THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable
Case No: 395/2020

In the matter between:

SOUTH AFRICAN NATIONAL ROADS AGENCY SOC LIMITED **APPELLANT**

and

FOUNTAIN CIVIL ENGINEERING (PTY) LTD **FIRST RESPONDENT**

LOMBARD INSURANCE COMPANY LTD **SECOND RESPONDENT**

Neutral citation: *SA National Roads Agency SOC Limited v Fountain Civil Engineering (Pty) Ltd and Another* (395/2020) [2021] ZASCA 118 (20 September 2021)

Coram: PONNAN, SCHIPPERS, MOKGOHLOA, MOTHLE AND MABINDLA-BOQWANA JJA

Heard: 24 August 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 20 September 2021.

Summary: Law of Contract – unconditional performance guarantee – interdict to restrain beneficiary from lodging claim under guarantee – no right established

– dispute resolution – court impermissibly ordering arbitration when contract provides for mediation and litigation – appeal upheld.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Basson J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with the following order:

'The application is dismissed with costs.'

JUDGMENT

Schippers JA (Ponnan, Mokgohloa, Mothle and Mabindla-Boqwana JJA concurring):

[1] The central issue in this appeal is whether an interdict restraining the beneficiary of an unconditional performance guarantee from making a claim under it, pending an arbitration to resolve disputes arising from the execution of a building and engineering contract, should have been granted by the court below. The appeal is with the leave of this Court.

[2] On 30 September 2016 the appellant, South African National Roads Agency SOC Limited (SANRAL), and the first respondent, Fountain Civil Engineering (Pty) Ltd (FCE), concluded a contract for certain improvements to be effected to a section of the R23 Freeway near Standerton, for the sum of R352 878 309.80 (the contract). The contract was based on the standard contract for building and engineering works (Red Book 1999 edition) issued by the Fédération Internationale des Ingénieurs-Conseils (FIDIC).

[3] The contract required FCE to obtain security to the value of 10% of the contract sum, for the proper performance of its obligations. The second respondent, Lombard Insurance Co Ltd (Lombard), issued a performance guarantee on behalf of FCE in favour of SANRAL in the sum of R35 287 830.98 including VAT, for the due fulfilment by FCE of its obligations under the contract, effective until completion of the works (the performance guarantee).

[4] The relevant provisions of the performance guarantee were the following:

'3. The Guarantor undertakes and agrees to pay to SANRAL the said amount of R35 287 830.98 . . . including VAT, or such portion as may be demanded on receipt of a written demand from SANRAL, which demand may be made by SANRAL if (in your opinion and at your sole discretion), the said Contractor fails and/or neglects to commence the work as prescribed in the contract or if he fails and/or neglects to proceed therewith or if, for any reason, he fails and/or neglects to complete the services in accordance with the conditions of contract, or if he fails or neglects to refund to SANRAL any amount found to be due and payable to SANRAL, or if his estate is sequestrated or if he surrenders his estate in terms of the Insolvency Law in force within the Republic of South Africa.

4. Subject to the above and without in any way detracting from your rights to adopt any of the procedures set out in the contract, the said demand can be made by you at any stage.'

[5] In accordance with standard industry practice, Lombard protected itself by an equivalent counter-guarantee by FCE for the maximum amount of the performance guarantee. In terms of the counter-guarantee, Lombard was entitled to claim from FCE any amount paid to SANRAL under the performance guarantee. Lombard was not a party to the appeal and abided by the decision of the high court.

[6] FCE did not complete the works. On 15 October 2018 it gave SANRAL a notice of termination of the contract on the grounds that it had become impossible for FCE to fulfil its obligations under it, 'due to the community unrest, riot,

commotion, lockout and disorder in the area'; that SANRAL had misrepresented the site conditions; and that it had failed to assess multiple claims by FCE for extensions of time. FCE also informed SANRAL that it would cease all work and remove its machines and personnel from the site.

[7] After FCE had issued its termination notice, the parties engaged in discussions concerning the resumption of the works by FCE, but without success. Consequently, by letter dated 6 November 2018 FCE confirmed its election to terminate the contract. FCE alleged that the agreed date upon which its termination would take effect was 6 November 2018, following the unsuccessful engagement between the parties in October 2018.

[8] SANRAL, on the other hand, alleged that it had given FCE notice to terminate the contract on 15 May 2019, as envisaged in clause 15.2 thereof (SANRAL's notice of termination).[1] The reasons for that notice were these. Since 5 September 2018 no work had been done by FCE or its subcontractor on section km 0-4 of the R23 Freeway. The conditions that led to FCE allegedly being prevented from executing the works on that section of road, were caused by FCE's own subcontractor. FCE had demonstrated its intention not to continue performance of its obligations under the contract and had effectively abandoned the site on 31 January 2019. In SANRAL's notice of termination it informed FCE that a claim would be made on the performance guarantee.

[1] SANRAL relied on clauses 15.2(a) and (b) which read:
'The Employer shall be entitled to terminate the Contract if the Contractor:
(a) fails to comply with Sub-Clause 4.2 [*Performance Security*] or with a notice under Sub-Clause 15.1 [*Notice to Correct*],
(b) abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract. . . .'

[9] In June 2019 FCE applied to the Gauteng Division of the High Court, Pretoria (the high court), for an order restraining SANRAL from making a claim on the performance guarantee. The relevant orders sought were these:

'2. Pending the outcome of the appropriate dispute resolution proceedings under the dispute resolution provisions 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 within 21 days from the date of this order, an order interdicting and restraining the First Respondent from making a claim under the performance guarantee issued by Lombard Insurance Company Limited in favour of the first respondent on 7 November 2016 under guarantee no: C201660828;

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.'

[10] The grounds for the application were the following. A claim by SANRAL under the performance guarantee 'would be unlawful', because SANRAL was precluded from claiming any amount under the guarantee, save in the circumstances contemplated in clause 4.2 of the contract. Clause 4.2 provided:

'The Employer shall not make a claim under the Performance Security, except 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,

(d) circumstances which entitle the Employer to termination under Sub-Clause 15.2 [*Termination by Employer*], irrespective of whether notice of termination has been given.

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.'

[11] FCE expressly disavowed reliance on clause 4.2(a) and (b). Regarding clause 4.2(c), FCE alleged that it had not been issued with a notice of default which it had failed to remedy within 42 days. As a result of FCE's notice to SANRAL that it was prevented from performing its obligations under the contract due to force majeure, it was excused from performing all site-related obligations. As to clause 4.2(d), there were no circumstances which entitled SANRAL to terminate the contract in terms of clause 15.2, because FCE's termination was lawful.

[12] The right upon which FCE relied was stated thus:

'FCE has a clear negative right against a claim of security, unless such claim against it complies with the terms of the Contract, which in this case it would not.'

FCE further alleged that it had established a prima facie right to enforce the dispute resolution provisions of the contract, because there were disputes concerning its notice terminating the contract on the ground of force majeure; whether the engineer's engagement with FCE between November 2018 and February 2019 constituted compliance with clause 16.3 of the contract;[2] whether SANRAL had substantially failed to perform its obligations under the contract; and whether SANRAL had acquired any right to terminate the contract.

[2] Clause 16.3 of the contract provided:
'After a notice of termination under Sub-Clause 15.5 [*Employer's Entitlement to Termination*], Sub-Clause 16.2 [*Termination by Contractor*] or Sub-Clause 19.6 [*Optional Termination, Payment and Release*] has taken effect, the Contractor shall promptly:
(a) cease all further work, except for such work as may have been instructed by the Engineer for the protection of life or property or for the safety of the Works,
(b) hand over Contractor's Documents, Plant, Materials and other work, for which the Contractor has received payment, and
(c) remove all other Goods from the Site, except as necessary for safety, and leave the Site.'

[13] SANRAL opposed the application on the basis that it was entitled to submit a claim on the performance guarantee as contemplated in clause 4.2(b) of the contract, because FCE had admitted that it was liable to SANRAL for delay damages prior to its purported termination thereof. SANRAL alleged that clause 4.2(d) did not require it to establish an entitlement to payment in accordance with the procedure in respect of claims by the employer, set out in clause 2.5 of the contract, or a determination by the engineer as envisaged in clause 3.5. In terms of clause 4.2 of the contract, SANRAL had indemnified FCE against all damages, losses and expenses resulting from claims on the performance guarantee which SANRAL was not entitled to make. The indemnity was therefore an adequate alternative remedy to an interdict.

[14] The high court (Basson J) found that FCE had demonstrated a prima facie right to terminate the contract on the basis of force majeure due to community unrest which led to the hijacking of the site by third parties. As a result of the latter event, the court concluded that FCE had 'prima facie exercised the right to terminate the contract' or was entitled 'at least to have the legality of the termination of the contract determined by the dispute resolution mechanisms available under the contract'. The court agreed that FCE had established irreparable harm and that the balance of convenience favoured it.

[15] FCE had proposed an arbitral process to address the concern that the dispute resolution procedures agreed upon by the parties in terms of the contract (mediation and litigation) would delay finalisation of the disputes. SANRAL rejected this proposal. On 13 June 2019 the high court however made the following order:

'Pending the outcome of dispute [resolution] by means of an arbitral process to be instituted by the applicant within 21 days from the date of this order the first respondent [is] interdicted and restrained from making a claim under the performance guarantee issued by Lombard

Insurance Co Ltd in favour of the first respondent on 7 November 2016 under guarantee no: C201660828. Failing an agreement, the Arbitrator to be appointed by the Association of Arbitrators.'

[16] In her reasons for the order of 13 June 2019 furnished on 1 August 2019, Basson J said:

'The applicant, in an attempt to address the concerns that the agreed dispute resolution procedures may unduly delay the finalisation of the dispute, proposed an arbitral process. *Taking into account the concerns raised, I have proposed an arbitral process* to be instituted within 21 (twenty-one) days of this court's order.'[3]

[17] As was accepted before us on appeal, the high court had no power to compel the parties to submit to arbitration to resolve their disputes. The contract provided that the contractor (FCE) and the employer (SANRAL) had the right to refer disputes arising from it to mediation by a mediator selected by agreement between the parties. Failing such agreement, a mediator would be nominated by the President of the South African Institute of Civil Engineering on the application of either party. If the dispute was not resolved by mediation, it had to be determined by court proceedings. The effect of the high court's order referring the disputes between the parties to arbitration, was to amend the contract.

[18] FCE rightly conceded that in the light of this Court's recent decision in *Aveng*,[4] that the high court's order could not be sustained. *Aveng* was directly in point. There, the issue was whether SANRAL was precluded by an underlying FIDIC building and engineering contract, from demanding payment in terms of a performance guarantee, also issued by Lombard, in precisely the same terms as the one in this case. The Court held that the purpose of the performance guarantee

[3] Emphasis added.
[4] *Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v South African National Roads Agency SOC Ltd and Another* [2020] ZASCA 146; 2021 (2) SA 137 (SCA).

'undoubtedly was to secure SANRAL's position in the event of a dispute and pending resolution thereof';[5] that the guarantee was unconditional; that SANRAL could demand payment under the guarantee for any reason; and that the contractor's failure to complete the works on account of force majeure (as alleged in this case), did not prevent SANRAL from making a demand on the performance guarantee.[6]

[19] Faced with the difficulty that SANRAL could not be interdicted from making a demand on the performance guarantee pending the resolution of disputes under the contract, which counsel for FCE called the 'primary relief' granted by the high court, he then submitted that it would be appropriate for this Court to issue the following order:

'1. The appeal is dismissed with costs, such costs to include the cost of one counsel;

2. The order of the court a quo is set aside and replaced with the following order:

2.1 Pending the appellant's compliance with clause 4.2 (b) and/or clause 4.2(d) of the construction contract concluded between the Appellant and the First Respondent, the Appellant is interdicted from demanding payment under the performance guarantee issued by the Second Respondent in favour of the appellant on 7 November 2016 under guarantee no: C201660828; and

2.2 The Appellant is ordered to pay the costs of the application (the order sought on appeal).'

[20] Subsequently, counsel for FCE suggested that paragraph 2.1 of the order sought on appeal be amended by removing the references to clauses 4.2(b) and 4.2(d) of the contract and replacing them with clauses 15.3 and 15.4, respectively. In effect then, this Court was asked to amend the interdict granted by the high court, to read that pending its compliance with clauses 15.3 and 15.4 of the

[5] *Aveng* fn 4 para 27.
[6] *Aveng* fn 4 para 28.

contract, SANRAL was restrained from making a demand on the performance guarantee.

[21] FCE's counsel contended that the order sought on appeal could be granted, since it was a 'lesser' form of relief than the primary relief granted by the high court. The order merely provided, so it was contended, that pending a determination by the engineer (in terms of clause 15.3 of the contract) of the value of the works and any other amounts due to the contractor after a notice of termination had taken effect,[7] and a decision by the employer regarding amounts due by the contractor in respect of delay, losses and damages incurred, under clause 15.4,[8] SANRAL was precluded from invoking the performance guarantee.

[22] These contentions however do not bear scrutiny, for the following reasons. First, the high court's order restraining SANRAL from making a claim on the performance guarantee, was inextricably linked to the resolution of the disputes between the parties by arbitration. That order preserved the status quo pending the final determination of the rights of the parties in the arbitration proceedings. If the high court's order was incompetent, as FCE conceded, then it cannot stand and the appeal must succeed. This renders it unnecessary to decide whether the high court's order was interim in nature and thus not appealable (as the court

[7] Clause 15.3 provided:
'As soon as practicable after a notice of termination under Sub-Clause 15.2 [*Termination by Employer*] has taken effect, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine the value of the Works, Goods and Contractor's Documents, and any other sums due to the Contractor for work executed in accordance with the Contract.'

[8] Clause 15.4 read:
'After a notice of termination under Sub-Clause 15.2 [*Termination by Employer*] has taken effect, the Employer may:
(a) proceed in accordance with Sub-Clause 2.5 [Employer's Claims],
(b) withhold further payments to the Contractor until the costs of execution, completion and remedying of any defects, damages for delay in completion (if any), and all other costs incurred by the Employer, have been established, and/or
(c) recover from the Contractor any losses and damages incurred by the Employer and any extra costs of completing the Works, after allowing for any sum due to the Contractor under Sub-Clause 15.3 [Valuation at Date of Termination]. After recovering any such losses, damages and extra costs, the Employer shall pay any balance to the Contractor.'

seems to have accepted), or final in effect, as FCE contended. The interests of justice require that an order which cannot withstand scrutiny, should be set aside.[9] In any event, even approaching the matter as the high court did, FCE did not establish the first requirement for an interim interdict, namely a prima facie right.

[23] Second, the order sought on appeal is unsustainable on the founding papers, and is based on an entirely new case. FCE's case – that SANRAL was called upon to meet – was for an interdict restraining SANRAL from making a claim on the performance guarantee, pending the outcome of dispute resolution proceedings. Indeed, the prima facie right asserted was FCE's right to invoke the dispute resolution provisions of the contract. What is more, the founding affidavit stated that SANRAL's right to terminate the contract in terms of clause 15.2 was 'invalid' and 'bizarre'. However, the order sought on appeal proceeds from the premise that SANRAL's cancellation was valid.

[24] Third, and as was held in *Aveng*, the performance guarantee is unconditional.[10] Clause 4.2 does not require SANRAL to prove an entitlement under the contract, before it can make a demand on the guarantee. Any other construction would render meaningless the indemnity in clause 4.2, that SANRAL would reimburse the contractor for any loss resulting from a claim on the performance guarantee to which it is not entitled.[11] A claim on the guarantee is permissible, regardless of disputes under the contract.[12] In fact, FCE furnished the performance guarantee, and it was accepted by SANRAL, on the basis that it was subject to the sole approval of SANRAL.[13]

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[9] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC).
[10] *Aveng* fn 4 para 28.
[11] *Aveng* fn 4 para 26.
[12] *Aveng* fn 4 para 27.
[13] Clause 4.2 of the contract provided, in relevant part:
'The Contractor shall deliver the Performance Security to the Employer within 14 days of the date of issue of the Letter of Acceptance. The Performance Security shall be issued by a bank or insurance company . . . approved by

[25] In the result, the following order is issued:

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with the following order:

‘The application is dismissed with costs.’

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A SCHIPPERS

JUDGE OF APPEAL

the Employer . . . The Performance Security shall be subject to approval by the Employer and shall be in the form prescribed in the tender documents or in another form approved by the Employer.’

APPEARANCES

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