



REPORTABLE

CASE NO: SA 167/2024

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**JDN CIVIL ENGINEERING CC JV NEW ERA
INVESTMENTS (PTY) LTD**

Appellant

and

**CENTRAL PROCUREMENT BOARD OF NAMIBIA
NAMIBIA WATER CORPORATION LTD
ADAPTIVE BUILDING CONSTRUCTION CC JV
CHINA STATE CONSTRUCTION ENGINEERING
CORPORATION (PTY) LTD
CSV CONSTRUCTION NAMIBIA (PTY) LTD
NEXUS CIVIL JV M.E.S.
MAKALANI ENGINEERING CC JV JNJ TRADING
CC
VALOMEK CIVILS JV CHINA RAILWAY
SEVENTH GROUP NAMIBIA (PTY) LTD
SIKU & CHINA JIANGXI INTERNATIONAL
C.K. HEYDT CIVILS CC JV UNIK
CONSTRUCTION ENGINEERING NAMIBIA (PTY)
LTD
NDAKALIMWE INVESTMENT CC**

**First Respondent
Second Respondent**

**Third Respondent
Fourth Respondent
Fifth Respondent**

Sixth Respondent

**Seventh Respondent
Eighth Respondent**

**Ninth Respondent
Tenth Respondent**

KSP CIVILS CC**Eleventh Respondent****ZHONG MEI (PTY) LTD JV LUKA ROADS AND****RAILS AND CIVILS CC****Twelfth Respondent****Coram:** ANGULA JA, SMUTS AJA and FRANK AJA**Heard:** 25 April 2025**Delivered:** 20 June 2025

Summary: The appellant, a joint venture (JV) between JDN Civil Engineering CC (JDN) and New Era Investments Pty Ltd (New Era), was formed to tender for a water pipeline construction project from the Naute Dam to Keetmanshoop. The Central Procurement Board of Namibia (CPBN), acting on behalf of Namwater, awarded the contract to the JV on 14 February 2024. The award required submission of a Performance Security, which would trigger the formal signing of the contract. The JV acknowledged the award and accepted its terms. However, complications arose regarding the submission of the Performance Security. While New Era was ready, JDN encountered difficulties. Several deadlines were extended, but delays persisted. Communications between CPBN and the JV were at times flawed, with New Era claiming it was not copied on key correspondence due to incorrect email addresses.

CPBN eventually cancelled the bidding process on 13 June 2024 for failure to submit the Performance Security. Though New Era claimed to be unaware of the cancellation, it was confirmed at a subsequent meeting on 3 July 2024. CPBN later initiated a restricted bidding process, inviting the original bidders, including the appellant, which participated under protest, insisting that the original contract should still be honoured. CPBN then decided to submit a debarment application against the JV for failure to comply with the security requirement.

The appellant launched an urgent court application seeking to set aside the cancellation, the restricted bidding process, and the debarment action, and to

compel CPBN or Namwater to provide the contract for signature. However, at the hearing, only the relief for specific performance — delivery of the contract — was pursued. The court found that the failure to submit the Performance Security by the deadline meant that the contract had not come into effect and dismissed the application with costs. The appeal challenges this order.

Held that, a clause making a contract subject to an event over which one party does not have complete control is, in the absence of any indication to the contrary, interpreted as a condition and not a term. There also can be no question of a party being in *mora* in respect of the fulfilment of a condition. Section 55(7) of the Public Procurement Act 15 of 2015 reinforces this interpretation as there is no need to cancel or annul the award as this follows, *ipso facto*, from the failure to supply the security timeously.

Held further that, it follows that when the appellant did not furnish the Performance Security, the contract either never came into existence or ceased to exist and there is no basis to set aside the decision by the CPBN to cancel the bidding process and to move on to the next step following such cancellation.

The appeal accordingly was dismissed with costs.

APPEAL JUDGMENT

FRANK AJA (ANGULA JA and SMUTS AJA concurring):

Introduction

[1] The appellant, a joint venture (partnership) was created to bid for a tender put out by the Central Procurement Board of Namibia (CPBN) relating to the construction of a water pipeline from the Naute Dam to Keetmanshoop (the work) and, if successful, to execute the work. The tender closed on 21 August 2022. CPBN

administered the tender process on behalf of the Namibia Water Corporation Ltd (Namwater).

[2] On 23 October 2023, the appellant was informed that it had been selected as the successful bidder. Following an unsuccessful application for reconsideration and an urgent court challenge by a competing bidder, appellant was notified on 14 February 2024 that it had been awarded the contract for the work.

[3] On the same day, namely 14 February 2024, appellant was informed per letter that it had been awarded the contract in which letter appellant was informed that:

‘3.3 You are required to submit a Performance Security worth ten (10) per cent of the contract value (excluding VAT) in line with s 55(8) read with Reg 38(4) of the Public Procurement Act 15 of 2015 as amended. If the Performance Security is accepted by the CPBN, a contract shall be signed within the period stated in 3.9 below or as extended by the Accounting Officer of the CPBN.’

[4] Paragraph 3.9 of said letter indicated that pending the signature of the ‘Contract Agreement’ the letter together with the ‘employer’s requirements’ and the submitted bid of appellant ‘shall constitute the establishment of the contract’. In paragraph 3.10 of the said letter it is indicated that the ‘Performance Security’ had to be provided by 28 March 2024 and that the ‘Contract Signing’ was scheduled for 5 April 2024, ie about a week subsequent to the receipt of the Performance Security. The Joint Venture (JV) acknowledged receipt of the letter under the rubric ‘We . . . accept the Terms and Conditions contained herein to be contractually binding to all parties’ by signing the letter.

[5] Per email dated 25 March 2025, New Era enquired from the CPBN if JDN had already submitted proof of 'Financial Performance' in respect of half the work so that the JV could move on to the aspect of the Performance Security. In response the CPBN stated that they expected the partners to keep each other informed of matters such as these and that it was for each JV partner to confirm with the other whether documentation had been submitted. A number of extensions were given for the filing of the Performance Security. On 28 March 2024 the JV was invited to a meeting with CPBN on 2 April 2024. On the same date New Era accepted the invitation and informed the CPBN that arrangement has been made for 'Performance Security on our side'. In the meantime the CPBN had already per letter dated 29 March 2024 put the JV on notice that the deadline for the 'Performance Security' was extended to 15 April 2024. It seems that the issue of the Performance Security was discussed at the meeting of 2 April 2024. In the founding affidavit it is stated that at this meeting the CPBN 'only discussed the submission of performance guarantee and proof of working capital'. It is thus clear that by this time New Era must have become aware that failure to provide the Performance Security was a potential problem.

[6] On 30 April 2025 CPBN wrote a letter addressed to the JV setting 16 May 2024 as the deadline for the delivery of Performance Security failing which the matter would be dealt with in terms of s 55(7) of the Public Procurement Act 15 of 2015 (the Act). New Era complains that this letter was not forwarded to it as the wrong email address was used. It is however clear that JDN received it. The deadline was again extended and on 20 May 2024 and the CPBN sought a commitment before close of business that day that a Performance Security would be

forthcoming by 6 June 2024. JDN in response made this commitment. According to New Era, it was not copied in this correspondence between JDN and CPBN as a wrong email address was again used.

[7] Be that as it may, after a number of extensions were granted to file the Performance Security, the CPBN on 13 June 2024 cancelled the bidding process. New Era avers it did not receive this letter but it appears that JDN received it. However, at a meeting on 3 July 2024 to which all bidders were invited and where New Era (and not JDN) was present, the minutes reflect that those present at the meeting were informed that as a result of the failure to provide a Performance Security and because there were no other responsive bids, the CPBN 'resolved to cancel the procurement process on 13 June 2024'. CPBN indicated that they were awaiting a response from Namwater and if the latter's need was still the same they would 'conduct a restricted bidding process with the bidders who participated in the initial procurement process'. On 4 July 2024 a notice of bid cancellation was addressed to the bidders informing them of the cancellation of the bid on 13 June 2024.

[8] Per letter dated 17 September 2024, CPBN invited the appellant to participate in the restricted bidding process for the same work. Appellant participated with reservation of their rights and insisted that the contract under the initial bid had to be made available to them for signature and execution. The current third to twelfth respondents are the bidders who took up the invitation to participate in the restricted bidding process that followed the cancellation of the original tender and they were all bidders in the initial bidding process.

[9] In a further letter dated 9 October 2024 CPBN informed the appellant that the restricted bidding would be closing on 11 October 2024 and on this day it is averred by appellant that the CPBN took a decision to file a debarment application with the Review Panel against the appellant following its failure to provide a Performance Security.

[10] The appellant thus urgently sought the following relief in the court *a quo* (I summarise the relief sought):

- (a) Reviewing and setting aside the decision of CPBN to cancel the bid for the work.
- (b) Reviewing and setting aside the decision of CPBN to procure through restrictive bidding, from the original bidders a contractor for the work.
- (c) Reviewing and setting aside the decision of the CPBN to file a debarment application with the review panel in respect of appellant.
- (d) Reviewing and setting aside the decision to invite new bids, following a restricted bidding process, for the work.
- (e) Compelling CPBN, alternatively Namwater, to provide a procurement contract for the work to appellant within five days of the order.

- (f) Costs against those parties opposing the order.

[11] According to the judge *a quo*, counsel for the appellant at the hearing of the application indicated that the relief sought was the orders to compel the CPBN, alternatively Namwater, to provide a contract to the appellant within five days so as to entitle the appellant to execute the works, ie the orders set out in paras (a) and (e) referred to above. Orders (b), (c) and (d) were apparently not persisted with. According to the judge *a quo* the failure to furnish the Performance Security by the extended deadline meant that the contract terminated automatically as the furnishing of the guarantee was a condition precedent to the contract.

[12] The court *a quo* accordingly dismissed the application for the specific performance relief claimed with costs, inclusive of one instructing and one instructed counsel. This appeal lies against this order.

Joint Venture Agreement

[13] The written joint venture agreement is headed a 'Pre-Bidding Joint Venture Agreement' and is stated to be between JDN Civil Engineering CC which is described as a Namibian registered close corporation and a 100 per cent Namibian owned BEE/SME Company with limited liability and 'New Era' a Namibian registered limited company, and a 100 per cent 'Non-Namibian owned company with limited liability'.

[14] The joint venture was formed for the purpose 'to jointly tender and execute, if awarded, the work'.

[15] The agreement is stated to terminate if the tender is not awarded to it otherwise on conclusion of the work, or by agreement or by order of court.

[16] The interest of the parties to the joint venture is stated as 51 per cent to JDN and 49 per cent to New Era.

[17] In clause 5.2 under the heading 'Joint Venture Leading Party' the following appears:

' . . . agree that JDN Civil Engineering CC shall act as the Leading Party to represent the Joint Venture towards the employer and third parties which are related to the project taken into consideration of its similar construction experience capabilities.'

[18] In respect of the bid it was agreed in clause 6.2 that the representative of New Era, Mr Miao Qin 'to represent the Joint Venture to sign and submit the relevant tender documents on behalf of the Joint Venture' and that for the purposes of the tender submission the address of New Era in Windhoek with email tenders@newera.na.com would apply.

[19] In clause 9 it is provided as follows:

'9.1 Immediately upon being awarded the Contract, and in all case shall be no later than the submission of the performance guarantee in the name of the Joint Venture, the Parties shall enter into and sign a detailed Joint Venture agreement in order to determine in details the contractual stipulations governing their cooperation as a Joint Venture.'

[20] As pointed out above JDN encountered problems to provide the Performance Security for half the required amount whereas New Era did not have any issues in this regard. New Era was either not aware of the difficulties encountered by JDN or did not initially feel it had to take up the additional burden where it only had a 49 per cent interest in the Joint Venture. Here it must be borne in mind that the preamble to the Joint Venture agreement, the parties undertook *vis-à-vis* each other 'their ability to provide their respective share of bonding capacity, finances, personnel, equipment and supervision to complete the work'. It now appears that unexpectedly JDN could not obtain what is in essence a performance bond for their share in the works.

[21] New Era thus, in respect of the detailed new agreement envisaged in clause 9 quoted above, sought to increase its share in the JV to 80 per cent. Be that as it may, a new agreement was never forthcoming as JDN did not agree to the proposals of New Era. The 'Pre-Bidding JV Agreement' thus remained operative as per clause 9.2 thereof insofar as applicable to the new circumstances after the award of the bid to the Joint Venture up to the disputed 'cancellation' thereof.

Appeal on the merits

[22] The whole thrust of the case for the appellant is that their right to be provided with a contract for signature was a prior obligation to their obligation to provide a Performance Security and hence they did not have to provide the security prior to the signature of the procurement agreement. In the oral submissions on behalf of the JV it was submitted that the failure to provide the procurement contract for signature amounted to a repudiation of the award to the JV suspending the duty of the JV to provide the Performance Security.¹

¹ *Erasmus v Pienaar* 1984 (4) SA 9 (T).

[23] The Act provides as follows when it comes to the question of Performance Security: s 55(6) provides for a Performance Security bond to be furnished within a specific period by a successful bidder. In the present matter the bid documents required such security to be furnished within 30 days of the notification of the award. Section 55(7) provides that where such a bidder fails to provide the required Performance Security within the prescribed period, another bidder from amongst the remaining valid bids may be selected. There is no suggestion in s 55(7) of the Act that CPBN may cancel the award of the tender to the successful bidder when the Performance Security is not forthcoming. The failure to provide security, *ipso facto*, leads to a process to select a new bidder.

[24] Regulation 38(4) ties in with the above sections in the Act and reads as follows:

‘(4) A bidder to whom a procurement contract is awarded fails to . . . provide the required security for the performance of the contract within a period of 30 days from the notification of the award or such further period as may be extended by the public entity, the public entity must select another bidder from amongst the remaining valid bidders as contemplated in s 55(7) of the Act.’

[25] As pointed out above on 14 February 2024 in a notice to all the bidders for the work, the CPBN gave notice of the award of the bid to the JV. On the same date a contract acceptance letter was forwarded to the JV. In this letter, the JV is informed that a Performance Security was required by 28 March 2024 and upon receipt of such Performance Security ‘a contract will be signed’ The JV was informed that

pending the signature of the contract 'this letter of acceptance, Employer's requirements, and your submitted bid offer; shall constitute the establishment of the contract'.

[26] The letter of 14 February 2024 is in line with the instruction to bidders which provides that until a formal contract is prepared and concluded, the notification of award will constitute a binding contract. As pointed out above, this letter and the terms set out therein were accepted by the JV.

[27] From the Act, the regulations and the bid documents it is clear that what was envisaged was that the disparate documents constituting the contract in terms of the award of the tender would be reduced in writing to a single contract which would then be signed by the parties so as to govern the execution of the works. To avoid the task of combining the disparate documents constituting the contract into one new contract being effort wasted the issue of the Performance Security must be addressed, for if this was not forthcoming there would be no need for the task of consolidating all the contractual documents into a unitary contract as the award would not be executed. The letter of acceptance of 14 February 2024 makes this clear: 'If the Performance Security is accepted . . . the contract will be signed' This also follows for what is stated in Reg 38(4)'.

[28] It does not matter that an inchoate contract already existed after the award of the tender based on the mentioned bid documents and the letter of acceptance. This may be important to secure a Performance Security, but it is clear that the inchoate contract would fall by the wayside if the Performance Security 'is not furnished

timeously'. It also does not matter whether the condition relating to the Performance Security is a suspensive or a resolutive condition as it is clear that the failure to furnish such security means the end of the contract, either because it was suspended pending such security or it ceases to have any effect once the security is not timeously given. What is clear is that the essentials of the contract were stated with reference to the documents referred to in the letter of 14 February 2024 and that this 'contract' could be used for the purpose of obtaining a Performance Security.

[29] A clause making a contract subject to an event over which one party does not have complete control is, in the absence of any indication to the contrary, interpreted as a condition and not a term.² There also can be no question of a party being in *mora* in respect of the fulfilment of a condition.³ Section 55(7) reinforces this interpretation as there is no need to cancel or annul the award as this follows, *ipso facto*, from the failure to supply the security timeously.

[30] A condition is not a term of an agreement. It is an unclear future event on which the agreement is premised. If the contract does not take effect unless the condition is fulfilled, it is a suspensive condition and if the contract comes into effect immediately but ceases to exist if the condition is not fulfilled it is a resolutive condition. In either event there is no reciprocal duty in respect thereof. The only duty of a counterparty to a contract containing such condition is not to frustrate the fulfilment of the condition. This difference between terms and conditions was explained in *R v Katz*⁴ by De Villiers AJ as follows:

² *Administrateur-Generaal vir die gebied Suidwes Afrika v Hotel Onduri (Edms) Bpk & andere* 1983 (4) SA 794 (SWA), *Dirk Fourie Trust v Gerber* 1986 (1) SA 763 (A).

³ *Christodoulides & another v SA Dry Cleaners (Pty) Ltd* 1962 (3) SA 595 (W) at 597 and *Cardoso v Tuckers Land and Development Corporation (Pty) Ltd* 1981 (3) SA 54 (W).

⁴ *R v Katz* 1959 (3) SA 408 (C) at 417.

‘ . . . The word “condition” in relation to a contract, is sometimes used in a wide sense as meaning a provision of the contract, ie an accepted stipulation, as for example in the phrase “conditions of sale”. In this sense the word includes ordinary arrangements as to time and manner of delivery and of delivery and of payment of the purchase price, etc – in other words the so called *accidentalia* of the contract. In the sense of a true suspensive or resolutive condition, however, the word has a much more limited meaning, viz of a qualification which renders the operation and consequences of the whole contract dependent upon an uncertain future event . . . In the case of true conditions the parties by specific agreement introduce contingency as to the existence or otherwise of the contract, whereas provisions which are not true conditions bind the parties as to their fulfilment and on breach give rise to ordinary contractual remedies of a compensatory nature, i.e. (depending on the circumstances) specific performance, damages, cancellation or certain combinations of these’

[31] It follows that when the applicant did not furnish the Performance Security, that the contract either never came into existence or ceased to exist and there is no basis to set aside the decision by the CPBN to cancel the bidding process and to move on to the next step following such cancellation.

[32] Even if I am wrong and the requirement relating to the furnishing of a Performance Security was a term of the agreement, this would make no difference to the result. This is so because whether a contract contains reciprocal terms is a matter of interpretation. Where terms do not impose reciprocal obligations they are said to be independent.⁵ It is clear from the present context that the requirement of a Performance Security was an independent obligation imposed on the JV which had to be discharged prior to the signing of the contract and which needed no input from the CPBN. This is so because the parameters of the contract were spelled out with

⁵ *Andrews v Lidaks & another* 1971 (1) SA 892 (W) and *U-Drive Franchise Systems (Pty) Ltd v Drive Yourself (Pty) Ltd & another* 1976 (1) SA 137 (D).

reference to the documents already mentioned as the acceptance letter. Furthermore, New Era encountered no difficulties to obtain guarantees based on this inchoate contract which is also indicative of the fact that there was no obligation to provide a signed contract prior to the obligation on the JV to obtain a Performance Security. This obligation was thus, if it was a term of the agreement (which I doubt) an independent obligation, the failure of which triggered the termination of the contract when the Performance Security was not delivered timeously.

[33] Counsel for the JV submitted that the failure to provide the procurement contract for signature was a breach of the agreement justifying a non-compliance with the obligation relating to the furnishing of the security by the JV. He referred to this failure to provide a contract for signature as a repudiation entitling the JV to not perform and obtain a Performance Security. He submitted that the bid documents stipulate that a procurement contract had to be provided 'promptly' for signature and that such contract was necessary to obtain a Performance Security.

[34] The first obstacle in respect of this submission is that the premise on which it is based, namely a repudiation by the CPBN, cannot be accepted. It is abundantly clear from the actions of the CPBN that they approached the matter as indicated above, ie that a contract came into existence on the JV being notified that it had been awarded the tender but that this was subject to the condition that a Performance Security had to be supplied prior to the matter proceeding. The refusal to provide a procurement agreement for signature was based on the premise that this would have to be provided once it was clear that the contract would be executed by the JV which clarity would only be obtained once the security had been delivered.

In the meantime, the JV was placed in a position where everything necessary had been provided to it for the purpose of obtaining a Performance Security. The CPBN's action was not and could not be seen as a repudiation. CPBN simply waited to see if the condition relating to the Performance Security would be fulfilled or not and this must have been clear to the JV. There is simply no basis on the facts to categorise the failure of the CPBN to provide a procurement contract for signature prior to the receipt of the Performance Security as a repudiation from their side of the agreement.

[35] It is correct that the dictionary definition of 'promptly' refers to this word's meaning as 'with little or no delay or immediately'. However in the context used in the present matter this literal meaning does not fit. The statutory condition imposed on the contract is of a very short duration (30 days) and to expect a contract to be prepared and provided to the successful bidder prior to receipt of the Performance Security may well be labour wasted if the security does not materialise. Thus it is indicated in the letter of 14 February 2024, that the contract for signature would be furnished 'with little delay' subsequent to the fulfilment of the condition when it became clear that the contract will remain in existence. The JV, after all accepted the terms of that letter and hence by agreement between the parties 'prompt' in the present context meant the procurement contract would be given to the JV for signature 'with little delay' subsequent to the fulfilment of the condition.

[36] Here it must be borne in mind that because the prompt furnishing of a written agreement is a term of the agreement (and not a condition), the JV is entitled not to execute the contract pending the fulfilment of this obligation of the CPBN. The JV is

thus not prejudiced in that it must commence with the work with all that entails up to the time the contract has been signed. This was also clearly intended when the parties agreed that the contract for signature had to be produced subsequent to the production of the Performance Security. In this matter there would be no need for restitution should the Performance Security not be forthcoming. A failure to provide a contract for signature promptly after the security had been timeously furnished would have entitled the JV to exercise all the rights normally available in respect of breach of contract.

[37] The above approach is the only sensible and business-like manner to interpret the bid documents to align them with the statutory condition relating to security embodied in s 55(6) of the Act. The letter accompanying the notice of award makes it clear that pending the signed contract, a contract already exists which would be reduced to writing in due course. The purpose for this is that the JV can, pending the signed contract, already take steps to make the necessary financial arrangements inclusive of the securing of the Performance Security. This period is intended to endure for a short period of 30 days in this matter. This period may be extended but that would be to the sole advantage of the affected bidder who, by requesting such extension, recognises that the work and the terms of the contract will be suspended during this extension. If the Performance Security is not forthcoming the contract falls by the wayside and any effort to have a composite and complete contract prior to the deadline for the delivery of the security would have been work and time wasted. The reference to 'promptly upon notification' in the above context thus from a sensible and business perspective means promptly from the date the execution of the contract by the successful bidder is assured.

[38] The only question arising is whether the refusal to provide the procurement contract for signature earlier frustrated the acquisition of such security. As already indicated, the JV was informed that there was a contract in place when it acknowledged the acceptance letter. The documents constituting the contract were spelt out and whereas the eventual procurement contract may have certain formal or procedural clauses not contained in the disparate documents constituting the contract in the meantime, all the material terms are contained in these documents, such as the nature and scope of the work and the remuneration for the work to be done and the payment intervals. In short, everything that a provider of a Performance Security would need is to decide whether to furnish such security. In fact, it is common knowledge that this is what most successful bidders require in such situations to obtain such securities. It is also common cause that New Era encountered no difficulties obtaining a Performance Security which were belatedly provided in respect of the work.

[39] It was submitted on behalf of the JV that as the extension of the deadline to supply the Performance Security was not forwarded to New Era (because of the wrong email address) the CPBN could not rely on this extended deadline. It is common cause that the issue of the furnishing of the Performance Security was discussed at a meeting on 2 April 2024 where New Era was present. That between New Era and JDN the agreement was that each would provide 50 per cent of the required security. That the CPBN informed the JV that the question as to whether the other partner had performed in this regard was for the parties to discuss between themselves. That the partners must have been involved during this extended period

with discussions relating to the final JV agreement as envisaged in clause 9 of the initial agreement quoted above. That JDN undertook to provide the security by the extended deadline.

[40] Although it is highly unlikely that New Era did not know of the deadline in view of what is stated above, it is clear that the CPBN through its communications with JDN notified the JV of this extended deadline which was accepted by JDN. JDN clearly in this context acted for and on behalf of the JV. It is trite law that a partner is an agent of his co-partners and that he binds himself and his partners through his actions for and on behalf of the partnership.⁶ It follows that this submission on behalf of the JV in the context of the present matter, cannot be accepted.

[41] The appellant criticizes the decision of CPBN to, subsequent to the cancelling of the award to appellant, resort to a 'restrictive bidding process' by invitation to the indicated bidders. This was done because the JV was the only bidder that qualified in the initial bidding contest for the work. There was thus no alternative valid bid that could be considered in terms of s 55(7)(c) for which another bidder could be selected for the work.

[42] It will be recalled that the JV was invited to join this group of previous bidders to form part of the 'restricted bidding process'. Appellant did participate in this process, with reservation of rights, and took up the position that the award to them of the work had to be finalised and did not come to an end as they, long after the deadline, did obtain a Performance Security. Obviously some alternative process to

⁶ *Potchefstroom Diaries v Standard Fresh Milk* 1913 TPD 506 at 511 and *Tedder & another v Grieg & another* 1912 AD 73.

select someone to do the work had to be followed and no basis is spelt out as to why the process chosen was in any manner flawed, save to aver that it was unnecessary as their award still stood, which as pointed out above is not correct. There is thus likewise no basis to review and set aside the decision relating to the setting in motion so as to identify an entity to do the work from this restrictive bidding process.

[43] The alleged decision by the CPBN to apply to the Review Board for the 'debarment' of the JV because of their failure to file the Performance Security is premature. Once such application is filed the JV will have the opportunity to oppose it and answer and challenge whatever allegations are made in support thereof and those issues can be determined in the normal process. Until then, the JV suffers nothing and is not 'debarred' from any bids in the public space at all. In short, the debarment application is premature and also falls to be dismissed.

Conclusion

[44] As indicated above the appeal must fail and I can see no reason why the normal consequences as to costs should not apply, ie that costs should follow the result.

[45] In the result, I make the following order:

The appeal is dismissed with costs.

FRANK AJA

ANGULA JA

SMUTS AJA

APPEARANCES

APPELLANT:

R Heathcote

Instructed by Fischer, Quarmby &
Pfeifer

FIRST RESPONDENT:

R Katijjere

Instructed by Government Attorneys