



Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 499/2014

In the matter between:

SCATEC SOLAR SA 163 (PTY) LTD

First Applicant

ITOCHU CORPORATION

Second Applicant

v

TERRAFIX SUEDAFRIKA (PTY) LTD

First Respondent

HSBC BANK PLC

Second Respondent

Court: Justice J Cloete

Heard: 24 – 26 March 2014 and 14 April 2014

Delivered: 25 April 2014

JUDGMENT AFTER ORAL EVIDENCE

CLOETE J:**Introduction**

- [1] This is a further stage in proceedings launched by the applicants (*'Scatec'* and *'Itochu'*) on 15 January 2014 for certain interim interdictory relief against the respondents (*'Terrafix'* and *'HSBC'*). As the matter evolved, the relief sought against HSBC fell away, and that sought against Terrafix has become final in nature.
- [2] The history is set out in a judgment which I delivered on 5 March 2014 and will thus not be repeated herein, save to the extent that it is unavoidable. In short, Scatec and Itochu seek a declaratory order that Terrafix's written demands to a bank in Japan (*'Sumitomo'*) for payment of some R42 million under certain irrevocable standby letters of credit (*'LCs'*) are invalid, unenforceable and unlawful by reason of fraud; as well as an order that Terrafix shall forthwith revoke the demands and instruct Sumitomo accordingly. An interim interdict granted by agreement on 17 January 2014 preventing Terrafix from compelling payment has been further extended pending judgment herein.
- [3] Demands presented to Sumitomo that the amounts claimed under the LCs were due and payable to Terrafix were signed by Stephan Reisch (*'Reisch'*), a director of Terrafix and the chief executive officer of its holding company, Terrafix A in Germany (where he is based). At the previous hearing the primary issue was whether, in certifying that payment was due under the LCs, Terrafix (in the form of Reisch) acted fraudulently, and the applicants sought a referral to oral

evidence for purposes of determination thereof. For the reasons set out in my previous judgment I ordered Reisch to submit himself to cross-examination on this issue, which he duly did. This is now the only remaining aspect requiring determination (save for costs).

- [4] I also granted leave to the parties to apply to adduce such other evidence which, in the opinion of the court hearing Reisch's evidence, was directly relevant to the determination of the fraud issue, but none of the parties availed themselves hereof.

Applicable legal principles

- [5] For ease of reference I will briefly refer to the authorities and principles set out in paras [26] to [28] of my previous judgment and I will also amplify certain aspects thereof.
- [6] In *Loomcraft Fabrics CC v Nedbank Ltd and Another* 1996 (1) SA 812 (A) at 817E-H it was held that:

‘ Nonetheless, it is now well established that a Court will grant an interdict restraining a bank from paying the beneficiary under a credit in the event of it being established that the beneficiary was a party to fraud in relation to the documents presented to the bank for payment. For, as was observed by Lord Diplock in the United City Merchants case supra at 725],

“ ‘...fraud unravels all’. The courts will not allow their process to be used by a dishonest person to carry out a fraud.”

But the fraud on the part of the beneficiary will have to be clearly established. Tukan Timber Ltd v Barclays Bank plc [1987] 1 Lloyd's Rep 171 (QB) at 175. The onus, of course, remains the ordinary civil one which has to be discharged on a balance of probabilities but, as in any other case where fraud is alleged, it will not lightly be inferred. See Gates v Gates 1939 AD 150 at 155; Gilbey Distillers & Vintners (Pty) Ltd and Others v Morris NO and Another 1990 (2) SA 217 (SE) at 226A.'

- [7] In *Guardrisk Insurance Company Ltd v Kentz (Pty) Ltd* (94/2013) [2013] ZASCA 182 (29 November 2013) at para [18] the Supreme Court of Appeal, citing *Loomcraft* with approval, emphasised that:

'Mere error, misunderstanding or oversight, however unreasonable, would not amount to fraud. Nor was it enough to show that the beneficiary's contentions were incorrect. A party had to go further and show that the beneficiary knew it to be incorrect and that the contention was advanced in bad faith.'

- [8] *Casey and Another v FirstRand Bank Ltd* 2014 (2) SA 374 (SCA) was handed down on 26 September 2013 and thus obviously did not refer to *Guardrisk*, but it similarly approved and applied *Loomcraft*. At para [12] the court reiterated the principle that *'a letter of credit is wholly independent of the underlying contract between the customer of the bank and the beneficiary. It establishes a contractual obligation on the part of the issuing bank to pay the beneficiary in accordance with its terms'*. It held that whether or not the claim of Firstrand Bank (which had demanded and received payment under the LC concerned) had prescribed was irrelevant. *Casey* serves to demonstrate just how strictly our law requires adherence to payment having to be made under an LC in the absence of fraud being established.

- [9] C R Snyman: Criminal Law (5th ed) p 531 defines fraud as meaning *'the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another'* (see also the authorities cited therein at fn 1).
- [10] It is not in dispute that if an intentional misrepresentation was made by Reisch when he certified, it would result, ultimately, in prejudice to Scatec and Itochu. What is in dispute, and is now the crux of the matter, is whether: (a) Reisch made misrepresentations *in the presentation of the demands* by wrongly certifying that certain milestones which would trigger payment by Sumitomo had been met; and (b) if so, whether such misrepresentations were intentional. Both elements must be found to be present before it can be said that Scatec and Itochu have discharged the onus that rests upon them to establish fraud.
- [11] During argument at the previous hearing counsel for Scatec submitted, on the basis of *R v Myers* 1948 (1) SA 375 (A), that a misrepresentation will also be intentional if it is made as a result of *'fraudulent diligence in ignorance'*. In argument at the present hearing counsel for Terrafix contended that *'the applicants' use of the dictum [in Myers] to establish fraud in the context of a presentation made pursuant to an LC is (at best) novel and without precedent'*.
- [12] In *Casey* the Supreme Court of Appeal reiterated the contractual nature of an LC, and referred in terms to the establishment of a *'contractual obligation on the part of the issuing bank to pay the beneficiary in accordance with its terms'*. Christie and Bradfield in Christie's The Law of Contract in South Africa (6th ed) at p 305

quote *Myers* as authority for the requirements of fraudulent misrepresentation in a contractual context:

'The telling of a deliberate lie is an obvious example of fraud, but other examples require to be closely examined in order to decide whether the representation must be treated as fraudulent, with all the results that follow, especially the awarding of damages against the maker. The requisites of fraud were authoritatively stated by the Appellate Division in R v Myers 1948 1 SA 375 (A)...'

- [13] In *Hamman v Moolman* 1968 (4) SA 340 (A) the court, referring *inter alia* to *Myers*, stated the following at 347A-B:

'The fact that a belief is held to be not well-founded may, of course, point to the absence of an honest belief, but this fact must be weighed with all the relevant evidence in order to determine the existence or absence of an honest belief.'

- [14] There does not appear to be anything in *Loomcraft*, *Guardrisk* or *Casey* to militate against Scatec's partial reliance on Reisch's '*fraudulent diligence in ignorance*', or that the test for fraud in matters concerning LCs differs in some way from the test for fraud in all other cases. It would thus be prudent, when evaluating the evidence, to also consider whether Reisch can be said to be guilty of '*fraudulent diligence in ignorance*'.

- [15] In *Lekup Prop Co No 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA) at para [32] the Supreme Court of Appeal set out the approach to be taken when evaluating evidence in motion proceedings, coupled with a referral to evidence on limited issues, as follows:

'A referral to trial is different to a referral to evidence on limited issues. In the latter case, the affidavits stand as evidence save to the extent that they deal with dispute(s) of fact; and once the dispute(s) have been resolved by oral evidence, the matter is decided on the basis of that finding together with the affidavit evidence that is not in dispute.'

The terms of the LCs, the demands made thereunder and the relevance of

Reisch's state of mind

[16] I will briefly repeat the terms of the LCs. The first LC (for the Linde subcontract) was issued on 5 September 2013 and expires on 31 May 2014. The initial amount for which it was issued was R119 238 213.41. This was subsequently reduced on 23 October 2013 to the amount of R83 466 749.39. The second LC (for the Dreunberg subcontract) was also issued on 5 September 2013 but expires on 31 August 2014. It was issued for an amount of R251 558 105.36.

[17] Each LC stipulates that the documents to be presented in order to trigger payment are:

'1) A COPY OF DEBIT NOTE BY THE BENEFICIARY ATTENTION TO ITOCHU ... JAPAN SHOWING THE DOCUMENTS APPLICABLE TO THE RELEVANT PAYMENT MILESTONE SET OUT IN APPENDIX 1 HERETO FOR PAYMENT OF A SPECIFIED AMOUNT.

2) BENEFICIARY'S SIGNED STATEMENT ATTENTION TO ITOCHU...CERTIFYING THAT THE AMOUNT OF ANY DRAWING(S) HEREUNDER REPRESENT(S) INVOICE(S) AMOUNT WHICH REMAIN UNPAID AND THAT PAYMENT(S) HAS NOT BEEN RECEIVED FROM ITOCHU CORPORATION.

3) SIGNED CONFIRMATION LETTER ISSUED BY ITOCHU...STATING THAT ITOCHU CORPORATION ADMIT TO HAVE NOT MADE PAYMENT TOWARD BENEFICIARY'S SIGNED STATEMENT...'

[18] Each LC thus contains, as one of its conditions for payment, the presentation of a debit note by Terrafix to Itochu '*showing the documents applicable to the relevant payment milestone set out in appendix 1 hereto for payment of a specified amount*'. In addition Terrafix must certify to Itochu that the amount of any '*drawing(s) hereunder represent(s) [the] invoice[ed] amount*'. Each LC incorporates an appendix 1, setting out a payment schedule linked to completion of work stages, or payment milestones, on fulfilment of which the relevant invoice may be generated to obtain payment.

[19] On 17 December 2013 Terrafix (through its attorneys) presented two demands for payment to Itochu under the LCs.

[20] The demand for payment under the Linde LC (no. 211LCJ-62055053) had annexed to it the following:

20.1 A certificate dated 10 December 2013 signed by Reisch, certifying that an amount of R13 414 299 (exclusive of VAT) was due and payable to Terrafix and that Itochu had not made payment. Reisch certified that the aforesaid amount '*represents the aggregate amount of debit notes and/or rendered invoices that have been issued and delivered*' to Itochu;

20.2 Three tax invoices issued to Scatec, two dated 15 November 2013 and one dated 21 November 2013, each in the amount of R5 097 433.52 inclusive of VAT, in respect of milestones allegedly achieved for anchor installations on zones 1, 2 and 3; and

20.3 Three debit notes issued to Itochu on the same dates and containing essentially the same information as the three tax invoices, but exclusive of VAT and with a different specified payment period.

[21] The demand for payment under the Dreunberg LC (no. 211LCJ-62055054) was to similar effect and had similar annexures. The certificate signed by Reisch was dated 12 December 2013. The total amount demanded was R28 300 286.85 exclusive of VAT; the invoices and debit notes were all dated 27 November 2013, and payment was demanded on the basis of milestones allegedly achieved for the first three deliveries of product on site.

[22] Itochu did not pay and on 20 December 2013 Terrafix presented its two demands for payment under the LCs to Sumitomo.

[23] At the risk of repetition, the question is whether Reisch knew when he presented the demands for payment to Sumitomo that Terrafix was in fact not entitled to payment in terms of the relevant invoices, but he nonetheless intentionally went ahead and deliberately represented to Sumitomo that the amounts were due. Linked to this is whether Reisch took positive steps to inform himself that the amounts were in fact not due, or whether he deliberately refrained from acquainting himself with the true position so as to relieve himself of knowledge of the true facts.

[24] After the conclusion of Reisch's oral evidence, it is Scatec's case that: (a) in respect of the Linde LC, Reisch had actual knowledge that the amounts were not

due and in addition wilfully abstained from establishing the true facts; and (b) in respect of the Dreunberg LC, Reisch is guilty of such wilful abstention only. I will deal first with the evidence in respect of the Linde LC and thereafter with the evidence in respect of the Dreunberg LC.

The evidence of Reisch and the affidavit evidence

[25] Reisch was cross-examined for almost three days, at times with the assistance of a sworn interpreter. He has an excellent command of the English language but it was clear to me that he did not always follow the context and nuances of the questions that were put to him. Upon receiving clarification he was generally able to convey his answers in a cogent manner, but due allowance needs to be made for this difficulty when evaluating his testimony.

[26] The overall impression that I gained was that Reisch, although not averse to expediency, was essentially an honest witness. He is a typical hard-nosed, smooth talking businessman who leaves matters of detail to those he believes he can rely upon, such as his employees and legal advisors. The picture that emerged is that Reisch can certainly be accused of a lack of attention to detail as well as a cavalier attitude towards this litigation, as is evidenced by his failure to familiarise himself with the affidavits of the deponents in the application as well as failing to pay proper attention to the contents of his own affidavits before deposing to them, both of which were canvassed exhaustively with him.

- [27] There can be little doubt that, *stricto sensu*, Reisch made a misrepresentation to Sumitomo when he certified that payment milestones had been achieved *in respect of anchor installations on zones 1, 2 and 3* on the Linde subcontract. On his own version, the work stages which triggered payment for these milestones had not been completed.
- [28] However it was Reisch's testimony that Terrafix and Scatec had agreed that, because Terrafix could not complete the anchor installations on these zones due to open cable trenches, provided that Terrafix installed anchors on zone 4 as well to a quantity of anchors equivalent to what would otherwise have been installed to complete zones 1 to 3, Terrafix would become entitled to payment from Scatec as if the relevant milestones on zones 1 to 3 had been achieved. It was also Reisch's testimony that he understood that this agreement had been reached during the first two weeks of November 2013. The terms of that agreement had been conveyed to him by Martin Ramsauer, a project director on the subcontracts and with whom he was in daily contact, as well as Matthias Kirchner, a site manager in charge of the foundation works on both the Linde and Dreunberg sites. Reisch's evidence was further that he believed (although he was not certain) that this agreement had been reached with Roberto Berardo and Kari de Fremme of Scatec, to whom I will refer below.
- [29] Despite the scepticism with which this testimony was received by Scatec's counsel, given the absence of any specific prior allegations to this effect, I cannot ignore the following which serve to corroborate Reisch's evidence on this aspect.

[30] The first piece of evidence is that Ramsauer alleged in his answering affidavit that *'delays in installing the anchor stations were entirely due to [another subcontractor] Raubex's failure to close the trenches. Scatec accepted that this was the position'*. In reply to this allegation, and after dealing with Terrafix's alleged failure to request extensions under the Linde subcontract, Scatec's Irma Pienaar stated the following:

'35.3 Secondly, the complaints concerning alleged delays by Raubex and delays on site are, once again, vague and generalised without any particularity as to which portion or zone(s) of the site was affected, when, for how long and to what extent. The Applicants therefore simply cannot deal with this issue meaningfully.

35.4 Thirdly, and in any event, Raubex's delays in digging and/or closing trenches were raised and discussed at site meetings attended inter alia by representatives of Terrafix and Scatec. Because Terrafix was able to progress with work in other sectors of the site, it in fact never submitted claims for extensions of time under the sub-contract and, in fact, no delays resulted from this.

35.5 The allegations contained in this paragraph are accordingly denied. Without derogating from the generality of this denial, I categorically deny the unsubstantiated allegation that Scatec accepted that delays in installing the anchor stations were entirely, or at all, due to Raubex's failure to close trenches.'

[emphasis supplied]

[31] From the foregoing it is clear that: (a) the issue of delays in closing cable trenches (irrespective of who was to blame) was raised and discussed at more than one site meeting, and thus, at the very least, there must have been a

problem sufficient to merit discussion on more than one occasion; and (b) Terrafix in fact progressed with work in other sectors of the Linde site as a result. This lends credence to Reisch's version that there was a deviation from the schedule for completion of the work stages on the Linde site, although of course it does not translate into a clear agreement on a deviation in payment terms.

- [32] The second piece of evidence is contained in an email dated 14 November 2013 annexed to Ramsauer's answering affidavit. It was addressed by Daniel Brandhuber of Terrafix to Henk Lange of Lerumo (a subcontractor of Terrafix) as well as various other individuals involved in the Linde project, and was in response to the uploading of documents required by Scatec to project place in order to approve payment. It reads as follows:

'Henk this is not acceptable for us. Is there any way to get the final approval from Scatec earlier? This is so bad for our payment flow.

Is it possible that you will have another discussion with Scatec tomorrow? We already finished nearly 4 zones and Scatec has not provide [sic] any payment.'

- [33] If Reisch's version is to be rejected out of hand, the question that arises is why Terrafix would have almost completed zone 4 by mid-November 2013 instead of first trying to finalise completion of zones 1 to 3 so as to obtain payment in accordance with the stipulated payment milestones. This ties in with what Pienaar had stated in her affidavit, namely that Terrafix progressed with work on other sectors of the site. It also ties in with the date of submission of the first two invoices, namely 15 November 2013, one day after Brandhuber's email to the effect that zone 4 had almost been completed.

- [34] The third piece of evidence is contained in two separate emails, also dated 14 November 2013, annexed to Ramsauer's affidavit. One was circulated by Fred Maritz, Scatec's construction site manager on the Linde subcontract. Maritz thanked the various teams (or subcontractors) on the Linde site for their efforts and hard work, stating that at times it had been '*very difficult and with commitment from all parties involved we achieved success*'. The other was an email circulated by Roberto Berardo, Scatec's project manager on the Linde site, in which he referred to the email from Maritz and congratulated all concerned (including Terrafix, given that it was copied to Ramsauer) '*...for the achievement...let's beat the installation now*'. This implies that despite the installation not having been completed (although I accept that this is not the only possible interpretation), Scatec appeared to be satisfied with progress made up to that point.
- [35] The fourth, and most significant piece of evidence, is contained in an affidavit of Kari de Fremme ('*Fremme*') filed in proceedings during December 2013 before Veldhuizen J, when Terrafix unsuccessfully sought to interdict payment to Scatec under certain performance guarantees, and to which I referred at paras [17] and [19] of my previous judgment ('*the Lombard application*'). Fremme is the vice president of project execution for Scatec's holding company, Scatec Solar AS in Norway and the person who was appointed by Scatec as its official representative on the subcontracts. In dealing with what she referred to as Terrafix's '*delays and incompetence*' on the Linde site and the assistance allegedly provided to it by Scatec, she stated the following:

'We have also agreed to pay for the anchor installations in the Linde project, despite the fact that the contracted payment milestones had [sic] yet to be met as the anchors for the drive stations are still not installed.'

- [36] Scatec did not ask for leave to call Fremme to explain this statement, although it was clearly relevant to the determination of the fraud issue. Rather, Scatec sought to explain it away by relying upon what Pienaar had stated in her replying affidavit:

'48.1 The quotation from Scatec's supplementary answering papers in the prior application, which Ramsauer incorrectly quotes – he ought to have quoted "as the anchors for the drive station are still not installed" – must be seen in context. Scatec was demonstrating the extent to which it had been accommodating and granting indulgences to Terrafix – which are in any event not binding in terms of clause 1.2.5 of the sub-contract – in relation to the project by reason of Terrafix's own cash flow dilemma. Such an indulgence was obviously dependent on actual completion by Terrafix of the milestones. In the event this did not occur as the sub-contracts were cancelled and the milestones were not (and could not be) completed or achieved. Such context also requires consideration of what Fremme stated elsewhere in her affidavit, as referred to above, namely that it was denied that payments were due to Terrafix at the time of the termination.'

- [37] Scatec's attempts to explain away Fremme's statement, which is consistent with Reisch's testimony, are not persuasive. Firstly, there is no clear indication that prior to Reisch's certification under the Linde LC, Scatec had taken issue with the invoices submitted to it for payment in respect of milestones allegedly achieved for anchor installations on zones 1, 2 and 3, which invoices were dated 15 and 21 November 2013 respectively. The highwater mark of any such dissatisfaction

(save for a dispute about which documents were required to be uploaded to project place) is contained in Scatec's notice of termination of the Linde subcontract dated 25 November 2013, in which it informed Terrafix that it would withhold further payments until its '*costs and damages*' had been established. Secondly, in the Lombard application before Veldhuizen J, Scatec denied that any amount was owed to Terrafix '*as a result of its breach of the subcontract*', while at the same time alleging (per Fremme) the existence of the arrangement relied upon by Reisch in his subsequent testimony. Thirdly, Fremme herself made it clear that payment in respect of invoices for anchor installations on zones 1, 2 and 3 was *not* dependent upon actual completion of the relevant milestones – but that in fact the opposite was the case. Fremme's affidavit in the Lombard application was deposed to on 3 December 2013, a week before Reisch certified on the Linde LC.

- [38] It was also Reisch's evidence that: (a) he checked with his employees on the ground in South Africa that the requisite percentage of anchors had been installed, albeit in four zones instead of three; (b) the emails from Scatec's representatives congratulating all concerned were then sent, which reassured him that all was in order; (c) he contacted his attorney to ascertain whether there was any clause in the Linde subcontract which would nonetheless preclude the relevant invoices being issued, and was advised that there was not; (d) he had regard to the terms of the Linde LC in order to satisfy himself of what was required to be submitted to secure payment; (e) he checked that the agreed period for payment by Scatec had expired; and (f) he then certified. None of this evidence could be seriously challenged.

- [39] That Scatec and Terrafix are genuinely at loggerheads over the Linde and Dreunberg subcontracts is clear. It might be that the arbitrator hearing these disputes exonerates Scatec and finds Terrafix to have breached the subcontracts. That is not the issue. The obligation of Sumitomo to make payment under the LC exists entirely independently of the underlying subcontracts between Scatec and Terrafix. Provided that the terms of the LC are met, Sumitomo must pay, unless fraud on Reisch's part is established.
- [40] Of course the possibility exists that Reisch has opportunistically seized upon the objective facts to which I have referred and found himself an escape hatch. The fact remains however that on the probabilities as they stand there is just not enough to find fraudulent intent on his part. He might have been wrong, he might even have been negligent, but I cannot find that he knew that he was wrong and that he presented the demand under the Linde LC to Sumitomo in bad faith.
- [41] Accordingly, and although Reisch made a misrepresentation in the presentation of the demand under the Linde LC to Sumitomo, the applicants have failed to show, on a balance of probabilities, that such misrepresentation was fraudulent, whether deliberate or as a result of fraudulent diligence in ignorance.
- [42] In relation to the Dreunberg subcontract Scatec contended that the milestones for product delivery in zones 1 to 3 were not achieved; and that Reisch is guilty of fraudulent diligence in ignorance by deliberately having refrained from satisfying

himself that the milestones had been achieved when he certified under the Dreunberg LC.

[43] However, what Pienaar had alleged in her founding affidavit was that:

'76. I furthermore annex marked "IP23" a stock management report emanating from Terrafix's main subcontractor, Lerumo, setting out the materials delivered to the Dreunberg site as at 25 November 2013. In reviewing this report, it is apparent that as at the said date Terrafix had not procured delivery of sufficient materials to commence construction in accordance with the schedule anywhere on site. Terrafix's own Weekly Progress Report (Week 47) for the week preceding the milestone (annexed and marked "IP24") further evidences Terrafix's failure to properly perform in terms of the relevant material delivery milestones. One need only look at the "cumulative variance" figures on pages 6 – 8 of the Weekly Progress Report, which show the backlogs in delivery of materials eg drive stations.' [emphasis supplied]

[Scatec's additional reliance on Terrafix's alleged failure to submit certain documentation in order to claim payment was abandoned at the previous hearing.]

[44] The Dreunberg LC is calibrated, *not* according to whether there were materials sufficient to commence construction, but according to percentages of the quantity of materials delivered to site.

[45] In response to this allegation Ramsauer relied on the specific invoices dated 27 November 2013 which were submitted for payment reflecting the first three percentage deliveries of product to the Dreunberg site. In reply, Pienaar only took

issue with what documents had to be submitted to claim payment. She did not contend that, in any event, Terrafix had failed to deliver in accordance with the payment milestones. This does not mean that Ramsauer was correct and Pienaar was wrong, and is but one of the issues which will be determined at the arbitration. It is however directly relevant to whether Reisch was guilty of fraudulent diligence in ignorance when he certified.

[46] In his answering affidavit, Ramsauer had also alleged that:

‘38. In any event, although Terrafix was not required to do so, Terrafix uploaded documentation to the project place in respect of the claims made in the Dreunberg invoices. What Terrafix uploaded was the same as had sufficed previously at the same stage on the Linde project in order to obtain payment. That Terrafix so uploaded documentation appears from an email addressed by Brandhuber to Scatec on 27 November 2013. I attach a copy of Brandhuber’s email in this regard marked MR15.’

[47] The email to which Ramsauer referred was addressed to various Scatec representatives (including Fremme). Its subject was *‘Invoice/Dreunberg/Delivery on Site 1+2+3’* and read *‘...please see attached for the invoices. All documents are uploaded to project place’*. Its attachments were debit notes and invoices which reflected that the first three deliveries of product on site had allegedly taken place. Again, Pienaar only took issue with the nature of the documents allegedly required by Scatec to be uploaded to project place in order for Terrafix to claim payment *and not* whether such deliveries had indeed taken place.

- [48] In an affidavit deposed to by Reisch after conclusion of argument at the previous hearing, he alleged that:

'...to my knowledge the material that is the subject of the invoices had been delivered to site and all documentation was in place, with the consequence that Terrafix was entitled to payment in respect of the invoices issued. The source of my knowledge was documentation available to me.'

- [49] During his testimony Reisch was asked about the basis on which he had certified that payment milestones on the Dreunberg subcontract had been met. It emerged that the source of his knowledge was not only '*documentation*' available to him but also discussions which he had with certain Terrafix employees.

- [50] The '*documentation*' to which Reisch had referred was the covering email from Brandhuber dated 27 November 2013 to various representatives of Scatec annexing the debit notes and invoices in question. His evidence was further that he had asked his employees whether they had submitted whatever was necessary by way of documentation and they had replied in the affirmative; that the same type of documentation had been submitted as in the Linde subcontract and that '*...my understanding was if it is good enough for Linde it should be...good enough for Dreunberg. This is why I verified the invoice.*'. Reisch's evidence was also that he had spoken to Peter Jutten, the Terrafix employee in South Africa who attended to the purchasing of product, and who knew the details of each delivery to site. Reisch's testimony was that he was told by his '*Terrafix staff that we reached these amounts, so we are entitled [to] payment*'. It was not suggested by Scatec that any staff member of Terrafix was part of a

fraudulent conspiracy or that Reisch was aware thereof. It was also not suggested that Reisch should not have relied upon the information allegedly conveyed to him by the relevant Terrafix staff members. His testimony was further that before sending the invoices he checked with his legal advisor to make sure that they could be dispatched.

[51] During argument Scatec contended that Reisch's testimony showed that he had only made the most superficial and perfunctory enquiries of his staff and legal advisors before submitting the invoices. He had not requested or had regard to important and relevant documentation (e.g. stock reports from Lerumo, or documents uploaded to project place dealing with product delivery to Dreunberg). It was also argued that Reisch's lack of interest in, and knowledge of, Terrafix's performance of its contractual obligations was such that he did not even know of the existence of weekly reports – prepared by Terrafix and/or Lerumo – dealing with product deliveries at Dreunberg. It was accordingly contended that the "verification exercise" conducted by Reisch, such as it was, could not genuinely or reasonably have satisfied a "reasonable person" certifying that the amounts claimed under the invoices were due.

[52] There is some merit in these contentions. However carelessness or negligence does not equate to an intentional avoidance of proper investigation, which is what Scatec and Itochu were required to show in order to establish Reisch's '*fraudulent diligence in ignorance*'. There is simply not enough to prove: (a) a misrepresentation; and (b) that Reisch wilfully abstained from establishing facts which he knew might cause him not to certify in good faith.

[53] It follows that Scatec and Itochu have also failed to discharge the onus that rests upon them to establish, on a balance of probabilities, that Reisch acted fraudulently in the presentation of the Dreunberg LC.

Conclusion

[54] **In the result I make the following order:**

The application is dismissed with costs, including all reserved costs orders and the costs of two counsel where employed.

J I CLOETE