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GENERAL: TIME BUT NOT COST: THE MYTHOLOGY OF CONCURRENT DELAYS

Introduction

This article sets out to explore the concept of apportioning costs between the employer and the contractor in the event of concurrency of delays and how this concept fits in with current South African law.

The issue of concurrent delays and how to deal with them is commonly encountered.

When discussing the concept of concurrency for the purposes of this article, concurrency will be discussed on the basis as being an instance when two delaying events occur at the same time. The risk for one delaying event lying with the contractor and for the other the risk lies with the employer. Both events are delaying completion of the works. The contractor has notified and submitted his claim and now we are in the claim assessment/determination phase.

The common approach, where there has been a concurrent delay, is to apportion time to Contractor but not his cost. But is there any basis for this in South African law? Or is it based on a misconception of the law?

The starting point is to understand the purpose of claims in a construction contract. The purpose of a claim is not, as the popular mythology would have it, a way for Contractors to gain more time and money. The purpose is to protect the Employer from the consequences of his risks.

This is very important to understand, because claims deal with the consequences of the Employer's risks only. They do not deal with the consequences of the Contractor's risks at all; those consequences are for the Contractor to bear entirely and are not the concern of the Employer.

The Employer may breach his obligations and, if the contract did not make provision for a claim, the Employer would lose the entitlement to enforce time, leaving the Contractor to complete in a reasonable time, and in addition the Contractor would be awarded his costs on a *quantum meruit* basis[1].

So what is the legal status of allowing the Contractor time but not cost? The Employer has breached an obligation or suffered the incurrence of a risk event. By virtue of this fact, the Contractor is entitled to claim additional time and cost. The time is for the extension for the construction time, and the cost is in essence the damages (cost) that he has suffered as a result.

The concurrency debate arises when the Contractor may also have been responsible for a delay. So if the Employer hadn't delayed the Contract, the Contractor would have been late in any event.

It is here that the argument is made that the time should be granted but not the cost.

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[1]*This is of course a very generalized statement for the purposes of making the point. The actual effects though are beyond the scope of this article.*

The English courts have used this approach too, but one must be careful to understand the basis of their decisions. The signal case is that of *Henry Boot v Malmaison Hotel*[2]. It is important to note that the English court found the authority to apportion costs in event of a concurrent delay was based in the contract.

The nature of the apportioning time but not cost must be understood. At its heart it seeks to apportion the damages of the event between the Employer and Contractor. In terms of this approach, both Parties will incur the damages associated with the extension of time – the loss will lie where it falls.

It is therefore an action of apportioning damages under a contract, and it here that this practice runs into legal trouble.

The law in South Africa simply does not recognize a common law right to apportion damages under a contract. This can only happen if the contract expressly makes provision for it. This was held to be the position in *Thoroughbred Breeders Association v Price Waterhouse*[3].

For the purposes of this article the following extracts are appropriate:

a) The defence of preponderance of guilt on the part of the plaintiff did not belong in the field of contract.
b) Where a plaintiff was able to prove that the breach of the defendant was ***a*** cause of the loss, he had to succeed, even if there was another contributing cause, including the plaintiff's own carelessness or failure to take reasonable precautions.
c) A plaintiff who sued for damages allegedly sustained through the negligence of the defendant, but who was himself careless in relation to the non-avoidance of such loss, was non-suited only if:

    a. there was a term in the contract to that effect;
    b. the plaintiff's own carelessness was the sole cause of the loss; or
    c. the defendant's negligence was, comparatively speaking, so negligible as to be discountable as a significant cause of the loss (which is effectively an extension of b).

d) When the defendant's breach had been ***a*** cause of the loss, the appellant had succeeded in proving the causative element of its cause of action.

(Our emphasis)

Accordingly, once a claimable event has occurred, it is established that the Contractor has the right to claim the time and cost of the event as directed by the contract.

The contract is often firm that this is the case, and the mere fact of the event triggers the right to claim. The next question is then the evaluation of the time and the cost.

There is a further impediment in the Conventional Penalties Act. Usually Employers set out their stall for damages in the event of the Contractor being late. The Contractor can only breach his obligations in terms of time, and accordingly be responsible for delay, once the completion date has passed and he still has not finished. Until that moment, he is not in breach in respect of delay and therefore not liable for any damages.

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[2]*Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 ConLR 32 TCC
[3]*Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA)

To get around this, construction contracts often include clauses that allow the Engineer to order remedial measures for the Contractor to adopt in order to expedite his progress when he is delaying progress[4].

In conclusion, in South Africa the concept of concurrent delay and apportioning the damages does not exist as a common law approach to dealing with instances where there is concurrent delay. Unless the contract makes specific provision for the apportionment of damages in the event of concurrent delay, the Contractor should receive both his time and cost of an event for which the Employer has taken the risk.

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[4]*For example see: Sub-Clause 8.6 of FIDIC 1999; Clause 5.7 of GCC 2010 and JBCC Principal Building Agreement clause 15.3*