NEWSLETTER ISSUE 1-11 APRIL 2011

The purpose of this Newsletter is to brief interested persons on matters relating to alternative dispute resolution in the Namibian construction industry. Its purpose is further to expose particularly members of the NATDAB forum to the developments and international and regional trends in construction contract management, as well as to noteworthy judgements of courts in the region.

The content of this Newsletter will include selected contributions that are posted on the DABFORUM as part of the **C**ontinued **L**earning requirement of registered adjudicators.

CASE LAW

1. LIABILITY OF SUBCONTRACTOR OR OTHER PARTY NOT HAVING CONTRACTUAL NEXUS - DELAYS CAUSED

'Contracting on unfavourable terms'

INTRODUCTION

AB Ventures concluded a written agreement with Lumwana Mining Company Limited under which AB Ventures undertook to construct to completion the Lumwana Copper Mine in northern Zambia. A **joint venture** between Ausenco Americas LLC and Bateman International Projects BV was to supply four specialized electrical units (referred to in the particulars of claim as 'the drives') that were to be used by AB Ventures in the project.

The **joint venture** (and not AB Ventures) concluded a written agreement with Siemens under which Siemens undertook to engineer, design, manufacture, supply and commission the drives, which then failed. AB Ventures alleged that the malfunction of the drives and the resultant loss was caused by negligence on the part of Siemens and it claimed damages to compensate for its loss.

SUMMARY

Court: South Africa: Supreme Court of Appeal

Case: AB Ventures Ltd v Siemens Ltd (294/10) [2011] ZASCA 58 (31 March 2011)

Summary: Delict – pure economic loss – negligence of an associated contractor – plaintiff capable of having avoided the loss contractually – no grounds to extend Aquilian liability.

The form of Contract: A project consisting of complex contractual relationships. However no contract exists between AB Ventures and Siemens.

SUMMARY OF JUDGEMENT

Siemens delivered, installed and commissioned the drives at the construction site. After the drives had been commissioned they malfunctioned, resulting in a failure of the transformers in which the drives were used. That caused the completion of the project to be delayed, in consequence of which, AB Ventures alleged, it became liable to Lumwana for penalties or damages under the construction contract and it also incurred additional expenses. AB Ventures alleged that the malfunction of the drives and the resultant loss was caused by negligence on the part of Siemens and it claimed damages to compensate for its loss.
*Note: the legal term mentioned in the judgement: 'Aquilian liability'**:** arising from or governed by a statute of the Roman republic with respect to wrongful damage to property —used of a fault or liability in civil and Roman law*

In this case counsel for AB Ventures placed heavy reliance upon cases that fall under the rubric of what has come to be called 'products' or 'manufacturer's' liability. It was submitted that, analogous to those cases, Siemens held itself out as having special skill and knowledge relating to the design and manufacture of units of the kind that are now in issue, and is thus liable for loss caused to the user by a defect in the product. The submission aligned itself with what was said in *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd*:[15]

Howwever, the Court found that the considerations of policy that underlie cases of products liability have no bearing upon a case of the present kind. "We are not concerned in this case with anonymous consumers of mass-produced goods. **We are concerned with a major construction project involving a multiplicity of contractors and sub-contractors whose co-operation was defined through a web of inter-related contractual rights and obligations.** That bears no resemblance to the distant and impersonal relationship that characterises the distribution of bottles of ginger beer and motor vehicles."

The judge: "It seems to me that there would be major implications for a multi-partied project of this kind if each of the participants was to be bound not only to adhere strictly to the terms of its specific contractual relationship but, in addition, it was to be held bound to all the other participants by a general regime of reasonableness."

Citation of earlier relevant case law: *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd,*[26] in a related context that finds equal application in this case:

'[In] general, contracting parties contemplate that their contract should lay down the ambit of their reciprocal rights and obligations. To that end they would define, expressly or tacitly, the nature and quality of the performance required from each party. If the Aquilian action were generally available for defective performance of contractual obligations, a party's performance would presumably have to be tested not only against the definition of his duties in the contract, but also by applying the standard of the *bonus paterfamilias*. How is the latter standard to be determined? Could it conceivably be higher or lower than the contractual one?'

As per the court: In this case in which Siemens bound itself to the joint venture to conform to the standards specified in its contract, it would be most anomalous if it was to be bound to a stranger to conform to a different standard.

As in a previous cited similar case, a claim was brought in delict and an exception was taken to the particulars of claim on the same grounds that the exception was taken in this case – that the conduct complained of was not wrongful for purposes of delictual liability.

The Court cited earlier case, where it was concluded that the existing law enabled the plaintiff to protect itself through the contract that it had concluded. In that previous case it was reasoned as follows:

'In my view, the answer [to the question whether an extension of Aquilian liability is justified in the present case] must be in the negative, at any rate in so far as liability is said to have arisen while there was a contractual *nexus* between the parties. While the contract persisted, each party had adequate and satisfactory remedies if the other were to have committed a breach . . .. When parties enter into such a contract, they normally regulate those features which they consider important for the purpose of the relationship which they are creating . . .. [I]n general, contracting parties contemplate that their contract should lay down the ambit of their reciprocal rights and obligations. To that end they would define, expressly or tacitly, the nature and quality of the performance required from each party.'

The Court thus holds: If AB Ventures indeed sustained loss then the reason that it did so was because **it attracted the loss to itself in its contract with Lumwana**. By its own contractual act it took upon itself the risk of liability arising from delay and expenses that might be caused by the default of other contractors. The act of Siemens in causing delay and expense was no more than the trigger for that liability to arise. Had AB Ventures not contracted to accept that risk in the first place then it would not have suffered the loss at all. **That it had no contractual nexus with Siemens means only that it was not capable of shifting the loss that it had brought upon itself to Siemens contractually but that is beside the point.** We are concerned with whether it was capable of avoiding the loss, and not whether it was capable of shifting it elsewhere, **and clearly it was capable of doing so**.

The standard-form general conditions of the construction contract that AB Ventures concluded with Lumwana anticipated that there might be delay caused by defective performance by other contractors and clause 8.4 entitled AB Ventures to an extension of time for completion if that came about. No doubt it could also have protected itself against additional expenses in a similar way. The only reason that the case is before us is that AB Ventures took liability upon itself when it might just as well not have done so.

AB Ventures is not entitled as of right to secure a contract and has no cause for complaint if it chooses to contract on unfavourable terms.

The SCA thus holds that the exception was correctly upheld (by the Court below) and the appeal should be dismissed with costs that include the costs of two counsel.

CONCLUSION

As was rightly pointed out by the Copurt, with projects of this nature, there would be major implications if each of the participants was to be bound not only to adhere strictly to the terms of its

specific contractual relationship but, in addition, it was to be held bound to all the other participants by a 'general regime of reasonableness', as would normally be the case in common law. Hence the 'exception' to the latter requirement.

Thus the contractual relationships on this project prevail and take precedent. AB Ventures clearly failed to shift the contractual risk to it's subcontractors, and thus has no cause for complaint if it contracted at unfavourable terms. It can not elect to step outside contractual arrangements (even though it has no direct contractual relationship with Siemens) and seek relief through 'delict'.

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2. INTERPRETATION OF CONSTRUCTION GUARANTEE: LIABILITY

INTRODUCTION

A number of cases have ended up with the South African Supreme Court of Appeal, related to construction guarantees. This clearly shows that often the Employer, or the Contractor, or both, are unsure of the terms of these guarantees. What makes things worse is that the market offers a variety of standard forms of agreement containing terms that have vastly varying consequences. **Attached** is yet another recent SCA case that concerns itself with the interpretation of such a guarantee.

SUMMARY

Minister of Transport and Public Works, Western Cape v Zanbuild Construction (68/2010) [2011] ZASCA 10 (11 March 2011)

Summary: Interpretation of construction guarantee – whether liability of guarantor is limited to the contractor's liability under the construction contract – or whether it is for the full amount of the guarantee on demand by the employer.

The form of Contract: Joint Building Contracts Committee (the JBCC).

SUMMARY OF JUDGEMENT

When reading the judgement, it quickly becomes clear that we have a case of poor administration on the part of the Employer, in this case 'the department'. Standard clause 14 of the JBCC deals with security to be provided by the contractor. That clause, however, is immaterial because the department in its letters accepting Zanbuild's tender required a guarantee in accordance with the department's standard guarantee form, which is not an option provided for in clause 14. But the department's standard guarantee form is also immaterial. The guarantee issued by Absa, which gave rise to the present dispute, is substantially different from the department's standard form. Nonetheless, they were issued with the acquiescence of Zanbuild and accepted by the department. *This proved to be a mistake that would cost the department dearly later on. The question that arises: who checked that the submitted guarantee conformed to the requested standard form?*

As per para [13] of the judgement: In the parlance of the English authorities[1] the dispute can be usefully paraphrased as being whether the guarantees are 'conditional bonds'[2] (as suggested by Zanbuild) or 'on demand bonds' (as suggested by the department). The essential difference between the two, as appears from these authorities, is that a claimant under a conditional bond is required at least to allege and – depending on the terms of the bond – sometimes also to establish liability on the part of the contractor for the same amount. An 'on demand' bond, also referred to as a 'call bond', on the other hand, requires no allegation of liability on the part of the contractor under the construction contracts. All that is required for payment is a demand by the claimant, stated to be on the basis of the event specified in the bond

In English law, as in our law, it is accepted that the question whether the guarantee under consideration constitutes the one or the other is dependent on the interpretation of the terms of that guarantee.

Para [17] of the judgement: ... But, as we know, what the department wanted is not what the department got. A comparison of the terms of the department's standard guarantee, as appears from the judgment in *Dormell Properties,* on the one hand, with those of the guarantees in this case – to which I will presently return – on the other hand, reveals substantial differences. The consequence of these differences is, in my view, self-evident. The Absa guarantees cannot be interpreted, as the department sought to do, with reference to the terms of the standard guarantee, or, indirectly, with reference to statements in *Lombard Insurance* and *Dormell Properties* with regard to those terms.

CONCLUSION

The department wanted a 'demand guarantee' and got a 'conditional guarantee'. The department took this matter all the way to the SCA, at great cost and effort. The correct administration at the time of tender acceptance, and ensuring that the requested guarantee was in face submitted, would have saved them all this effort and cost.

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3. LETTER BY THE PRESIDENT OF THE EPA

To Employers in the Namibian Construction Industry

REMUNERATION STRUCTURE FOR ADJUDICATORS REGISTERED ON THE NAL

This letter serves to notify all employer organisations within the Namibian construction industry of the alignment of the remuneration structure for adjudicators registered on the National Adjudicators' List (NAL).

A survey was launched on 18 August 2010 for the purposes of gauging the views of registered adjudicators regarding the most suitable remuneration for the services of registered adjudicators, per category. It was requested that one of three options (option A, B or C)be voted for, and that the responses be properly motivated. The survey resulted in the following unanimous proposal:

	percentage of Government Gazetted Hourly Fee (currently N$890.00)
Junior Adjudicator	100
Adjudicator	120
Senior Adjudicator	140

	Corresponding Hourly Fee in N$
Junior Adjudicator	890.00
Adjudicator	1,068.00
Senior Adjudicator	1,246.00

The motivation provided by the registered adjudicators for this can be summarised as follows:

1. Option B (the option above) is considered to be reasonable and fair on contractors and employers.
2. The increase from the currently implemented option is defendable.
3. Under option B the fee for a Junior Adjudicator is 100% of the 'gazetted fee', which is the fee at which registered engineers are remunerated. All adjudicators are registered with statutory professional councils.
4. Adjudication, besides its practical and cost effective merits, can also be seen as something rendered by the engineering profession to society, in this case the construction industry, hence fees should be kept reasonable.
5. It was mentioned that Adjudication has a valuable component of self education in that one is compelled to check up on contracts and contract law which one might otherwise not be inclined to do, thus benefiting the Adjudicator.

The above proposal was submitted to the NAL Committee on 20 September 2010, and to the representatives of employer organisations (the NATDAB) on 22 October 2010.

No objections were received, and the NAL Committee after due consideration adopted the above remuneration structure as of 1 December 2010.

Although the above remuneration structure is merely a guideline supported by the EPA, employer organisations are advised not to deviate from this structure in order to achieve uniformity across the industry.

Yours faithfully
Signed: Ako Al-Jaf
PRESIDENT

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NEW PUBLICATION

The NAL Committee published a new document during late 2010, viz. the '*Overview of the Procedures and Guidelines for the Nomination of Adjudicators – 1st Edition 2010*'. This document is intended to assist officials of employer organisations when requesting the EPA NAL to nominate an adjudicator on a specific project. Should you not have received a copy of this document, kindly request one from the Registrar of the EPA NAL, Ms Tanja Bednarek at tel 223009.

NAL REPORT

Period;	13.10.2008 to	30.03.2011
Number of adjudicators:	19	
Number of Nominations:	36	
Number of Adjudicators nominated:	zero times:	5
	once:	3
	twice:	3
	three times:	6
	four times:	1
	five times:	1

This letter is published by the *NAL Committee* of the *Engineering Professions Association*. Any enquiries regarding any article or information contained herein can be directed at the NAL Registrar, *Engineering Professions Association,* telephone 223009, fax 223009 or e-mail as follows: **epa@africaonline.com.na**.

Where case law summaries are included in this publication, the comprehensive judgement can be requested from the Forum Convener via e-mail Brunauer.Ronald@gmail.com.

