

SOUTH AFRICA / JUDGMENT

Rumdel Cape and Others v South African National Roads Agency Soc Ltd (7312/2014) [2014] ZAKZDHC 68 (25 September 2014)

[2014] ZAKZDHC 68

COURT
Kwazulu-Natal High Court, Durban

BEFORE
Lopes

CASE / FILE NUMBER
7312/2014

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No : 7312/2014

In the matter between :

Rumdel Cape/EXR Holdings/Mazcon Joint Venture.....Applicant
and

South African National Roads Agency Soc Ltd.....Respondent

Judgment

Lopes J

[1] The applicant in this matter is a joint venture between two partners, who are Rumdel Construction (Cape) (Pty) Ltd and EXR Construction

Holdings (Pty) Ltd (formerly Rumdel Construction Holdings (Pty) Ltd), ('the joint venture', 'the joint venture partners' or Rumdel' and 'EXR' respectively). The joint venture partners carry on business as civil engineering contractors, and in December 2010 were appointed to construct certain improvements including what may be referred to as a flyover system at the N2/M19 interchange in the vicinity of Springfield, Durban. The project is referred to as the Umgeni Road Interchange and the contract sum was R352 674 423,75. Pursuant to the conclusion of the contract ('the contract') the site was handed over to the joint venture during March of 2011, and construction has continued.

[2] The joint venture contends that security issues have become so serious that the joint venture seeks an order :

- (a) that the respondent pay to it the sum of R926 000 (excluding VAT) per month for the period from the 4th June 2014 until completion or termination of the contract, alternatively that the respondent be directed to establish security

measures consistent with those offered to the applicant on the 4th June 2014 by a company, referred to as TVU VIP Protection ("TVU");

- (b) a declaration that the violent events particularised in the joint venture's founding affidavit constitute force majeure as contemplated in Clause 19.1 of the contract;
- (c) a declaration that the joint venture is entitled at its election to claim release from performance in respect of the provisions of Clause 19.7 of the contract.

[3] The joint venture submits that the factors which gave rise to this application include the following :

- (a) there are two communities established near the construction site, and they are referred to as Wards 23 and 25. The communities live in what are referred to in the papers as 'shack dwellings';
- (b) the joint venture maintains that the security problems of which it complains find their source in the communities situated in Wards 23 and 25, and which culminated in one of the joint venture's security guards being stabbed on the 2nd June 2014, and dying as a result of his injuries;
- (c) the joint venture regards itself as being at a crossroads with the options of either trying to continue to complete the contract, thereby placing its workforce in danger and vulnerable to death and injury, or invoking the force majeure provisions of the contract or relying upon the principles of impossibility of performance to stop executing the contract;
- (d) it is common cause that in ordinary circumstances the contract would be completed within the next six to nine months;
- (e) because the joint venture regards it as unfair and unreasonable that it should be required to decide whether to allow its workforce to continue in such dangerous circumstances or to terminate the contract, it seeks the orders sought in its notice of motion.

[4] It is common cause that the contract stipulated that the joint venture could draw its labour force from the entire eThekweni

metropolitan municipal area. After the conclusion of the contract, the residents of Wards 23 and 25 demanded that the joint venture should employ its labour requirements exclusively from those wards. These demands were made during May of 2011.

Pursuant to what it describes as the disruptive behaviour of the community members from the two wards, including an attack on the

joint venture's security guards in June of 2011, the joint venture gave notice to the respondent's appointed engineer on the 12th May 2011 of what it considered to be force majeure circumstances precipitated by the residents of the two wards.

- [5] Pursuant to the problems which occurred a meeting was held in June of 2011 between the respondent's appointed public liaison officer and councillors representing the communities residing in the two wards. The meeting concluded that requests for labour would be made by the joint venture to the respondent and that Ward 23 would provide 70 per cent of such labour, and Ward 25 would provide 30 per cent, until the number of employees employed on the site was in balance for both wards. The joint venture maintains that up until that decision was made, the applicant was prevented from proceeding with the execution of the contract works because of the communities' destructive attitude.
- [6] In August of 2011 the employees sourced from the two wards engaged in an illegal work stoppage preventing what is referred to as the joint venture's 'core workforce' from continuing to work. They did so because they maintained that sub-contractors should only be allowed to employ labour from the two wards, and that no more core workforce was to be allowed on site. Further problems occurred in October of 2011 when it was alleged that the joint venture was bringing in core skilled labour to the site instead of employing them from the two wards.
- [7] The joint venture then regarded the decision to recruit the labour force from the two wards as what it describes as 'a serious mis-step'. This was impacting on its ability to execute the contract. As a result of further ongoing labour problems, on the 13th July 2012 the respondent agreed to the joint venture reverting to the original contractual arrangement that targeted labour could be procured from the greater eThekweni Municipality area and that it need no longer be restricted to obtaining such labour from Wards 23 and 25.
- [8] On the 11th May 2012 the joint venture addressed a letter to the respondent alleging that the joint venture had been prevented from working on site by the local community. Various incidents of violence occurred during May and August of 2012 involving the local community expressing its discontent. Their behaviour resulted in certain work stoppages and some damage to equipment and assaults on several employees. According to the joint venture there was a further work stoppage as a result of community violence in January of 2013. The source of the discontent would appear to have been that the joint venture was again hiring labour from the greater eThekweni metropolitan municipal area and not solely from the two wards.
- [9] Further work stoppages occurred in April and May of 2013. However, this unrest was, on the joint venture's own version,

the result of a dispute between the joint venture and its workforce regarding a project bonus of R12 000 per worker. As a result of the labour dispute a protected strike took place between the 17th May 2013 and the 22nd July 2013. There is a dispute about the instigators of this strike. The joint venture avers that it was organised at the instance of the communities in the two wards and the respondent submits that it was a result of the fact that the workers were now organised by the National Union of Mineworkers ('NUM'). The strike was apparently eventually resolved with the promise of a production bonus linked to specific milestones being achieved by the workforce. A further strike occurred in July of 2013 when national wage negotiations between the South African Federation of Civil Engineering Contractors and the relevant trade unions were deadlocked in wage negotiations. This came to an end on the 9th September 2013.

[10] The joint venture avers that the labour force drawn from the wards has proven to be militant, unproductive and prone to acts of violence and intimidation with high levels of absenteeism and sick leave. Because of the continuing misconduct of the workforce following a wildcat strike instigated on the 8th April 2014, the entire workforce (bar ten employees) was dismissed on the 2nd May 2014. This was, on the version of the joint venture, triggered by a dispute over a production bonus which had been scheduled to be paid on the 7th April but which the joint venture did not pay. Following the dismissal of the workers, further protest action occurred during May of 2014 which included various acts of violence towards the joint venture's employees who had continued working and new staff who had been hired. Some damage to equipment was recorded. The joint venture points out that such was the violence which accompanied these protests that the respondent's engineers supervision team requested that a carport be erected to protect the respondent's vehicles from projectiles 'thrown during riots'.

[11] The joint venture alleges that it was as a consequence of this violence that a security guard was fatally stabbed on the 2nd June 2014. Pursuant to all these problems the joint venture sought advice from its security company, TVU, with a view to

increasing security. It received recommendations and a quote of R926 000 per month excluding VAT together with a further R40 000

excluding VAT for additional security infrastructures.

[12] The joint venture points out that this is over and above the R150 000 per month which it already spends on security measures. The joint venture avers that this additional financial burden should not be laid at its door and should be borne by the respondent. In its application papers the joint venture sets out various contractual provisions of the contract which it alleges assist it in its demands for such payment. It also wishes to invoke the provisions dealing with the invocation of force majeure and the consequences thereof.

[13] The respondent's attitude may be summarised as being that its belief is that the joint venture's labour problems are largely as a result of disputes between its workers and the joint venture, and are not something which can be laid at the door of the respondent. The respondent maintains that the allegations of violence, etc are grossly exaggerated and the incident relating to the death of the security guard on the 2nd June is disputed insofar as it is suggested that that act of violence had its origins in the labour dispute or the conduct of the

communities of the two wards. The respondent submits that that murder originated in the conduct of two security guards over a money debt. The respondent also points out that the events which led up to the joint venture dismissing virtually its entire workforce was partly of the joint venture's own making, because it had agreed to pay a production bonus which it failed to do.

[14] The respondent submits :

- (a) that the joint venture should have made proper provision in its tender for security on the site which is its own responsibility in terms of the conditions of contract;
- (b) that as a result of its failure properly to deal with its labour problems, labour unrest occurred resulting in stoppages and unruly behaviour on the part of its workforce;
- (c) the labour problems experienced by the joint venture were entirely foreseeable and of its own making and that the joint venture now seeks unfairly to recover the additional expenditure it envisages having to incur until the end of the contract, from the respondent.

[15] It is clear from the conditions of the contract (Clauses 4.8, 4.22 and 6.11) that the primary obligation to ensure that unauthorised

persons are kept off the site and that the care and safety of all persons entitled to be on the site vests in the joint venture, and that it is required to take all reasonable precautions to prevent any unlawful, or riotous conduct by its personnel and to preserve peace and the protection of persons and property on or near the site.

[16] The joint venture however avers that Clauses 17.3 and 17.4 reflect that the respondent's risks include those occasioned by riot, commotion, or disorder within the country by persons other than the joint venture's personnel and other employees of the joint venture and sub-contractors. Any claims in this regard resulting from loss or damage to the works requires the joint venture promptly to give notice to the engineer and the respondent is to rectify such loss or damage to the extent required by the engineer.

[17] Clause 19 which deals with force majeure records :

“Force majeure” means an exceptional event or circumstances :

- (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 :

... (iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel or other employees of the Contractor and Sub-contractors

...'

Clause 19.2 provides for notice to be given to the respondent of any such claim within fourteen days after the joint venture becoming aware of the circumstances constituting such force majeure. Clause 19.3 requires that each party shall use all reasonable endeavours to minimise any delay in the performance of the contract as a result of force majeure.

Clause 19.4 :

'If the Contractor is prevented from performing any of his obligations under the Contract by Force Majeure of which notice has been given under Sub-clause 19.2 [Notice of Force Majeure] and suffers delay and/or incurs Cost by reason of such Force Majeure, the Contractor shall be entitled subject to Sub-clause 20.1 [Contractor's Claims] to :

- (a) an extension of time for any such delay ... and
- (b) if the event or circumstance is of the kind described in sub-paragraphs (i) to (iv) of Sub-clause 19.1 [Definition of Force Majeure] and, in the case of sub-paragraph (ii) to (iv), occurs in the Country, the payment of any such Cost.

After receiving this notice, the Engineer shall proceed in accordance with Sub-clause 3.5 [Determinations] to agree or determine these matters.'

Clause 19.6 provides that where the execution of the works is prevented for a continuous period of 84 days by reason of force majeure, or for multiple periods exceeding 140 days for the same notified force majeure, either party may give to the other a notice of termination of the contract.

Clause 19.7 provides that notwithstanding any other provisions of the clause any event or circumstances outside the control of the parties, but not limited to, force majeure, arises making it impossible or unlawful for either or both parties to fulfil their contractual obligations, the parties are discharged from further performance and the payment by the employer to the contractor is regulated.

- [18] Where circumstances arise making it impossible or unlawful for the joint venture to fulfil its contractual obligations, it is entitled to be released from further performance of the contract. The joint venture's contention in this regard is that it is not contractually obliged to expose its workforce to the threats posed by outside forces endangering them.
- [19] Mr Kemp SC, who appeared for the joint venture together with Mr P Wallis, submitted that upon a reading of the papers the only conclusion one can arrive at is that a serious threat from dissident communities in the immediate vicinity of the project exists and that threatens the normal contractual relationships between the parties and the normal working conditions. What he submits falls to be determined is whether the contract has reached a point where the provisions relating to force majeure apply, and in that case who bears responsibility for the measures that have to be taken to resolve the problem.
- [20] Mr Kemp made it clear that the joint venture wishes to rely upon the provisions of the force majeure insofar as they have occurred since the workforce was dismissed on the 2nd May 2014. What went before is of no moment. He submitted that the interference with the contract which is ongoing at the moment is not from workers employed by the joint venture. He submits that it is not in the interests of the surrounding community to have the contract completed because there will be no chance of employment for them. Mr Kemp submitted that the provisions of Clause 19.4 provide the joint venture with a basis for the relief which it seeks in the notice of motion.
- [21] Mr Kemp submitted that notices in terms of Clauses 19.4 and 19.6 can only be given by the party who is prevented from functioning by virtue of the force majeure. After notice has been given, either party can terminate the contract in terms of Clause 19.7.
- [22] Mr Kemp conceded that although the joint venture's claim was under Clause 19.4, it could not succeed in establishing force majeure if the joint venture's own personnel were responsible for circumstances giving rise to force majeure. Mr Kemp also pointed out that Clause 19.7 does not only rely on the presence of force majeure for its application.
- [23] Mr Kemp emphasised in his argument that the persons who were employed after the dismissal of the workforce in May 2014 were from outside Wards 23 and 25. In this regard he referred to two paragraphs in the founding affidavit of the joint venture which read as follows :

'79

Following the mass dismissal of the workforce (save for the ten mentioned workers), the applicant commenced employing replacement labour (the new workforce)

...

94

As a result of the site attacks, the applicant's supervisory staff and the new workforce are feeling vulnerable, insecure and unsafe. A number of them have received threats verbally and by sms. I annex hereto marked GW27 statements garnered from the workforce verifying this.'

[24] Mr Kemp's submission is that this demonstrates that the workforce which was employed after the wildcat strike were not from Wards 23 or 25, and accordingly the interruption with the joint venture's current work programme is not attributable to its own employees. Mr Kemp submitted that it was no coincidence that the violence escalated from the beginning of May 2014.

[25] Mr Kemp emphasised that the joint venture was seeking relief from the respondent with regard to the cost of preventing the harm which will

occur if the extra security measures for which the joint venture has been quoted are not put into place. In this regard Mr Kemp pointed out that the additional security costs were not an amount which was recoverable from its SASRIA insurance because the costs are to prevent the occurrence of certain events. SASRIA insurance only covered damage to property and possibly personal injuries.

[26] Mr Kemp submitted that in an evaluation of the joint venture's case, the procedure laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984

(3) SA 623 at 634 E – 635 C is of no application, because the events which took place in May 2014 are essentially not disputed and are the material events with regard to the decision which is sought.

[27] Mr Kemp submitted that although a contractor bears an obligation to price all foreseeable items in its contract, the conduct of the communities in Wards 23 and 25 was not foreseen by the joint venture. He submitted that the security which had to be provided must be paid for by someone, and on the basis of lack of the foreseeability, the provisions of Clause 17.3 and the Clause relating to force majeure, that obligation fell upon the respondent.

[28] Mr Harpur SC, who appeared for the respondent, submitted that this was essentially a claim about money and that the joint venture was simply

unable to justify the payment by the respondent of the additional expenses involved in providing the security necessary. Mr Harpur emphasised that prior to the amendment of the contract which had taken place in June of 2011, the parties had been aware of the

problems arising from the demands of the communities situated in Wards 23 and 25.

[29] Mr Harpur emphasised that on the principles set out in *Plascon-Evans*, the matter was to be decided on the respondent's version together with those allegations made by the joint venture which are not disputed. Mr Harpur submitted that the respondent had started to invoke the dispute resolution procedures set forth in the contract and then departed

from this cause of action. He emphasised that although this court was not deprived of its jurisdiction, there is no reason why the joint venture could not have followed the alternative dispute resolution procedures provided for in the contract and resolved the matter internally.

[30] Mr Harpur pointed to the fact that the joint venture could have financed the extra expenditure of R9m pending the outcome of the dispute

resolution process. He submitted that the joint venture alleges that the fact that they were forced to employ labour from Wards 23 and 25 was the fault of the respondent, and yet allege that force majeure applies, inter alia, because the events which have taken place are not substantially attributable to the respondent. He submits that this is a material contradiction in their approach.

[31] Mr Harpur directed my attention to the provisions of Clause 4.8 of the contract which provides that the joint venture had the obligation to comply with all applicable safety regulations and to take care for the safety of all persons entitled to be on the site and, essentially, to protect the site. Clause 4.22 of the contract provides that the joint venture would be responsible for keeping unauthorised persons off the site. Read with the amendments to the contract it was further provided that responsibility for damage incurred to, or the loss of property within the site identified in the contract documents as not belonging to the respondent will vest with the joint venture, even if the loss is not incurred by the joint venture's personnel or equipment. Mr Harpur submitted that these clauses indicated that the risk in incursions vested with the joint venture. He submitted that the effect of the amended Clause 17.3 was an effective reversal of responsibility, because the amendment provided that the respondent's

responsibility was abrogated by the fact that the joint venture could insure against the risks and primary responsibility for security for the contract vested in the joint venture.

[32] Mr Harpur also drew my attention to the contract documents which required that the joint venture ensure the risks of disorder with SASRIA. He also referred me to the SASRIA Ltd coupon policy for special risks insurance for contract works. He submitted that this policy specifically covered the joint venture for an amount up to R300m in respect of any 'riot, strike or public disorder'.

[33] Mr Harpur submitted that it cannot have been intended that the joint venture bear the risk of damage to property, and not have to bear the cost of preventative measures. He pointed out that in terms of Clause 17.4 of the contract the joint venture was required to rectify loss or damage or risks including 'riot, commotion or disorder'.

[34] With regard to the force majeure claim, Mr Harpur submitted that this claim had been settled pursuant to previous negotiations between the parties. This had occurred as long ago as the 9th May 2012, and was recorded in a letter of that date addressed by the joint venture to the principal engineer. Mr Harpur pointed out that the previous claims were made by the joint venture in circumstances where they submitted that the harm caused had been as a result of the conduct of the communities of Wards 23 and 25. They had not suggested that

their own employees were responsible for the damage. There was thus no need to distinguish between the events which took place prior to May of 2014 and those thereafter. In those circumstances the matter had been raised and dealt with and settled between the parties. There was no warrant for the joint venture to now advance a further claim based essentially on the same

facts.

[35] With regard to the severity of the problems, Mr Harpur referred to weekly security reports dated the 9th and 22nd June 2014 and from which it appears that not only do very few incidents occur, but they are of the type one would expect on a construction site – i.e. incidents of petty theft, etc.

[36] Mr Harpur submitted that there was no evidence of an impossibility of performance by the joint venture. He submitted that with the

provision of proper security the contract can be concluded and the obligation for paying for that security rests on the joint venture.

[37] In interpreting the contract between the parties I have borne in mind the dicta of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012

(4) SA 593, paras 17 – 19 and *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014

(2) SA 494 (SCA) paras 10 – 12. On this basis, as I understand it, the provisions of the contract are not to be viewed in isolation, but in the context, inter alia, of the whole contract.

[38] In my view there is no warrant in the suggestion that the cost of additional security which the joint venture deems necessary in order to complete the contract, should be paid for by the respondent. The provisions of Clause 4.8, 4.22, 6.7, 17.3 (as amended) make it clear that the primary obligation for ensuring the safety of the site vests with the joint venture, who is required to insure with SASRIA against certain of the risks. Whilst there is a distinction between the risks insured against the cost of taking precaution against the occurrence of the risk, I agree with Mr Harpur that if the joint venture could insure against the risks, it had to have provided in its tender for the costs of such insurance.

Unless the events which have taken place can be said to fall within the provisions of the force majeure clause in the contract, the joint venture cannot now complain when there is a necessity to increase the level of its security. In my view the necessity for the increase in the level of security is not something which can be laid at the door of the respondent.

The respondent is in no way responsible for the conduct of the communities in Wards 23 and 25. I do not agree with Mr Kemp's submissions, that there was some sort of obligation on the respondent to warn the joint venture prior to the conclusion of the contract, of the presence of the communities in those wards and the possible likelihood of their demands for being accommodated as the labour force for the performance of the contract.

[39] All tenderers were required to attend an inspection of the site prior to tendering, and a perusal of the contract site would have alerted a reasonable contractor to the existence of the communities and the probability of being able to secure unskilled labour from those communities. That the communities may have ended up being somewhat demanding in their requests for jobs is not an unsurprising consequence of the unfortunate social conditions in which they find themselves. That members of those communities may have overstepped the boundaries of what is proper in seeking employment is also unsurprising given their circumstances. What is clear is that those who have overstepped the mark are in the minority, and I do not believe that it can be said that the 'disorder' which has resulted from their demands is supported by all, or the majority, of those communities. That these matters can be dealt with, and the contract completed within the next nine months is accepted by the joint venture, albeit it on the basis that it is required to provide the additional security at an additional cost.

[40] The objection of the joint venture to paying for the additional security cannot vest upon the respondent any moral responsibility

with regard to the consequences of the actions of the communities of Ward 23 and 25. It is untenable to imply in this application

that it would be unfair and unreasonable were the respondent not to pay for the additional security and to allow the workforce to continue in such dangerous circumstances. The labour disputes and disorder which have resulted from the conduct of the communities of Wards 23 and 25, whether considered in the light of their conduct during 2011, or the latest conduct in 2014, cannot be said to be a result of anything which the respondent has done. The contract has between six and nine months to run. The contract price was in excess of R352m, and the additional cost of hiring security in order to ensure that its employees are kept safe is a cost of approximately R9m, or a mere 2.5 per cent of the contract price. A simple and reasonable solution thus exists to solving the problem.

[41] In all the circumstances, and leaving aside the force majeure contract for the moment, there is no other contractual basis upon which the applicant is entitled to recover the cost of the additional security from the respondent. Accordingly, as it is neither impossible nor unlawful for the joint venture to fulfil its contractual obligations, there is no question of the provisions of Clause 19.7 being applicable as suggested by Mr Kemp.

[42] Further, with regard to the applicability of Clause 19.7, I do not believe it is correct to suggest that there is no dispute between the parties as to what has occurred since the 2nd May 2014. This is so with regard to the events themselves, the interpretation of those events and the involvement of the parties responsible for them. Accordingly it has not been established by the joint venture that the acts of disorder were not carried out by persons who are, inter alia, persons employed by the joint venture.

[43] With regard to the applicability of force majeure, I was referred to the matter of 419 B.&S. Contracts and Design Ltd v Victor Green Publications Ltd 1980 (B) No, 80 (CA) in which the plaintiff, B. & S. Contracts and Design, had claimed from the defendants the sum of £4 500

being the balance due for work done and materials supplied. The additional expenditure arose from the fact that the plaintiff had undertaken to erect certain stands for an exhibition. At a crucial stage in the proceedings, workers threatened to down tools unless the plaintiff paid an additional amount of £4 500. The plaintiff then told the defendant that, without a payment of £4 500 it would not continue with the contract. The Appeal Court saw this as a clear case of duress as the representative of the defendant had no option but to pay the additional amount, failing with the exhibition would not have been able to go ahead with disastrous consequences for it, and the exhibitors. The Court of Appeal held that it was not every case where an employer had to give into the demands of its workers, but on the facts of that case it would have been reasonable for the plaintiff to have done so, even though it may have been distasteful to do so.

[44] The Appeal Court dismissed the appeal because it found that every effort had not been made to perform the contract and in those circumstances reliance could not be placed on the force majeure clause. Griffiths LJ emphasised that force majeure clauses have to be construed on the basis that those relying upon them will have taken all reasonable efforts to avoid the effect of the various matters set out in the clause which entitle them to vary or cancel the contract. The judgment of Kerr L J also makes it clear that even if the force majeure contract was left out of account, the contractor was still liable to pay the additional amount.

[45] With regard to the requirements for force majeure to operate :

- (a) the applicant is required to demonstrate that the disorder which occurred was beyond its control. I understand this phrase in the contract to mean that the exceptional circumstances would not be beyond the applicant's control where it is able to take reasonable steps to prevent it. As set out above, there seems no reason why, with the payment of an additional 2.5 per cent of the contract price, the problem could not be solved. I am not suggesting that in every case a contractor should be obliged to pay money in order to solve problems which may befall it. In this case it is simply not unreasonable to require the applicant to sort the problem out rather than going to the extremes of cancelling the contract or requiring the respondent to pay for the additional security;

(b) the joint venture has also not satisfied the requirement that it could not reasonably have provided against the additional cost before entering into the contract. The joint venture no doubt took into account the cost of site security in its tenders. When it complained of this during the first half of 2011, agreements were reached in order to resolve the problem. It is always so that there are unforeseen occurrences which take place in the execution of works on a project as large as this one. Such are the vagaries of the civil construction industry.

[46] There is in any event a dispute of fact on the circumstances which arose after the firing of the workforce on the 2nd May

2014. It is, in my view, a distinction without a difference to suggest that the joint venture's own employees were not involved after that date. The overwhelming probabilities favour that the disorder involved former employees of the joint venture who had been dismissed on the 2nd May 2014. This requires, perhaps, an evaluation of the reasons for the labour unrest. That falls outside the scope of this decision. But what it does indicate, is that the unrest arose out of the labour relations between the applicant and the communities in Wards 23 and 25 when they were employed by the applicant, albeit that they may no longer be so employed.

[47] That the employees may have embarked on an unlawful wildcat strike does not detract from the respective merits of the dispute. The employees followed the wrong procedure and the consequence was their dismissal. This raises the suggestion by the respondent that the unrest was partly of the joint venture's own making. In this regard I am of the view that the Plascon-Evans test is applicable, with the result that the dispute of fact prevents the joint venture from succeeding in demonstrating that it could not reasonably avoid or overcome the disorder which followed the dismissal on the 2nd May 2014.

[48] With regard to the likelihood of industrial unrest on the project, I have already set out above my views for finding that industrial

unrest was foreseeable and that it was something which could have been insured against, and which, seemingly, the joint venture insured itself in terms of the SASRIA policy. It seems to me whether or not that policy would pay out with regard to the costs of additional security (as opposed to the consequences of the disorder), is not a debate which is properly before me and one on which I could make a decision.

[49] In my view the joint venture has not demonstrated that it will be prevented from performing any of its obligations under the contract by force majeure. On its own case it is able to prevent any interruption to the contract works as a result of the disorder it has experienced by providing additional security. I do not accept that the point has been reached where the provisions relating to force majeure apply.

[50] For the reasons I have set forth above, I find that additional security is not recoverable from the respondent either by way of the contractual provisions or the requirements of force majeure. In all the circumstances I make the following order :

The application is dismissed with costs, such costs to include those consequent upon the employment of senior counsel.

Date of hearing : 17th September 2014

Date of judgment : 25th September 2014

Counsel for the Applicant : K J Kemp SC with him P J Wallis (instructed by Cox Yeats)

Counsel for the Respondent : G D Harpur SC (instructed by Edward Nathan Sonnenbergs)

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