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CLAIMS UNDER THE JBCC DUE TO CIVIL UNREST

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Life and business in parts of South Africa, mainly in Kwa-Zulu Natal and to a smaller extent Gauteng, was brought to a grinding halt between 9 July 2021 and 16 July 2021 due to the rioting, looting and general community unrest which took place.

Naturally, the construction sector felt the effects of this unrest too. Therefore, the purpose of this article is to address how a contractor would be able to deal with delays caused by the community unrest, specifically under the JBCC contract (Edition 6.1 (March 2014) and 6.2 (May 2018)).

As a starting point, both the March 2014 (edition 6.1) and May 2018 (edition 6.2) editions of the JBCC, deal with extensions of time under clause 23.1 to clause 23.3 as follows:

1) Clause 23.1 lists circumstances entitles a

contractor to a revision of the date of practical completion without an adjustment to the contract price;

2) Clause 23.2 lists circumstances which entitles a contractor to a revision of the date of practical completion with an adjustment to the contract price; and

3) Clause 23.3 provides an opportunity for the contractor to a revision of the date for practical completion for additional unlisted circumstances which is *“beyond the contractor’s reasonable control that could not have been reasonably anticipated and provided for”*. The contractor may be entitled to an adjustment to the contract value under this clause if *“such delay is due to the employer and its agents”*

Further, both editions of the JBCC provide in clause 23.1.6 that one of the grounds for an extension of time to the date of practical completion without an adjustment to the contract value is a force majeure event.

Force majeure is defined under the JBCC as “an exceptional event or circumstance that:

- *Could not have been reasonable foreseen;*
- *Is beyond the control of the parties; and*
- *Could not reasonably have been avoided or overcome.”*

The definition goes further and sets out specific events which the drafters of the contract consider force majeure events and contained therein is both “*insurrection, rebellion, revolution, military or usurped power and terrorism*” and “*civil commotion, disorder, riots, strike, lockout by persons other than the contractor’s employees or his subcontractors*”.

President Cyril Ramaphosa has made statements that the civil unrest which gripped Kwa-Zulu Natal and Gauteng was a “*failed insurrection*” and therefore it would fall squarely within the definition of a force majeure event. Notwithstanding his comments labelling the civil unrest as a “*failed insurrection*”, the period of civil unrest would still qualify as a force majeure event.

Therefore, if the contractor’s progress on the works was affected by the civil unrest, it would be entitled to submit a claim for an extension of time but would not be entitled to additional compensation.

We now turn our attention to more specific issues that may have arisen as a result of the unrest and how to deal with them under the JBCC, including:

- 1) Delayed access/lack of access to site;
- 2) Supply issues
- 3) Staff unable to come to site;
- 4) Damage to the works;

ACCESS

Due to the community unrest, a number of enterprises shut down operations in order to try and prevent the looting and damage that was caused by the rioting. If a contractor was due to start on a site and this start was delayed as result of the community unrest, he would need to submit a claim under clause 23.2.1 which states that a “*contractor is entitled to a revision of the date for practical completion by the principal agent with an adjustment of the contract value...caused by...delayed possession of the site.*” It should be noted that this clause would only apply if the contractor had not already been given possession of the site by the employer.

In the event that access had already been given to the contractor, the contractor would need to submit a claim in terms of clause 23.3 of both editions of the JBCC and show that it could not have reasonably anticipated that the community unrest would have occurred and caused its to be unable to access it site. It should therefore be entitled to an extension of time but is unlikely to be able to claim any adjustment to the contract value as the access issue could not be attributed to the employer or its agents.

SUPPLY ISSUES

Another issue that may have affected contractors during the unrest and as a result of businesses shutting down is the inability to obtain the necessary materials and goods to continue with the works.

Should this situation have occurred, the contractor may submit a claim under clause 23.1.2 of both editions of the JBCC which provides that a contractor will be entitled to a revision of the date of practical completion due to an inability to obtain materials and goods where the contractor has taken reasonable steps to avoid or reduce such delay. Should a contractor submit a claim under this clause, it would have to show that it was unable to obtain the materials and goods from any other source and that this directly impacted the works. If successful, the contractor would be entitled to an extension of time but not to costs.

STAFF UNABLE TO COME TO SITE

Many people faced difficulties in travelling safely during the period of unrest, and in fact it was advisable to avoid leaving your homes if possible. With this in mind, it is not unlikely that a contractor may have been faced with a situation where his employees were unable to come to site and work which would logically lead to delays in the works.

Clauses 23.1 and 23.2 do not cover this event and therefore the contractor would likely have to submit a claim in terms of clause 23.3. As mentioned above,

clause 23.3 of both editions of the JBCC provides a contractor with an entitlement to claim for further circumstances which may entitle it to a revision of the date for practical completion which was out of the contractor's reasonable control and could not have been reasonably anticipated.

The community unrest and its consequences are both out of the contractor's reasonable control and could not have been reasonably anticipated and therefore a claim based on employees being unable to come to work due to the community unrest would fall within the ambit of this clause. There would therefore be an entitlement to an extension of time but no entitlement to costs.

DAMAGE TO THE WORKS

During the period of civil unrest which gripped Kwa-Zulu Natal and Gauteng, a significant amount of physical damage to property occurred. In the event that this damage occurred on construction site, the Contractor would likely be called on to repair such damage.

Clause 23.2.2 of both editions of the JBCC provide that the contractor is entitled to a revision of the date of practical completion and an adjustment to the contract value where the contractor is responsible for making good physical loss or damage to the works where the contractor is not at risk.

In terms of clause 8.1 of both editions of the JBCC, Contractor is expected to take responsibility of the works from *“the date on which possession of the site is given to the contractor and up to the date of issue of the certificate of practical completion”*. This includes accepting the possibility of making good physical loss and damage to the works, and covering the costs thereof, unless such physical loss and damage is excluded in terms of clause 8.5 of the JBCC, which includes an act of force majeure.

As mentioned above, the civil unrest that gripped the country falls squarely within this definition.

Therefore, had the contractor needed to repair the works, and this had cost and time implications, he would be able to submit a claim for a revision of the date for practical completion as well as an adjustment of the contract value under clause 23.2.2 of the JBCC.

As a cautionary note to the above, the employer may claim that the contractor should claim under clause 23.1.3 of the JBCC which entitles the contractor to an adjustment to the date of practical completion without costs, however, this would be incorrect as the contract specifically states in clause 8.5 that the contractor should not be liable for the costs of damage caused by force majeure and therefore should be entitled to claim any costs that it incurs in fixing such damage.

ANY OTHER CLAIMS

In the event that the contractor suffers delay as a

result of the civil unrest but does not find that such delay fits in any other circumstances covered in clauses 23.1 or 23.2, it is available to the contractor to submit a claim under 23.3 which acts as a “catch-all” clause. However, such claim must be carefully constructed and supported so that there is no room for the principal agent to disallow such a claim.

As shown above, there are numerous ways that a contractor may be able to submit claims but how a contractor submits its claims can have a direct effect on its entitlements in respect of such claims. Therefore, it is always a good idea to contact specialists (such as MDA) to assist with the preparation and submission of claims to ensure that the claims are correctly submitted and the contractor receives its full entitlements.