

MDA CONSULTING



FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

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JBCC

Introduction

The Minister of Public Works has under section 33 of the Construction Industry Development Board Act 38 of 2000, made draft regulations that compel contracting parties in the construction industry who find themselves in a dispute situation to resolve their disputes by adjudication. The intended benefit being that adjudication will facilitate a speedy resolution of the dispute and allow the project to continue with minimum interruption. The basic principle of adjudication is to decide who should hold the money now so that cash flows and the works can continue.

This soon to be legislated system of adjudication, although new to South Africa, is prevalent in other jurisdictions such as the United Kingdom, Australia, Malaysia and New Zealand. It has been very successful in the resolution of disputes and there is little doubt that South Africa will enjoy the same benefits when it is signed into legislation.

Apart from the issue of receiving prompt payment of interim payment certificates, another challenge facing main and sub contractors is accessing their retention monies where it has been withheld in cash and the employer company is liquidated. It has been highly publicized of late in mining, engineering and

construction online publications that construction companies ranging in size from medium to large are falling victim to business rescue, which is becoming a gateway into liquidation.

You may be surprised to know that there is no legislated protection to a main or sub contractor in a construction contract, if the employer company is liquidated because their claim is viewed as that of a concurrent creditor. In South Africa the two pieces of legislation that are intimately involved in the winding up of a company and the distribution of the companies assets are the

Companies Act 71 of 2008 and the Insolvency Act 24 of 1936.

It can be argued that retention monies should be recognized as a secured or even preferred claim during liquidation proceedings because that money has been earned by the main or sub contractor through the completion of the works. It is then certified by the architect or engineer in the payment certificate as due, owing and payable. The reality is that this is not the case and the main or sub contractor is left to stand in line with all the other concurrent creditors for his share of the distributable assets.

Does the main or sub contractor have any form of protection of the retention money at their disposal?

The concept of a “trust account” for retention monies is not new to South Africa. The 1981 - 1988 edition without quantities ‘old white form contract’ for building works made provision for a trust account in the name of

SAVE YOUR MONEY IN A TRUST ACCOUNT NOW:
An absolute necessity for the protection of retention money

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both parties and the interest that accumulated on the account was shared equally between both parties. The old white form contract was replaced by the JBCC series. It has proven difficult to obtain comment from the JBCC drafting committee as to why this trust account provision was removed from the JBCC series, but it has been suggested that the introduction of guarantees negated the need for trust accounts.

The need for the protection of retention monies has recently been recognized in international jurisdictions such as New South Wales, a state on the east coast of Australia. They are pushing for the draft Building and Construction Industry Security of Payment Amendment Bill, 2013 (the “Bill”) to be legislated. Section 12A of the Bill calls for the payment of all retention monies into a trust account held by an independent third party or institution. Legislation like this would make considerable inroads in protecting retention money for the intended recipient.

South Africa may be some time away from being in a position to legislate the holding of retention monies in a trust account, but a prudent contractor in this day and age and who is not in a position to provide a retention guarantee *in lieu* of the employer withholding cash retentions, may consider inserting a clause in the contract conditions stipulating that retention monies are held in a trust account by an independent third party.

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