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LOCAL COMMUNITY DISRUPTION - FORCE MAJEURE FACT OR FORCE MAJEURE FICTION? "Durban Construction Bosses under Seige"

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This was a headline in the Daily News article by Lee Rondanger back in 2016. Calls were made to industry stakeholders to come together to address the issues of, what has been called by construction bosses as local community forums performing acts of "thuggery" and "behaving like the mafia".

So what has been done since then? We know the situation is getting worse and not better. Its not often that we receive a judgment in our court here in SA relating to the construction industry, so it's always a bonus when we do, and this should have some impact on the way contractors "do business". While there are many factors surrounding the implications of violence and disruption caused by local communities (who ultimately want a piece of the pie in terms of work), it begs the question as to whether the standard form contracts deal with this matter appropriately (two of the recommended standard forms being the internationally used FIDIC and NEC suites and the other two being the proudly South African brand of the JBCC and the GCC suites)[1].

If we look at the judgment that was handed down in the Kwa-Zulu Natal Local Division by Judge J Lopes (Rumdel Cape v South African National Roads Agency Soc Ltd 2016), while the case deals with a couple of issues but I would like to focus on how the court viewed two specific items:

1 Recommended for use in South Africa by the Construction Industry Development Board.

1. Was the employer (SANRAL) responsible to pay additional security costs to the contractor which would enable the contractor to continue to work? and
2. Was disruption and violence by the local community seen as being a force majeure event which discharged the contractor's obligations under the contract?

In summary, the JV was appointed to construct certain improvements to a flyover interchange in the vicinity of Springfield, Durban. At one point, the security issues on the Site became so serious that the JV sought an order that SANRAL be responsible to pay for the additional costs of security (to the tune of R926 000 per month), that the violent events constituted a "force majeure" event, and that the joint venture was entitled, at its election to claim release from performance of the contract in terms of the force majeure provisions of the contract.

We all know that in South African law, decisions made by judges in the court have a rather persuasive outcome when looking at how one should deal with a particular issue. So is stopping work on site due to threats of violence and intimidation a force majeure event or not? Let's start the debate with a closer look at how the court viewed this issue in the SANRAL Case.

The contract was a FIDIC Red contract, with a typical Force Majeure clause which defined Force Majeure as:

"…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: …

(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 19.7 of the contract provided 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.

The court held that the local community disruption was NOT a force majeure event. Without going into too much detail, the court found that in order for the force majeure clause to operate the JV had to demonstrate that the disorder which occurred was beyond its control. It was found that this phrase in the contract means that the exceptional circumstances would not be beyond the JV's control where it is able to take reasonable steps to prevent it. The judge found that there seemed to be no reason why, with the payment of an additional 2.5 per cent of the contract price (ie. the R926 000 mentioned earlier in respect of additional security), the problem could not be solved.

In summary:

- The JV had, at tender stage, inspected the site and this inspection 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 such community find themselves.
- In terms of the contract, 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 JV, 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.
- In all the circumstances, there was no other contractual basis upon which the JV was entitled to recover the cost of the additional security from SANRAL either by way of the contractual provisions or the of force majeure.
- The JV failed to demonstrate that it would be prevented from performing any of its obligations under the contract by *force majeure*. On its own case it was able to prevent any interruption to the contract works as a result of the disorder it has experienced by providing additional security. Accordingly, it was neither impossible nor unlawful for the JV to fulfil its contractual obligations.
- The judge was 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, he found that it was simply not unreasonable to require the JV to sort the problem out rather than going to the extremes of cancelling the contract or requiring SANRAL to pay for the additional security.

In South Africa, there is no common law meaning of the term "Force Majeure" and the terms applicable thereto need to be written into the contract for them to be effective.

The GCC 2015 does not use the term "Force Majeure". It uses the term "Excepted Risks" instead. I always say that a rose by any other name would smell as sweet (thanks William Shakespeare) and in fact it doesn't matter what words you use, the contract should set out how a particular risk event will be dealt with.

In the Guide for the GCC 2015, the objective of the GCC 2015 is stated as being (inter alia):
"The risks involved in a construction works project should be dealt with at the start of the planning of the project and should be allocated to the party most suited to be able to attend to the risk. The objective of planning is to limit the number of risks as uncertainty could lead to a variation during construction – a risk that will be to the Employer's account. The main objective of the GCC 2015 is to set out fair, equitable, efficient, economic, and transparent contract administration procedures and the allocation of risk…. GCC 2015 complies fully with the CIDB requirements for form of contract".

We all know that our contracts require local community participation, the extent thereof varying from contract to contract. Somehow we are getting it all wrong. Employer's pointing fingers at Contractors and vice versa. This blame game sure is keeping us construction lawyers in business.

Standard forms contracts are supposed to evolve with the times. In my view, the GCC 2015 has been on the forefront of dealing with the situation where the local communities cause delay and disruption (damage to the works is a different story for a different time). Have they got it right? And should we be looking to make the necessary amendments to the FIDIC standard forms contracts to reflect the situation?

Clause 8.3 of the GCC 2015 states:

"Clause 8.3 – Excepted Risks

8.3.1 The excepted risks are risks of damage or physical loss or any other loss caused by or arising directly or indirectly as a result or consequence of:

…

8.3.1.4 Strike, riot, commotion, disorder, violent demonstrations, sabotage or any form of civil disturbance (whether lawful or not) which is not attributable to any action or inaction of the employees of the Contractor or his Subcontractors..

8.3.2 If, in carrying out the Works, any of the excepted risks, other than pertaining to the damage or physical loss referred to in Clause 8.2.2.2 causes the Contractor to suffer delay to Practical Completion and/or brings about proven additional costs, the Contractor shall be entitled to make a claim in accordance with Clause 10.1."

Clauses 9.1.2 and 9.1.4 then goes on the state:

"If any of the excepted risks set out in Clauses 8.3.1.2 and including Clause 8.3.1.5 occur, and if any such event beyond the control of the Contractor shall materially affect carrying out the Works, or the supply of labour or materials, or physically interfere with access to the Site, or constitute a material risk to persons or property associated with the Contract, the Contractor shall, unless and until the Contract is terminated in terms of this Clause, endeavour to complete the Works to the best of his ability; provided that:

9.1.2.1 Either the Employer or Contractor shall, if such state of affairs continues for a period of at least 20 consecutive working days, or for two or more periods aggregating not less than 40 working days in any period of six months, be entitled to terminate the Contract by written notice to the other party, and upon such notice being given, the Contract shall (save as to the rights of the parties under this Clause(terminate forthwith but without prejudice to the rights of either party in respect of any antecedent breach thereof;

9.1.2.2 If the Employer shall undertake, in writing, to bear any resultant additional costs involved in continuing the Works, the Contractor shall not exercise his right to terminate the Contract."

The GCC therefore recognises that *Strike, riot, commotion, disorder, violent demonstrations, sabotage or any form of civil disturbance (whether lawful or not) which is not attributable to any action or inaction of the employees of the Contractor or his Subcontractors* is an Employer's risk event. Not only does its occurrence entitle the Contractor to additional time and money but it also allows for the scenario where the Employer wants the Contractor to keep on trying to execute the works so long as he offers to pay for the additional costs in respect thereof.

How would the Rumdel case have turned out if the form of contract was a GCC 2015? Well, lets assume that the local community did not fall within the definition of "employees or subcontractors of the Contractor". The minute there was disruption on the site, the Contractor would have had a claim for additional time and money in terms of Clause 10.1.

Then, provided the disruption was beyond the control of the Contractor, and materially affected carrying out the works **OR** the supply of labour or materials, **OR** physically interfere with access to the Site, **OR** constitute a material risk to persons or property associated with the Contract, the Contractor is required to endeavour to complete the Works to the best of his ability (unless either of the parties decide to terminate). Practically, the Employer won't want to terminate, particularly a state entity that will then have to go through the entire tender process all over again. The Employer than has the option to require the Contractor to continue with the works and cover the additional costs in respect thereof. There we would have had Rumdel's additional security costs paid by SANRAL.

If anything, this demonstrates that the wording of contractual clauses can have a significant impact on how things pan out for you when faced with disruptions by an angry local community. While the GCC mentality is that the Employer should bear the brunt of the "Excepted Risks" there are still exclusions to this – one found in Clause 8.3.1.4 (ie. the disruption is not caused by a Contractor employee / subbie) and the other in Clause 9.1.2 – the event must be beyond the control of the Contractor.

HINT: No matter how friendly the GCC 2015 looks - if your contract requires you to subcontract to local community businesses and such subbies cause the drama, it will be a Contractor's risk. If you have to employ locals on the Works and these locals cause the drama – they may be seen as your employees and therefore Contractor's risk. I cannot stress enough the importance of early intervention of a contractual advisor when putting your tender together. The local community participation requirements and remedies for a failure thereof need to be carefully scrutinized.

In my opinion – definitely "Force Majeure Fiction".