guarantee . . . shall expire in terms of either 1.1.4 or 2.1, or payment in full of the Guaranteed Sum or on the Guarantee expiry date, whichever is the earlier, where after (sic) no claims will be considered by the Guarantor. . . .'

[30] Clause 1.1.4 deals with the variable variety of the guarantee and is therefore not relevant to the interpretation of the document under discussion. In clause 11 of the guarantee the parties thereto did not agree upon a period of days or weeks that has to be calculated in order to establish the last date upon which the guarantee could be called up. The date of inception is clearly the date of issue as set out in clause 2 quoted above. The expiry date is not dependant upon the effluxion of a particular number of days or weeks, but upon the happening of a particular event: the issue of a certificate of practical completion; or the last certificate of partial completion as set out in clause 2.1; or, as clause 11 reflects, the payment in full of the guarantee or the arrival of the guarantee expiry date reflected on the face of the document.

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the end of a period of two years" or "after a period of two years" or "after two years" or even simply "two years". Similarly in the Afrikaans, the unsigned, text equivalent expressions would be "na 'n tydperk van twee jaar" or "na twee jaar" or simply "twee jaar").

[31] The expiry date is 28 February 2008 as agreed upon by the parties. The court below erred in applying the civil method of computation to this contract.

RECTIFICATION

[32] The court below dismissed Dormell's prayer for rectification of the guarantee to reflect it as the employer on the ground that Dormell was unable to show that there was either a common intention or an antecedent agreement between the parties that was not correctly reduced to writing as a result of a common error. Reference was made to *Levin v Zoutendijk* 1979 (3) SA 1145 (W) at 1148A and to *Spiller & others v Lawrence* 1976 (1) SA 307 (N), where Didcott J (as he then was) said at 307 H:

'When a written contract does not reflect the true intention of the parties to it, but has been executed by them in the mistaken belief that it does, it may be rectified judicially so that the terms which it was always meant to contain are attributed in fact to it. That, as a general principle, is well recognised by both South African and English law.'

[33] It is correct that the appellant and the first respondent did not agree upon the identity of the employer prior to the signing of any of the three guarantees. Renasa was informed by a broker of the particulars of the party in whose favour the guarantee had to be issued. These instructions reflected the company's particulars. The insurer remained unaware of Dormell's existence until the building contract was cancelled.

[34] Dormell argued that it and Renasa had certainly intended to benefit the employer by the issuing of the guarantee in order to enable the employer to finalise the building project if the contract between it and the contractor were to be cancelled before the work was completed. Renasa disputed that there was ever a consensus in respect of the employer, either before or at the time the guarantee was signed, which, so the argument ran, precluded any possibility of rectification.

[35] The court below was apparently not referred to *Meyer v Merchant's Trust* 1942 AD 244. In that matter a guarantee was issued for the payment of certain liabilities, without the parties having entered into a prior agreement. The guarantee did not reflect the parties' intention to limit the guarantor's liability to a specific amount, regardless of the actual sum of the secured debts. A claim for rectification was resisted on the ground that no antecedent agreement had come into existence. At 253 De Wet CJ. said the following:

'It is therefore open to the Court to consider the question whether, in the absence of proof of an antecedent agreement, it is competent to order the rectification of a written contract in those cases in which it is proved that both parties had a common intention which they intended to express in the written contract but which through a mistake they failed to express.

It is difficult to understand why this question should not be answered in the affirmative. Proof of an antecedent agreement may be the best proof of the common intention which the parties intended to express in their written contract, and in many cases would be the only proof available, but there is no reason in principle why that common intention should not be proved in some other manner, provided such proof is clear and convincing.'

[36] This judgment was followed in *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) at para 21. The absence of an antecedent agreement does not in itself preclude rectification of a written agreement that does not correctly reflect the parties' intention.

[37] The facts of this matter clearly demonstrate that Renasa was more concerned with obtaining sufficient security from Synthesis to back up the guarantee than with the terms of the building contract or the exact description of the employer. There is merit in Dormell's argument that all three parties, and in particular Renasa and Dormell, intended to secure the employer's position. The guarantee should therefore have been rectified to reflect that intention.

THE GUARANTEE'S ENFORCEABILITY

[38] A guarantee couched in the exact terms as the one under discussion, a JBCC series 2000 pre-printed guarantee, and the circumstances under which a claim could be made on it, was described by this court in *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd & others* 2010 (2) SA 86 (SCA) para 20 Navsa JA said:

'The guarantee by Lombard is not unlike irrevocable letters of credit issued by banks and used in international trade, the essential feature of which is the establishment of a contractual obligation on the part of a bank to pay the beneficiary (seller). This obligation is wholly independent of the underlying contract of sale and assures the seller of payment of the purchase price before he or she parts with the goods being sold. Whatever disputes may subsequently arise between buyer and seller is of no moment insofar as the bank's obligation is concerned. The bank's liability to the seller is to honour the credit. The bank undertakes to pay provided only that the conditions specified in the credit are met. The only basis upon which the bank can escape liability is proof of fraud on the part of the beneficiary. This exception falls within a narrow compass and applies where the seller, for the purpose of drawing on the credit, fraudulently presents to the bank documents that to the seller's knowledge misrepresent the material facts.

'In the present case Lombard undertook to pay the Academy upon Landmark being placed in liquidation. Lombard, it is accepted, did not collude in the fraud. There was no obligation on it to investigate the propriety of the claim. The trigger event in respect of which it granted the guarantee had occurred and demand was properly made.'

In *Loomcraft Fabrics CC v Nedbank Ltd & another* 1996 (1) SA 812 (A) on 815G-J Scott AJA said:

'The system of irrevocable documentary credits is widely used for international trade both in this country and abroad. Its essential feature is the establishment of a contractual obligation on the part of a bank to pay the beneficiary under the credit (the seller) which is wholly independent of the underlying contract of sale between the buyer and the seller and which assures the seller of payment of the purchase price before he parts with the goods forming the subject-matter of the sale. The unique value of a documentary credit, therefore, is that whatever disputes may subsequently arise between the issuing bank's customer (the buyer) and the beneficiary under the credit (the seller) in relation to the performance or, for that matter, even the existence of the underlying contract, by issuing or confirming the

credit, the bank undertakes to pay the beneficiary provided only that the conditions specified in the credit are met. The liability of the bank to the beneficiary to honour the credit arises upon presentment to the bank of the documents specified in the credit, including typically a set of bills of lading, which on their face conform strictly to the requirements of the credit. In the event of the documents specified in the credit being so presented, the bank will escape liability only upon proof of fraud on the part of the beneficiary.' See further *Petric Construction CC t/a AB Construction v Toasty Trading t/a Furstenburg Property Development & others* 2009 (5) SA 550 (ECG) para 27.

[39] In principle therefore, the guarantee must be honoured as soon as the employer makes a proper claim against it upon the happening of a specified event. In the present case there is no suggestion that Dormell did not properly demand payment of the guaranteed sum. In the normal course of events payment should have been effected within seven days of demand.

[40] However, the facts of this matter are unusual because the arbitration of the dispute between Dormell and Synthesis resulted in the finding that the appellant was not entitled to cancel the building contract. The arbitration is final, not subject to appeal and has not been taken on review. A second leg of the arbitration dealing with outstanding claims arising from the building contract was also decided in Synthesis' favour. The question must thus be answered whether Dormell is entitled to persist in claiming payment of the guarantee notwithstanding the fact that it has been held to have repudiated the contract which was lawfully cancelled by the second respondent.

[41] There is no longer any dispute about the cancellation of the underlying agreement that still has to be resolved. The arbitration has established that Dormell is in the wrong. Its repudiation of the building contract was held to have been unlawful. As a consequence, Dormell has lost the right to enforce the guarantee. There remains no legitimate purpose to which the guaranteed sum could be applied.

[42] If it were to be ordered to honour the guarantee, Renasa or Synthesis

would be entitled to repayment of the full amount guaranteed. Hudson's Building and Engineering Contracts 11th ed para 17.078, quoted in *Cargill International SA & another v Bangladesh Sugar and Food Industries Corp* [1966] 4 All ER 563 QBD (Commercial Court) at 570b-c states:

'It is generally assumed, and there is no real reason to doubt, that the Courts will provide a remedy by way of repayment to the other contracting party if a beneficiary who has been paid under an unconditional bond is ultimately shown to have called on it without justification . . . In cases where there has been no default at all on the part of the contractor, there would additionally be a total failure of consideration for the payment.' See further: *General Surety & Guarantee Co Ltd v Francis Parker Ltd* 6 BLR 18 QBD Commercial List at 20.

FURTHER WRITTEN ARGUMENT AFTER THE HEARING

[43] In the light of the above considerations, the court requested the parties to present further written argument on the question whether, if the appellant were to succeed, the resultant judgment would have any practical effect or not, as any payment made by Renasa would have to be repaid by Dormell. Reference was made to clause 7 of the Guarantee in this regard. Counsel for Synthesis pointed out that Renasa's or Synthesis' claim to repayment does not arise from this clause, but from the fact that Dormell is no longer entitled to payment. The court is indebted to counsel for their further heads of argument.

[44] Dormell submits that the guaranteed sum could and should be devoted to the payment of claims that might be found to exist once a final certificate is prepared, regardless of the question whether the enforcement of the guarantee was indeed justified by a breach on the part of the contractor or not. Reference was made to a number of clauses in the construction contract in this regard. The short answer to this submission is that the guarantee is intended to enable the employer to complete the contract in case of default by the contractor. Claims arising after a breach by the employer are matters for arbitration. The guarantee is not intended to provide a source of funds for the payment of any outstanding amounts that might be due by the contractor to the employer – of which there is no evidence in any event, apart from an oblique reference to potential future claims by the employer against the

contractor in correspondence.

[45] It would amount to an academic exercise without practical effect if Dormell were to be granted the order it seeks. It would immediately have to repay the full amount to Renasa or Synthesis. Such an order would, at best, cause additional cost and inconvenience to the parties without any practical effect. In terms of section 21A of the Supreme Court Act 59 of 1959 the court must exercise its discretion against Dormell: *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA).

[46] Appellant is entitled to succeed with the appeal against the judgment in the court below in as much as that court's order must be set aside. Dormell is entitled to the costs of those proceedings and to all costs incurred in the prosecution of this appeal until the date of the arbitration award, 15 October 2009. In the particular circumstances of this case it is however, not entitled to an order that the guarantee should be enforced.

[47] The following order is made:

1. The appeal is dismissed.
2. The respondents' application to place further evidence relating to the arbitration award before the court is granted.
3. The appellant is to pay the respondents' costs, including the costs of two counsel, incurred in respect of the appeal from 16 October 2009.
4. The respondents are to pay the appellant's costs, jointly and severally, the one paying the other to be absolved, of the appeal until 15 October 2010.
5. The order of the court a quo is set aside and substituted with the following: 'The respondents are to pay the applicant's costs, jointly and severally, the one paying the other to be absolved, including the costs of two counsel.'

E BERTELSMANN
ACTING JUDGE OF APPEAL

CLOETE JA (MPATI P concurring):

Introduction

[48] I have had the advantage of reading the judgment of my colleague Bertelsmann AJA. I would allow the appeal, for the following reasons. I shall first set out a summary of the facts relevant to this judgment.

[49] (a) On 16 December 2006 a letter of intent was issued by Dormell Properties 282 (Pty) Limited (the 'Dormell Company') to appoint the second respondent as contractor for the construction of the Cobble Walk Retail Shopping Centre.

(b) On 23 January 2007 the first respondent received an application in writing from the second respondent to issue a 'JBCC Construction Guarantee' in favour of the Dormell Company. In response to this application the first respondent the next day issued a guarantee in favour of the Dormell Company.

(c) On 26 January 2007 the Dormell Company was converted, in terms of s 27 of the Close Corporation Act, 1984, from a private company to a close corporation with the name Dormell Properties 282 CC. The close corporation was the applicant in the court a quo and is the appellant in these proceedings.

(d) On 14 February 2007 the second respondent, as contractor, and the Dormell Company, as employer, concluded a building contract in the form of the JBCC standard agreement. The 'employer' was expressly defined in the contract as being the Dormell Company ─ not the applicant.

(e) On 15 February 2007 the applicant notified various persons, but not the first respondent, that the Dormell Company had been converted to a close corporation. It is not in dispute that the first respondent was never informed at any material time of the conversion, and remained unaware of it.

(f) On 5 December 2007 the first respondent issued a new construction guarantee in favour of the Dormell Company. The guarantee provided that it would expire at the end of the period of liability (defined as up to and including the date of practical completion), or upon payment in full of the guaranteed sum, or on the guarantee expiry date, whichever would be the earlier. The guarantee expiry date was 28 February 2008. This guarantee is the subject of

the present proceedings.

(g) On 28 February 2008, ie on the stated expiry date of the construction guarantee, the appellant purported to cancel the building contract with the second respondent and demanded payment of the guaranteed sum, an amount of R6 691 646,78, from the first respondent. The first respondent refused to pay.

[50] There are three issues on appeal:

(a) Whether the appellant is entitled to rectification of the guarantee to reflect itself and not the Dormell Company as the employer and therefore the beneficiary under the guarantee;

(b) whether demand for payment under the guarantee was made timeously; and

(c) whether the award by an arbitrator, given in proceedings between the appellant and the first respondent, which became known after the matter had been heard in the court a quo and in terms of which the arbitrator found that the appellant was not entitled to cancel the agreement between itself and the first respondent, would either (i) mean that this appeal would have no practical effect or result as contemplated in s 21A of the Supreme Court Act, or (ii) would preclude the appellant from enforcing payment of the guarantee against the first respondent because to do so would be contrary to the dictates of good faith.

Rectification

[51] The court a quo non-suited the appellant on the basis that it was not entitled to rectification of the construction guarantee to reflect that it and not the Dormell Company was the employer. The court a quo reasoned that the first respondent was unaware of the existence of the appellant and that there could accordingly have been no antecedent agreement between them. Furthermore, so the court a quo reasoned, there can be no question of a common intention because the parties' intention must be gleaned from the building agreement, which requires that a guarantee be issued in favour of the employer; and the 'employer' was defined as the Dormell Company.

[52] The fallacy in the court a quo's approach is this. The common continuing intention of the appellant, the beneficiary under the guarantee, the second respondent, that procured the guarantee, and the first respondent, that gave the guarantee, was quite obviously that the guarantee should be issued in favour of whoever was the employer in terms of the building contract ─ not who was defined as the employer, but who was in fact the employer. The mistake that the first respondent made was that, contrary to its belief, the Dormell Company was not the employer as (unbeknown to the first respondent) the Dormell Company had been converted to a close corporation, the appellant. The mistake made by the appellant and the second respondent was that they thought that the appellant's conversion into a close corporation was irrelevant. But all parties concerned intended that the guarantee should be in favour of the employer under the building contract; and the appellant was in fact the employer. That suffices for rectification: *Meyer v Merchant's Trust*.[3]

Expiry of the guarantee

[53] The guarantee contained the following provisions in regard to the period of liability:

'2.1 The Guarantor's liability shall be limited . . . as follows:

. . .

From and including the date of issue of this Construction Guarantee and up to and including the date of the only practical completion certificate . . . upon which this Construction Guarantee shall expire.'

'11. The Construction Guarantee . . . shall expire in terms of . . . 2.1, or payment in full of the Guaranteed Sum or on the Guarantee expiry date, whichever is the earlier, where after no claims will be considered by the Guarantor.'

No practical completion certificate was issued before the guarantee expiry date. As I have said, the guarantee was issued on 5 December 2007 and the 'guarantee expiry date' was specified as '28 February 2008.'

[54] The court a quo held that the guarantee had expired when the claim was lodged for payment by the appellant with the first respondent on 28

3 1942 AD 244 at 253 and 258.

February 2008. The court formulated the question to be decided as follows: 'At issue is exactly when on 28 February 2008 was the guarantee intended to expire.'[4] The court a quo went on to consider 'cases in which it was held that, for purposes of determining from when to when a period expressed in days runs, the ordinary civilian method of computation must be followed'. The court then referred to submissions made by counsel for the first respondent that 'in terms of clause 11 of the construction guarantee it would expire either in terms of² clause 2.1 or on² the expiry date'; that 'the period of liability in terms of clause 2.1 runs from and including² the date of issue of the guarantee up to and including² the date of the practical completion certificate'; and accepted the submission of counsel that 'where the parties to the guarantee intended to include the whole of² a specific day into its operative period, they did so expressly;' and that 'they did not expressly include the day of 28 February 2008'. Consequently, held the court a quo, it was not the intention of the parties that the appellant be given the whole day of 28 February 2008 and the agreement therefore expired immediately after midnight on 27 February 2008.

[55] The approach of the court a quo is fundamentally wrong. It is based on the fiction contained in the civilian method of computation of a period of time in accordance with which the first day of the period is initially excluded and the last day determined; but because the last day is deemed to have concluded immediately it began (*ultimus dies coeptus pro completa habetur*) the last day is excluded and so, to give the full period, the first day is included. But here, no period of time requires computation. The civilian and all other methods of computation for a period of time are accordingly not applicable. The relevant contractual provision states that the guarantee 'shall expire . . . on the guarantee expiry date' ie 28 February 2008. To state the obvious, the guarantee accordingly expired on that date. The present matter may be contrasted with *Cock v Cape of Good Hope Marine Insurance Co*.[5] In that case the insurance cover was for a period of 12 calendar months from January 14th 1857 to January 14th 1858. There, a calculation of the period of time was required and the court, in applying the civilian method for

4 Emphasis in the original judgment.
5 3 Searle 114, approved in *Joubert v Enslin* 1910 AD 6.

computation of time, held that the twelve months expired at midnight on 13 January 1858. Here, no period of time has to be calculated and the guarantee expired on 28 February 2008. Once that is so, there is ancient and modern authority in support of the proposition that the guarantee could be called up at any time, or at least during business hours, on 28 February 2008.

[56] Paul is quoted as follows in the *Digest*:[6]

'By Roman custom, a day begins at midnight and ends in the middle of the succeeding night. And so whatever is done in these twenty-four hours, that is, in two half nights with the intervening daylight, is done just as if it were done at any hour of the daylight.'

The Institutes[7] contain the following proposition:

'As an instance of a stipulation "*in diem*", as it is called where a future day is fixed for payment, we may take the following: "Do you promise to give ten *aurei* on the first of March?" In such a stipulation as this, an immediate debt is created, but it cannot be sued upon until the arrival of the day fixed for payment: and even on that very day an action cannot be brought, because the debtor ought to have the whole of it allowed to him for payment; for otherwise, unless the whole day on which payment was promised is passed [sic], it cannot be certain that default has been made.'

[57] These principles were received into the Roman-Dutch Law.

Grotius[8] says:

'Where something is promised to be fulfilled at a certain time, the right vests at once, but cannot be enforced before the time arrives; nay, the year, month or day mentioned in the promise must have ended before the demand is made.'

Voet[9] says:

'But if they [stipulations] are framed against a day, the vesting day indeed of the obligation arrives at once so that what was promised starts to be due, but the due day has not arrived. Thus no suit can be brought thereon unless the day has come round, and unless also the whole day has elapsed since the whole of that day ought to be allowed at the discretion of the payor [sic]. In like manner one who has stipulated for something to be given "this year" or "this month" does not correctly

6 2.12.8. Translation taken from *The Digest of Justinian*, Mommsen, Krueger and Watson, eds; vol 1 p 58.
7 3.15.2; Moyle's translation 5th ed p 133.
8 *Introduction to Dutch Jurisprudence* 3.3.50, Maasdorp's translation (1888) (2nd ed) p 219.
9 *Commentary on the Pandects* 45.1.19 Gane's translation vol 6 p 647.

claim unless all parts of this year or month have gone past.'

[58] In the modern South African law Maasdorp JP in a concurring judgment in this court said in *National Bank of SA Ltd v Leon Levson Studios Ltd*:[10]

'The rent was due on 1 December, and could have been paid at any time during that day and the tenant was not in arrear till after the close of that day.'

Lansdown JP held in *Davies v Lawlor*:[11]

'Ordinarily a debtor required to pay on a certain day has the whole of that day for payment — *Voet* 45.1.19.'

Because the question does not arise in the present appeal, it is not necessary to consider the immediately following statement by Lansdown JP:

'But the time up to which payment may be made on that day may be limited by the hours of business of the place at which the payment is to be made. Where, for instance, the office of a professional man or the house of a mercantile business is appointed as the place of payment, the parties must be held to contemplate that payment shall be made within the hours during which in accordance with practice business is transacted there.'[12]

[59] I therefore hold the proposition to be self-evident and backed by centuries of authority that where a contract does not require a period of time to be calculated, but provides that the entitlement to exercise a right or the obligation to perform a duty ends on a specific day — as in the present case, where the guarantee provides that it will expire on 28 February 2008 — the right may be exercised, or the obligation performed, on that day. The appellant in fact called up the guarantee on 28 February 2008 and the court a quo was wrong in non-suiting it on the basis that the guarantee had expired at midnight on the previous day.

Relevance of the arbitrator's award

[60] Then finally, there is the question whether the appellant should now be allowed to enforce payment under the guarantee in view of the award by the

10 1913 AD 213 at 220.
11 1941 EDL 128 at 132; see also *Whittaker v Kiessling* 1979 (2) SA 578 (SWA) at 582A-E.
12 See in this regard the three judgments in the *National Bank of SA Ltd v Leon Levson Studios Ltd* above, n 7, and *Davis v Pretorius* 1909 TS 868 at 871-2.

arbitrator (contained in evidence which the respondents sought to adduce on appeal) that it was not entitled to cancel the building contract, that its attempt to do so constituted a repudiation and that the building contract was cancelled by the second respondent. There are two arguments in this regard:

(a) that an award on appeal would have no practical force or effect as contemplated in s 21A of the Supreme Court Act; and

(b) that the appellant's attempt to enforce the guarantee constitutes fraud in the sense of bad faith.

It is here that I part ways with my learned colleague Bertelsmann AJA.

[61] It is important to bear in mind that in cases such as the present there are three separate legal relationships:

(a) one between the employer and the contractor, usually termed a building contract, pursuant to which the contractor undertakes to perform building works for the employer;

(b) one between the employer and a financial institution which the employer requires the contractor to procure to protect the employer against possible default by the contractor under the building contract, which is variously called a performance guarantee, a performance bond or a construction guarantee, and in terms of which the financial institution undertakes to the employer that it will make payment to the employer on the happening of a specified event; and

(c) one between the contractor and the financial institution for the provision by the latter of a guarantee to the employer.

The construction guarantee which the appellant seeks to enforce in the present appeal is an example of the second type of contract.

[62] In terms of clause 5 of the guarantee, the first respondent undertook to pay to the appellant the guaranteed sum 'upon receipt of a first written demand' from the appellant to the first respondent at the latter's physical address 'calling up on this Construction Guarantee stating that . . . The Agreement [between the appellant and the second respondent] has been cancelled due to the Contractor's default and that the Construction Guarantee is called up in terms of 5'. The clause further provided that 'The demand shall

enclose a copy of the notice of cancellation.'

[63] The appellant complied with the provisions of clause 5. It was not necessary for the appellant to allege that it had validly cancelled the building contract due to the second respondent's default. Whatever disputes there were or might have been between the appellant and the second respondent were irrelevant to the first respondent's obligation to perform in terms of the construction guarantee. That is clear from the passages quoted by my learned colleague in para 38 of his judgment from *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd* and *Loomcraft Fabrics CC v Nedbank Ltd*, and also from the following passage in the judgment of Lord Denning MR in *Edward Owen v Barclays Bank International*:[13]

'A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.'

My learned colleague reasons that a valid demand on the construction guarantee is subject to a bona fide claim that an event has occurred that is envisaged in the guarantee as triggering the guarantor's obligation to pay. Put more accurately, a valid demand on the construction guarantee can only be defeated by proof of fraud. In the present matter there was a valid demand. There was no suggestion of fraud.

[64] Once the appellant had complied with clause 5 of the guarantee, the first respondent had no defence to a claim under the guarantee. It still has no defence. The fact that an arbitrator has determined that the appellant was not entitled to cancel the contract, binds the appellant ─ but only vis-à-vis the second respondent. It is *res inter alios acta* so far as the first respondent is concerned. As the cases to which I have referred above make abundantly clear, the appellant did not have to prove that it was entitled to cancel the

13 [1978] 1 All ER 976 (CA) at 983b-d.

building contract with the second respondent as a precondition to enforcement of the guarantee given to it by the first respondent. Nor does it have to do so now.

[65] For these reasons, it is not in my view bad faith for an employer, who has made a proper demand in terms of a construction guarantee, to continue to insist on payment of the proceeds of the guarantee, when the basis upon which the guarantee was called up has subsequently been found in arbitration proceedings between the building owner and the contractor to have been unjustified. I would add that the fact that the arbitrator's award is final as between the appellant and the second respondent does not mean that it is correct, or that the appellant would have to set it aside before calling up the guarantee, much less that the appellant is acting in bad faith in seeking to enforce payment under the guarantee against the first respondent.

[66] I turn to consider the question whether the order sought by the appellant on appeal would have no practical effect or result as contemplated in s 21A of the Supreme Court Act. My learned colleague states in para 42 of his judgment that if the first respondent were to honour the guarantee, it or the second respondent would be entitled to repayment of the full amount. In support of this conclusion, my learned colleague refers to parts of para 17.078 in the 11th edition of *Hudson's Building and Engineering Contracts*. It is important to note that Hudson in that particular paragraph is dealing with the rights of the contractor. It would be convenient to quote the paragraph in full as in my respectful view nothing in the paragraph supports the proposition for which my learned colleague cites it:

'It is generally assumed, and there is no real reason to doubt, that the Courts will provide a remedy by way of repayment to the other contracting party [ie the contractor] if a beneficiary who has been paid under an unconditional bond is ultimately shown to have called on it without justification: "I do not doubt that in such an event the money would be repayable, but it is not so certain it would be repayable with interest". (*General Surety and Guarantee Co Ltd v Francis Parker Ltd* (1977) 6 BLR 16, 21, *per* Donaldson J.)

In cases where an owner or buyer is claiming damages against the seller or

contractor which exceed the amount of the bond there is little difficulty in holding that he must give credit for the "cash in hand" received by him if he has made a call under any unconditional guarantee arrangements. Where, however, there is no defence or counterclaim to the contractor's claim for moneys due, other than sufficient payment in full, or where the sum already received from the bank or guarantor exceeds the set-off or damages ultimately awarded, the contractor's or seller's claim for repayment of the whole or any balance of the sums called and paid can be put, it is submitted, in two ways. First, the payment by the bank or guarantor, being required in most cases under the principal construction contract itself, or sometimes by a side-contract, must be regarded as being made by the bank as agent for the contractor and subject, it is submitted, to an implied term for repayment if not in fact due. Secondly, it has been seen that in the case of a *conditional* bond, equity would not permit recovery of a sum in excess of the true debt or damages, as being a penalty, so that by analogy in a case where the payment under the bond was obligatory and unavoidable, and indeed brought about by the owner's own act in making the call, it would be only logical to order repayment for the same reasons. Such a claim could also be based in quasi-contract on wider principles of unjust enrichment and unconscionability, it is submitted. In cases where there has been no default at all on the part of the contractor, there would additionally be a total failure of consideration for the payment.[14] Questions of interest and costs pose considerable difficulties, however.'

Hudson therefore suggests that where, in the case of an unconditional guarantee, the contractor, after the adjustments at the end of the building contract, claims repayment of the whole or any balance of the sums called by the employer and paid by the bank under the guarantee, the payment must be regarded as a payment by the bank as agent for the contractor subject to what in South Africa would be called a tacit term for repayment if not in fact due. There is no suggestion in the paragraph quoted from Hudson that the bank or guarantor can recover anything. Nor is there any suggestion that the contractor can, as a matter of course, recover the full amount of the guarantee from the owner where the latter is ultimately shown to have called upon it without justification.

14 The reliance by my learned colleague on this sentence is, with respect, misplaced as it has been clear since *Conradie v Rossouw* 1919 AD 279 that the English law of consideration forms no part of the law of South Africa.

[67] I agree with the submission on behalf of the appellant that the guaranteed sum could and should be devoted to the payment of claims that might be found to exist once a final certificate is prepared, regardless of the question whether the enforcement of the guarantee was indeed justified by a breach on the part of the contractor or not. My learned colleague counters in para 44 of his judgment that the construction guarantee is to enable the contractor to complete the contract in case of default by the contractor, and that the guarantee is not intended to provide a source of funds for the payment of any outstanding amounts that might be due by the contractor to the employer. But if this was so, then an employer who has validly cancelled the building contract could never use the proceeds of a performance guarantee to satisfy amounts owing to it by the contractor prior to and as at cancellation, and would be left with a claim against the contractor. That is simply not what happens in practice. The proceeds of a construction guarantee are not ring-fenced in this way.

[68] What would have to be found, as a positive conclusion of fact, in order to support a conclusion that an order on appeal in favour of the appellant would have no practical effect or result, is that there is nothing on which the guarantee could operate if it were paid out now. That finding simply cannot be made on the papers before this court. The appellant's attorneys wrote a letter to the respondents' attorneys dated 24 August 2010 in which they said inter alia:

'Subsequent to the issuing of the final arbitration award, correspondence ensued between the appellant's attorneys and the second respondent's attorneys in which it was conveyed that the appellant . . . intends referring to a fresh arbitration it claims in respect of amounts paid by it direct to sub-contractors, and which the arbitrator found was not a dispute capable of adjudication by him in the arbitration. The appellant's claim in this regard amounts to R1 417 940.00 (VAT inclusive).'

That is hardly 'an oblique reference to potential future claims by the employer against the contractor in correspondence' as my learned colleague would have it in para 44 of his judgment. The point is, however, that it cannot be said with certainty that there is nothing on which the construction guarantee could operate, as this question was not properly ventilated in the application to lead

further evidence on appeal and it was obviously not even touched upon in the original application papers.

[69] Finally, it is necessary for me to say something about the application by the respondents to place further evidence before this court on appeal, which was met with a response by the appellants. It is a requirement for the admission of evidence on appeal that the evidence should be materially relevant. The law in this regard has recently been reviewed by this court in a criminal context in *Britz v S*,[15] but the principle applies equally in a civil context. In my view, the finding by the arbitrator is entirely irrelevant and I would accordingly disallow the respondents' application to place evidence of this fact before the court and order the respondents to pay the costs occasioned by the application, which would include the reply thereto by the appellant.

[70] For these reasons I would allow the appeal; dismiss the respondents' application to place further evidence before this court; rectify the construction guarantee to reflect the appellant as the employer; order the first respondent to pay the guarantee amount of R6 691 646,78 to the appellant together with mora interest; and order the respondents jointly and severally to pay the appellant's costs of the proceedings in this court and in the court a quo, in both cases including the costs of two counsel.

T D CLOETE
JUDGE OF APPEAL

CACHALIA JA (MHLANTLA JA concurring):

[71] I concur in the judgment of Bertelsmann AJA and the order made by him, and also in paragraphs 48 to 59 of the judgment of Cloete JA.

15 (613/09) [2010] ZASCA 71 (21 May 2010).

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A CACHALIA
JUDGE OF APPEAL

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