



THE SUPREME COURT OF APPEAL REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

Raubex Construction Pty Ltd v Bryte Insurance Company Ltd –ZASCA 14 (20 March 2019)

From: The Registrar, Supreme Court of Appeal

Date: 20 March 2019

Status: Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Raubex Construction Pty Ltd (Raubex) secured a contract with Eskom for the construction of an Eskom Operations and Management Office and Visitors Centre. Raubex subcontracted a portion of the works to Peak Star 133 Pty Ltd (trading as Dolphin Construction) (Dolphin). In terms of the subcontract Raubex waived its right to withhold retention money subject to the provision of a Retention Money Guarantee. Bryte Insurance Company (formerly Zurich Insurance Company, South Africa Ltd) provided the said guarantee.

The guarantee was unconditional subject only to the receipt of a demand. The guarantee required the demand by Raubex to certify:

- (a) that Dolphin is in breach of its obligations under the subcontract and that Raubex is entitled to be paid amounts for which Dolphin is liable under the subcontract;
- (b) that the amount demanded by the certificate does not exceed the amount of retention money which, but for the guarantee, would have been retained by Raubex in terms of the subcontract at the date of the certificate; and
- (c) that the amount demanded does not exceed a good faith estimate of the cost to Raubex of having the breach remedied.

Raubex alleged that Dolphin was in breach of its contractual obligations and called upon Bryte to make payment of the amount which in its bona fide estimation was required to remedy the breach. Bryte contended that Raubex had made fraudulent misrepresentations relating to the existence of the alleged breach and, in the event that a breach of contract did exist, of the estimation of the costs to remedy the breach. Bryte accordingly declined to make payment.

Raubex successfully applied to the Gauteng Division of the High Court, Johannesburg, to implement the terms of the guarantee. In an appeal to the Full Court of the Gauteng Division, Johannesburg, the order in favour of Raubex was set aside. The Full Court held:

- (a) that Raubex failed to comply with the terms of the guarantee in that the guarantee required a 'bona fide' estimate of the costs to remedy the breach which, in the judgment of the Full Court, required a substantive specification of precisely how the amount demanded was arrived at; and
- (b) that Raubex had acted fraudulently in its estimation of the amount demanded.

The Full Court held that retention money could be withheld only to remedy defects in the works which manifest after the completion of the contract and that Raubex had fraudulently included in its estimation of the amount demanded costs relating to defects or omissions which existed prior to the issue of the certificate of completion.

The Supreme Court of Appeal concluded that the nature of the guarantee was to be determined by its terms and that the demand made by Raubex complied with the terms of the guarantee. It rejected the argument that Raubex was required in terms of the guarantee to justify the accuracy of its estimation.

The Supreme Court of Appeal also held that the purpose for which retention money could be held had to be determined by the interpretation of the contract and, on a proper interpretation of the contract Raubex was entitled to withhold retention money in respect of omissions in the works which existed prior to the issue of the certificate of completion and defects in the workmanship, whether they manifested prior to the

issue of the certificate of completion or thereafter. An appropriate order was accordingly made.