

Contractors beware of new clauses in road tender deals

Sanral's recent tenders for the upgrades to the N2/N3 are worth millions, which is great news for contractors in a sector that is in slump. But, warns construction and technology law specialist MDA Attorneys, amendments to Sanral's standard contract make it much more difficult for contractors to deal with disruptions related to the construction mafia - where local communities and business forums disrupt sites to demand that they are awarded work under threat of violence, which causes costly delays.



Kelly Meijers, senior associate at MDA Attorneys

Sanral has added five conditions to the clause on which contractors rely when dealing with strikes and riots, including construction mafia type circumstances. Called *force majeure*, this clause entitles contractors to claim time extensions, costs and termination of the contract.

"In South Africa, there is a high possibility that local communities and business forums will disrupt the works, which causes prolonged delays and could necessitate ending the project," says Kelly Meijers, senior associate at MDA Attorneys. "Sanral's previous contract made it difficult for contractors to define these disruptions as *force majeure* events, but Sanral's new contract makes it even harder, posing significant risks for contractors."



Can your contract protect you against construction mafia losses?

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Under the new contract, contractors need to have five conditions in place for an event to be considered *force majeure*:

- The contractor needs to have engaged with those responsible for the disruptions. Specifically, they need to have met with leadership: recorded details, grievances, and any threats made; and asked them to cease the unlawful conduct;
- The contractor must have proof of the riot, commotion, disorder, strike or lockout, and of any unlawful conduct;
- All threats and unlawful conduct must have been reported to the South African Police Service;
- An urgent application must have been launched in court which correctly identifies the parties and defines the unlawful conduct to be interdicted; and
- The contractor must have ensured that the court order is enforced.

Meijers says that contractors who are not aware of the additional requirements are at risk of being unable to obtain time extensions, which may result in delay damages and penalties. “If the conditions do not meet the definition of *force majeure*, contractors cannot terminate the contract for that reason,” she says.

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