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CONSTRUCTION AND ENGINEERING ALERT

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SUPREME COURT OF APPEAL JUDGMENT AFFIRMS POSITION ON ON-DEMAND PERFORMANCE GUARANTEES

It is established law in South Africa that no defences can be raised to a demand made under an on-demand performance guarantee, except the existence of fraud. Despite this, the South Gauteng High Court handed down judgment, in an urgent application, on 13 February 2013 in which the employer under a construction contract, as the beneficiary of the performance guarantee, was required to provide notice to the contractor, who procured the performance guarantee in favour of the employer, before making a demand on the performance guarantee.

The application was brought by Hitachi Power (Pty) Limited against Eskom Holdings SOC Limited in respect of three performance guarantees amounting to over R600 million which were furnished by Hitachi Power (Pty) Limited in accordance with the provisions of the construction contract entered into between the two for certain construction Works to be carried out at the Medupi Power Station.

An appeal by Eskom Holdings SOC Limited, as the employer under this particular construction contract, against this judgment was upheld by the Supreme Court of Appeal (SCA) on 12 September 2013. The SCA held that regardless of whether a demand on a performance guarantee is disputed, the performance guarantee, being an on-demand guarantee, could be called on by the employer, without prior notice having been given to the contractor.

The SCA specifically noted that a bank which provides a performance guarantee is not required to "traverse areas which fall outside the scope of its authority", but merely has to satisfy itself that the requirements contained in the wording of the performance guarantee, if any, are met when a demand is made on the performance guarantee. This is a welcome affirmation of the position on on-demand performance guarantees.

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