REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2008/41068

[1]	REPORTABLE: YES / NO
[2]	OF INTEREST TO OTHER JUDGES: YES / NO
[3]	REVISED.

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Date: **WHG VAN DER LINDE**

In the matter between:

Group Five Power International (Pty) Limited	Applicant
and	
Cenpower Generation Company Limited	1st Respondent
HSBC Bank PLC, Johannesburg Branch	2nd Respondent
Standard Chartered Bank	3rd Respondent

J U D G M E N T

Van der Linde, J:

Introduction

[1] This is an application to interdict the paying out of a retention bond and a performance bond which the 2nd and 3rd respondents, financial institutions, had given in favour of the 1st respondent, the owner of a construction project for a power plant in Ghana, in which the

applicant as main contractor had, according to the 1st respondent, defaulted. I set out below at some length the parties' submissions.

The contractor's case

[2] Mr Gautschi, SC who appeared with Mr Smit for the applicant, commenced his submissions by moving for an amendment to the Notice of Motion to introduce in the alternative prayers for an interim interdict pending an arbitration. That application was opposed by Mr Subel, SC who appeared with Mr Bresler for the 1st respondent. I ruled that all of the arguments including that in favour of and against the amendment should be dealt with by the parties when they make their main submissions.

[3] Mr Gautschi submitted that the issue of an interim interdict was fully covered both in the founding, the answering, and the replying affidavits. He referred to pages 24 to 28 of the founding papers, page 311 of the answering affidavit and page 616 paragraph 38 of the replying affidavit.

[4] As to urgency, Mr Gautschi submitted that the bonds were only called on the 1st November 2018 and this was not preceded by threats that they would be called. The applicant had no choice, he submitted, but to come to court in the manner and at the time that it did.

[5] Starting with the retention bond, Mr Gautschi pointed out that the full amount under that bond was being called up. He submitted that a retention bond in construction law substitutes for retention monies of usually 10% that are held back from payments made during the course of the execution of the project. The necessary implication is therefore, he submitted, that retention bond monies can only be used for repair work that had to be done. He pointed to clause 4.2 of the contract in which the retention was fixed at 10%.

[6] He pointed out that in that clause the performance bond was fixed at 15%. With reference to clause 17.6.3(a) at page 113, he pointed out that delay damages were capped at 15%, equating to the extent of the performance bond required. He pointed out that in terms of

clause 8.7.6 at page 72, delay damages were the only damages that were recoverable. Therefore the implication was that the only bond that could be called for a delay damages was the performance bond and not the retention bond; the retention bond was earmarked for defects.

[7] With reference to pages 42 to 46 of the founding papers he stressed that the expiry date of the retention bond was 3 October 2017. In contrast to this, as appears from page 482, the expiry date of the performance bond was 30 December 2017. The retention bond was to be released on taking over certificate as appears from page 42 clause 4.2.4.

[8] Mr Gautschi accordingly concluded that the retention bond could not be called to recover delay damages: the retention bond was intended to cover defects in the works. He referred to the contracts bundle page 64 clauses 7.5 and 7.6 in support of this proposition. Yet, he submitted, the 1st respondent called the whole of the retention bond to cover for delay damages, and only a portion of the performance bond for delay damages.

[9] He submitted that the 1st respondent did not disclose to the financial institutions that it was calling the retention bond for delay damages to its full extent, and only a portion of the performance bond for delay damages. He submitted that failure to disclose this is misleading. He submitted that no honest belief could have been held that the retention bond could be called for delay damages.

[10] With reference to the underscored words "*final determination*" in the bond, he submitted that this anticipated an arbitration process which is the contractual mechanism for resolution of disputes.

[11] Mr Gautschi pointed out, as regards the merits, that the owner alleged a breach as appears from FA34 dated 1 November 2018, and relied in this context on the performance bond. With reference to the retention bond at page 37, the owner asserted that the contractor was in breach.

[12] But there could not have been any honest belief in this statement of fact. In this regard Mr Gautschi referred to the contractor's obligations in terms of clause 9.1.1, which provides that no tests on completion shall be carried out in respect of the works unless the contractor has constructed and installed all materials, plant and equipment constituting the works "*in accordance with the design book*". The design book at Appendix "A" page 86 provides in clause 2.1 under "*Scope of Services*" and "*Owner's Responsibilities*", that the owner shall provide, to the limits specified, the following services, including "*fuel for commissioning and testing purposes, up to and including the first performance test only (excluding reliability testing). The quantity of fuel that will be provided will be kept at an agreed level commensurate with normal commissioning and testing purposes and the kept volumes will be included in Appendix 'F'. Additional fuel for repeating failed performance tests will be for the contractor's account*".

[13] Clause 12, dealing with commissioning and testing, sets out the following:

"*12.1* <u>*GENERAL REQUIREMENTS*</u>

The contractor shall be responsible for delivering a fully commissioned, tested and reliable plant that needs all contract requirements. Commissioning and testing shall follow the following sequence:

1. *Pre-commissioning.*
2. *Commissioning.*
3. *Functional testing.*
4. *Performance testing.*
5. *Reliability testing.*

Acceptance testing will comprise a sequence of functional, performance and reliability tests to establish that the plant can function as designed, achieves all performance guarantees and that the plant will operate reliably. Reliability testing *shall be carried out only after the successful completion of all specified functional and performance tests.*"

[14] The "*acceptance testing*" referred to here is further expanded upon at clause 9.4:

"*12.4 <u>ACCEPTANCE TESTING</u>*

12.4.1 <u>General</u>

The works will not be accepted by the owner until satisfactory completion of all acceptance tests. Acceptance testing shall include:

- *Function tests to demonstrate functionality of plant requirements and different operation modes.*
- *Performance tests to validate that the plant can achieve guaranteed electrical power output, heat rate and environmental limits.*
- *Reliability tests to establish the ability of the plant to operate reliably in a representative operating state.*

The tests shall be performed in sequence; the performance tests shall commence after completion of commissioning and functional tests and shall be satisfactorily passed prior to commencement of the reliability test."

[15] Mr Gautschi's submission was that it follows that each test must follow sequentially and successfully. As to the fuels that must be used for the testing, the contract provides that:

"*The contractor and the owner acknowledge and agree that as at the commencement date the contractor shall use only one of the fuels in accordance with the specifications set out in Appendix "1" [fuel quality specifications] as the fuel for the following commissioning and testing activities:*

(i) Commissioning under section 12.1 of the design book (although it is agreed that functional testing will be performed using input LCO, distillate oil and natural gas);

(ii) Performance testing under section 12.4.3 of the design book; and

(iii) Reliability testing under section 12.4.4 of the design book (the 'primary fuel')."

[16] Mr Gautschi accordingly stressed that for functional testing all three fuels, being input LCO, distillate oil and natural gas had to be used.

[17] Clause 8.4 deals with extension of time for completion and in terms of it, the contractor is entitled to an extension of time for completion if and to the extent that taking over for the purposes of sub-clause 10.1 is or will be delayed by (in each case) any of the following causes, being a variation, a cause of delay giving an entitlement to extension of time, or any delay, impediment or prevention caused by or attributable to the owner.

[18] As regards "*delay damages*" it is provided in clause 8.7.2 that the contractor shall, subject to prior notification by the owner, pay or allow to the owner liquidated and ascertained damages, also known as "*delay damages*" for each day or part of a day for the period commencing on the day after the relevant time for completion and expiring on the taking over date for the works. In terms of clause 1.1.153, "*time for completion*" is defined as including extensions of time granted under sub-clause 8.4. As to variations, clause 1.1.155 defines these as "*any change, modification, addition or deletion to, in or from the design book or the works or a change or restriction in the contractor's sequence, timing, conditions or methods of working which is instructed or approved as a variation is issued under clause 13*".

[19] As to the facts, Mr Gautschi submitted that it turned out that the supply of natural gas was unattainable, and the owner advised the contractor that it need not use natural gas. In the owner's letter of 27 April 2018 to the contractor, the owner wrote in paragraph 5.2, with reference to clause 2.5.8 of the contract, that "*the contractor maintains that the owner has failed to provide natural gas and that the contractor has proceeded with the commissioning and testing of the plant with distillate fuel and light crude oil. For the reasons given in section 4 above, the owner denies that the lack of natural gas has had any impact upon the*

contractor (as claimed by the contractor or otherwise). However, the owner is willing to proceed on the basis that the commissioning has commenced and that natural gas was not available at the date upon which the contractor maintains that commissioning commenced. Therefor clause 2.5.8 of the EPC contract automatically applies. Therefore, the contractor is relieved of the obligation to conduct any testing and any commissioning on natural gas. The contractor should proceed to conduct the testing and commissioning on other fuels."

[20] Mr Gautschi stressed that this letter only came seven months after the time for completion. In the contractor's letter of 29 June 2018, the contractor wrote that it was within the knowledge of the owner that the time for completion was 13 September 2017, and that to enable the contractor to achieve that date, all three fuels had to be supplied by no later than 21 May 2017.

[21] On 10 May 2017 the owner notified the contractor that natural gas would only be available in November 2017, and therefore not be available within the timeline provided for in the contract. This indicates that the owner was still intent on supplying natural gas, and it required the taking over of the whole of the works, tested and commissioned with all three fuels. That, so contended the contractor, extended the time for completion.

[22] At paragraphs 3.1 to 3.11 of that letter, the contractor spells out the argument that this conduct on the part of the owner, if not an abandonment of clause 2.5.8, certainly extended the effect of clause 2.5.8. The contractor argued that when the owner's representative notified the contractor on 14 September 2017 that the contractor had failed to achieve completion of the whole of the works, he was clearly not entitled to do so having regard to the fact that the owner itself had notified the contractor that natural gas would only be available in November 2017.

[23] Mr Gautschi stressed that clause 2.5.8 referred to the failure of the owner to provide natural gas, and not the mere postponement. The first occasion on which a failure occurred was on 27 April 2018 and not before.

[24] The submission was that this illustrates clearly that the contractor was entitled to an extension of time. Mr Gautschi argued that the absence of natural gas in the testing sequence either constitutes a variation for purposes of clause 8.4.1, or at least a "*delay*" for purposes of clause 8.4.3, in both instances entitling the contractor to an extension of time for completion.

[25] The commissioning had to be completed, on the contractor's case, by the 21st August 2018. By 30 September 2018 the contractor found contamination in the input LCO. The contractor advised the owner, and this resulted in a dispute as to whose fault it was. The owner advised the contractor to use different fuel, but of course it must give the contractor an appropriate instruction in this regard; but this the owner would not want to do, because it implies a variation which in turn entitles the contractor to an extension of time.

[26] As from the 30th September 2018 the contractor argued that it could not complete the work because the owner had provided the contractor of contaminated fuel. The basis for the extension of time claim beyond 30 September 2018 is therefore this contaminated fuel.

[27] Mr Gautschi submitted that there were about 40 days between 21 August 2018 and 30 September 2018, and pointed out that this was an issue that would be subjected to arbitration. Accordingly, submitted Mr Gautschi, even if the owner was not in breach of its contractual obligations, the contamination was caused by the owner thus entitling the contractor to an extension of time. That being so, the owner cannot honestly contend that the contractor had committed a breach, and so the calling of the bonds by the owner was not honest.

[28] This pattern of dishonesty was reflected in the outright rejection by the owner of the contractor's claims for extension of time.

[29] By virtue of clause 8.7.3 of the contract, if the owner wishes to claim payment or a deduction in respect of delay damages incurred by the contractor in terms of clause 8.7.2, the owner is obliged first to serve notice to that effect on the contractor. The owner cannot

proceed under clause 3.5 of the contract to agree or determine any matter unless it will first have given such a notice. In this matter the owner gave a notice under clause 2.4, which governs an asserted entitlement "*to any payment under any clause of these General Conditions*"; this was therefore the general provision which had to succumb to the specific provision of clause 8.7.3.

[30] What the owner did in this case is reflected in its letter of 31 May 2018, in which the owner preferred a claim of some US $62,7 million. The letter by the owner on 25 June 2018 was the second notice, and this was a notice under clause 3.5 of the General Conditions. A third relevant letter that of 25 June 2018 (the same date) contains the demand by the owner that it requires payment in respect of delay damages in the sum of US $62,7 million. There is no date for payment set.

[31] But, submitted Mr Gautschi, the correct contractual provisions had not been followed, and there could not have been any honest belief on the part of the contractor that it had in fact followed the correct contractual provisions. Mr Gautschi accordingly submitted that the contractor's entitlement to an extension of time could not be reasonably disputed.

[32] He submitted that the other requirements for an interim interdict were also satisfied. The fact that there was no satisfactory alternative remedy, is illustrated by the fact that the owner is a mere special purpose vehicle, and it vaguely asserts to have "*free equity*" of greater than US $200 million. But there is no evidence that it has cash in the bank or liquid assets and one cannot execute against the kind of asset which the owner asserts it has.

[33] He submitted that the contractor's prejudice far outweighs the prejudice of the owner. The owner has bonds as security and their period has been extended.

[34] The lack of *bona fides* on the part of the owner is illustrated by the fact that it could have enforced the delay damages by April 2018 but waited until November 2018 before it attempted to do so.

[35] In terms of clause 4.2.6 of the General Conditions, it is provided that the retention bond and the performance bond is to be returned to the contractor immediately after it becomes null and void save where there are pending claims; in that case they are only to be returned following final determination and payment if applicable of such claims, and in the meantime they remain valid.

[36] Mr Gautschi concluded by asking for an interim interdict in terms of the Notice of Amendment; therefore in terms of prayers 2A, and 3 of the Amended Notice of Motion, as well as the costs of two counsel.

The owner's case

[37] In answering the case on behalf of the owner, Mr Subel handed up a fresh affidavit which deals with the loss suffered by the owner. That affidavit, which was dated 5 November 2018 by the contractor's Director of Legal and Corporate Affairs, asserts that the Kpone project is currently suffering damages in the form of lost revenue arising out of the delay to the date for completion in the magnitude of approximately US $15 million per month, equating to US $500 000 per day. She says also that the owner estimates that it has lost approximately US $195 million in revenue for the period from the agreed date for completion up to 13 October 2018.

[38] Mr Subel submitted that the amendment to the Notice of Motion is bad and ought not to be granted. To the extent that it seeks to pend the interim interdict which it seeks to the final determination of the disputes between the contractor and the owner by arbitration, this excludes the banks because they are not party to the arbitration agreement. Further, he submitted that fraudulent claims cannot be the subject of arbitration proceedings. He pointed out that the agreed arbitration will be concerned with extensions of time, and not with the question of fraud. He pointed out that the original Notice of Motion was for a final interdict and what was now being sought was an interim interdict. Yet he submitted that the

issue which is before the court in the current matter will never be revisited and is therefore final in effect in any event.

[39] He submitted that there was no evidence to show an entitlement on the part of the contractor to an extension of time. He submitted further that the centrality of the argument advanced by Mr Gautschi was never raised as a basis of the application on the papers. The criticism that the owner was relying on the retention bond was not raised in the papers; the submission that the owner could not rely on a retention bond to satisfy a delay claim was a new point.

[40] Apart from these points Mr Subel submitted that the matter was not urgent. Already on 31 May 2018 the owner had given the contractor notice that it was going to call the bonds. Further correspondence followed after the letter of 31 May 2018, and yet the LCO contamination issue was not raised until now. Further, the arbitration to which the contractor refers has not been initiated.

[41] In the contractor's letter of 7 June 2018, particularly paragraphs 4.8, 4.9 and 4.10, the contractor's argument centered around the natural gas issue. In paragraph 4.8 for example the contractor argues that the owner's performance and adherence to its own obligations as set out in the contract are required so as to enable the contractor to comply with its obligations to attain taking over for the whole of the works. The contractor argues in that letter that as of date thereof, the owner has failed to provide natural gas, this being the dominant cause of the delay that is preventing the contractor from attaining taking over for the whole of the works. The contractor therefore argued that the determination of an indebtedness of US $62.7 million is premature until and unless the owner has itself complied with its contractual obligation to supply the natural gas.

[42] The response to the contractor's letter is by the owner on 25 June 2018, and after that followed the contractor's letter of 29 June 2018.

[43] Mr Subel submitted that there was no obligation upon the owner in terms of clause 2.5.8 to issue a variation, or to instruct the contractor to proceed with its testing and commissioning obligations without natural gas. That was an automatic consequence of the owner's failure to provide natural gas. Since that is so, by definition the absence of natural gas could not cause a delay. All it serves to do, is to relieve the contractor of the obligation to include natural gas in its testing and commissioning obligations. Therefore, the absence of natural gas was irrelevant to the completion date of 17 September 2017.

[44] The contractor asserts that it was only on 27 April 2018 that the owner "*formally instructed the applicant that it was to proceed with the testing and commissioning … with the remaining two fuels … due to the 1st respondent's failure to provide natural gas*". But submitted Mr Subel the contractor did not need such an instruction.

[45] Mr Subel submitted that the contractor has failed to make out any case that it was in a position to test and commission the plant with other types of fuel until 30 September 2018; the owner was only advised in October 2018. By the letter of 31 May 2018 the owner advised the contractor that on 14 September 2017 the owner had given the contractor notice of non-completion by the contractual completion date of 13 September 2017, duly and properly in accordance with clause 8.7.1 of the General Conditions. The letter further advised the contractor that in terms of clause 8.7.2 of the General Conditions, the contractor was to pay liquidated and ascertained damages calculated in accordance with Appendix "L", being liquidated damages, at the rate of US $310 000 for every day. The cap in respect of penalties was reached in April 2018.

[46] The contamination of LCO was also raised late. The whole issue about LCO is in any event irrelevant, submitted Mr Subel. The founding affidavit does not say that the contractor was ready to test at any stage earlier than September 2018 with other fuels. It was only in September 2018 when suddenly the contractor raised the complaint about LCO contamination.

[47] If the contractor was not able to start testing and commissioning the plant before April 2018, then all that remains of the contractor's alleged case, is the point about natural gas not being available.

[48] With reference to clause 2.5.1 of the General Conditions the obligation of the owner to provide at the owner's cost, LCO, distillate oil and natural gas was timed at, "*… when the contractor is ready to commence commissioning …*". But, submitted Mr Subel, there is no word in the founding affidavit as to when in fact the contractor was in fact ready to commence commissioning.

[49] On a proper interpretation of clause 2.5.8 it means no more than that the contractor is simply relieved of its duty if the owner fails to provide natural gas. The completion date remains completely unaffected. The failure to supply natural gas can never lead to a delay in the completion of the works. But, submitted Mr Subel, even if there was an arguable case in this regard, this cannot be decided on paper. And in any event, even if it was an arguable case, it still does not show fraud. Fraud, it was submitted, is a serious allegation; and it has not been shown on these papers.

[50] Mr Subel pointed to the owner's correspondence of 14 September 2017 to the contractor, in which the owner recorded that the contractor had failed to attain taking over for the whole of the works within the time for completion, and recording that the owner was reserving all of its rights. On 28 September 2017 the contractor responded to the owner's letter denying the owner's contentions. On 2nd October 2017 the owner responded to the contractor, declining the contractor's request to the owner to provide a written undertaking that the owner will not deduct any liquidated damages until such time as the contractor's twelve claims will have been finally determined. Mr Subel pointed out that in the contractor's letter of 6 October 2017 there is no complaint raised that the natural gas was being delayed.

[51] The contractor's letter of 25 October 2018 for the first time raised the contamination which the contractor asserts came to its knowledge on the 30th September 2018. On 31st October

2018 the owner responded, denying that the LCO was not in accordance with the fuel quality specifications; and contending that it is apparent that the source of contamination must be downstream of the fuel connection point. The contractor's letter of 25 October 2018 is therefore written at a high level and way after the completion date. It notifies that the contractor will submit a fully detailed claim for extension of time and additional payment in due course.

[52] Mr Subel submitted that the contractor therefore does not make out a case at all that the LCO contamination caused a delay. Also, he submitted that no case was made out that it was the owner that caused the contamination. The high watermark of the contractor's case is the letter of 2 November 2018 by Greg Combrink to Charl Janse van Rensburg. The last paragraph of that letter says:

"*Considering the above it seems very likely that the water has been fed to the FOPT in the feed. The most likely source of this is the supplier fuel tanks. We are still performing tests for water in the fuel on samples of LCO taken from various locations in the KIPP plant including in the upstream line from the ILCO. We are also running tests to evaluate the efficiency of the FOTP.*"

This letter stressed Mr Subel was written a day after the owner called the two bonds. The assertions in this email are not common cause.

[53] He submitted that the applicant has known of the contamination all along. This appears from the letter of 31 October 2018, and yet there is no evidence that can attribute the contamination to the owner. Neither is there any evidence of a delay as result of the contamination.

[54] Insofar as the contractor relies on a fraud constituted by the owner calling the retention bond (which was allegedly intended for defects) in respect of delay damages, Mr Subel pointed to the definition of "*performance bond*" in clause 1.1.119 (which refers to Appendix

"U"); the definition of "*retention bond*" at paragraph 1.1.142, which also refers to Appendix "U"; and the definition of "*time for completion*" at paragraph 1.1.153.

[55] The performance bond at page 478, and the retention bond at page 490, contain identical trigger provisions for the call up of the bonds. It is simply:

"*The bank hereby irrevocably and unconditionally undertakes to pay to owner within three business days following that on which it receives a written demand from owner in accordance with clause 4 below, stating that the contractor is in breach of its obligations in terms of the contract or an event as stated in sub-clause 15.2.5 of the contractor has occurred in respect of the contractor, an amount equal to the lesser of:*

(a) The amount specified in such demand; or

(b) The bond amount stated in the first schedule less the aggregate of all previous payments made under this bond."

(This is the clause as it appears in the performance bond; in the retention bond the only difference is the insertion of the word "*either*" after "*stating*".)

[56] Mr Subel submitted that the purpose of retention is to give security. All that is required to trigger the entitlement on the part of the owner to be paid out of the retention bond, is the statement of a breach. He submitted that such a payment is not irreversible, because the contractor can always claim in back if it should be able to prove that it did not actually commit a breach. But the banks are not obliged to become involved in the underlying dispute between the owner and the contractor.

[57] As regards the submission that the owner was obliged first to notify the contractor of a breach and to negotiate its resolution, this was denied. In any event, submitted Mr Subel, the terms of the bonds do not require such prerequisites.

[58] As to the law, Mr Subel referred to *Loomcraft Fabrics CC v Nedbank Limited and Another* 1996 (1) SA 812 (A) where at page 816 Scott, AJA referred with approval to the English case

of *R D Harbottle (Mercantile) Ltd and Another v National Westminster Bank Ltd and Others* [1977] 2 All ER 862 (QB) where at 870b-d it was said that it was only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. "*They are the lifeblood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take.*"

[59] Mr Subel refer also to *Guardrisk Insurance Company Limited v Kentz (Pty) Limited* 2013 JDR 2727 (SCA). At paragraph [13] the court stated that the liability of the bank as principal is absolute and unconditional, and should not be construed to create an accessory or collateral obligation. The court referred to *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Limited and Others*, in which the court compared bonds of this kind with irrevocable letters of credit issued by banks and used in international trade. The essential feature is the establishment of a contractual obligation on the part of the bank to pay the beneficiary, and this obligation is wholly independent of the underlying contract.

[60] Reference was also made to *Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others NNO*, 2011 (1) SA 70 (SCA).

[61] As to the balance of convenience Mr Subel submitted that the contractor called on its own subcontractor in exactly the same terms as the owner is now calling upon the contractor in this case, and the subcontractor, Worley Parsons launched an urgent application to interdict the payment of the on-demand bonds issued in favour of the contractor. The contractor's explanation for calling those bonds against Worley Parsons was that it was "*a cautionary response*" to the owner's initial threat to impose delay damages against the contractor, "*on*

a back to back basis". As it happens, in that matter the application for an interdict by Worley Parsons against the contractor was successful.

[62] Mr Subel concluded his argument by asking for a dismissal of the application with costs of two counsel.

Reply

[63] In reply Mr Gautschi moved a further amendment to the notice of motion, to provide for the interim interdict to pend a referral to oral evidence of the question whether or not there was a fraud on the part of the owner in calling up the bonds.

[64] As to the prayer to pend the interim interdict to the arbitration proceedings, Mr Gautschi pointed out that several claims for extension of time by the contractor had been made and rejected as appears from page 580 to 595. These issues have to go to arbitration in any event. In terms of clause 20 of the General Conditions disputes are to be referred to arbitration in accordance with the ICC Rules. That arbitration process has started, and the interim interdict which the contractor seeks, can simply be pended to that arbitration.

[65] Mr Gautschi submitted that whether or not the banks were party to the arbitration agreement is irrelevant. The question is whether the owner knew that it could not honestly assert that the contractor was in breach of its contractual obligations.

[66] He submitted that the contamination of the LCO only came after the natural gas problem which was the first basis for an extension of time. As to the facts, he submitted that there was initially on the part of the owner a postponement of the failure to supply natural gas and not a failure in itself as envisaged in clause 2.5.8. With reference to the owner's letter of 10 May 2017 he pointed out that the owner there advised the contractor that natural gas would only be available in November 2017. He submitted that this kind of postponement was perpetuated until 27 April 2018 when the owner first advised the contractor that it could not supply natural gas.

[67] With reference to the sequence of the testing, he submitted that this was interrupted until 27 April 2018 when it became clear that natural gas could not be supplied. Until then the contractor could not progress beyond functional testing. Mr Gautschi pointed out that the contamination was raised in the founding affidavit at paragraphs 41.5 and 41.6, and that the letter and the report was annexed and that this was sufficient raising of the dispute in the founding papers. It was dealt with fully in the answering affidavit but when the response is considered, it is in fact no more than a bare denial. The owner says that the contractor could have used diesel, but for that an instruction is required which of course the owner would not give.

[68] He submitted that the contractor was never put, in this litigation, to establish that it was ready to receive natural gas and uncontaminated crude oil. In any event on 24 November 2017 the contractor wrote that it was ready to commence with testing and commissioning associated with the fuel gas system. In that letter the contractor specifically requested the owner to make natural gas available by 27 November 2017 in order to enable the contractor to commence with the testing and commissioning of the works on natural gas, and the contractor's rights were strictly reserved. So, submitted Mr Gautschi, clearly the contractor has established an entitlement to an extension of time. The owner could not honestly have believed otherwise.

[69] Mr Gautschi submitted that for his case on fraud he relied on first that the owner knew that the contractor could not test until 27 April 2018; and that the owner is in bad faith in rejecting the numerous applications for extension of time that the contractor had put in. Based on these two facts, the owner could not honestly believe when it said that a breach had been committed, certainly not to call the US $62 million.

[70] As concerns the entitlement to call the retention bond, Mr Gautschi submitted that the retention bond itself is the wrong place to look to see whether there was such an entitlement. He submitted that one must look at the contractual relationship between the

parties, and if they are agreed that the retention bond was for a specific purpose, and that purpose was not being honoured, then the contractor was entitled to apply to stop its payment out.

[71] In this context he stressed that the retention bond was kept at 10% and the performance bond at 15%, which coincided exactly with the only form of damages claimable, being delay damages, which was also kept at 15%. He submitted that in fact the contractor did not even need to prove fraud: if the contractual intention was that the retention bond was to be used solely for defects and not delays, then the owner could not, as a matter of contract, call on it for delays. But he submitted that the decision to call the retention bond was a deliberate decision anyway.

[72] On the contractor's calculation the extended date for completion ought to be 21 August 2018 in respect of the delay caused by the natural gas issue; and the period from 21 August 2018 to 2 November 2018 would fill the period in respect of the delay damages.

[73] He denied that there was any admission of liability by the contractor in calling up the bonds against the subcontractor; it was a standard precaution in matters of this kind. In any event, he pointed out that the delay complained of as against Worley Parsons occurred long before the commissioning stage and was related to problems with the design function as appears from the contractor's letter of 3 August 2015 to Worley Parsons. He referred also to the contractor's letter of 19 October 2015 and of 14 January 2016 in this regard. So, he submitted, it was not dealing with a delay in commissioning.

[74] As to balance of convenience he submitted that the contractor's case remained that the owner was an SPV; and whatever its contention of "*free equity*" meant, it was not cash in the bank. He submitted that it was unthinkable that the contractor should execute against a power plant in Ghana and therefore the balance of convenience hugely favoured the contractor.

[75] In further submissions Mr Subel argued that the 2nd and 3rd respondents, the banks, might not want to be involved in a reference to fraud. He submitted that if this Court cannot find that the contractor had an entitlement to an extension of time; or if this Court experienced uncertainty in that regard, the contractor's case must fail.

[76] He submitted too that the argument that the contractor need not prove fraud at all and could obtain an interim interdict on a contractual basis was new; it was based on a tacit term argument; and no such case has been pleaded. He referred again to the General Conditions of contract clause 4.2.4 which provide for the release of the retention bond upon the taking over date of the whole of the works and the substitution for it by a replacement performance bond, upon which the performance bond held until then would also be released.

[77] He disputed that the contract required a specific instruction by the owner to proceed without natural gas and submitted that clause 2.5.3 of the General Conditions is the source of the owner's obligation. It does not provide there that the contractor has to wait for an instruction; if the natural gas is not supplied by the date when the contractor is ready to commence commissioning as referred to in clause 2.5.3, then that constitutes a failure in terms of clause 2.5.8 of the General Conditions.

[78] It was for the contractor to show that it was ready to commence commissioning in terms of clause 2.5.3, yet this was nowhere asserted. He submitted that there were three references in the correspondence that preceded the litigation in which this point was issuably raised. First, in the owner's letter of 27 April 2018 paragraph 6.3 where the owner denied that the lack of natural gas has had any impact on the contractor's performance of its obligations. There it is asserted that the contractor is simply not ready to receive the gas and has never particularised what impact the lack of gas is alleged to have had.

[79] Then in the letter of 28 November 2017 by the owner in paragraph 3.5 the owner again asserted that the contractor was not ready to commence testing and commissioning on

natural gas and accordingly does not require natural gas to be made available on 27 November 2017. Also in that same letter at paragraph 4.2 the owner asserted that the contractor was not then ready to receive natural gas and so the owner's obligation had not yet been triggered. Therefore Mr Subel submitted that no case was made out that the owner delayed. Mr Subel submitted further that one could go beyond the functionality testing without natural gas: each of the three fuels had to be tested independently.

[80] In a further response Mr Gautschi submitted that there was no impediment to asking for a reference to oral evidence because the banks are in any event simply abiding. He reiterated that the fraud is not required to be proved on the calling of the retention bond because that is a legal argument. The retention bond could only be used for defects and not delays. Yet the owner called it for delays.

[81] As to clause 2.5.8 he submitted that until there was a statement from the owner that they are unable to supply the natural gas, the contractor was unable to proceed as if there was a failure. He reiterated his submission that without successful completion of the functional testing with all three fuels, one could not move on to do the performance and reliability testing.

[82] Finally, he submitted that the contractor was implicitly ready, in any event, to do the commissioning. This appears from the letters.

Discussion

[83] As I see it, the issues that arise in this matter are: has the contractor shown that there is a contractual prohibition (with or without having to show absence of honest belief in the asserted breach) against calling on the retention bond for delay damages? And has the contractor shown that there was no honest belief on the part of the owner in asserting breach by the contractor?

The contractual case

[84] The contractual case, whether in the form of the fraudulent call on the retention bond as delay damages are allegedly not covered by it, or in the more nuanced form raised in reply (that the call on the retention bond could be interdicted without having to show fraud) was not pleaded in the founding affidavit. The terms of the bonds do not, certainly not expressly, contain the limitation contended for. Mr Gautschi argued that the limitation would not be found there anyway; the limitation exists within the contractual scheme arranged between the owner and the contractor.

[85] Accepting that if such a limitation exists, that is where it is to be found, the contention still requires the importation of an implied term (within its narrower meaning of a tacit term) into the parties' contract. The "entire agreement" provision at clause 1.20 would not be an impediment to such a clause (*Ranch International Pipelines (Transvaal) (Pty) Ltd v L M G Construction (City) (Pty) Ltd; LMG Construction (City) (Pty) Ltd v Ranch International Pipelines (Transvaal) (Pty) Ltd and Others* 1984 (3) SA 861 (W)), nor was it argued to be such; but it was argued that it should have been pleaded.

[86] In *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere, 1984(4) SA 261 (W)* the applicant asserted a new cause of action, based on a tacit contract, in the replying affidavit. When the court was confronted with the proposition that a tacit term need not be expressly pleaded, because it arises from all the facts already pleaded as part of the papers, the argument was rejected. The court held that where a tacit contract is relied upon it must, amongst other things, be averred that the party concerned relies on a thus proven contract from which the remedies which he seeks to enforce flow.

[87] That case applies to tacit contracts as opposed to tacit terms, but in my view the same principle applies. Insistence on pleading the very term said to have been breached is, as I see it, essential for the proper running of motion court proceedings. If it is not done, the court does not have the benefit of both sides' evidence and submissions on the very issue that

arises in the case. That is a fundamental omission that negates the most essential tenet of our legal process, being that both sides must be heard. The contractual case therefore cannot be considered.

No honest belief in the contractor's alleged breach?

[88] That brings me to the second point. The parties are not disagreed on the legal test. It is, essentially, fraud: does the owner call up the bond well knowing that it is not entitled to assert the essential prerequisite, viz a contractor's breach? The language used in the cases is strong: Scott, AJA in Loomcraft, borrowing from judgments in the UK, speaks of "the most exceptional cases". And equally important is to stress that the minority judgment of Cloete, JA in Dormell was held to be correct in *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association, 2014 (2) SA 382 (SCA).* Coface held that the majority judgment in Dormell was wrong.

[89] The Coface court stressed that the relationship between the owner and the banks (guarantors) is unrelated and unaffected by the relationship between the owner and the contractor; these two sets of relationships are, in the words of Cloete, JA in Dormell, res inter alios acta. The banks must pay; the underlying disputes between owner and contractor are – barring fraud – none of their business.

[90] In this context I should say something about the contractor's application to amend its notice of motion to include an application for an interim, as opposed to final, interdict in the alternative. The four requirements for an interim interdict are well-known: a prima facie right although open to some doubt; irreparable harm if the interdict is refused; no satisfactory alternative remedy; and balance of convenience.

[91] In the context of bonds such as are involved in this case, it seems to me that, generally, this last requirement will be satisfied only with considerable difficulty. The very point about such bonds is that they should serve as unclouded immediate cash despite the underlying real

dispute between an owner and a contractor as to the respective legal entitlements of the parties.

[92] That underlying dispute is required to be resolved in the manner provided for in the contract between them; and its determination may even come to a conclusion wholly different from that which the owner asserted to the banks. Moreover, as happened in Dormell, such a wholly different conclusion, even if it is reached before the bonds are called, affords no defence at all to the calling of the bonds.

[93] The point is that the arbitration process binds those two parties to it only; and it is a different process, dehors the process involved in the calling up of the bonds. Self-evidently, ultimately there has to be, as between the owner and the contractor, a final determination of their respective rights and obligations and pursuant thereto, a squaring of accounts. And in that process the owner will not be permitted to cling to a credit following payment by the banks under performance bonds, should the final dispute resolution between the owner and the contractor reflect that the owner owes the contractor money and not vice versa.

[94] But in the meantime, the contractually required bond is there to be called up, excepting only where in the clearest of cases a fraud is illustrated. To my mind, that implies that there is, generally, little if any scope to refer the determination of the question of fraud to the very arbitration which is the place for merits determination between the owner and the contractor.

[95] Perhaps put differently: the final resolution of the underlying contractual dispute between owner and contractor by viva voce evidence is the province of the contractual arbitration proceedings; by definition, given the structure and purpose of bonds such as these, that arbitration process is anathematic to the demand of speedy determination of the question, between the owner and the banks, as to whether there is an impediment to the bonds being called up.

[96] This conclusion implies, of course, that the applicant who wants to interdict the calling of a bond must pass the muster of the approach to factual disputes in an application for final relief: the applicant must succeed on the respondent's version, together with those allegations of the applicant which the respondent cannot (really) dispute. It is for this reason that the parties' contentions are set out in some detail above. To my mind, they show that the applicant cannot succeed, essentially for the reasons that I now state briefly.

[97] First, the dispute about claimed extensions of time (EOTs) is what underlies the calling of the bonds, as will appear from the parties' contentions. Generally, in construction arbitrations such disputes are often complex, and the more complex, the less the scope for finding on affidavit that no honest opposing belief can be held.

[98] Second, in this case, the debate about whether the contractor was "ready to commence commissioning" is very real. The owner contends that the contractor was in fact not ready to commence commissioning at any time before 27 April 2018. The owner's letter of that date is referred to above. Its contention, as advanced before the court, was that clause 2.5.8 implies that the contractor need not wait for the owner; if natural gas is not available, the commissioning goes ahead without it.

[99] That argument, namely that absence of natural gas does not require a variation under clause 8.4.1, and does not imply a delay attributable to the owner under clause 8.4.3, is not obviously without merit. The argument is that these two clauses do not impact clause 2.5.8, which has its own internal mechanism for what occurs if the owners fails to provide natural gas.

[100] The contractor's argument, that it cannot be said that there has been a failure until the owner has conveyed that there is an inability, really shows where the rub lies. A failure and an inability are not necessarily the same thing; a failure will have occurred when the owner will have failed to provide when the time to provide has arrived. Accordingly I do not believe that it can be said on these papers that the contractor's position on clause 2.5.8 and its

application to these facts are so axiomatically correct, that in truth the owner knew them to be correct.

[101] Third, the correspondence war between the parties had been on-going for some time before the bonds were called. That is indicative, to some extent, of the substance of the opposing contentions. If the owner's position was completely unmeritorious, one would have expected the contractor, who must have seen the calling of the bonds on the horizon, applying for an anticipatory interdict the moment the owner's contention was first raised.

[102] Fourth, the parties' respective positions on the LCO contamination are starkly different. The contractor says the owner supplied contaminated fuel; the owner, having examined the issue, disputes this. It is not possible on these papers to conclude that the clearest of cases has been made out that the owner dishonestly believes in its own position.

Conclusion

[103] In these circumstances the application cannot succeed. The application to amend the notice of motion is dismissed; and the main application is dismissed with costs, including the costs consequent upon the employment of two counsel.

WHG van der Linde
Judge, High Court
Johannesburg

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