THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 577/2019

In the matter between:

JOINT VENTURE BETWEEN AVENG (AFRICA) (PTY) LTD AND STRABAG INTERNATIONAL GmbH **APPELLANT**

and

SOUTH AFRICAN NATIONAL ROADS AGENCY SOC LTD **FIRST RESPONDENT**

LOMBARD INSURANCE COMPANY LTD **SECOND RESPONDENT**

Neutral citation: *Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v South African National Roads Agency Soc Ltd and Another* (Case no 577/2019) [2020] ZASCA 146 (13 November 2020)

Coram: NAVSA, SALDULKER and MAKGOKA JJA and GOOSEN and UNTERHALTER AJJA

Heard: 14 September 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The time and date for hand-down is deemed to be 10h00 on 13 November 2020.

Summary: Contract law – performance guarantee – whether in terms of the underlying contract in this case the beneficiary under a performance guarantee was prevented from demanding payment.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Makhuvele J, sitting as court of first instance): judgment reported sub nom *Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v South African National Roads Agency Soc Ltd and Another* [2019] ZAGPPHC 97; [2019] 3 All SA 186 (GP).

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Makgoka JA (Navsa and Saldulker JJA and Goosen and Unterhalter AJJA concurring)

[1] At the heart of this appeal is whether the first respondent, the South African National Roads Agency Soc Ltd (SANRAL), is restricted by the underlying contract between it and the appellant, a joint venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH (the Joint Venture), from demanding payment in terms of a performance guarantee issued in its favour by the second respondent, Lombard Insurance Company Ltd (Lombard). The guarantee was issued pursuant to a written construction contract, concluded between SANRAL and the Joint Venture in August 2017, for the construction of the Mtentu River Bridge on the N2 Wild Coast Toll Road in the Eastern Cape.[1] I will, in due course, deal with the terms of the guarantee.

[2] In 2018 the relationship between SANRAL and the Joint Venture broke down, with each party purporting to terminate the contract. The circumstances which led to

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[1] The contract comprised of the standard form Fédération Internationale des Ingénieurs-Conseils (FIDIC) *Conditions of Contract for Construction for Building and Engineering Works designed by the Employer* (1999), the so-called FIDIC Red Book, which contains general conditions, guidance for the preparation of particular conditions, and annexes: forms of letter of tender, contract agreement and dispute adjudication agreement.

the termination of the contract are briefly these. From 22 October 2018 there were disruptions of the works by some members of the local community. Among other matters, the community demanded that the local people be employed to work on the project, and that some of the materials be sourced from local suppliers. Some of the disruptions took a violent turn, and potentially endangered life and limb of the Joint Venture's staff and workers. It is common cause that, due to the disruptions, no works were performed from 22 October 2018. The Engineer, acting on the instructions of SANRAL, suspended the works from time to time between 31 October 2018 and 13 January 2019.

[3] Against this backdrop, the Joint Venture, on 30 January 2019, gave SANRAL a notice purporting to terminate the contract, effective seven days after the notice. The Joint Venture stated that the civil unrest and commotion at the site constituted *force majeure*[2] which had prevented it from performing the works for a continuous period of 84 days.[3] Having given notice of termination, the Joint Venture considered itself entitled to be released from further performance of its obligations under the contract.[4]

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[2] In terms of sub-clause 19.1 of the contract, *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;
(iv) munitions of war, explosives 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.'

[3] In terms of sub-clause 19.6:

'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*] … then either Party may give to the other Party a notice of termination of the contract [which] shall take effect 7 days after the notice is given…'

[4] In terms of sub-clause 19.2, a party having given notice of the *force majeure* 'shall … be excused of its obligations for as long as such *force majeure* prevents it from performing them. This sub-clause should be read with sub-clause 19.7, which provides for the release from performance under law:

'[I]f 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

[4] SANRAL denied the existence of *force majeure* and asserted that, if it ever existed, it had come to an end on 9 January 2019 following a meeting with the local community. It had communicated this to the Joint Venture and instructed it to resume the works on 14 January 2019, which it refused to do. Accordingly, SANRAL contested the Joint Venture's entitlement to terminate the contract. It gave the Joint Venture until 4 February 2019 to withdraw its notice of termination and to return to site, failing which SANRAL would itself exercise its right to terminate the contract. On 5 February 2019, after the Joint Venture failed to return to site, SANRAL also purported to terminate the contract. The dispute as to whether the disruptions at the construction site constituted *force majeure*, which entitled the Joint Venture to terminate the contract, was referred to arbitration in terms of clause 20 of the General Conditions of the Contract, read with the Particular Conditions.[5]

[5] In the wake of the second purported termination of the contract, the Joint Venture sought SANRAL's assurance that, pending the arbitration proceedings, it would not call up the guarantee. SANRAL not only declined to give such assurance but notified the Joint Venture of its intention to do so. As a result, the Joint Venture applied to the court a quo, the Gauteng Division of the High Court, Pretoria, for an interlocutory interdict, restraining SANRAL from calling up the guarantee, pending the outcome of the arbitration proceedings. The Joint Venture asserted that SANRAL's call on the guarantee would be unlawful, as it had not met certain conditions in the underlying contract which limited its right to call up the guarantee. I shall refer to those conditions later.

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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.'

[5] We were informed by counsel during the hearing of the appeal that the arbitration had not yet taken place.

[6] The application came before Makhuvele J.[6] The learned judge did not decide the Joint Venture's assertion that SANRAL's right to call up the guarantee was limited in the underlying contract. She remarked, however, that had that been the only issue for determination, she would have decided it in favour of the Joint Venture.[7] She concluded that, on the facts of the case, the Joint Venture had failed to make out a prima facie case that the disruption of the works constituted *force majeure*.[8] Accordingly, Makhuvele J dismissed the Joint Venture's application with costs, but subsequently granted it leave to appeal to this court. Lombard did not take part in the appeal and filed a notice to abide the decision of this court.

[7] Before I consider the Joint Venture's submissions before us, it is necessary to restate our jurisprudence on the nature and effect of letters of credit (which applies equally to performance guarantees). Our law is well settled, and firmly recognises the autonomy principle, ie the autonomy of the performance guarantee from the underlying contract. The principle is best expressed in the oft-quoted passage from Lord Denning MR's speech in *Edward Owen*:[9]

'A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is where there is a clear fraud of which the bank has notice.'

[8] Thus, in *Loomcraft*,[10] with reference to *Edward Owen* and other decisions, Scott AJA explained at 815G-J:

'The unique value of a documentary credit, therefore, is that whatever disputes may subsequently arise between the issuing bank's customer (the buyer) and the beneficiary under the credit (the seller) in relation to the performance or, for that matter, even the existence of the underlying contract, by issuing or confirming the credit, the bank undertakes to pay the

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[6] The judgment of Makhuvele J is reported as *Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v South African National Roads Agency Soc Ltd and Another* [2019] ZAGPPHC 97; [2019] 3 All SA 186 (GP).
[7] Ibid para 120.
[8] Ibid para 122 *et seq*.
[9] *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 All ER 976 (CA) 983b-d.
[10] *Loomcraft Fabrics CC v Nedbank Ltd and Another* 1996 (1) SA 812 (A).

beneficiary provided only that the conditions specified in the credit are met. The liability of the bank to the beneficiary to honour the credit arises upon presentment to the bank of the documents specified in the credit, including typically a set of bills of lading, which on their face conform strictly to the requirements of the credit. In the event of the documents specified in the credit being so presented, the bank will escape liability only upon proof of fraud on the part of the beneficiary.'

[9] *Loomcraft* was followed in a long line of decisions, which have consistently recognised the autonomy principle.[11] The Joint Venture accepted this principle. However, it submitted that our law should be developed to recognise an exception, so that, where the underlying contract restricts or qualifies a beneficiary's right to call up the guarantee, a contractor is entitled to interdict a beneficiary from doing so until the conditions in the underlying agreement have been met (the underlying contract exception). As I have already said, the Joint Venture asserted that the proposed exception would apply to the performance guarantee currently before us.

[10] The exception relied upon by the Joint Venture has received some attention in our jurisprudence. It was, for example, mooted in *Union Carriage and Wagon Co Ltd v Nedcor Bank* 1996 CLR 724 (W). The Full Court there remarked, obiter,[12] that if it was agreed between a beneficiary and a contractor in the underlying contract not to draw on the letter of credit before a specific event, and the beneficiary nevertheless sought to exact payment, it could be guilty of fraud. The question did not arise in that case as there was no allegation of such an agreement. In both *Sultzer Pumps*[13] and

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[11] See, for example, *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd and Others* [2009] ZASCA 71; 2010 (2) SA 86 (SCA) paras 20-21; *Minister of Transport and Public Works, Western Cape and Another v Zanbuild Construction (Pty) Ltd and Another* [2011] ZASCA 10; 2011 (5) SA 528 (SCA); *Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd* [2011] ZASCA 149; 2012 (2) SA 537 (SCA) para 15; *Guardrisk Insurance Company Ltd and Others v Kentz (Pty) Ltd* [2013] ZASCA 182; [2014] 1 All SA 307 (SCA) para 14; *FirstRand Bank Ltd v Brera Investments CC* [2013] ZASCA 25; 2013 (5) SA 556 (SCA) para 2; *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association* [2013] ZASCA 202; 2014 (2) SA 382 (SCA) paras 12-13 and 25, which overturned the majority decision of Bertelsmann AJA in *Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others NNO* [2010] ZASCA 137; 2011 (1) SA 70 (SCA) paras 40-41 and approved the view of the minority (per Cloete JA) which had followed the decisions referred to above (see paras 64-65).

[12] *Union Carriage and Wagon Co Ltd v Nedcor Bank* 1996 CLR 724 (W) at 735.

[13] *Sulzer Pumps (South Africa) (Pty) Limited v Covec-MC Joint Venture* [2014] ZAGPPHC 695.

Granbuild[14] the respective high courts found that the prohibition on the beneficiaries from calling up the guarantees arose from the terms of the guarantees themselves, and not from the underlying contracts. Therefore, the issue did not arise directly in those cases.

[11] In *Kwikspace*[15] this court was enjoined, by the contract between the parties, to apply Australian law. Cloete JA concluded after an excursus on Australian law that, in Australia, a contractor may restrain a beneficiary from making demand on a performance guarantee if the contractor can show the beneficiary would breach a term of the building contract by doing so. At para 11 he said the following:

'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] Recent Australian authorities have continued on the path identified above. See, for example, *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd* [2015] VSCA 98. There, with reference to *Fletcher Construction Australia Ltd*,[16] *Clough Engineering*[17] and *Lucas Stuart*,[18] the Victoria Court of Appeal (at paras 19-24) emphasised the importance of identifying the commercial purposes for which a guarantee was furnished when interpreting its provisions, namely to provide security and, perhaps in addition,[19] to allocate the risk as to who, between the employer and the contractor, shall be out of pocket pending resolution of a dispute.

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[14] *Granbuild (Pty) Ltd v Minister of Transport and Public Works, Western Cape and Another* [2015] ZAWCHC 83.
[15] *Kwikspace Modular Buildings Ltd v Sabodala Mining Co Sarl and Another* [2010] ZASCA 15; 2010 (6) SA 477 (SCA).
[16] *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd* [1998] 3 VR 812.
[17] *Clough Engineering Ltd v Oil & Natural Gas Corporation* Ltd [No 3] (2008) 249 ALR 458.
[18] *Lucas Stuart Pty Ltd v Hemmes Hermitage Pty Ltd* [2010] NSWCA 283.
[19] See Callaway JA's observations in *Fletcher Construction* (above fn 16) at 826-827:
'There are broadly two reasons why the beneficiary may have stipulated for a guarantee. One is to provide security. If it has a valid claim and there are difficulties about recovering from the party in default, it has recourse against the bank. The second reason, which is additional to the first, is to allocate the

[13] At para 25 the court remarked:

'The fact that a performance bond is intended to operate as a risk allocation device is not, of course, necessarily determinative of the right of a party to have recourse to it. It may be subject to a contractual qualification or limitation upon the circumstances in which recourse may be had.'

[14] In September this year, in *Uber Builders and Developers*,[20] Nichols J restated the position as follows:

'Where the contract does impose a condition on the right to access the security, the party seeking to restrain recourse must establish the existence of a serious question to be tried as to whether the beneficiary has in fact met the contractual requirements.'[21]

[15] English law appears to have followed the same path, too. Eveleigh LJ in *Potton Homes Ltd v Coleman Contractors Ltd* (1984) 28 BLR 19 CA at 28 made the following obiter remarks:

'As between buyer and seller the underlying contract cannot be disregarded so readily. If the seller has lawfully avoided the contract prima facie, it seems to me he should be entitled to restrain the buyer from making use of the performance bond. Moreover, in principle I do not think it possible to say that in no circumstances whatsoever, apart from fraud, will the court restrain the buyer. The facts of each case must be considered. If the contract is avoided or if there is a failure of consideration between buyer and seller for which the seller undertook to procure the issue of the performance bond, I do not see why, as between seller and buyer, the seller should not be unable to prevent a call upon the bond by the mere assertion that the bond is to be treated as cash in hand.'

[16] 27 years later, in *Simon Carves Ltd v Ensus UK Ltd*[22], the same conclusion was reached. Simon Carves was employed by Ensus to construct a bioethanol plant.

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risk as to who shall be out of pocket pending resolution of a dispute. The beneficiary is then able to call upon the guarantee even if it turns out, in the end, that the other party was not in default. It is a question of construction of the underlying contract whether the guarantee is provided solely by way of security or also as a risk allocation device. Remembering that we are speaking of guarantees in the sense of standby letters of credit, performance bonds, guarantees in lieu of retention moneys and the like, the latter purpose is often present and commercial practice plays a large part in construing the contract.'

[20] *Uber Builders and Developers Pty Ltd v MIFA Pty Ltd* [2020] VSC 596.

[21] Ibid para 26. (Footnotes omitted.) See also *Dedert Corporation v United Dalby Bio-Refinery Pty Ltd* [2017] VSCA 368 and *Siemens Gamesa Renewable Energy Pty Ltd v Bulgana Wind Farm Pty Ltd* [2019] VSCA 318.

[22] *Simon Carves Ltd v Ensus UK Ltd* [2011] EWHC 657 (TCC).

In terms of the contract, Simon Carves provided an unconditional, autonomous performance bond as security for its performance of the contract. A dispute arose between the parties in respect of the underlying contract. Simon Carves sought and obtained an injunction preventing Ensus from making a call on the bond. The head of the Technology and Construction Court, Akenhead J, held that unless fraud is established, a court will not prevent a bank from paying out on a demand bond provided the conditions of the bond itself have been complied with (such as formal notice in writing). 'However', noted the learned judge, 'fraud is not the only ground upon which a call on a bond can be restrained by injunction'.[23] If the underlying contract clearly and expressly prevents the beneficiary from making a demand under the bond, it can be restrained by the court from making a demand under the bond.

[17] For present purposes, I am willing to assume that there is room in South African law to follow the same path as that taken in Australian and English law, with the clear caveat expressed at the end of para 11 in *Kwikspace*.[24] The caveat will often provide the basis to resolve the inherent tension between a performance guarantee, framed without conditionality, and usually required in circumstances such as these, and an underlying contract that contains some asserted restriction. Furthermore, given the significance of performance guarantees and letters of credit in international trade and commerce, such claims as are made by the Joint Venture in relation to the underlying contract, should be approached with caution.

[18] I turn, first, to the provisions of the performance guarantee, before considering the relevant provisions of the underlying contract. In relevant parts, the guarantee reads as follows:

'3. The Guarantor [Lombard] undertakes and agrees to pay SANRAL the … amount of R 245 120 849.40 … 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 [the Joint Venture] 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

[23] Ibid para 33.
[24] *Kwikspace* (above fn 15).

conditions of the 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. The said amount … including VAT, or such portion as may be demanded may be retained by SANRAL on condition that after completion of the service, as stipulated in the contract, SANRAL shall account to the guarantor showing how this amount has been utilised and refund to the guarantor any balance due.

6. This guarantee is neither negotiable nor transferable and

(a) must be surrendered to the guarantor at the time when SANRAL accounts to the guarantor in terms of clause 5 above;

(b) shall lapse upon the issue of the Taking Over Certificate in terms of sub-clause 10.1 of the Conditions of Contract; and

(c) shall not be interpreted as extending the guarantor's liability to anything more than payment of the amount guaranteed.'

[19] As to the provisions of the underlying contract, the Joint Venture relies on sub-clause 4.2, read with sub-clauses 2.5 and 3.5 thereof. Sub-clause 4.2 regulates the circumstances in which SANRAL is permitted to make a demand under the performance guarantee. The relevant provisions of sub-clause 4.2 read as follows:

'The employer [SANRAL] shall not make a claim under the performance security, except for an amount to which the employer is entitled under the contract in the event of:

(a) failure by the contractor [the Joint Venture] to extend the validity of 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 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.'

[20] It is common cause that sub-clauses (a), (b) and (c) are not applicable. The Joint Venture relied on sub-clause 4.2(d). The 'circumstances which entitle the employer to termination under sub-clause 15.2' referred to in that sub-clause are where SANRAL cancelled the contract either on the basis that the Joint Venture: failed to comply with a notice to correct; had abandoned the works; or demonstrated its intention not to continue performance of its obligations. The Joint Venture raised two contentions in relation thereto.

[21] First, it submitted that the force of SANRAL's cancellation on 5 February 2019 is diminished by its own cancellation on 30 January 2019 on the basis that *force majeure* prevented the execution of the works. Thus, so went the submission, if it succeeds in an arbitration presently pending to prove *force majeure*, and the consequent lawfulness of its cancellation, SANRAL would then be precluded from being able to comply with sub-clause 4.2(d). This, according to the Joint Venture, would be so because circumstances would never have existed which could entitle SANRAL to cancel the contract in terms of clause 15.2.

[22] I do not agree with the Joint Venture's submission. The entitlement that is referenced is not one established under the dispute resolution provisions of the contract. That would contradict the clear wording in the indemnity in clause 4.2. The indemnity compels the interpretation that when clause 4.2 refers to an entitlement it means no more than the employer's claim to an entitlement under one or the other of (a)–(d). So interpreted, SANRAL's entitlement to claim under the performance security is met because there is no dispute that SANRAL claimed to be entitled to cancel the agreement. That the Joint Venture has contended otherwise by reason of *force majeure* entails no limitation of SANRAL's entitlement to enforce the performance security.

[23] The Joint Venture's prospects of success in the pending arbitration is of no moment. In *Dormell*[25] the parties had referred the dispute regarding the cancellation of the contract to arbitration. By the time the appeal was heard in this court, the arbitrator had determined that the employer was at fault regarding the cancellation of the contract. The majority held that, in light of the arbitrator's determination, the contractor's guarantee could no longer be validly enforced. The issue had therefore, in the view of the majority, become academic. The appeal was dismissed on this ground.[26] The minority disagreed and held that the fact that an arbitrator had determined that the employer was not entitled to cancel the contract, binds the employer ─ but only *vis-à-vis* the contractor.[27] In *Coface*,[28] this court held that the majority decision in *Dormell* was 'clearly wrong'.[29]

[24] The Joint Venture also relied on the stipulation that there must be 'an amount to which SANRAL is entitled under the contract' for SANRAL to make a call on the guarantee. According to the Joint Venture, 'an amount' can only accrue to SANRAL by way of clause 2.5 of the contract. That clause, titled 'Employer's Claims', reads:

'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…

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].

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[25] *Dormell Properties* (above fn 11).
[26] Ibid paras 45-46.
[27] Ibid paras 64-65.
[28] *Coface South Africa Insurance Co* (above fn 11).
[29] Ibid para 25.

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.'

[25] The Joint Venture submitted that SANRAL had to establish a factual basis for its entitlement to make a call on the performance guarantee, and that it should be precluded from demanding payment under the guarantee until that basis is established. The Joint Venture pointed to the above clauses as being indicative of the parties' intention to qualify SANRAL's entitlement to make a call on the performance guarantee, and to limit that entitlement to instances where SANRAL is entitled to an amount under the contract through the application of clauses 2.5 and 3.5, and SANRAL is, among others, in a position to cancel the contract. In sum, the Joint Venture asserted that the trigger events in the guarantee have not arisen.

[26] What should also be borne in mind is the effect of the indemnity provision in clause 4.2, which provides that SANRAL shall indemnify the Joint Venture to the extent that SANRAL was not entitled to make the claim. Thus, it is contemplated that SANRAL might make a demand in circumstances where it is subsequently established that it was not entitled to do so. Thus, properly construed, clause 4.2 does not need SANRAL to prove its entitlement to make the demand at the time such demand is made. If it elects to make the demand, it does so at its own risk that it might subsequently be required to repay the Joint Venture. Any contrary construction would render the indemnity provision meaningless.

[27] Clause 2.5 is to the effect that, for SANRAL to make a call on the performance guarantee, it must act in the bone fide belief that it is entitled to payment under the provisions of the agreement. Whether it is in fact so entitled is immaterial at the time that the call is made. There is no suggestion that SANRAL's call is actuated by malice or that its stance, that it is entitled to payment, is far-fetched. Regard must also be had to the purpose for which the performance guarantee was provided, which undoubtedly was to secure SANRAL's position in the event of a dispute and pending resolution thereof.

[28] As stated above, the guarantee is an unconditional one. Its wording is instructive: Lombard was obliged to pay 'on receipt of a written demand' from SANRAL, which could be made if, in SANRAL's 'opinion and … sole discretion', the Joint Venture had failed and/or neglected to commence the work as prescribed, or if it had failed and/or neglected to proceed therewith, '*or if, for any reason*, [it] fails and/or neglects to complete the services in accordance with the conditions of the contract' [italics supplied]. The catch-all provision, *viz.* 'any reason', is important. The Joint Venture's failure to complete the project, be it due to *force majeure* or otherwise, falls into this category. In other words, the reason for such failure is irrelevant. That the Joint Venture considered itself to have been prevented by *force majeure* is immaterial as far as this provision is concerned.

[29] In *Eskom Holdings Soc Ltd v Hitachi Power Africa (Pty) Ltd and Another* [2013] ZASCA 101, this court had to construe a guarantee with similarly worded provisions to clauses 4.2 and 2.5 presently before us. The *Hitachi* clause 2.5 was differently worded to the one under consideration in two minor respects. Whereas the present clause provides that the notice shall be given as soon as practicable after SANRAL became aware of the event or circumstances giving rise to the claim, the *Hitachi* clause was silent in this respect. The second difference relates to the role of the engineer, to determine the amount to which Eskom was entitled. There was no such provision in the *Hitachi* clause.

[30] The contractor advanced a similar argument to that of the Joint Venture, namely that the employer, Eskom, was prohibited from making a demand on the performance guarantee as it had not complied with similar clauses to the ones under consideration. Mthiyane AP rejected the argument, and made the following trenchant observations at paras 17 and 18 about these clauses:

'Finally under the requirement of notice provisions of clause 2.5, it has relevance only in relation to a claim under the guarantee made in terms of sub-clause 4.2(b), dealing with the circumstances entitling the employer to terminate under sub-clause 15.2, irrespective of whether notice of termination has been given.

The requirements of clause 2.5 are not to be read into the whole of clause 4.2 – as did the high court – otherwise the specific reference to clause 2.5 in sub-clause 4.2(b) would become

tautologous. Eskom in this regard makes no claim for payment under the construction contract, but in exercising a right which it has, under the construction contract, to make demand upon the Bank in terms of the guarantees themselves. Hence the obligation to pay arises from the terms of the guarantee and not from the conditions of the construction contract to which the Bank is not a party. Furthermore, the provisions of the guarantees, which gives rise to an entirely separate cause of action to which Hitachi is not a party, do not incorporate whether by reference or at all, clause 2.5 of the construction contract nor any like provision.'

[31] The Joint Venture sought to distinguish the *Hitachi* provision equivalent to the present clause 2.5 on two bases. First, that in that case an application for an interdict was made after demand had been made in terms of the performance guarantees. In my view this makes no difference. The issue is one of principle rather than of procedure. Second, the Joint Venture submitted that there are material differences between the present clause 2.5 and the *Hitachi* equivalent. I have already shown that those differences are not material. *Hitachi* is therefore not distinguishable.

[32] The Joint Venture has failed to show that the parties had intended anything other than that SANRAL would be entitled to payment before any underlying dispute between them is determined. Accordingly, the appeal must fail. The following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

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T M Makgoka

Judge of Appeal

APPEARANCES:

For Appellant:	PMM Lane SC (with him CJ Mc Aslin) Instructed by: Pinsent Masons South Africa Inc, Sandton Lovius Block, Bloemfontein.
For First Respondent:	CE Watt-Pringle SC (with him A Glendinning and S Tshikila) Instructed by: Cliffe Dekker Hofmeyr Inc, Sandton Symington de Kok, Bloemfontein.