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CONFLICT AND CONCORD: ADDRESSING BUSINESS FORUM DISRUPTIONS UNDER FIDIC

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Disruption of construction works by local business forums has become increasingly common, particularly in KwaZulu-Natal. This disruption usually takes the form of a demand for the employment of, and/or the subcontracting of a percentage of the main contract work to, its members, at inflated rates. These demands are underscored by threats of violence and damage to property, which can force work on the site to cease for days or even months on end.

With no quick or easy solution in sight, this article will consider the options and possible remedies available to a contractor in these circumstances.

The Common Law

Under the common law, a mere increase in cost or difficulty of performance, will not excuse a party from performing its obligations in terms of a contract, and will not entitle such party to additional payment. Only if performance becomes objectively impossible (performance is impossible for everyone, not just the contractor in question) will the contract be discharged¹.

Unless a construction contract makes specific provision for such disruption, the provisions of the common law will apply.

¹ See Christie's Law of Contract in South Africa (7th Edition) 2016 LexisNexis, pages 109 – 112 and 547 – 551.

Force Majeure Under FIDIC (1999)

The common law position is altered by Clause 19 of FIDIC (1999)², which entitles a contractor to an extension of time for any delay caused by a force majeure event, as well as payment of cost if this event is one of the force majeure events listed in Sub-Clause 19.1(i) to (iv). Sub-Clause 19.1(iii) specifically references *“riot, commotion, disorder, strike or lockout by persons other than the Contractor’s Personnel and other employees of the Contractor and Sub-contractors”*.

Whether the actions of the local business forums constitute a force majeure event, however, is somewhat contentious. In terms of Sub-Clause 19.1, *“Force Majeure” means an exceptional event or circumstance:*

- a) *which is beyond a Party’s control,*
- b) *which such Party could not reasonably have provided against before entering into the Contract,*
- c) *which, having arisen, such Party could not reasonably have avoided or overcome, and*
- d) *which is not substantially attributable to the other Party.”*

With disruptions by local business forums becoming increasingly common, their status as an exceptional event is likely to be questioned. What may also be questioned, is whether or not such disruption could be provided against before entering into the contract and/or, having commenced, whether or not such disruption could be reasonably avoided or overcome. In other words, does disruption by a local business forum constitute force majeure at all?

In the matter of *Rumdel Cape v South African National Roads Agency Soc Ltd 2015 JDR 0388 (KZD)*, it was held that the disorder caused by a local community, in attempting to force the contractor to employ its members, was both capable of being provided against and, having arisen, being prevented or overcome, in this case through insurance against such disorder and the employment of additional security measures (at the contractor’s own cost of R 926 000.00 ex VAT per month). In support of such contention, the court found that *“a perusal of the contract site would have alerted a reasonable contractor to the existence of the communities and the probability of being able to secure unskilled labour from those communities”* and that industrial unrest was foreseeable and capable of being insured against³. It also pointed to Clauses 4.8, 4.22 and 6.11 of FIDIC, which, it held, make it clear that *“the primary obligation to ensure that unauthorised persons are kept off the site and that the care and safety of all persons entitled to be on the site vests”* in the contractor, and that *“it is required to take all reasonable precautions to prevent any unlawful, or riotous conduct by its personnel and to preserve peace and the protection of persons and property on or near the site”*.

This decision was taken on appeal to the Supreme Court of Appeal (SCA) in Rumdel Construction (Cape) (Pty) Ltd v South African National Roads Agency Soc Ltd 2016 JDR 0512 (SCA).

² *Fédération Internationale des Ingénieurs-Conseils (FIDIC) Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (1st Edition) 1999*

³ *Although this type of insurance is available to a contractor in these circumstances it would only cover damage to the works.*

While the SCA expressed the view that *“[t]he reasoning of the court a quo may well have been flawed in certain respects...[f]or example, its conclusion that as the appellant had been able to overcome the difficulties on site by taking additional security measures showed that there had not been force majeure as defined, appears to me to be somewhat illogical”*, it was unable to make a decision on this issue, as the monetary value of the claim had already been settled privately between the parties.

It is questionable whether insurance, such as SASRIA (which only covers damage to the works), would be sufficient in these circumstances. It is also arguable, whether paying R 926 000.00 ex VAT per month for additional security over the remaining life of the project could be considered a reasonable step in avoiding or overcoming the difficulties created by the local community. If this is truly the case, Clause 19 does not provide any protection to the contractor in such circumstances, and the common law position will apply.

While we wait for this issue to be further tested by the courts, the decision of the KwaZulu-Natal High Court in the Rumdel matter will be persuasive in other jurisdictions, leaving contractors facing disruptions by local business forums, in a tenuous position.

Exceptional Events Under FIDIC (2017)

Clause 18 of the new FIDIC contract (2017)⁴ deals with exceptional events. While reference to force majeure has been removed, whether an exceptional event has

occurred is determined by the same test as that laid out in Clause 19.1 of the 1999 edition. Presumably, therefore, parties can expect to have the same difficulties regarding business forum disruption, as under the old standard form version.

What can be done?

In light of the increased frequency of business forum related disruptions, such issues should be considered by the parties before conclusion of a contract, and reasonable provision made for any such eventuality. This (over and above consultations with the local communities, which have already become the norm) may take the form of specific contract provisions setting out how business forum related disruptions should be addressed and a corresponding allowance in the contract price and contract period (i.e. with consideration to the cost and time involved in obtaining an interdict, as addressed below), provision for specific insurance requirements and provisional sums (to be spent at the discretion of the engineer) to accommodate the need (if any) for increased security on or around the site.

As a last resort, faced with the prospect of escalating security costs, and an already over-stretched police force, many contractors have (in lieu of acquiescing to the business forums' demands) resorted to interdicting the business forum in question from engaging in acts of violence or damaging the works and equipment.

⁴ Fédération Internationale des Ingénieurs-Conseils (FIDIC) Conditions of Contract for Construction (2nd Edition) 2017

An interdict is a court order, ordering someone to either refrain from performing an action (a prohibitory interdict) or to perform an action (a mandatory interdict), and can be both interim or final. A contractor, in these circumstances, would seek a final prohibitory interdict against the business forum in question.

This would usually be obtained by way of a two-part process where an interim or temporary interdict is obtained on an urgent basis (how urgently will depend on the circumstances and nature of the anticipated prejudice and could range from almost immediately to a few weeks down the line), with a return date where (if the business forum cannot show cause why it should not be) the interdict is made final. The SAPS will then be called upon to enforce this interdict, whether temporary or final.

By engaging in acts of violence, intimidation and destruction of property, the business forum would already have run afoul of the law. The granting of an interdict against such actions serves as a warning to those involved, that they have been identified and will be held accountable for their actions (the consequences for breach of an interdict can include imprisonment for contempt of court). It also serves to render the business forum (if it has been incorporated as a non-profit company) and/or its members and chairman liable for the costs of the interdict application (potentially on a punitive basis), which can be an effective deterrent in and of itself.

Conclusion

The common law is unforgiving when it comes to performance of contractual obligations in circumstances more difficult than originally envisioned. The increased cost and difficulty of performance are not a determining factor.

It is obvious that Clause 19 of FIDIC 1999 and Clause 18 of FIDIC 2017 do not provide clear assistance to a contractor on this issue and parties should, therefore, make specific mention, in the contract documents, as to how such disruption will be dealt with and where the cost thereof can be accommodated. A contractor should be prepared to pursue legal remedies in the form of an interdict, should it be necessary.

This is not to say that a contractor should abandon any hope of making a successful claim in terms of Clause 19 of FIDIC 1999 or Clause 18 of FIDIC 2017. Whether business forum disruptions are truly excluded from this clause still remains to be seen, and much will rest upon the interpretation of what is reasonable in providing for, avoiding and overcoming such disruptions.