

MDA CONSULTING



FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

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GCC

Introduction

The General Conditions of Contract for Construction Works¹ (“GCC 2010”) regulates interim payments through clause 6.10.

Clause 6.10 provides for the Contractor to deliver a monthly statement to the Engineer for payment of all amounts he considers to be due to him. The Engineer is then obliged to issue a payment certificate based on the amounts he considers due and owing to the Contractor within 7 days. The Employer then has 28 days in which to pay the amount set out in the payment certificate.

Failure by the Employer to make payment of the payment certificate, within 28 days, entitles the Contractor to terminate the Contract by written notice.²

Possible Remedies

In the event that the Employer persists in repudiating the Contract by failing to make payment of the payment certificates, the GCC provides for the Contractor to terminate the Contract.

¹ The General Conditions of Contract for Construction Works, second edition, 2010.

² Clause 9.3.1.1.2

However, could the Contractor rather elect to suspend the Works and seek damages from the Employer instead of terminating the Contract?

Could the Contractor elect to suspend the contract in lieu of cancelling the contract and claiming damages?

“In the absence on an entitlement for the Contractor to suspend the Works (under the GCC 2010 contract), is the Contractor nevertheless entitled to suspend the Works if the Employer fails to comply with his obligation to make payment of the interim payment certificates? If so could the Employer terminate the Contract based on the Contractor’s breach of contract as a result of its suspension of Works? ”

Although the GCC doesn’t expressly make provision for the Contractor to suspend the works, the GCC does not contain a clause obliging the Contractor to continue with the works in the face of the Employer’s failure to pay the amounts due to the Contractor in terms of the payment certificates.

Clause 9.3.3 provides that:

Nothing in this Clause shall prejudice the right of the Contractor, to exercise, either in lieu of or in addition to the rights and remedies specified in this Clause, any other rights or remedies to which the Contractor may be entitled under the Contract or common law”.

Therefore, in terms of Clause 9.3.3, the Contractor could argue that he is entitled to suspend the works, mitigate his damages³ and seek an extension of time claim (until payment of the certificates have been received) and compensation for any time related items associated with the extension of time.

³ It is trite law that when a contract has been breached, the innocent party is not entitled to sit back and allow damages to multiply and that he has a duty to mitigate. The duty was expressed in *Haziz v Transvaal and Delagoa Bay Investment Co Ltd* 1939 AD 372.

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However, the GCC 2010 provides for the Employer to terminate the Contract in the event that the Contractor has suspended the progress of the Works for fourteen (14) consecutive days after receiving from the Engineer written notice to proceed⁴; or is not executing the Works in accordance with the Contract⁵.

The question that arises then is whether the Contractor, in electing to suspend the Works instead of terminating the contract, can be held to be in breach of the Contract by the Employer even though the Employer's breach of failing to make payment of the payment certificates resulted in the Contractor suspending the Works.

Exceptio non adimpleti contractus

A possible defence to this lies in the *exceptio non adimpleti contractus* ("exceptio").

In the case of *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*⁶, the Appellate Division (now known as the Supreme Court of Appeal) reviewed in some detail the history and scope of what has become to be known as the principle of reciprocity and the *exceptio*.

The principle of reciprocity recognises the fact that in many contracts the common intention of the parties is that there should be an exchange of performances and the *exceptio* gives effect to the recognition of this fact by serving as a defence for the defendant who is sued on the contract by the plaintiff who has not yet performed.⁷

In order to decide whether it is open to the Contractor to raise the defence it is first necessary to establish whether the contract is one to which the principle of reciprocity applies.⁸ This is a question of interpretation assisted by the assumption that in any bilateral or synallagmatic contract, the common intention is that neither party should be entitled to enforce the contract unless he has performed or is ready to perform his own obligations.⁹

In *Motor Racing Enterprises (Pty) Ltd (In Liquidation) v NPC (Electronics) Ltd* the court found that the *exceptio* presupposes the existence of mutual obligations which are intended to be performed reciprocally, and that the parties' intention is to be sought primarily in terms of their agreement.

As stated in *Lawsa 2 ed "Contract" 5(1) para 210*¹⁰, in the case of reciprocal contracts, one party undertakes to perform specifically in exchange for a particular counter performance by the other. In such cases, the principle of reciprocity applies. The first party is not entitled to demand counter performance from the other party unless the first party has performed or prepared to perform.

Therefore, where the GCC 2010 provides for the Contractor to perform specifically in exchange for an interim payment, and where the Employer has failed to perform in not making payment, the Employer would not be entitled to compel the Contractor to continue with the works without running foul of the *exceptio*.

Regarding whether the Contractor would have to elect to cancel the contract instead of suspending the Works, *Van Deventer: The Law of Construction Contracts*¹¹ provides that armed with the *exceptio* as a defence, the South African legal system

⁴ Clause 9.2.1.3.2

⁵ Clause 9.2.1.3.5

⁶ 1979 (1) SA 391 (A)

⁷ Christie, 421.

⁸ Ibid

⁹ Ibid

¹⁰ ADJ Van Rensburg, JG Lotz and TAR Van Riijn

¹¹ 1993: 283.

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appears to have no need to import cancellation as a remedy to protect an innocent party from its obligations of further performance in a bilateral executor contract which requires mutuality of performance. Armed with the exceptio for material non-performance, the innocent party has his remedy in damages and the contract is suspended.

Conclusion

Although not expressly provided for in the GCC 2010, by operation of the common law, a Contractor could possibly elect to suspend the Works and seek a damages claim against the Employer provided that the Employer has failed to comply with a reciprocal obligation. Should the Employer seek to terminate the contract or counter-claim against the Contractor, the Contractor could raise the exceptio as a defence.

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