



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF  
APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 20 September 2021

**Status:** Immediate

*The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal*

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

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Today the Supreme Court of Appeal (SCA) handed down and upheld an appeal by the South African National Roads Agency SOC Limited (SANRAL) and set aside an interdict granted by the Gauteng Division of the High Court, Pretoria (the high court), restraining SANRAL from making a demand on an unconditional performance guarantee, pending an arbitration to resolve disputes arising from a building and engineering contract.

A contract was concluded between SANRAL and Fountain Civil Engineering (Pty) Ltd (FCE) on 30 September 2016 for certain improvements to be effected to the R23 Freeway near Standerton for the sum of R352 878 309.80 (the contract). 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).

Lombard undertook to pay SANRAL the sum of R35 287 830.98 or a portion of it on receipt of a written demand by SANRAL, that could be made at any stage, if in its opinion and at its sole discretion, FCE did not complete the works. In terms of the contract, SANRAL indemnified FCE against any loss resulting from a claim on the performance guarantee to which it was not entitled.

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 force majeure (community unrest). On 15 May 2019 SANRAL also issued a notice of termination on the grounds that the community unrest had been caused by FCE's subcontractor, and FCE had abandoned the site. FCE then successfully applied to the high court

to restrain SANRAL from making a claim on the performance guarantee, pending an arbitration to resolve the disputes arising from the contract, which included the rights of the parties to terminate it. FCE claimed that SANRAL could not make a demand on the performance guarantee unless it was entitled to do so under the contract.

The SCA held that the high court was not empowered to compel the parties to submit to arbitration. The contract provided for the settlement of disputes by mediation and failing mediation, court proceedings. The effect of the high court's order was to amend the contract. The SCA held further that the performance guarantee was unconditional: SANRAL was not required to prove an entitlement under the contract before it could make a demand on the guarantee. Any other construction would render meaningless the indemnity in the contract that SANRAL would reimburse the contractor for any loss resulting from a claim on the performance guarantee to which it was not entitled. A claim on the guarantee was permissible regardless of disputes under the contract. FCE had furnished the performance guarantee, and it was accepted by SANRAL, on the basis that it was subject to the sole approval of SANRAL and thus unconditional.