



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 8331/19

(1)	Reportable: No
(2)	Of interest to other judges: Yes
(3)	Date heard: 14/05/19
(4)	Date delivered: 17/05/19
(5)	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 ON LEAVE TO APPEAL

MAKHUVELE J

[1] After making positive findings on the question as to whether SANRAL is bound to comply with the terms of the building contract before it can present the construction guarantees for payment, I nevertheless proceeded to dismiss the relief sought in the Notice of Motion on the basis that the applicant was unlikely to succeed in the intended dispute resolution proceedings with regard

to its right to cancel the contract on the basis that there was a state of *force majeure*.

[2] This application for leave to appeal is mainly based on the approach that I adopted in reaching my decision to dismiss the application. The main issue is that I should not have made findings of fact with regard to the existence of the dispute because the *prima facie* right that the applicant sought to protect was the proper implementation of the terms of the contract.

[3] In essence, the argument in this application for leave to appeal is that I should not have gone beyond answering the legal question with regard to the independence or autonomy of the construction guarantees.

[4] This being an application for leave to appeal, I am not required, at this stage, to justify my judgment or offer an interpretation thereof but only to consider whether there is substance in the arguments advanced by the applicants that would justify granting leave to appeal.

[5] Section 17(1) of the Superior Courts Act, No 10 of 2013 reads as follows:

"Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties "

[6] Section 16(2)(a) referred to in section 17(1)(b) refers to the issues that would have no practical effect or result at the time of hearing of the appeal. The issues arising from this matter do not fall in the ambit of this subsection.

[7] Whilst I continue to believe that the approach that I adopted was correct, I am also of the view that there is substance in the argument that the *prima facie* right that would have entitled the applicant to the relief sought is the very legal question that I have answered in its favour, but decided that it was not dispositive of the application because of the difficulties relating to existence of the state of *force majeure*.

[8] Should the approach that I have adopted in reaching my decision be incorrect as contended for by the applicant, it means that the application would have succeeded on the basis of the pronouncements that I made on the legal questions arising from what is referred to as the '*lacuna*' that has been left open in the judgment of Cloete JA in the matter of Kwikspace Modular Buildings Ltd v Sobodala Mining Co SARL and Another 2010 (6) SA 477 (SCA).

[9] I am therefore satisfied that the arguments advanced on behalf of the applicant have substance and are important and do meet the threshold for granting of leave to appeal. Furthermore, I agree with the submissions that they deserve the attention of the Supreme Court of Appeal. The first respondent's counsel also agreed that should the application be successful, leave to appeal should be granted to the Supreme Court of Appeal.

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

[10.1] The applicant is granted leave to appeal the whole of the judgment and order to the Supreme Court of Appeal.

[10.2] The costs of this application shall be costs in the appeal.


TAN Makhuvale

Judge of the High Court

APPEARANCES**Appearances:****Applicant:**

Instructed by:

Advocate JG Wasserman SC

Pinsent Masons South Africa Inc

Sandton

JOHANNESBURG**First Respondent:**

Instructed by:

Advocate CE Watt-Pringle SC

Advocate A Glendinning

Advocate S Tshikila

Cliffe Dekker Hofmeyr Inc

Sandton

JOHANNESBURG