THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY

JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

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STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

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)

Today, the Supreme Court of Appeal (the SCA) dismissed the appeal by the Joint Venture between Aveng (Africa) Pty (Ltd) and Strabag International Gmbh (the Joint Venture) against the order of the Gauteng Division of the High Court, Pretoria, which dismissed the Joint Venture's application for an interdict restricting the South African National Roads Agency Soc Ltd (SANRAL) from demanding payment in terms of a performance guarantee issued in its favour by 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. The relationship between the Joint Venture and SANRAL broke down, and each of the parties purported to terminate the contract. The dispute as to who was lawfully entitled to terminate the contract was referred to arbitration in terms of the provisions of the contract. The Joint Venture applied to the high court to restrain SANRAL from demanding payment from Lombard in terms of the performance guarantee, pending the outcome of the arbitration proceedings. The Joint Venture contended that the underlying contract between the parties restricted Sanral's right from calling up the performance guarantee. The high court did not decide the issue, and instead considered the application on the basis that the Joint Venture had not made out a prima facie case for an interdict. It accordingly dismissed the Joint Venture's application.

On appeal, the Joint Venture contended that our law should be developed to recognise an exception 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).

After a survey of English and Australian law, the SCA assumed, for the purposes of the appeal, that there was room in South African law to follow the same path as that taken in English and Australian law, with the clear caveat expressed in para 11 of *Kwikspace Modular Buildings Ltd v Sabodala Mining Company Sarl and Another* [2010] ZASCA 15; [2010] 3 All SA 467; 2010 (6) SA 477 (SCA), namely that: 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.

The court pointed out that 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.

The court then interpreted the provisions of the performance guarantee together with the relevant provisions of the underlying contract and concluded that the Joint Venture had failed to show that the parties had intended anything other than that SANRAL would be entitled to payment before any underlying dispute between them was determined. Accordingly, the court, per Makgoka JA (with Navsa and Saldulker JJA and Goosen and Unterhalter AJJA concurring) dismissed the appeal with costs.

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