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DISPUTE RESOLUTION **ALERT**

IN THIS ISSUE >

Lockdown and turbocharged lawyers

2020 saw South Africa's lawyers jolted from their suits and briefcases into an electronic, virtual realm, turbocharging a change that had certainly started but was progressing terribly slowly. Many lawyers will tell you that since the beginning of April 2020, they haven't printed a document, had a face-to-face meeting or physically appeared in court. Some will even confess that although they spend most of the day in meetings, consultations or even in court over Zoom, Teams or one of the other similar platforms, they haven't worn long trousers or closed shoes for many months. Zoom suits are a reality!

You've heard of sanctity of contract; now get ready for autonomy of contract

In the recent judgment of *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 heard on 13 November 2020, the Supreme Court of Appeal was called upon to pronounce on the question of whether a beneficiary under a performance guarantee, in this case the South African National Roads Agency SOC Ltd (SANRAL) could be interdicted from demanding payment in terms of the performance guarantee issued in its favour (in this case by Lombard Insurance Company Ltd (Lombard)) in circumstances.

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Lockdown and turbocharged lawyers

Many hearings are now held virtually, meaning that time spent commuting to and from court is eliminated and lawyers and judges can deal with their matters from anyplace they can find bandwidth and a quiet space.

2020 saw South Africa's lawyers jolted from their suits and briefcases into an electronic, virtual realm, turbocharging a change that had certainly started but was progressing terribly slowly. Many lawyers will tell you that since the beginning of April 2020, they haven't printed a document, had a face-to-face meeting or physically appeared in court. Some will even confess that although they spend most of the day in meetings, consultations or even in court over Zoom, Teams or one of the other similar platforms, they haven't worn long trousers or closed shoes for many months. Zoom suits are a reality!

CaseLines, the virtual platform for filing of pleadings, notices and documents, has transformed the administration of court files, saving judges and lawyers time and significantly reducing the frustration that came with missing or incomplete court files. Documents are uploaded remotely, securely filed and paginated and immediately available to all parties including the judge. Filing a notice or pleading, which could take a candidate attorney an hour or more, now takes minutes. But the exhilaration of an in-person hearing is missing as is the rite of passage that is organising and paginating a large, dusty court file on a court bench. In virtual hearings, parties can ensure that the relevant documents appear automatically on the judge's computer screen and, in fact, parties are able to make their own notes on the system, confidential to their team. They can effectively prepare and run their matter off CaseLines.

Many hearings are now held virtually, meaning that time spent commuting to and from court is eliminated and lawyers and judges can deal with their matters from anyplace they can find bandwidth and a quiet space. Of course, that flexibility brings challenges with hearings interrupted by boisterous children, deliveries and barking dogs, all oblivious to the fact that they are interrupting a very serious High Court trial.

The turbocharged change into the electronic realm will be assisted by the codification of rules relating to electronic document discovery in the High Court which came into effect on 30 October 2020. 'Discovery' is the process by which parties to an action are made aware of all documentary evidence that is available and parties may, prior to trial, request the sharing of documents relevant to their respective cases for use in evidence. This codification is crystallised in the definition of 'document' to include *'any written, printed or electronic matter, and data and data messages as defined in the Electronic Communications and Transactions Act [No 25], 2002'* (the Act). The Act defines 'data' as '*electronic representations of information in any form*' and '*data messages*' as '*data generated, sent, received or stored by electronic means*', including voice recordings and stored data. Previously, the word 'document' was not explicitly defined in the High Court Rules as including data and data messages.

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Lockdown and turbocharged lawyers...*continued*

Access to a host of electronic documents - documents that were previously undiscoverable - also offers an attorney the chance to discover evidence that strengthens a client's claim.

This development may be more theoretically interesting than practically significant, as litigators have been grappling with the discovery of electronic documents and data for some time, but this amendment will assist in streamlining electronic discovery. There are, of course, concerns that we might ultimately embrace a US style system where, because of the massive extent of electronic data which might be relevant to the matter, discovery becomes a huge and expensive undertaking capable of being managed only by the use of consultants with expensive software. This warning is tempered by the positive implications of electronic discovery. Printing reams of bundles for the purposes of disclosure of documents can be immensely costly both for a client and for the environment.

Access to a host of electronic documents - documents that were previously undiscoverable - also offers an attorney the chance to discover evidence that strengthens a client's claim, or which shows at an early stage that the claim should not be pursued.

Lawyers tend to resist change more than most but 2020 has certainly seen a remarkable and positive change in the way that lawyers work. That is to be welcomed. But we cannot, not for one second, forget that the jolt into the electronic realm, that turbocharging of the legal world, was brought about by a global pandemic that has taken the lives of so many. A silver lining to a very dark cloud.

Tim Fletcher and Lisa de Waal

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You've heard of sanctity of contract; now get ready for autonomy of contract

The Joint Venture had purported to cancel the underlying agreement, alleging that performance under the agreement was rendered impossible by a *force majeure*.

In the recent judgment of 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 heard on 13 November 2020, the Supreme Court of Appeal was called upon to pronounce on the question of whether a beneficiary under a performance guarantee, in this case the South African National Roads Agency SOC Ltd (SANRAL) could be interdicted from demanding payment in terms of the performance guarantee issued in its favour (in this case by Lombard Insurance Company Ltd (Lombard)) in circumstances where there was an alleged outstanding condition in the underlying construction agreement (Agreement) between SANRAL and the Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH (Joint Venture).

The underlying contract

The appeal emanated from a decision handed down by the Gauteng Division of the High Court, Pretoria, wherein the court denied the Joint Venture interdictory relief against SANRAL in circumstances where the Joint Venture alleged that it could not tender performance in terms of the underlying agreement as performance had been rendered impossible as a result of an alleged *force majeure*. The Joint Venture had purported to cancel the underlying agreement, alleging that performance under the agreement was rendered impossible by a *force majeure*. SANRAL, represented by CDH, disputed the existence of the alleged *force majeure* at the time of the purported cancellation by the Joint Venture and demanded performance in terms of the underlying agreement, failing which it would then exercise its right to cancel the underlying agreement - which it subsequently did.

In line with the contractual provisions of the underlying agreement, the parties referred the dispute as to whether there was *force majeure* to adjudication (a procedure prescribed under the agreement for the resolution of disputes). Pending the outcome of the adjudication, the Joint Venture demanded that SANRAL not call up the performance guarantee issued in its favour by Lombard pending the resolution of the dispute on the *force majeure*. SANRAL declined this demand, and instead notified the Joint Venture of its intention to in fact call up the performance guarantee. It is this issue which was the subject of the appeal proceedings.

In the court *a quo*, the court refused to grant the relief sought by the Joint Venture to interdict SANRAL from calling up the performance guarantee pending the outcome of the adjudication proceedings. The court *a quo* decided the issues based solely on the fact that it was of the view that the Joint Venture had failed to make out a *prima facie* case that there was *force majeure*. The question whether the Joint Venture could, in law, interdict the beneficiary of a performance guarantee was not decided by the *court a quo*.

You've heard of sanctity of contract; now get ready for autonomy of contract...*continued*

The SCA held that it was unnecessary for SANRAL to prove that it in fact lawfully terminated the agreement, in order to be entitled to make a demand under the guarantee.

The autonomy of the performance guarantee

Unlike the court *a quo*, the SCA decided the issue on the law. It held that, in light of the autonomous nature of performance guarantees, SANRAL's right to call up the guarantee was not constrained by the underlying contract.

Likening the performance guarantee to that of a bank, the SCA quoted Lord Denning with approval in that a party which gives a performance guarantee (in this case Lombard) must honour that guarantee according to its terms. It held that such an obligation is not in the least concerned with the relationship between SANRAL and the Joint Venture, nor with the question whether the Joint Venture is in default or not. Therefore, Lombard would be obligated to pay according to its guarantee, on demand if so stipulated, without proof or conditions except in circumstances where fraud is proved on the part of SANRAL.

Exceptions which may prevent a party from calling on a guarantee?

The Joint Venture argued that a further exception (other than the recognised fraud exception) should be recognised in our law which would preclude SANRAL from calling up the performance guarantee where the underlying contract restricts or qualifies SANRAL's right to call up the guarantee; in which case the Joint Venture would be entitled to the interdict sought. The Joint Venture relied, for this principle, on the decision of the SCA in *Kwikspace Modular Buildings Ltd v Sabodala Mining Company 2010* (6) SA 477 (SCA). That matter dealt with a similar principle of Australian law. The Joint Venture's argument was that our law should also recognise this principle. Applying this principle, the Joint Venture contended that the underlying agreement (and not the performance guarantee) constrained SANRAL to make a demand only under certain circumstances, none of which (the Joint Venture contended) had been fulfilled.

Given the all-encompassing and unconditional provisions of the performance guarantee, the SCA was of the view that, the mere contention by SANRAL that the Joint Venture had failed to perform in terms of the underlying agreement due to *force majeure* was sufficient to trigger an entitlement to make demand under the performance guarantee. The SCA held that it was unnecessary for SANRAL to prove that it in fact lawfully terminated the agreement, in order to be entitled to make a demand under the guarantee.

Finally, relying on the foreign laws of Australia and England, the SCA was of the view that there may be room to develop South African law to the extent that a contractor may restrain a beneficiary from making demand on an unconditional performance guarantee if the contractor can show that a party to the contract would breach a term of the underlying contract by doing so. The court did, however, caution against readily interpreting the underlying contract as conferring such a right.

Mongezi Mpahlwa and Nomlayo Mabhena

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Cliffe Dekker Hofmeyr's Dispute Resolution rankings in THE LEGAL 500 EMEA 2020:

CDH's Dispute Resolution practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.
Tim Fletcher is ranked as a Leading Individual in Dispute Resolution in THE LEGAL 500 EMEA 2020.
Eugene Bester is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.
Jonathan Witts-Hewinson is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.
Pieter Conradie is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.
Rishaban Moodley is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2020.
Kgosi Nkaiseng is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2020.
Tim Smit is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2020.
Gareth Howard is ranked as a Rising Star in THE LEGAL 500 EMEA 2020.

CDH's Construction practice is ranked in Tier 2 in THE LEGAL 500 EMEA 2020.
Clive Rumsey is ranked as a Leading Individual in Construction in THE LEGAL 500 EMEA 2020.
Joe Whittle is recommended in Construction in THE LEGAL 500 EMEA 2020.
Timothy Baker is recommended in Construction in THE LEGAL 500 EMEA 2020.
Siviwe Mcetywa is ranked as a Rising Star in Construction in THE LEGAL 500 EMEA 2020.

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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