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THE NEGLIGENT AGENT - THE AMBIT OF THE AGENT'S LIABILITIES UNDER THE JBCC

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Clause 9.2 of the JBCC Principal Building Agreement (Edition 6.2) lists indemnities given by the employer to the contractor. Clause 9.2 provides that:

"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..." [our emphasis].

The ambit of this clause is extended further by the provisions of clause 9.2.1 which provides that the employer will be liable to the contractor for:

"An act or omission of the employer, the employer's employees and/or agents and those for whose actions they are responsible" [our emphasis].

Instances where an agent has acted prejudicially

are not unheard of. So, what happens when the employers' agent discharges their duties in a manner that is improper and demonstrates a lack of skill, and even negligence and which results in the contractor suffering damages, expense and/or loss?

An impartial agent?

An agent is the person or entity appointed by the employer to manage or administer the services of contractors during a project undertaken between the employer and contractor in terms of a construction agreement.

Clause 9.2 has important considerations in terms of its applicability as an agent has obligations towards the employer (and the contractor) such as protecting the employer's interests, carrying out his or her duties with reasonable skill and care and exercising independent judgment in their professional capacity.

An agent is also responsible for:

- Discharging the obligations of the employer by performing some of the employer's obligations in terms of the construction agreement;
- Enforcing the obligations of a contractor by accepting or rejecting the performance of the contractor's obligations under the construction agreement.

This presents somewhat of a misnomer – as the agent needs to act professionally and impartially, but they are employed by the employer and therefore it can be argued that they have a direct interest in ensuring that the employer obtains the best outcome from a project. This does not mean that they can set aside their duties of professionalism and impartiality and prejudice the contractor (or any other party).

The contractual relationship

There is no contractual relationship between the contractor and the agent as the building agreement is concluded between the employer and contractor. The agent's responsibilities are regulated by a contract between the agent and the employer. This means that the agents' responsibilities are not directly linked to the obligations set out in the contract for the building works, and that the agent may act without any contractual liability under the building agreement between the employer and the contractor.

However, there is a legal relationship between the contractor and agent in terms of liability under the law of delict. A liability in terms of delict is a liability that applies between all persons. For example, we have a duty towards others, not to harm them or cause them

loss through our negligence. If we do cause such loss, no agreement needs to exist between the parties for the wronged party to claim damages for negligent acts caused by another. This means that the agent owes the contractor a duty to act with fairness and without negligence.

Does delict fit in?

A contractor suffering loss as a result of the acts or omissions of an agent may claim these damages, expense and/or loss directly from the employer. The indemnity clause in the JBCC has created an avenue for the Contractor to obtain contractual recourse. The employer may thereafter hold the agent liable either contractually (in terms of the agency agreement in force between the employer and the agent) or in delict. This means that the contractor will not be able to lodge a direct contractual claim against the agent, but the employer may.

In the matter of *Hyde Construction CC v Blue Cloud Investments 40(Pty) Ltd*¹ the court had to decide if a contractor could seek compensation for loss it suffered by instituting a delictual claim against an agent. The contractor argued that the agent owes a legal duty to the contractor and that the agent had breached this duty by negligently failing to comply with its contractual obligations, which thereafter resulted in the contractor suffering damages.

¹ 2011 JDR 0954 (WCC)

The agent defended this on the following grounds: that the agent could not be sued in his own name (as the agent acted in its capacity as agent of the employer), that the legal duty alleged by the contractor was not competent in law and that the contractors' particulars of claim lacked the necessary averments to sustain a cause of action against the agent. The contractor's claim failed in that it had provided no grounds for the extension of delictual liability to the agent.

The court concluded that:

“given the provisions of clause 9.2.1 of the JBCC 2000, the parties would have known that any act or omission of the principal agent in the course and scope of his employment as such would have rendered the employer liable to them under the indemnity afforded by that clause for any loss suffered as a consequence of any such act or omission. The contractor, in particular, would have known that it enjoyed the benefits of such an indemnity under the JBCC 2000 and would not have considered it necessary to secure any further protection against the principal agent in the event of the latter's negligence”.

The court stated further that:

“in this case the principal agent may be held liable to his employer, the First Defendant, either in terms of their contractual arrangement embodied in the JBCC 2000, or in delict². In those circumstances it seems to me to be an unnecessarily burdensome on the Second Defendant to expose him to potential liability to a further delictual claim by the contractor, who, as I have already pointed out has adequate other legal redress”.

This is good news for contractors and subcontractors as they can seek an adequate remedy for their losses by enforcing provisions of the building agreement instead of instituting delictual claim against the agent. *The Hyde Construction* case has thus closed the door to an influx of delictual claims (against agents) from contractors and subcontractors.

²“at paragraph 68”