IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA **CASE NO: 8331/19**

(1) REPORTABLE: NO.

(2) Of INTEREST TO OTHER JUDGES: NO

(3) DATE DELIVERED: 22/03/19

(4) SIGNATURE: .....

In the matter between:

JOINT VENTURE BETWEEN AVENG (AFRICA) PTY LTD

AND STRABAG INTERNATIONAL GmbH Applicant

and

SOUTH AFRICAN NATIONAL ROADS

AGENCY SOC LTD First Respondent

LOMBARD INSURANCE COMPANY LIMITED Second Respondent

JUDGMENT

MAKHUVELE J

Introduction

[1] The applicant, who I will henceforth refer to as ASJV instituted urgent application proceedings and sought the following relief;

'2. Pending the outcome of dispute resolution proceedings to be instituted under the provisions of the dispute resolution proceedings agreed to by the applicant and the first respondent (being based on the FIDIC Red Book (1999 edition), with particular conditions ("the contract"), to be instituted by the applicant no less than 10 days from the date of this order, an order interdicting and restraining the respondent from making a claim under:

2.1 the performance guarantee issued by Lombard Insurance Company Limited in favour of the first respondent on 8 June 2018 under guarantee no:C2017/63909 ("the performance guarantee"); and

2.2 the retention money guarantee issued by Lombard Insurance Company Limited in favour of the first respondent on 8 June 2018 under guarantee no: C2017/63910 ("the retention guarantee")

(Collectively, "the contract securities")

3. Declaring that any demand made by the first respondent on the second respondent is of no force and effect pending the outcome of the aforementioned dispute resolution proceedings.

4. Costs of this application against any respondent opposing this application.

[2] The matter came before FOURIE J and the following order was issued;

'1. The matter is removed from the roll;

2. Provided the applicant sets the matter down for hearing on Tuesday, 19 February 2019 at 10:00 or soon thereafter as counsel may be heard, and the matter is heard that week, the first respondent undertakes not to make demand, pending judgment in respect of the application, on the following:

2.1 the performance guarantee issued by Lombard Insurance Company Limited in favour of the first respondent on 8 June 2018 under guarantee no: C2017/63909 ("the performance guarantee"); and

2.2 the retention money guarantee issued by Lombard Insurance Company Limited in favour of the first respondent on 8 June 2018 under guarantee no: C2017/63910 ("the retention guarantee").

3. The issue of urgency is held over for determination by the court hearing the matter as referred to in paragraph 2, this court not having made direction in that regard; and costs of this application are held over for determination in the hearing of this application'

Indeed, the matter was set down for hearing in the week of 19 February 2019. The parties were in agreement that the matter is urgent, hence there was no need for determination of urgency and I was satisfied that it is indeed urgent.

[3] I must say that the extent of the documents filed (1108 pages) would ordinarily render the matter not legible to be heard in the normal roll, even though urgent. However, bulky as they are, the relevant portions of the documents for purposes of adjudicating the dispute properly formulated constitute less than half of the documents referred to in the affidavits and filed of record. At the hearing of the matter it became clear that the only relevant parts were the affidavits, correspondence exchanges as well as those parts of the building contract that deal with specific issues relating to the role of the Engineer, termination of the contract and consequences thereof.

[4] The first respondent, who I shall refer to henceforth as SANRAL or Employer, is opposing the relief sought. The second respondent, who I shall henceforth refer to as LOMBARD does not oppose the matter but has filed an affidavit to explain the nature or categorization of the guarantees.

[5] The legal position in South Africa is that in the absence of allegations of fraud, the contractor is not entitled to challenge payment of construction guarantees, even where there are contractual disputes in terms of the building contract.

[6] The ASJV in this matter seeks to interdict payment on the basis that SANRAL must first comply with the terms of the building contract before it can present the guarantees for payment.

[7] It is common cause that this argument constitute what is known as underlying contractual dispute, which, according to South African courts is not part of our law. It is however, part of Australian law. Cloete JA in the matter of Kwikspace Modular Buildings Ltd v Sabodala Mining Co SARL and Another 2010 (6) SA 477 (SCA)[1] summed up the position as follows;

> *[11] It therefore seems to me that it can be said with sufficient certainty that Australian law is to the following effect: a building contractor may, without alleging fraud, restrain the person with whom he had covenanted for the performance of the work, from presenting to the issuer a performance guarantee unconditional in its terms and issued pursuant to the building contract, if the Contractor can show that the other party to the building contract would breach a term of the building contract by doing so; but the terms of the building contract should not readily be interpreted as conferring such a right.*
>
> *[12] I expressly refrain from considering whether, in view of the decision of this court in Loomcraft Fabrics CC v Nedbank Ltd & another[14] (which dealt with a letter of credit) and the English decisions referred to therein, in particular the decision of the English Court of Appeal in Edward Owen Engineering Ltd v Barclays Bank International Ltd[15] (where Lord Denning MR[16] and Browne LJ[17] both said that a performance guarantee is akin to a letter of credit), there is any room for a contention that the position in South Africa should be the same as in*

[1] Footnotes were omitted.

Australia. So far as Australian law is concerned, English authority to the contrary notwithstanding, the Federal Court of Australia held as recently as 2008 in Clough Engineering:[18]

'[22] To sum up: as a matter of law in Australia, a building contract can contain provisions enforceable at the suit of the contractor which amount to preconditions to, and therefore limit, the right of the beneficiary of an unqualified performance guarantee to present it to the issuer. But even assuming in favour of the Contractor in this case that GC 5.5 requires the Principal to have an enforceable right under the contract before it is entitled to present the guarantees issued by Nedbank, it had such a right which it was entitled to assert; and no tacit term is to be incorporated into GC 5.5 obliging the Principal, in its notice to the Contractor required by that clause, to set out the grounds on which the demand will be made.

[9] The contentions before me relate to the question as to whether the void or lacuna that was left by Cloete J has now been answered, thus changing the position with regard to independence or autonomy of the construction guarantees. The extension of this argument is that our courts are not oblivious of this issue and have instead made rulings to the effect that a contractor is by right entitled to interdict the employer from presenting guarantees for payment. Unfortunately the authority that the ASJV relies on is just an order without written reasons for the judgment. It does not appear like there is any written judgment because there was no response to the challenge.

[10] Counsel for the ASJV contends that indeed the void has been filled. He referred to the judgment of the Queen's Bench in the matter of Simon Carves Ltd v Ensus UK Ltd [2011] EWHC 657 (TCC) para 33 where it was held that the beneficiary of a contract security bond can in principle be restrained from making a demand under the bond if the underlying contract makes express provision for that. It also makes reference to legal academic writing of Charl

Hugo; Construction Guarantees and the Supreme Court of Appeal 2010-2013, essays in honour of Frans Malan, Lexis Nexis, p168/170 to support the proposition that a contractor can obtain an interdict against an employer to prevent demand for payment of a bond of security, if doing so would breach a term of a building contract. This, according to applicant and authorities relied on, would not offend the principle of independence of the guarantee.

[11] On the other hand, Counsel for SANRAL maintained that this is not part of our law and that the legal precedents have not developed beyond the lacuna that was left by Cloete JA.

[12] The second respondent filed an affidavit and indicated that it will abide the decision of the court, however, it also offered to give an opinion on the nature of the guarantees.

[13] The parties are in agreement that it is not necessary for the court to make a determination with regard to whether the guarantees are on-demand or conditional (suretyship) bonds.

Background facts and basis for the relief sought

[14] The ASJV comprises of an unincorporated joint venture between a South African and German registered companies known as Aveng and Strabag International GmbH. It was awarded a tender by SANRAL for the construction of the Mtentu River Bridge on the N2 Wild Coast Toll Road.

[15] The parties entered into a construction contract in the form of a FIDIC Red Book (1999 Edition).

[16] As is usual practice with construction contracts, the ASJV was required to provide SANRAL with guarantees for proper performance of the works as well as for rectifying any defects on the works actually executed. These are known as performance and retention money guarantees.

[17] The total value of the contract was One Billion, Six Hundred and Thirty Four Million, Nine Hundred and Ninety Six Rand (R1, 634,996.00).

[18] The applicant was required to provide fifteen percent (15%) of the contract value as guarantee for proper performance of the works and ten percent (10%) thereof as retention money guarantees.

[19] The respective guarantees amounted to Two Hundred and Fourty Five Million, One Hundred and Twenty Thousand, Eight Hundred and Fourty Nine Rand and Fourty Cents (R245,120,849.40) and Eighty One Million Seven Hundred and Six Thousand Nine Hundred and Fourty Nine Rand and Eighty Cents (R81 769 49.80).

[20] The undertaking in respect of the guarantees was made by LOMBARD, and as is usual practice, the applicant also signed counter-guarantees in favour of LOMBARD which would entitle it to recover from the applicant any amount it would paid to SANRAL in the event of a claim. Each of the applicant, being an unincorporated joint venture provided its separate fifty percent (50%) share of the counter-guarantees to Lombard.

[21] The ASJV contends that it has validly cancelled the building contract due to a state of Force Majeure that persisted for eighty four (84) days. It contends further that in terms of the contract, there are certain prescribed

steps that must be followed before SANRAL can lawfully present the performance guarantees to LOMBARD for payment.

[22] It is further contended that SANRAL would be committing a breach of the building contract if it were to be allowed to present the guarantees for payment without following the prescribed procedure in the building contract, namely, consequences for termination of a contract as a result of a state of Force Majeure.

[23] SANRAL contends that the underlying contract dispute is not part of South African law, and as such, it is not prohibited from presenting the guarantees for payment whilst the parties are resolving whatever contractual dispute may be existing between them.

[24] To the extent that the ASJV is relying on termination of the contract on the basis of Force Majeure, SANRAL contends that the purported termination is invalid because there was no state of Force Majeure.

[25] As it will be seen hereunder, SANRAL did not accept the termination. Instead, it had, through the Engineer, issued an instruction to the ASJV to withdraw the termination and return to the site, failing which it indicated its intention to cancel the contract on the basis of the ASJV's repudiation thereof. The ASJV refused to withdraw the termination of the contract and indicated its intention to approach the court to assert its rights. SANRAL was requested to make an undertaking that it was not going to call up the guarantees without first giving the ASJV a fourteen day notice thereof. However, this was rejected, and a threat was issued that a demand would be made. This

prompted the launching of the current proceedings on an urgent basis as indicated above.

Chronology of events leading to the respective disputed rights to cancel the building contract

[26] The parties have filed the usual three sets of affidavits, namely, founding, answering and replying affidavit. In its answering affidavit, SANRAL has indicated its understanding of the applicant's case and also highlighted the sequence of events leading to the disputed termination of the contract. However, it appears from the replying affidavit that the ASJV challenges SANRAL's presentation of the facts. The replying affidavit is replete with 'corrections' of the sequence of events.

[27] This, in my view is not a real dispute because, save for what could have been discussed in the meetings, the essence of the dispute before me appears from the correspondence that was exchanged between 24 October 2018 and early February 2018 when the SAJV terminated the contract, the validity of which is disputed.

[28] Therefore, I deem it necessary to refer to the correspondence because the letters speak for themselves. Thereafter, I will deal with the relevant parts of the building contract.

[29] On 24 October 2018, the ASJV addressed a letter to SANRAL and notified what it referred to as stoppage of works to 'North/South Site" due to 'Third Party disruption'. The disruption of work had occurred on 22 October 2018 after a group of people stormed the site and demanded to address

management and the workforce directly, and not through the usual channels of communication, being the Public Liaison Officer (PLC).

[30] According to this letter, this work stoppage happened in the presence of the police, who were notified a day before after the ASJV received information of the imminent disruptions. Affidavits filed with the police were attached to the letter. There is also a photo album depicting the protesters, unlicensed firearms seized by the police and one identified person bearing a firearm. Subsequent to the invasion of 22 October, the ASJV received threatening emails from a group that called itself 'Practical Radical Economic Transformation'.

[31] After detailing the events of 22 October 2018, the letter concluded as follows;

> *'Due to the delay event and to protect our contractual position, the Contractor gives notice of its intention to submit a claim for 'Extension of the Time for Completion of the Works and Cost in accordance with Sub-Clause 20.1 of the Contract. The event conforms to the definition of Force Majeure as per Sub-Clause 19.1 of the Contract'.*

[32] A follow-up letter was addressed to both the Engineer and SANRAL on 31 October 2018 to advise that the disruptions were ongoing and that the ASJV regard them as Force Majeure.

[33] In this letter, the ASJV indicated that it was going to continue with execution of works that *'are not prevented and/or are capable of being executed off the Site'*. This was identified as amongst others *'administration* 'and '*procurement and logistics'*.

[34] Photographs depicting the unrest and protest of 30 October 2018 were attached. These depicted protesters blocking the main access route, billowing smoke from burning trees, firearms seized by the police as well as what has been described as police restraining the protesters.

[35] The Engineer wrote to the ASJV on 02 November 2018 and referred to a meeting that was held between the Contractor (the ASJV) and SANRAL on 31 October 2018 where it was *'mutually agreed that the progress of the Works be suspended'.*

[36] The Engineer recorded in the letter that the suspension is in terms of Sub-Clause 8.8 and was as a *'result of the disruption of the works caused by the community and other groupings, as notified by yourself in other correspondence'.* The suspension was indicated to cover the period from 22 October to 09 November 2018.

[37] The ASJV addressed another letter to the Engineer on 07 November 2018 which appears to challenge the latter's categorization of the cause of suspension of works as *'disruption of the works caused by the community and other groupings, as notified by yourselves in other correspondence'.* The ASJV maintained that the events that led to the suspension of works constituted '*Force Majeure'.*

[38] The letter also recorded that as a consequence of the Engineer's suspension in terms of Sub-Clause 8.8, the ASJV would suffer delays and /or incur Costs, and as such, it was entitled to an extension of time and payment of costs in terms of Clause 20.1 of the Contract. The ASJV also indicated its intention and notice to rely on Clause 2.1 (Right of Access) for its claim for an

extension of time and costs in the event that the Engineer and SANRAL would dispute that the events constitute 'Force Majeure'.

[39] The Engineer wrote to the ASJV again on 13 November 2018 and referred to a meeting of 09 November 2018 to confirm a further suspension of works from 09 November to 16 November 2018. No further details were given.

[40] The ASJV replied to the further suspension of works by letter dated 13 November 2018. The letter also addressed safety concerns and identified specific issues that SANRAL should address to ensure a safe environment before works could resume.

[41] On 15 November 2018 the ASJV addressed a further letter to the Engineer and SANRAL and advised them about a threatening email it had received from PRET. This organization was opposed to resumption of works at a site identified as *'Southern site in Kwakhanyayo whilst negotiations are still ongoing'*. Threats to the lives of people were made.

[42] The ASJV also requested feedback on the concerns it had raised in an earlier letter and also reiterated its view that the environment was not conducive for it to perform its contractual obligations.

[43] The ASJV submitted its Claim No.6 to the Engineer and SANRAL on 30 November 2018 in terms of Sub-Clause 20.1 of the Contract. The claim is titled *'Stoppage and Suspension of Works due to Civil Unrest by Third Parties'*. The letter also made a request to the Engineer for a determination *'in accordance with Sub-Clause 3.5 of the Contract'*.

[44] The suspension of works was extended from 17 November to 30 November by letter dated 30 November 2018 from the Engineer to the ASJV. Save for reference to a meeting that was held on 09 November and recent developments which were not explained, the letter did not give further details.

[45] The ASJV replied to the further extension of the suspension of works on 01 December 2018. It raised concerns about the retrospective suspension and intentions of the Engineer with regard to resumption of the works. It recorded that conditions had not changed to enable it to resume works on 03 December 2018 because issues that led to the Force Majeure had not been addressed despite several meetings held.

[46] The suspension of works was extended further by letter from the Engineer dated 03 December 2018. As usual, it was with retrospective effect, from 01 December to 07 December 2018.

[47] The Engineer addressed a letter to both the ASJV and SANRAL on 06 December 2018 and referred to Claim No.6 from the ASJV. The claim was evaluated against the sequence of events as indicated in the preceding correspondence. The Claim for an extension of time and costs for the period of suspension was approved, but it appears from the letter that the Engineer relied on Sub-Clause 8.9 of the Contract.

[48] The Engineer concluded the letter by making the following determinations, apparently in terms of clause 3.5 of the Contract;

' The claim for an extension of time of 30 working days (1.32 months) from 22 October 2018 to 30 November 2018 is approved.

The claim for Costs for the amount of R36 937 730.30 is not approved as these Costs are still under review.

Final Costs will be determined once the event has ended. An interim payment in terms of Sub-Clause 20.1 [Contactor's Claims] paragraph 9 of the Conditions of Contract for Costs will be made as reflected in Works Authorisation No 11'

[49] The suspension of progress of the works was further extended from 08 December to 15 December 2018 by letter dated 11 December 2018 from the Engineer to the ASJV. The reasons appear to be the initial issues and the previous meetings on the matter.

[50] In its letter dated 13 December 2018 the ASJV noted the further extension of suspension of works from 11 December and the instruction to resume on 15 December 2018 but reiterated that the instruction *'is not capable of being implemented* 'because it was still being *'prevented from performing all of its Site-related obligations under the Contract as a result of the civil commotion and unrest which have occurred since 22 October 2018 on the Site and the access routes to the Site'.*

[51] The ASJV addressed another letter to the Engineer on 14 December 2018 and referred to the latter's interim decision with regard to its Claim 6, particularly the acceptance thereof on the basis of Clause 8.9 of the Contract.

It was noted that one of the claims was accepted on the basis of the notified Force Majeure.

[52] It was further reiterated that the Engineer has not rejected or denied that the events that formed the subject matter of the claim constituted a Force Majeure and that the ASJV was entitled to claim in terms of Sub-Clause 19.4 of the Contract.

[53] The ASJV concluded the letter by reiterating that its decision not to challenge the Engineer's interim evaluation of the claim should not be construed as acceptance that the events do not constitute Force Majeure and that it is not entitled to an extension of time and claim for costs in terms of Sub-Clause 19.4 of the Contract.

[54] On 11 January 2019 the Engineer wrote another letter to the ASJV and confirmed a further suspension of the works from 15 December to 13 January 2019. Except for reference to previous correspondence, no new reasons were provided for the decision. On the same day (11 January 2019), the Engineer addressed a further letter to the ASJV and referred to a community meeting that was held on 08 January 2019 *'where a resolution was reached that work could resume on the Mtentu Bridge Site from Monday 14 January 2019'.*

[55] The ASJV was advised that the *'suspension period shall end on 13 January 2019 (inclusive) and progress of the works shall resume on 14 January 2019'.*

[56] The ASJV replied to this letter on the same day (11 January 2019). Amongst other issues, it maintained its earlier stance that *'the Force Majeure*

event cannot be considered to have come to an end until such time as the conditions on Site have been established to the point where the Works can resume without continued or persistent endangerment of personnel or interruption of activities '.

[57] An invitation was extended to the Engineer to engage with the ASJV to *'ascertain the current status of the force majeure event and to formally agree on the next steps to be taken'.*

[58] On 13 January 2019 the Project Manager extended an invitation to the parties to attend what was referred to as a *'formal welcome for the Contractor back onto the site'* meeting that had been arranged by the new PLC (Public Liaison Officer). The ASJV replied to the invitation of 14 January and agreed to attend the meeting but recorded that its attendance should not be construed *'as a resumption of works as it has not yet been established that the Site is safe'.*

[59] It appears from a letter dated 15 January 2019 from the Engineer to the ASJV that the latter did not resume works as instructed on 11 January 2019. The letter made reference to a meeting that was held on 08 January 2019 which the ASJV was alleged to have refused to attend. In this meeting, the issues that led to the suspension of the works were apparently *'overcome'.*

[60] It was further alleged that a representative of the ASJV attended the welcome meeting that was held on 14 January 2019, but that they refused to resume work as instructed *'until the issues with the Employer had been attended to and therefore the required joint examinations could not take place'.*

[61] The Engineer concluded the letter by making reference to Clause 3.3 of the Contract (Instructions of the Engineer) which obliges the ASJV to comply with an instruction. The ASJV was instructed to *'rectify the situation as the Contractor is not entitled to ignore such an instruction'.*

[62] The ASJV replied to the Engineer's letter on 16 January 2019 and outlined the sequence of events, the community meetings and correspondence exchanged. It reiterated its stance that the events that led to the notified Force Majeure subsists and consequently it was *'unable to resume works on Site'.*

[63] The ASJV concluded the letter by stating that *"Given the Force Majeure event has already subsisted for a continuous 84 day period, the Contractor is entitled to terminate the Contract and reserves its rights to do so. That notwithstanding and with the objective of engaging on what is an important issue for both the parties and indeed other stakeholders, the Contractor invites SANRAL to engage with it, on a without prejudice basis'.*

[64] It appears from a reminder letter that was sent by the ASJV on 18 January 2018 to both the Engineer and SANRAL that both did not respond to the ASJV's letter of 16 January 2019.

[65] The Engineer replied on 18 January 2019 and disputed the allegations that the events that led to suspension of the works were still in existence. Reference was made to stakeholder meetings where the issues were allegedly resolved. The Engineer undertook to supply SANRAL's response on the 16 January 2019 letter.

[66] The ASJV replied to this letter on 21 January 2019 and noted the reassurance that SANRAL would respond to its letter of 16 January 2019. It went on to address the Engineer's insistence that the conditions that led to suspension of works were no longer in existence. The SJV did not agree with this assessment and reiterated its stance that Force Majeure has occurred and was continuing.

[67] SANRAL addressed a letter to the ASJV on 21 January 2019 and replied to its letters of 11 January 2019, 13 January 2019 and 16 January 2019.

[68] With regard to the 13 January 2019, SANRAL's response was that the works were suspended on its instructions by the Engineer in terms of Clause 8.8 of the Conditions of Contract because of *'our shared concern for the safety of all staff on the Mtentu Site'*. SANRAL went on to dispute the ASJV's contention that the event was a Force Majeure. It outlined the sequence of events and the meetings held with the protesters and the community, which apparently the ASJV refused to attend. This refusal by the ASJV to attend meetings, SANRAL contended, contributed to delays in resolving the impasse. Furthermore, SANRAL disputed the allegations about safety concerns because according to it, all persons, including the Engineer and Contractor's personnel travelled safely to attend the welcome back meeting of 14 January 2019.

[69] The ASJV's letter of 13 January 2019 contained a list of requirements that SANRAL was asked to attend to in order to render the Site safe for resumption of works. SANRAL addressed these issues and reiterated the

steps that had been taken or were going to be followed up. It appears from the response that in SANRA's view the issues were no longer a hindrance to resumption of works.

[70] With regard to the letter of 16 January 2019, SANRAL agreed with the Engineer that the ASJV had failed to resume works as instructed. SANRAL reserved its right under the Contract, *'including termination'*. It accepted the invitation for further interactions and in this regard it undertook to make arrangements for a meeting.

[71] ASJV replied to this letter on 23 January 2019, but did not address the substantive issues in view of the meeting that was to take place.

[72] On the same day (23 January 2019), SANRAL addressed a letter to the ASJV and forwarded *'formal resolutions made at the community meeting held at Jama village with petitioners and other stakeholders on 09 January 2019'*.

[73] It appears from a letter from the Engineer dated 28 January 2019 addressed to the ASJV that the planned meeting between the parties did take place on 25 January 2019 and that the latter indicated that it '*had no intention to return to site and continue with progress of the Works'*.

[74] The Engineer concluded this letter by invoking the provisions of Sub-Clause 15.1 of the Contract and gave notice to the ASJV *'to make good the failure to resume the progress of the Works, within 7 days'*.

[75] SANRAL addressed a letter to the ASJV on 28 January 2019 and referred to the discussions at the meeting that was held on 25 January 2019,

particularly its stance that the conditions that led to suspension of works were no longer in existence and that the SAPS would address the safety concerns going forward.

[76] SANRAL ended the letter by stating that it was *'not in support of 'consensual 'termination and will not enter into any discussions to allow the ASJV to walk away from their contractual obligations. This is a position we stated very clearly at the meeting of 25 January 2019, which your correspondence of the same date unfortunately does not acknowledge. SANRAL believes the Contractor has no option but to return to site and to resume work immediately as instructed by the Engineer. Should the Contractor continue to refuse to return to site SANRAL will have no option but to follow the procedure laid out in Clause 15 of the Conditions of Contract'*

[77] The ASJV responded to this letter on 30 January 2019 and referred to the discussions in the meeting of 25 January 2019 and the subsequent letter from the Engineer wherein an instruction was given to it to resume works within 7 days, failing which a threat was made to invoke the provisions of Clause 15.1. It expressed its reluctance to comply with the instruction because in its view the state of Force Majeure was still in existence and it viewed the instruction as having an effect of exposing its personnel to material risk of harm or death.

[78] It was furthermore contended that the ASJV was entitled to *'a release from performance of the Contract under Law as contemplated under Sub-Clause 19.7 (Release from Performance under Law). This right is*

independent of, and additional to, the Contractor's right under Sub-Clause 19.6 [Optional Termination, Payment and Release]'

[79] The letter ended with the ASJV giving notice of termination of the Contract. The relevant parts read as follows;

'Accordingly;

1. The Contractor hereby gives notice of termination of Contract to the Employer in terms of and pursuant to Sub-Clause 19.6 [Optional Termination , Payment and Release], with the

a. execution of substantially all the Works in progress having been prevented for a continuous period of 84 days by reason of Force Majeure of which notice was given under Sub-Clause 19.2 [Notice of Force Majeure]; and

b. termination to take effect 7 days after this notice.

2. In addition to paragraph 1,the Contractor hereby, pursuant to Sub-Clause 19.7 [Release from Performance Under Law] , gives notice to the Employer that:

a. there has been and continues to be a material risk and threat of violence, unrest and disorder at and/or in the immediate vicinity of the Site with resultant indefinite risk to life and safety of personnel;

b. the Contractor is not permitted under Law or the Contract itself, to knowingly expose personnel to a material risk of harm or death by persons acting unlawfully;

c. the complex and technical nature of the Works affords no margin for disruptions in the form experienced and expected; and

d. the threat of violence, unrest and disorder at and/or near in the immediate vicinity of the Site and the related events and circumstances, as more fully detailed above and in the Contractor's numerous communications to date, effectively render the continued execution of the Works impossible and /or unlawful, in particular within the next 5 days, as required by the 15.1 Notice (the said notice having been given on Monday 28 January 2019).

The above event or circumstances is outside the control of the Parties and makes it unlawful, alternatively impossible, for the Contractor to fulfil its contractual obligations.

The Contractor, having given this notice, is (i0 entitled to be released from further performance of the Contract in accordance with and as contemplated under Sub-Clause 19.7 [Release from Performance under Law]; and (ii) discharged from further performance."

[80] The ASJV addressed another letter to SANRAL on 30 January 2019 subsequent to this termination notice and suggested a meeting to discuss management of the post-termination process. It further requested SANRAL to make an undertaking not to make a demand on the securities provided in terms of the Performance and Retention guarantees without first giving a 14 days' notice of the intention to do so. The request was based on its stance that SANRAL was, in its view, not entitled to make the demand.

[81] A further letter was addressed to SANRAL on 31 January 2019, calling on it to agree to a post-termination management process and to give an undertaking as requested in the 30 January letter. The letter provided a basis for the view that SANRAL was not entitled to make a claim against the guarantees and these were (a) that the Retention Money Guarantee was intended to serve as security for defects in the works actually carried out; and (b) SANRAL's right to call up the Performance guarantee is regulated by Sub-Clause 4.2 and limited to the circumstances listed therein, namely; (i) failure by the Contractor to extend the validity of the Performance security; (ii) failure by the Contractor to pay the Employer an amount due, as agreed or determined ; (iii) failure by the Contractor to remedy a default within 42 days after receiving the Employer's notice in that regard; and (iv) circumstances entitling termination by the Employer in terms of Sub-Clause 15.2.

[82] The ASJV further contended that SANRAL or the Engineer must first give notice in terms of Sub-Clause 2.5 if the latter considers itself entitled to any payment under or in connection with the Contract. Thereafter, the Engineer is obliged to proceed in accordance with Sub-Clause 3.5 of the

Contract and make a determination of the amount that SANRAL would be entitled to.

[83] SANRAL addressed a letter to the ASJV on 04 February and disputed its rights and basis to terminate the contract in terms of Sub-Clause 19.6 of the FIDIC Red Book. The letter detailed the sequence of events from the beginning of the unrests and protests, the community meetings and correspondence between the parties. SANRAL reiterated its position that the events did not constitute Force Majeure. It provided the ASJV an opportunity to withdraw the notice of termination and return to site as directed by the Engineer, failing which it reserved its rights to terminate the contract in terms of Clause 15.2(b).

[84] SANRAL addressed a further letter to the ASJV on the same day. It addressed the issue of the request for an undertaking not to make a claim against the guarantees. In essence, SANRAL's position was that should the ASJV not withdraw its notice of termination of the contract, that would be a repudiation of the contract, which it would accept, and as such the construction works contract would come to an end.

[85] Paragraph 8 of this letter constitutes the gist of the dispute and issues for determination in this matter, as such, I deem it appropriate to reproduce the relevant parts;

> *'8.1 The Contractor is not a party to the contracts concluded between LICL and the Employer, pursuant to which the Performance and Retention Money Guarantees, were issued;*

8.2 To the extent that any dispute may exist in relation to the underlying Construction Works Agreement, more particularly with regard to the validity or lack thereof, of the Contractor's potential termination based on what the Contractor considered to be an ongoing event of Force Majeure, is irrelevant in so far as the Employer may make any demand for payment, in respect of either the performance Guarantee, or the Retention Money Guarantee;

8.3 To that end, the Employer disputes that it may not make any lawful demand, in respect of either the Performance Guarantee and/or the Retention Money Guarantee in that the provisions of the underlying Construction Works Agreement are irrelevant to any such demand;

8.4 The terms of the respective Guarantees do not make provision for a limitation of any such demand, should same be made by the Employer, until such time that the amount has been finally determined, in accordance with the provisions of the underlying Construction Works Agreement'.

[86] SANRAL went on to outline the legal position and referred to decided cases to support its stance that the ASJV was not entitled to interfere in its relationship with the third party insurance company, in this case Lombard Insurance Company Limited (referred to LICL in the correspondence exchanged).

[87] The ASJV replied to this letter on 04 February 2019 and reiterated its stance that it was not going to withdraw the termination notice and was not

returning to the site. It indicated its intention to apply for an interdict against SANRAL with regard to the guarantees.

The relevant clauses in the Construction Contract

[88] An Engineer plays an important role in the execution, monitoring, reporting and generally resolution of disputes that may occur between an employer and a contractor. The Engineer is appointed and is by and deemed to act on behalf of the employer. The duties are prescribed in the Contract.

[89] In the present matter the appointed Engineer is HVA JV, which is constituted by a joint venture between Halcrow Group Ltd, now part of CH2M, SMEC South Africa (Pty) Ltd and Aurecon SA (Pty) Ltd.

Though appointed by the employer, an Engineer is required to consult both parties and in certain circumstances to make determinations. This is provided in Clause 3.5 that read as follows:

> *'3.5* ***Determinations***
>
> *Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.*
>
> *The Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [Claims, Disputes and Arbitration].*

[90] The circumstances under which an employer is entitled to make a claim under the Performance Security appear from clause 4.2 of the Contract which reads as follows;

> *4.2 Performance Security*
>
> *The Contractor shall obtain (at his cost) a Performance Security for proper performance, in the amount and currencies stated in the Appendix to Tender. If an amount is not stated in the Appendix t Tender, this Sub-Clause shall not apply.*
>
> *The Contractor shall deliver the Performance Security to the Employer within 28 days after receiving the Letter of Acceptance, and shall send a copy to the Engineer. The Performance Security shall be issued by an entity and from within a country (or other jurisdiction) approved by the Employer, and shall be in the form annexed to the Particular Conditions or in another form approved by the Employer.*
>
> *The Contractor shall ensure that the Performance Security is valid and enforceable until the Contractor has executed and completed the Works and remedied any defects. If the terms of the Performance Security specify its expiry date, and the Contractor has not become entitled to receive the Performance Certificate by the date 28 days prior to the expiry date, the Contractor shall extend the validity of the Performance Security until the Works have been completed and any defects have been remedied.*
>
> ***The Employer shall not make a claim under the Performance Security, expect for amounts to which the Employer is entitled under the Contract in the event of:***
>
> ***(a) failure by the Contractor to extend the validity of the Performance Security as described in the preceding paragraph, in which event the Employer may claim the full amount of the Performance Security,***
> ***(b) failure by the Contractor to pay the Employer an amount due, as either agreed by the Contractor or determined under Sub-Clause 2.5 [Employer's Claims] or Clause 20 [Claims, Disputes and Arbitration], within 42 days after this agreement or determination,***
> ***(c) failure by the Contractor to remedy a default within 42 days after receiving the Employer's notice requiring the default to be remedied, or***
> ***(d) circumstances which entitle the Employer to terminate under Sub-Clause 15.2 [Termination by Employer]. Irrespective of whether notice of termination has been given.*** *(highlighted for emphasis)*

The Employer shall indemnify and hold the Contractor harmless against and from all damages, losses and expenses (including legal fees and expenses) resulting from a claim under the Performance Security to the extent to which the Employer was not entitled to make the claim.

The Employer shall return the Performance Security to the Contractor within 2 days after receiving a copy of the Performance Certificate.

[91] The Engineer suspended the construction works in terms of Clause 8.8 of the Contract. This provision also allows the ASJV to extension of time period as well as claim for costs occasioned by the delays. The relevant Sub-Clauses read as follows;

8.8 Suspension of Work

The Engineer may at any time instruct the Contractor to suspend progress of part or all of the Works. During such suspension, the Contractor shall protect, store and secure such part or the Works against any deterioration, loss or damage.

The Engineer may also notify the cause for the suspension, if and to the extent that the cause is notified and is the responsibility of the Contractor, the following Sub-Clause 8.9, 810 and 8.11 shall not apply.

8.9 Consequences of Suspension

If the Contractor suffers delay and/or incurs Cost from complying with the Engineer's instructions under Sub-Clause 8.8 [Suspension of Work] and/or from resuming the work, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claim] to:

(a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and
(b) payment of any such Cost, which shall be included in the Contract Price.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters.

The Contractor shall not be entitled to an extension of time for, or to payment of the Cost incurred in, making good the consequences of the Contractor's faulty design, workmanship or materials, or of the Contractor's failure to protect, store or secure in accordance with Sub-Clause 8.8 [Suspension of Work].

8.10 Payment for Plant and Material in Event of Suspension

The Contractor shall be entitled to payment of the value (as at the date of suspension) of Plant and/or Materials which have not been delivered to Site, if:

(a) the work on Plant or delivery of Plant and/or Materials has been suspended for more than 28 days, and

(b) the Contractor has marked the Plant and/or Materials as the Employer's property in accordance with the Engineer's instructions.

8.11 Prolonged Suspension

If the suspension under Sub-Clause 8.8 [Suspension of Work] has continued for more than 84 days, the Contractor may request the Engineer's permission to proceed. If the Engineer does not give permission within 28 days after being requested to do so, the Contractor may, by giving notice to the Engineer, treat the suspension as an omission under Clause 13 [Variation and Adjustments] of the affected part of the Works. If the suspension affects the whole of the Works, the Contractor may give notice of termination under Sub-Clause 16.2 [Termination by Contractor].

[92] Procedures for notification of Force Majeure and its consequences is prescribed by Clause 19 which reads as follows;

19.1 Definition of Force Majeure

In this Clause "Force Majeure" means an exceptional event or circumstance:

(a) which is beyond a Party's control,

(b) which such Party could not reasonably have provided against before entering into the Contract,

(c) which, having arisen, such Party could not reasonably have avoided or overcome, and

(d) which is not substantially attributable to the other Party.

Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:

(i) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,

(ii) rebellion, terrorism, revolution, insurrection, military or usurped power or civil war;

(iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Sub-

contractors, *(Highlighted for identification purposes. ASJV relies on this provision)*

(iv) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosive, radiation or radio-activity and

(v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity

19.2 Notice of Force Majeure

If a party is or will be prevented from performing any of its obligations under the Contract by Force Majeure, then it shall give notice to the other party of the event or circumstances constituting the Force Majeure and shall specify the obligations, the performance of which is or will be prevented. The notice shall be given within 14 days after the party become aware, or should have become aware, of the relevant event or circumstances constituting Force Majeure.

The Party shall, having given notice, be excused performance of such obligations for so long as such Force Majeure prevents it from performing them.

Notwithstanding any other provisions of this Clause, Force Majeure shall not apply to obligations of either Party to make payments to the other Party under the Contract.

19.3 Duty to Minimise Delay

Each Party shall at all times use all reasonable endeavours to minimise any delay in the performance of the Contract as a result of Force Majeure.

19.4 Consequences of Force Majeure

If the Contractor is prevented from performing any of his obligations under the Contract by Force Majeure of which notice has been given under Sub-Clause 19.2 [Notice of Force Majeure], and suffers delay and/or incurs Cost by reason of such Force Majeure, the Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:

(a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and

(b) if the event or circumstances is of the kind described in sub-paragraphs (i) to (iv) of Sub-Clause 19.1 [Definition of Force Majeure] and, in the case of sub-paragraphs (ii) to (iv), occurs in the Country, payment of any such Cost.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clauses 3.5 [Determinations] to agree or determine these matters.*(Highlighted to emphasise the procedure that the ASJV should have insisted on after giving notice)*

19.5 Force Majeure Affecting Subcontractor

If any Subcontractor is entitled under any contract or agreement relating to the Works to relief from force majeure on terms additional to or broader than those specified in this Clause, such additional or broader force majeure events or circumstances shall not excuse the Contractor's non-performance or entitle him to relief under this Clause.

19.6 Optional Termination, Payment and Release

If the execution of substantially all the Works in progress is prevented for a continuous period of 84 days by reason of Force Majeure of which notice has been given under Sub-Clause 19.2 [Notice of Force Majeure], or for multiple periods which total more than 140 days due to the same notified Force Majeure, then either Party my give to the other Party a notice of termination of the Contract. *In this event, the termination shall take effect 7 days after the notice is given, and the Contractor shall proceed in accordance with Sub-Clause 16.3 [Cessation of Work and Removal of Contractor's Equipment].*

Upon such termination, the Engineer shall determine the value of the work done and issue a Payment Certificate which shall include:

(a) the amounts payable for any work carried out for which a price is stated in the Contract;

(b) the Cost of Plant and Materials ordered for the Works which have been delivered to the Contractor, or of which the Contractor is liable to accept delivery: this Plant and Materials shall become the property of (and be at the risk of) the Employer when paid for by the Employer, and the Contractor shall place the same at the Employer's disposal;

(c) any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works

(d) the Cost of removal of Temporary Works and Contractor's Equipment from the Site and the return of these items to the Contractor's works in is country (or to any other destination at no greater cost); and

(e) the Cost of repatriation of the Contractor's staff and lobour employed wholly in connection with the Works at the date of termination.

19.7 Release from Performance under the Law

Notwithstanding any other provision of the Clause, if any event or circumstance outside the control of the Parties (including, but not limited to, Force Majeure) arises

which makes it impossible or unlawful for either or both Parties to fulfil its or their contractual obligations or which, under the law governing the Contract, entities the Parties to be released from further performance of the Contract, then upon notice by either Party to the other Party of such event or circumstance:

(a) the Parties shall be discharged from further performance, without prejudice to the rights of either Party in respect of any previous breach of the Contract, and

(b) the sum payable by the Employer to the Contractor shall be the same as would have been payable under Sub-Clause 19.6 [Optional Termination, Payment and Release] if the Contract had been terminated under Sub-Clause 19.6

[93] Clause 20.2 provides for appointment of a Dispute Adjudication Board which has powers to adjudicate any dispute arising from the Contract as indicated in Clause 20.4. The envisaged disputes include *'...any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer...'*

Oral Submissions

[94] Applicant

[95] Mr Lane SC appeared on behalf of the applicant. The issues arising from the Judgment of Cloete J in the Kwikspace matter that I have referred to in the preceding paragraphs emanate from the approach that the applicant has adopted in this matter. I have already summarized the essence of the applicant's case. It is contended that SANRAL is only entitled to present Performance Security for payment under circumstances specified in Clause 4.2, namely; (a) failure by the contractor to extend the validity of the guarantees, (b) failure by the contractor to pay the employer an amount agreed upon or determined by the Engineer in terms of clauses 2.5 or 20, (c) failure by the contractor to remedy a default within 42 days of agreement or

determination; and (d) circumstances that entitle the employer to terminate the contract in terms of clause 15.2.

[96] According to the ASJV, SANRAL can call up the guarantees if it contends that it is entitled to any amount in terms of Clause 2.5 which reads as follows;

> *2.5 Employer's Claims*
>
> *If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contractor, and/or to any extension of the Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the Contractor. However, notice is not required for payments due under Sub-Clause 4.19 [Electricity, Water and Gas], under Sub-Clause 4.20 [Employer's Equipment and Free-Issue Material], or for other services requested by the Contractor.*
>
> *The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim. A notice relating to any extension of the Defects Notification Period shall be given before the expiry of such period.*
>
> *The particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself to be entitled in connection with the Contract. The Engineer shall then proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the amount (if any) which the Employer is entitled to be paid by the Contractor, and/or (ii) the extension (if any) of the Defects Notification Period in accordance with Sub-Clause 11.3 [Extension of Defects Notification Period].*
>
> *This amount may be included as a deduction in the Contract Price and Payment Certificates. The Employer shall only be entitled to set off against or make any deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause.*

[97] The amounts due are determined by the Engineer acting in terms of Clause 3.5 that I have already referred to.

[98] First Respondent

[99] Mr Watt-Pringle SC appeared on behalf of SANRAL. The stance adopted by SANRAL is that the legal principles that were left open in the judgment of Kwikspace are not part of South African law and the English cases do not assist the applicant.

[100] The only clause that can potentially prohibit demand of payment of the guarantees is 4.2, however, the principle is that the guarantees must be paid and parties can fight about the entitlement of the amount paid at a later stage. For this reason, the applicant has not shown irreparable harm and absence of a satisfactory alternative remedy.

[101] There is a wealth of authorities to the effect that guarantees are akin to letters of credit. The banks pay without knowing whether the goods are in good order or not.

[102] Other submissions were with regard to the requirements for an interdict. According to Mr Watt-Pringle the relief sought was final in effect.

[103] He also raised the argument of locust standi of the ASJV to interfere with the contractual relations it has with Lombard under circumstances where it is not a party.

[104] It was also denied that the events that gave rise to the suspension of construction works constituted 'Force Majeure'. There is no evidence that the riots continued for a continuous period of 84 days. There is no prima facie evidence of a 'Force Majeure'.

[105] He referred to the judgment of Mthiyane AP in the matter of Eskom Holdings SOC Limited v Hitachi Power Africa 139/2013 [2013] ZASCA 101 (12 September 2013) and argued that the South Africa law has not advanced beyond the lacuna that was left by Cloete JA in the Kwikspace judgment. The relevant portions of the judgment relate to a question as to whether failure to comply with a clause similar to the current 2.5 was fatal. The court held that it was not and that the High Court's insistence that Eskom should have given notice was erroneous. The guarantees could be claimed under clauses that entitled Eskom to terminate the contract.

[106] Mr Lane submitted replying heads of argument on behalf of the ASJV and specifically addressed this judgment. This judgment does not assist me because there is no certainty that the clauses in the Eskom/Hitachi contract are actually similar or the same as in the present matter. I will elaborate my view in the paragraphs below that indeed South African law has moved from the lacuna that was left open. Each case must be decided on its own merits.

[107] Second Respondent

Appearing for Lombard, Mr McAslin's contribution to the matter before me was limited to submissions relating to the nature of the guarantees. The view of Lombard is that the performance guarantee that is the subject matter of these proceedings is a 'conditional' guarantee. The parties agreed that I should not make a determination on this issue, consequently, the arguments in this regard are merely academic.

DISCUSSION

[108] ***Autonomy/independence of construction guarantees, and whether South African law has developed in line with the position in Australian law.***

[109] I agree with the submissions made on behalf of the ASJV that our courts are not oblivious of the relevance of the underlying agreement between the employer and the contractor and the effect that it may have on the rights of the former should it seek to make a claim against the guarantees.

[110] It is unfortunate that the Counsel for the applicant, Mr Lane did not produce a written judgment in the matter of Liero Civils (Pty) Ltd v Roads Agency Limpopo (SOC) and Credit Guarantee Insurance Corporation of South Africa, Case No. 24906/2018 (SGJ) to support a submission in his heads of argument that the court has ruled that a contractor is entitled as of right to seek interdictory relief against the employer from breaching the underlying contract. Absence written reasons for the order, it is difficult or impossible to comprehend the rationale for the decision.

[111] I have, on my own, as I was preparing to write this judgment researched the matter and I came across a few authorities, albeit at the level of the High Courts, that seems to suggest that the lacuna left by Cloete JA may no longer pose a difficulty that we should be afraid to confront, and close, should the relevant facts provide such a platform. My judgment on this matter does not turn on this issue, hence I did not deem it necessary to direct the attention of the parties to these matters before finalizing my judgment.

[112] Indeed, a lot has happened since 2010 when the Kwikspace judgment was issued, and as expected, parties in construction contracts, would want to utilize the modern principles to argue for a view that the contractor is entitled to interdict the employer from presenting contract guarantees for payment on the basis of a clause in the construction agreement.

[113] It may be an issue of how the legal question was initially formulated and understood in 2010 , but indeed, there is authority that suggest that our courts have ventured to answered the lacuna left, without necessarily saying so.

[114] Whether or not the answers are correct and should be considered as law is another question because as I have indicated, these are decisions of lower courts (High Courts).

[115] One such case is the judgment of Rogers J in the matter of **Granbuild (Pty) Ltd v Minister of Transport and Public Works, Western Cape and Another (5021/2015) [2015] ZAWCHC 83 (5 June 2015)**. In this matter, the applicant sought to interdict the insurer from making payment to the employer in terms of a construction guarantee. The application was based on three grounds, being;

(a) that there was a pending leave to appeal an earlier judgment between the parties with regard to a disputed cancellation of the contract. This was rejected.

(b) the interpretation of a clause that dealt with the employer's 'right of recovery' of money against the contractor. This relates to payment certificates

prepared by the Principal Agent (Engineer in this case). The amount due is certified, whereafter if the contractor does not pay, the employer is entitled to claim from the insurer. The ground was upheld.

(c) that the applicant had locus standi to seek the interdict. The court found that the applicant had an interest that was worth protecting because of the counter-guarantees that it would be called upon to satisfy in the event of a successful claim being made by the employer.

[116] One of the arguments raised to support the reasoning that the so-called 'underlying contract exclusion 'is not part of South African law is that the contractor is not part of the agreement between the employer and the insurance company. As it can be seen from the judgment of Rogers J, a contractor has an interest in the manner in which and reasons for which a guarantee is presented. I may add that this is in line with the settled principles of natural justice. The fact that a party may obtain justice later does not mean that an injustice must be allowed to happen when on the face of the facts it should not.

[117] The right to recovery clause referred to in this judgment is in my view on the same footing with the clause 2.5 and the determinations in terms of clause 3.5 that an Engineer, such as in this case would be required to do with regard to calculating the money that is due to the employer.

[118] **In** the matter of Sultzer Pumps (South Africa) (Proprietary) Limited v Covec-MC Joint Venture (1672/2013) [2014] ZAGPPHC 695 (2 September 2014), Jansen J dealt with similar questions in the context of an agreement between the parties to extend the period of validity of guarantees. The

circumstances may not be similar, but the importance of the judgment in my view is that the learned Judge examined academic writings and foreign law to arrive at a decision. This is how any aspect of local law may be developed. We cannot shy away from confronting the issues simply because courts have not expressed an opinion and ruled on the matter. Academics play an important role in the development of the law.

[119] Having said the above, it is my view that there is a need for the Higher Courts to pronounce on the so-called lacuna that has been left by Cloete JA because two of the fundamental objections (legal standing of the contractor and autonomy principle) appear to be no longer relevant. For the moment, the views expressed by the High Courts represent South African law.

[120] The facts of the matter before me do not require a pronouncement on the issue, save to state that if this was the only issue for decision, I would make a finding that the applicant has locus standi to interfere with the right of the first respondent to present the guarantees for payment. And furthermore, based on Clause 4.2 of the Contract, the first respondent would have to meet the jurisdictional factors therein before presenting the guarantees for payment. This, in my view would entitle the applicant to interdictory relief as prayed for.

[121] I must examine whether on the facts before me the applicant has made out a case for the relief sought. The declaration of rights must happen in context, and if there is no context, it becomes an academic exercise to grant the relief of declaration of rights. The context here is whether the ASJV was entitled to rely on Force Majeure for its purported cancellation of the contract.

Because there are many issues that were not canvassed in the letters exchanged, a proper and final answer to this question belongs to the dispute resolution forum created in terms of the Contract. For present purposes the applicant need only prove a prima facie case.

Whether there was a state of Force Majeure entitling cancellation of the contract

[122] I am alive to the fact that I do not have to decide the presence or absence of a state of Force Majeure. There are three main issues here; (a) whether on the facts, and having regard to the definition of what constitute Force Majeure, the applicant would succeed in the intended dispute resolution forum to prove that indeed there was a state of 'Force Majeure', (b) whether on the facts the prescribed procedures were followed. The last issue is the validity of the cancellation. This depends on the answers to (a) and (b).

[123] The difficulty that the applicant will have to overcome looking at the definition of 'Force Majeure' is the following; (a) whether the protests or unrests could not reasonably have been avoided or overcome; (b) whether these incidents are not substantially attributable to SANRAL and (c) whether the alleged 'Force Majeure' affected a substantial part of the works. It is clear from the determination of Claim 6 that 'Force Majeure' applied to one claim. The reporting was also vague, such that there is no indication of the extent of the affected areas. This should have been made clear, and absence evidence in this regard, the ASJV will face a difficulty to prove that indeed there was 'Force Majeure', as defined.

[124] It appears from the correspondence that has been attached emanating from the protesters and the local authorities that there were some agreements or undertakings made by SANRAL with regard to the source of materials and employment opportunities for the local community.

These issues are similar to those that formed the subject matter of the first application in the matter of Granbuild that was before Schippers J and pending application for leave to appeal. The undertakings that SANRAL makes with the local service providers or even in terms of economic empowerment policies often lead to dissatisfaction, resulting in the nature of protests that the ASJV has described.

[125] SANRAL repeatedly asked the ASJV to attend community meetings to resolve the dissatisfaction that was causing the unrests. From day one, the ASJV adopted a stance that the events constituted 'Force Majeure' that entitled it certain rights in terms of the contract. The Contract obliges the parties to make efforts to resolve the problems.

[126] Indeed, no efforts were made by the ASJV to at least be party to the problem solving, which, in my view could reasonably have been anticipated and planned for. The ASJV contends that SANRAL's allegations that the matter of unrests was resolved in the meeting of 08 or 09 January are false at misleading because a day later (10 January 2019) Chief Khanyayo and Headman Jama addressed to the parties and the Mbizana Local Municipality and threatened to instruct the *'people to stop any truck bringing stone to the bridge site, until ASJV starts using the quarries in Madiba area'.*

[127] Reading this letter and others directed to the parties by the local community suggest that the events giving rise to the unrests cannot, objectively assessed, be deemed as 'Force Majeure'.

[128] The next enquiry that I would undertake on this issue of Force Majeure is whether it was properly notified and dealt with in terms of the Contract. The ASJV was aware from the beginning that the Engineer was not willing to classify the events as Force Majeure and did nothing about it except to refer to it in each and every letter and reserve its rights. This is not enough. The Contract makes provision for referral of disputes that arises in the execution of the Contract to the Dispute Appeal Board. It became even clearer when Claim 6 was assessed and evaluated that there was no consensus on the classification of the events.

[129] The questions with regard to termination of the contact on the basis of 'Force Majeure' have become academic in view of what I have stated above with regard to the difficulties that the applicant will have to overcome.

The disputed cancellation of Contract and the rights of SANRAL

[130] The ASJV's refusal to return to site as instructed by the Engineer and its subsequent cancellation of the contract on the basis of Force Majeure in view of what I have stated above has no legal basis.

[131] consequently, the instruction issued by the Engineer to the ASJV to return to site was valid and the ASJV ignored it at its own peril.

[132] All this lead to one conclusion. SANRAL was justified to regard the ASJV's actions as repudiation of the Contract. It (SANRAL) will be justified to

rely on the provisions of the contract to terminate the contract and, amongst other consequences, present the guarantees for payment.

Conclusion

[133] Under the circumstances, I make the following order;

[133.1] The application is dismissed with costs.

TAN Makhuvele

Judge of the High Court

Appearances:

Applicant:	Advocate PM Lane SC
Instructed by:	Pinsent Masons South Africa Inc
	Sandton, **JOHANNESBURG**
First Respondent:	Advocate CE Watt-Pringle SC
	Advocate A Glendinning
Instructed by:	Cliffe Dekker Hofmeyr Inc
	Sandton, **JOHANNESBURG**

Second Respondent: Advocate CJ McAslin

Instructed by: Frese Moll and Partners

c/o Prinsloo Van der Linde Attorneys

Lynwood

PRETORIA