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JBCC: THE EMPLOYER'S INDEMNIFICATION OF THE CONTRACTOR IN THE JBCC, PBA ED 6.1

Author: Ross Falconer

Clause 9 of the 2014 JBCC PBA edition 6.1 governs the various exemptions and indemnifications that the contractor and the employer afford each other. The clause is particularly far reaching, but just how far do these indemnities extend?

Does the JBCC indemnity clause give the contractor access to recover any other loss, in addition to the care of the works, fixed property and harm to human beings?

Indemnity Clause

The 2014 JBCC Principal Building Agreement states in clause 9.2:

*"The **employer** indemnifies and holds the **contractor** harmless from all claims or proceedings for damages, expense and/or loss (including legal fees and expenses) in respect of or arising from:*

*9.2.1 An act or omission of the **employer**, the **employer**'s employees or **agents** and those whose acts they are responsible*

*9.2.2 An act or omission of a **direct contractor** [16.0]*

*9.2.3 Design of the **works** [7.1] where the **contractor** is not responsible for such design*

*9.2.4 The use or occupation of any part of the **works** by the **employer**, tenants, **direct contractors** or others authorised by the **employer***

*9.2.5 Proceeding with the **works** on instruction from the employer without the **employer** obtaining the required permission under the **law** in terms of this **agreement** [2.1]*

*9.2.6 Interference with any servitude or other right not depicted in **construction information** issued to the **contractor** that is the unavoidable result of the execution of the **works** including the removal of or weakening of or interference with the support of the land and property adjacent to or within the **site** unless resulting from any negligent act or omission by the **contractor** or his **subcontractors**. Should such event occur, the **contractor** shall forthwith give notice to the **principal agent**.*

*9.2.7 Physical loss or damage to an existing this structure and the contents thereof where this **agreement** is for alterations or additions to the existing structure [CD]. Should such an event occur, the **contractor** shall forthwith give **notice** to the **principal agent**.*

*9.2.8 a **defect** in **free issue** [CD]*

*9.2.9 Physical loss or damage to the **works** where **practical completion** has been certified [19.0] or deemed to have been achieved.*

*9.2.10 Advance payments certified and paid by the **contractor** or **subcontractors** [27.1.7]; 27.2.4].*

<u>Indemnity</u>

The common law places an expectation on contracting parties not to cause harm to human beings, whether that harm takes the form of the physical injury to them or damage to that person's property. Bearing in mind that harm to a person can extend as far as harm to their personality as well as their reputation, this is a very important consideration on the contractor and the employer's behalf when ensuring the safety of the site.

The contractor is strictly informed of his obligation in respect of the care of the works in clause 8.1 of JBCC PBA. This includes all the parties to the contract, their employees and agents and other parties for whom the contractor or the employer could be responsible for (it does not include third parties – this is what the indemnity clause covers). The contractor's liability in this clause is not unlimited[1] and is curtailed by the Contract Works Insurance. Furthermore, the contractor is also not liable for the cost of making good physical loss and repairing damage to the works caused by or arising from the six instances listed in clause 8.5 of the JBCC PBA.

In the JBCC PBA 2014, the allocation of risk is the only basis for liability under the contract, and a contractor will only take responsibility for the works, and nothing more.[2] The contractor assumes the risk only to the works, until completed and handed over to the employer. The exceptions to this lie where the loss is caused either by factors beyond the control of the contractor or it is caused by the employer and those for whom the employer is responsible. Clause 8 only makes provision for the contractor to be liable for the works and the insurance is required only in respect of the works.[3]
The indemnity clause, however, and as mentioned above considers and contracts for the liability of the contractor and the employer in respect of injury to third parties and their property, rather than the works. In circumstances where death of, or bodily injury to a third party or physical loss or damage to any property other than the works is directly or indirectly caused by the employer, the employer will indemnify and allow the contractor to recover any loss from any claim, proceeding, damages or expenses.[4] Moreover, the employer indemnifies the contractor against any claims, proceedings, damages, costs or expenses that have been caused to the contents of the works after the date of physical completion.[5]

In the instance where the contract is for alterations and additions to an existing structure, the contractor is also set free from liability for the cost of making good physical loss or repairing damage to the structure.[6] The full extent of this clause was laid bare in the judgment of *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd.*[7]

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[1] Clause 8.4.
[2] Clause 8 in particular.
[3] (573/2007) 94 [2008] ZASCA paragraph 10.
[4] Clause 9.2.
[5] Clause 9.2.9.
[6] Clause 9.2.7.
[7] (573/2007) 94 [2008] ZASCA (12 September 2008).

Consequential Damages

Clause 9.2 allows the contractor to recover the direct damages as a result of failure by the employer in terms of the specific instances listed in clause 9.2. The use of the terminology "all claims and proceedings for damages expense and/or loss" is in this observer's view, wide enough to open the ambit for consequential damages from a pure reading of the JBCC PBA 2014 edition 6.1 (not taking into account any change of attitude towards special damages that do not flow directly from the contract).

"Any other loss" as described in the first paragraph is consequential damages which could include, amongst other things, reputational damage, time spent not working (and therefore not generating income) productivity losses and many others. The most common and perhaps costliest example of consequential damages in a construction dispute are lost profits. However, this kind of loss in the past has generally not been recovered, and the contractor is not normally indemnified from special damages. In South Africa, a competent court has previously held that the cost of demolishing and reconstructing a building flows naturally from a failure to deliver bricks and cement of the required quality, but not the loss of profit resulting from the delay in completing the building.[8]

Furthermore, the contractor may not have to strictly pursue his remedy through only the indemnities clause, but may also be able to utilize 32.5 of the JBCC (which's clauses wording bears a stark resemblance to "expense and or loss" in clause 9.2). Clause 32.5 allows the contractor amongst other things, to recover incurred expense and loss if not priced for, if due to the default by the employer his agents (32.5.5) as well as suspension or termination of a nominated/selected subcontract due to default by the employer or his agents (32.5.6). It is submitted that a contractor could go either by means of clause 9.2 or clause 32.5 provided that the default of the employer is the cause as per the specifications of clauses 32.5.5 or 32.5.6 and recover the same loss.

An innocent party can recover special damages, if they can prove that:

1. The damages were actually foreseen or reasonably foreseeable at the time of entry into the contract (the contemplation principle); and

[8] *Holmdene Brickworks (Pty) Ltd v Roberts Construction.*

2. The parties entered into the contract on the basis of their knowledge of special circumstances, and thus can be taken to have agreed, explicitly or tacitly, that there would be liability for damages arising from such special circumstances (the convention principle).[9]

Furthermore, the wronged party need only prove that the breach of contract was a cause of the loss, not that it was the dominant preponderant cause of the loss, in order to potentially qualify for consequential damages.[10]

Following the two step approach laid out above, any contractors and employers would be susceptible to a claim for special damages as experienced contractors are often expected to reasonably foresee many occurrences happening on a project (point 1), and parties with experiences could be said to tacitly agree to specific consequential damages due to their experience (point 2). Furthermore, once it is considered that the breach of contract need not be the dominant cause of the loss in order to qualify for special damage, the inclusive wording of the indemnities clause could indeed invoke special damages for any of the parties to a project.

Conclusion

This is an area of our law currently in flux, and attitudes towards special damages have changed and new flexible tests have been proposed, in which factors such as reasonable foreseeability, directness, the absence or presences of a novus actus interveniens, legal policy, reasonably, fairness and justice all play a part.[11] Now is not the time to be caught unprotected.

Effectively contracting out of consequential damages could be possible if a specially drafted project specific consequential damages waiver was signed and agreed between the parties. This would remove any suspicion that the parties would allow for special damages to flow from any incidents governed by the contract.

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[9] Huchinson, D *et al The Law of Contract in South Africa,* 2010. Page 336.
[10] *Thoroughbred Breeders' Association v Price Waterhouse Coopers.*
[11] *Standard Chartered Bank of Canda v Nedperm Bank Ltd* 1994 (4) SA 747 (A).