THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 234/2015

In the matter between:

RUMDEL CONSTRUCTION (CAPE) (PTY) LTD/
EXR CONSTRUCTION HOLDINGS (PTY) LTD/
MAZCON JOINT VENTURE **APPELLANT**

and

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

Neutral Citation: *Rumdel Cape v SA National Roads Agency* (234/2015) [2016] ZASCA 23 (18 March 2016)

Coram: Maya AP, Leach, Seriti, Pillay and Mathopo JJA

Heard: 16 February 2016

Delivered: 18 March 2016

Summary: Declaratory order – should not be issued where dispute has become only of academic interest and where rights of the parties are not determined.

ORDER

On appeal from: KwaZulu-Natal Local Division, Durban (Lopes J sitting as court of first instance):

The appeal is struck from the roll, with costs.

JUDGMENT

Leach JA (Maya AP, Seriti, Pillay and Mathopo JJA concurring)

[1] The appellant is a joint venture between two civil engineering companies. In December 2010, it contracted with the respondent, a State owned company responsible for the construction and renovation of the national roads system in this country, to effect improvements to what is commonly known as the 'Umgeni Road Interchange' at the intersection of the N2/M19 roads in the vicinity of Springfield, Durban. The project was a substantial one, the agreed contract price having been in excess of R352 million. The appellant subsequently applied to the KwaZulu-Natal High Court, Durban for an order that, inter alia, directed the respondent to pay it an additional monthly cost of R926 000 (excluding VAT) as from 4 June 2014 until completion or termination of the contract, so as to enable the respondent to secure the construction site and protect its workers against violence on the part of local residents. The

application was dismissed. With leave of the court a quo, the appellant appeals to this court.

[2] The parties' construction agreement was recorded largely in the form of an extensive and voluminous standard form contract.[1] Although it was specifically recorded therein that the appellant could draw its local labour requirements from the whole of the eThekwini Metropolitan Municipal area, the appellant undertook to involve community participation and the 'engagement and training of labour recruited from local communities'. The contract work entailed the construction of what is described as multi-levelled curved flyovers and appurtenant works linking up with or crossing over the N2 and M19 roadways ─ simply put, an extremely large clover-leaf intersection. The site was thus both large and disjointed, comprising substantial areas both to the east and west of the N2 and north and south of the M19 roadway.

[3] Under general condition 4.1 of the contract, the appellant, as contractor, was 'responsible for the adequacy, stability and safety of all site operations and of all methods of construction'. In addition, general condition 4.8 required the appellant to:

'(a) comply with all applicable safety regulations,
(b) take care for the safety of all persons entitled to be on the Site,
(c) use reasonable efforts to keep the Site and Works clear of unnecessary obstruction so as to avoid danger to these persons,
(d) provide fencing, lighting, guarding and watching of the Works . . . and

[1] The conditions of contract for construction (1999 ed) prepared by the International Federation of Consulting Engineers, as amended, together with additional amendments prescribed by the South African National Road Agency Limited.

(e) provide any Temporary Works (including roadways, footways, guards and fences) which may be necessary, because of the execution of the Works, for the use and protection of the public and of owners and occupiers of adjacent land.'

[4] The contract also made provision for the possibility of what might be referred to as civil commotion. Thus, eg, general clause 17(3)(c) provided that 'riot, commotion or disorder within the country by persons other than the contractor's personnel and other employees of the contractor and sub-contractors' would be an 'employer's risk' which, if resulting in damage, would oblige the respondent to bear the cost. Furthermore, and of particular relevance to the appellant's claim, general clause 19 dealt with so-called 'force majeure' and its consequences. It provided, inter alia, as follows:

'19.1 Definition of Force Majeure

In this Clause, "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, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the contractor's use of such munitions, explosives, radiation or radio-activity, and

(v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.

[5] The site of the construction was in the immediate vicinity to what is referred to as Wards 23 and 25, areas in which the residents live in informal settlements in economically deprived circumstances. These people, naturally, regarded the project as a potential economic windfall and, after the site was handed over in March 2011, they immediately brought pressure on the appellant to draw its labour requirements for the project exclusively from their ranks. From the outset, this was associated with threats of violence and led to interference with the appellant's on-site activities. Thus in a letter addressed to the appellant on 11 May 2011, the 'community of Ward 25' (who described themselves as 'not emotionally well') demanded that their 'CLO' be employed on site and stated that 'no job will continue without doing our wishes there will be fire works' and that 'this is starvation and we have starved for a long time we rather die if need be'.

[6] This set the tone of an unfortunate saga of on-going disturbances caused by local residents. Wage demands, labour unrest and on-site violence led to numerous work stoppages. A wildcat strike in April 2014 led to the appellant dismissing almost its entire workforce and replacing them with workers from the greater eThekwini area. The new workforce was in turn subjected to vicious attacks and threats of violence. In the light of the issues as they were ultimately argued in this court, however, it is unnecessary to detail the history of these various occurrences leading up to May 2014.

[7] In this court, the appellant relied solely on incidents of violence that occurred on two days that month. On 20 May 2014, a group of some 40 persons made their way from Ward 23 to one of the main gates in the site perimeter. The police and the appellant's own security officials site were alerted, and rushed to

the gate where the group was attempting to stop vehicles entering the site. A while later, one of the appellant's security officials was attacked by a group of individuals who threw rocks at his vehicle. At about the same time, another employee was stoned in another sector of the site. A few hours later, a worker was attacked and struck on the head by a rock thrown at him. It shattered the hard-hat he was wearing and led to him being hospitalised. In another incident, a rock was hurled at the driver of a water tanker belonging to the appellant, shattering the windscreen of the vehicle. In addition, a foreman of the appellant making his way to the site offices was attacked by some five people, two of whom were armed with handguns and the others with knives. He was dragged into nearby bushes and was only saved from harm by the fortuitous arrival of a police vehicle. That evening a bakkie of the appellant was stoned and damaged.

[8] A few days later, on 27 May 2014, members of the appellant's staff working in the vicinity of Ward 25 were attacked by about 20 members of that community. In the course of the incident, a foreman was struck on the leg by a rock thrown at him, causing a wound that required stitches. Another foreman was attacked in his vehicle whilst trying to escape from a violent group of persons hurling rocks, one of which narrowly missed his head. The vehicle itself was badly damaged. A surveyor working for the appellant was also attacked by another group who threw rocks at him and his vehicle. Yet another foreman was accosted by a number of persons who attempted to abduct him from the site. Fortunately he was able to fight them off and made his way to safety. In another sector of the site, the appellant's security team needed to fire plastic bullets at a group of attackers in order to ward them off.

[9] For completeness I should mention that, 31 May 2014, three unidentified males held up a security supervisor of the appellant at gun point in the vicinity of a mobile crane which was then set alight. This incident was dealt with by the appellant filing a SASRIA claim under an insurance policy and was not taken as an incident giving rise to the appellant's force majeure claim against the respondent. By the same token, another incident in which one of the appellant's workers died after being stabbed, was accepted as having had its source in a private feud between the deceased and his attacker, and fell to be excluded from consideration in the issues we were called upon to decide.

[10] On launching the proceedings in the court a quo on 23 June 2014, the appellant alleged that the events I have described had led to such a sad state of affairs on site that it found itself 'at the crossroads' in regard to the project. It stated it could either try to continue and complete the contract (which would endanger its employees) or invoke the force majeure provisions in the contract and stop executing the work. As it regarded it as unfair and unreasonable for it to require its workforce to continue in the dangerous situation which then prevailed, and as the anticipated cost of providing the necessary security measures to enable the contract to be completed would be R926 000 per month, it therefore sought the following relief in its Notice of Motion:

'1. [That the matter be heard as urgent];

2. that the Respondent pay to the Applicant the sum of R926 000.00 (excluding VAT) per month for the period from 4 June 2014 until completion or termination of the contact;

3. alternatively to prayer 2 above that the Respondent be directed to establish security measures consistent with the security measures offered to the Applicant on 4 June 2014 by [a security company] with effect from 1 August 2014;

4. that it be declared that the violent events particularised in the Applicant's founding affidavit constitute force majeure as contemplated in clause 19.1 of the contract between the Applicant and Respondent.
5. that it be declared that Applicant is entitled, at Applicant's election, to claim release from performance in respect of the contract as contemplated in clause 19.7 thereof;
6. that the Respondent pay the costs of this application.'

[11] The appellant's monetary claim was presumably based upon the provisions of clause 17(3)(c) as read with 19.4 of the agreement. (The latter provided that should the contractor incur costs by reason of force majeure in certain circumstances, including those envisaged in clause 19.1(d)(iii) it would be entitled to be reimbursed by the respondent.) However, notwithstanding the wide ambit of these terms and the high level of violence that had been directed at the appellant's employees, the court a quo found that the appellant 'has not demonstrated that it will be prevented from performing any of its obligations under the contract by force majeure' and that it did not accept 'that the point has been reached where the provisions relating to force majeure apply'. Consequently, it dismissed the appellant's claim.

[12] The reasoning of the court a quo may well have been flawed in certain respects. For example, its conclusion that as the appellant had been able to overcome the difficulties on site by taking additional security measures showed that there had not been force majeure as defined, appears to me to be somewhat illogical. But be that as it may, in the light of what follows the correctness of the court a quo's conclusion seems to me to be purely academic and unnecessary to decide.

[13] When the matter was called, Mr Kemp SC who appeared on behalf of the appellant, informed us that as a result of developments that had taken place since the institution of the proceedings in the court a quo he could not, in good conscience, ask this court to issue an order under prayers 2, 3 and 5 of the Notice of Motion quoted above. We were informed that the contract has since been completed which, in itself, renders prayers 3 and 5 nugatory. In addition certain developments have occurred relating to the monetary claim in prayer 2, details of which have not been disclosed but which placed the appellant in a position of not being able to seek an order in the terms prayed.

[14] In the circumstances the appellant sought to persuade us to grant merely the relief set out in prayer 4, namely, an order declaring that the violent events particularised constitute force majeure as contemplated in clause 19.1 of the contract. Moreover, as for the reasons mentioned above, as the events of 31 May 2014 in which a mobile crane was set alight as well as the incident in which one of the appellant's workers died after being stabbed can be excluded from consideration, the appellant sought to limit its entitlement to a declarator solely to the violence that occurred on 20 and 27 May 2014.[2]

[15] The immediate difficulty is, of course, that even if this court was of the view that the judgment in the court below was wrong, it would not as a matter of course issue the declarator the appellant seeks. The mere fact that parties are locked in dispute on a point of law or fact does not necessarily entitle either of them to an order declaring which standpoint is correct. Generally speaking, a court does not act in an advisory capacity by pronouncing upon hypothetical, abstract or academic issues. Instead, in order to entertain an application for declaratory relief, a court must be persuaded that the applicant has an interest in

[2] Detailed in paras 7 and 8 above.

an existing, future and contingent right or obligation that will be determined by the declarator and that its order will be binding upon other interested parties.[3] If it is so satisfied, the court then exercises a discretion whether to grant or refuse the order sought. In doing so the court may decline to deal with the matter where there is no actual dispute, where the question raised is, in truth, hypothetical, abstract or academic, or where the declarator sought have no practical effect.[4]

[16] The appellant faces difficulty on both legs of this two-stage inquiry. The declarator the appellant sought was ancillary to an order that, by reason of the existence of force majeure, the respondent should pay it a substantial sum of money on a monthly basis until the contract had come to an end. The statement of the appellant's counsel that the appellant had not 'abandoned' this monetary claim but had decided merely to no longer persist therein, is more a matter of semantics than substance. The simple truth is that the appellant no longer seeks this court to order payment of the money it claimed at the outset. The order of the court a quo dismissing that claim must therefore stand and the principal claim to which the declarator was inextricably linked is no longer a live issue.

[17] So while there is no doubt that the parties do not agree on whether the circumstances on site on 20 and 27 May 2014 were such as to constitute force majeure as envisaged by the contractor, there is no existing, future or contingent right or obligation in respect of which a declarator in that regard would be determinative. Counsel for the appellant argued that there might well be future

---

[3] *Maccsand (Pty) Ltd & another v City of Cape Town & others* [2011] ZASCA 141; 2011 (6) SA 633 (SCA) para 39, and *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2005] ZASCA 50; 2005 (6) SA 205 (SCA) at para 16.

[4] *West Coast Rock Lobster Association & others v Minister of Environmental Affairs and Tourism & others* [2010] ZASCA 114 (22 September 2010) para 45-46; [2011] 1 All SA 487 (SCA).

disputes between the parties in which the issue of force majeure might arise, and that in resolving those disputes the appellant did not want to be faced with the judgment of the court a quo to the effect that there had not been force majeure. But such a dispute is nowhere suggested on the papers, and sight must not be lost of the fact that the argument in this court related solely to the events of 20 and 27 May 2014. This illustrates the underlying problem that the outcome of any future case in which one of the parties might seek to rely upon force majeure will have to be determined in the light of its own peculiar facts and circumstances, and a finding of this court relating to only two specific days of violence and disturbance is likely to be of hypothetical use only.

[18] In these circumstances, as the principal relief sought by the appellant in the court a quo is no longer being sought, the appellant has not shown that there is an existing, future or contingent right or obligation in respect of which a declaratory order in the terms sought would be binding. This court should therefore decline to exercise its discretion to adjudicate upon such a declarator. This in no way places this court's seal of approval upon the decision of the court a quo. All it entails is a decision that this court, in the exercise of its discretion, should not adjudicate upon what has become an abstract or academic issue. The appeal should therefore be struck from the roll.

[19] The appeal is struck from the roll, with costs.

_____

L E Leach
Judge of Appeal

Appearances:

For the Appellant:	K J Kemp SC
Instructed by:	Cox Yeats Attorneys Durban McIntyre & Van der Post Bloemfontein
For the Respondent:	G D Harpur SC
Instructed by:	Edward Nathan Sonnenbergs Durban Webbers Bloemfontein