

# MDA PRESENTS



## FIRST AID FOR CONTRACTS



Fifth Edition – May 2020

### **Termination under the JBCC Principal Building Agreement, Edition 6.1 – March 2014**

**+** *Author: Tamlynn Avis*

**Termination of a contract is, and always will be, a last resort remedy and is not as simple as downing tools and walking off site, and while you may have a legitimate reason to terminate, if the due process is not followed, the Employer may be able to interpret the Contractor's actions as a repudiation and claim damages against the Contractor. In this article we discuss the Contractor's rights to termination under the JBCC Principal Building Agreement, Edition 6.1 – March 2014, and when this entitlement arises.**

The common – law position regarding cancellation of contracts is that a contract may be cancelled when one of the parties is in material breach of the or repudiates the contract. An example of a material breach of a construction contract would be non-payment by the Employer or refusal by the Employer to grant access to Site. Repudiation, on the other hand is where one party indicates unequivocally that it no longer intends

under the contract. An example of this would be the Contractor abandoning site.

It is generally accepted in our law, that if a cancellation clause exists in a contract, the party who seeks to cancel must rely on the provisions of same, failing which, its actions could be deemed a repudiation of the contract. Further, if a cancellation clause exists, the party who seeks to cancel must rely on the cancellation clause in the contract and not on the common-law. The reason for this is that the common-law cancellation remedies exist where there is a breach in respect of a material (fundamental) aspect of the contract and a cancellation clause in a contract generally speaks directly to the potential material breaches in a contract. Where a cancellation clause does not speak to a material breach in the contract, only then would the party attempt to rely on the common-law.

The general approach in a cancellation clause is that where one party fails to comply with an obligation, it is considered in breach of its obligation, the aggrieved party places the other party in breach, generally by furnishing it with a Notice setting out the obligation that it requires the party to comply with and providing it with a specific period of time to comply with said obligation and thereby remedy the breach.

Clause 29 of the JBCC Principal Building Agreement, Edition 6.1 – March 2014 is the contract's cancellation clause. There are separate sections dealing with termination by the Employer and termination by the Contractor, and a separate section pertaining to termination by either party to the Contract. The focus of this article is the Contractor's right to terminate and the process that should be followed.

Clause 29.14 of the Contract sets out the process of termination by the Contractor as being:

*"29.14 The Contractor may give Notice of intention to terminate this Agreement where the Employer has failed to:*

- 29.14.1 Provide a JBCC Guarantee for Payment within 15 working days of acceptance of the Contractor's offer, where applicable;*
- 29.14.2 Give possession of the Site to the Contractor;*
- 29.14.3 Allow the Principal Agent and/or agents to exercise fair judgement as contemplated in this Agreement;*

- 29.14.4 Effect insurance, where applicable;*
  - 29.14.5 Pay the amount certified by the due date;*
  - 29.14.6 Appoint another Principal Agent and/or Agents, where applicable*
  - 29.14.7 Or where the Principal Agent has failed to issue a Payment Certificate by the due date.*
- 29.15 Where the Contractor contemplates terminating this Agreement, the Contractor shall give Notice to the Employer and/or Principal Agent of a specified default, to be remedied within ten (10) Working Days of the date of receipt of the date of receipt of such Notice.*
- 29.16 Where the Employer has not remedied a default within such period, the Contractor may give Notice to the Employer and the Principal Agent of the termination of this Agreement forthwith"*

The subject contract, requires that the Contractor must place the Employer in breach. and provide the Employer with ten days to remedy same. For example, if the Employer fails to pay the Contractor on time, it has failed to comply with its obligation and is in breach of the terms of the contract. The Contractor must then issue a written Notice, in terms of clause 29.15, to the Employer calling on it to comply and perform its obligation under the contract. This Notice results in the Employer being placed in breach of its obligations.

Should the Employer not comply with the Contractor's written Notice to perform and thereby remedy its breach, the Contractor may then issue a further notice, in terms of clause 29.16, and terminate the contract.

By following the above procedure, the Contractor creates its entitlement to cancel the contract. A failure to comply with the terms of the contract and not follow the procedure set out above can be interpreted as a repudiation of the contract and may entitle the Employer to claim damages against the Contractor. The importance of complying with the cancellation provision of a contract and specifically the time periods contained therein is shown in the case of *Hodgkinson v K2011104122 (Pty) Ltd and another* [2019] 2 All SA 754 (WCC). This matter was a full bench appeal, in the Western Cape High Court, which dealt with the cancellation/repudiation of a construction contract (it was not a JBCC contract).

This matter was previously heard by a single High Court Judge and judgement on this matter had held that due to the Plaintiff (being the Contractor) having given the Defendant (being the Employer) 7 days' notice instead of the 14 days required by the Contract rendered the cancellation as premature and therefore it amounted to a repudiation of the Contract. On appeal, the Plaintiff sought to amend his particulars of claim by stating that even though the cancellation was initially defective, the Employer had still not complied within 14 days and therefore the cancellation became effective. The Court held that this was incorrect and that it would be incorrect to allow a defective notice to become effective through the passing of time.

In light of the above, it is of great importance that the Contractor place the Employer in breach via notice, and further that the notice is fully compliant. If not, the Contractor may find itself in a position where it is required to pay damages to the Employer, even if it has a fully legitimate reason for terminating the Contract.

Besides the compliance with Notices, Contractors should also be aware that their conduct should be compliant with the notice period. For example, if the Contractor sends the Employer a Notice placing the Employer in breach and then simply walks off of Site, the Employer would be able to claim that by the Contractor's conduct it has repudiated the Contract and not terminated it. Similarly, if the Contractor has sent its own Subcontractor a Notice placing the Subcontractor in breach of its obligations, and proceeds to hire a new Subcontractor before the time period in the notice has lapsed, the Subcontractor can claim that the Contractor has repudiated the Subcontract.

So as you can see, termination may seem simple, but it should only be considered as a last resort and the Contractor must ensure that both its conduct and compliance with the Contract are aligned so that it lawfully terminates the Contract and does not accidentally repudiate instead.