

# MDA CONSULTING



## FIRST AID FOR CONTRACTS



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### **GENERAL**

#### **1. INTRODUCTION**

- 1.1 Generally the process of terminating a contract is that the aggrieved party gives the defaulting party an opportunity through the termination clause in the contract to remedy his default within a reasonable time. Failure to timeously remedy the breach results in the termination of the contract at the end of the notice period without further notice<sup>1</sup> or in some cases after giving a further notice to terminate<sup>2</sup>.
- 1.2 What happens where the aggrieved party waits “too long” after issuing the default notice? Can the defaulting party argue that the fact that the aggrieved party failed to take further steps and effect the termination indicated they were in fact satisfied with the steps the defaulting party was taking towards remedying the Works?
- 1.3 What about the aggrieved party? How long after issuing the default notice is a reasonable time within which to issue the final termination notice? If the aggrieved party waits too long does his right to terminate fall away and does he

**HOW LONG AFTER NOTIFYING THE DEFAULTING PARTY TO REMEDY THE BREACH IS A REASONABLE TIME WITHIN WHICH TO TERMINATE THE CONTRACT?**

have to start the termination process afresh by issuing a new default notice?

- 1.4 On the assumption that the aggrieved party is terminating the contract based on a valid breach of the contract, this article will look at how long after notifying the defaulting party to remedy the breach is reasonable time within which to terminate the contract.

#### **2. TERMINATION IN TERMS OF A CANCELLATION CLAUSE**

- 2.1 The termination (or cancellation) of a Construction contract is the bringing to an end of the Employer / Contractor relationship in respect of the execution of Works. The different forms of contract such as JBCC; GCC; FIDIC and NEC3 set out the steps each party must take in order to terminate the contract.
- 2.2 The fact that ending this contractual relationship requires the issuing of certain notices within specific time periods, demonstrates that by choosing to proceed with this course of action the procedure for termination must be meticulously followed so that the end result is valid termination.
- 2.3 According to (McKenzie 2009)<sup>3</sup>, where the aggrieved party has a right in terms of the contract provisions to cancel the contract after giving the defaulting party notice of such cancellation, the

<sup>1</sup> General conditions of contract for construction works 2<sup>nd</sup> edition 2010 clause 9.2.1

<sup>2</sup> JBCC Principal Building Agreement July 2007 clause 36.3

<sup>3</sup> Mackenzie, *The Law of Building and Engineering Contracts and Arbitration*, 6<sup>th</sup> edition

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word ‘notice’ “will be interpreted to mean that an express, extra judicial announcement has to be made”. The notice will not be implied<sup>4</sup>.

- 2.4 From this interpretation of notice it is evident that the aggrieved party must demonstrate a clear unambiguous intention to no longer be bound by the terms of the contract.

### **3. ENGLISH LAW – DOCTRINE OF AFFIRMATION**

- 3.1 The doctrine of affirmation was successfully relied upon in the English law case of *Tele2 International Card Company SA and others v Post Office Limited*<sup>5</sup>. The facts of this case are that the defaulting party (Tele2 International Card Company SA) committed a material breach of the contract. The aggrieved party (Post Office Limited) sent a default notice then waited approximately 11 (eleven) months after the occurrence of the breach to terminate the contract. The defaulting party, relying on the doctrine of affirmation, argued that if the aggrieved party knows about a breach being committed that gives them the right to terminate then the aggrieved party must make a decision before the law takes the decision out of their hands. In this case the aggrieved party was of the opinion that there was no restriction on when it could terminate the contract after sending the default notice. It relied on the “non-waiver” clause in the contract, which stated that no delay by a party in enforcing the agreement would be deemed to be a waiver, or prejudice that party’s rights.
- 3.2 The aggrieved party was unsuccessful on appeal, when the Court of Appeal reasoned that postponing termination for 11 (eleven) months was more than just postponing the exercising of a right it was clear evidence of the aggrieved party’s intention not to terminate.
- 3.3 Similarly in the English law case of *Architectural Installation Services Ltd v James Gibbons Windows Ltd*<sup>6</sup> the main contractor in that case sent a default notice to the sub-contractor requiring compliance with the terms of the contract. Some months later the main contractor sent a facsimile to the sub-contractor terminating the contract. The court held that the second notice did not constitute a valid contractual termination since a reasonable person would have seen no connection between the two notices. There needs to be a reasonable connection between the notices both in content and time.
- 3.4 Notwithstanding my unsuccessful attempts to find local cases either applying or supporting this doctrine, there are common legal principles relied on in both of the aforementioned cases, which are also applied in South African law – reasonableness and the intention of the parties!

### **4. REASONABLENESS AND INTENTION**

- 4.1 In the appellate division case of *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and Other Related Cases*<sup>7</sup>, the court held that when:

“Determining what is a reasonable period of notice of termination of a contract, regard must be had to the actual circumstances existing at the time of notice or those existing at the time of contract. Whatever the position may be regarding the circumstances to be considered in determining what is the reasonable period of notice, a reasonable notice must allow the person to whom such notice is given sufficient time in which reasonably to regulate his own affairs.”

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<sup>4</sup> ibid. p. 78

<sup>5</sup> [2008] EWHC 158 (QB)

<sup>6</sup> (1989) 46 BLR 91

<sup>7</sup> 1985 (4) SA 809 (A)

4.2 In the case of *MSC Depots (Pty) Ltd v WK Construction (Pty) Ltd Wynford's Civil & Developments CC*<sup>8</sup> the Contractor placed the Employer on terms for breaching the Contract through withholding payments in respect of certified payment certificates. Failing remedy of the breach by the Employer, the Contractor then terminated the contract. The Employer advised the Contractor that since he was also in breach of the contract because of certain construction defects in the works, the Contractor was not entitled to terminate the contract and he himself had in fact repudiated the contract, which repudiation the Employer accepted and on that basis terminated the contract. The Supreme Court of Appeal held that the contractor in that case was entitled to cancel the contract because he was not given the opportunity to remedy the defects in the construction works. The court found that the Contractor demonstrated every intention to remedy the defects to the works; accordingly he was not in breach of the contract.

## **5. CONCLUSION**

What we can take from these cases is that:

### 5.1 The aggrieved party:

5.1.1 Must carefully read the breach or termination clause in the contract and prudently follow it.

5.1.2 Must not act irrationally when placing the defaulting party on terms to remedy a default but should apply his mind, use common sense and take into consideration the circumstances existing at the time of the breach.

5.1.3 Must act within a reasonable time after issuing the default notice and terminate the contract. A fundamental question that the aggrieved party can ask himself before terminating the contract is – what steps is the defaulting party taking to remedy the defect? If he is endeavoring to remedy the default then the Works should reach successful completion, if he is not then it is reasonable for the aggrieved party to take the final step and terminate the contract.

### 5.2 The defaulting party:

5.2.1 May object to a termination notice from the aggrieved party, if it is sent an unreasonable time after the default notice was sent on the basis that there is no connection between the notices in content and time.

5.2.2 May acknowledge the invalid termination made by the aggrieved party as a repudiation of the contract and accept the repudiation thereby bringing the contract to an end.

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<sup>8</sup> 2011 JDR 0678 (SCA)