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TERMINATION OF CONTRACTS – ANOTHER LOOK AT SURVIVING RIGHTS

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The decision to terminate a contract must never be taken lightly. It is a drastic course of action and the right to terminate should only be exercised as a last resort. The requirements and procedures for terminating a particular contract, as well as the parties' respective rights and obligations following termination, or purported termination for that matter, can be fraught with complexities. When considering terminating a contract, therefore, it is advisable to seek comprehensive legal advice.

This article will highlight the aforementioned complexities rooted in the act of terminating a contract and analyse what contractual rights, if any, survive termination, with specific focus on terminating a contract for a reason not provided for in the conditions of contract.

TERMINATION – CONTRACTUAL OR COMMON LAW

All standard form construction contracts provide requirements for termination and prescribe the respective procedures. On termination, certain rights may have already accrued to the parties prior to the termination and some rights may accrue as a result of the termination itself. When a party terminates in accordance with the provisions of the contract, the contract itself sets out the various rights and obligations of the parties.

It is important to ensure that the termination accords with the provisions of the contract as a failure in this regard may invalidate the termination and even be construed as a repudiation. There may, however, be an event or circumstance that justifies termination but is not specifically addressed in the contract.

In such a circumstance, a party may be entitled to terminate in terms of Common Law, for example, termination on the grounds of repudiation.

It cannot be stressed enough, however, that the above statement is extremely qualified. If the contract expressly excludes the right to terminate on Common Law grounds¹, then the parties cannot rely on the Common Law. Alternatively, if the contract makes provision for termination on grounds that also constitute Common Law grounds for termination, by means of prescribed procedures, a party seeking to terminate must do so in accordance with the said provisions.

In other words, a party cannot decide to terminate in accordance with the Common Law when the contract already makes provision and prescribes the requirements for termination on specified grounds, notwithstanding that such grounds are Common Law grounds. A good example of this is Clause 9.3 of the General Conditions of Contract for Construction Works, 2015 (GCC 2015), which specifically deals with repudiation by the Employer and the procedures the Contractor must follow in order to terminate on the grounds of repudiation by the Employer. In light of Clause 9.3 of the GCC, the Contractor may not merely elect to terminate in terms of the Common Law on the grounds of repudiation and ignore the prescribed procedure set out in the contract².

Many contracts provide a procedure that must be followed when the other party is, generally, in breach of the contract. In these circumstances, if a party seeks to rely on the Common Law ground for termination for repudiation, the supposed repudiatory conduct would

have to be so blatant and unambiguous, bordering an outright statement from the repudiating party to the effect that it no longer wishes to be bound to the contract. If a party purports to terminate but does so either for an invalid reason and/or does not follow the prescribed procedure, such conduct constitutes a breach by that party and may even constitute repudiation.

RIGHTS ON TERMINATION

As a general rule, when termination occurs the parties' primary obligations in terms of the contract come to an end. However, certain rights and obligations (or secondary obligations) may survive termination, the extent of which is dependent on the conditions of contract between the parties and how the contract was terminated.

It becomes more complicated when the contract is terminated for a reason not provided for in the contract. The contract, for example may not provide for termination for repudiation, fraudulent misrepresentation or a mutual agreement to terminate and therefore the rights and obligations following termination in such circumstances may likewise not be provided for in the contract.

¹ It is a rare exclusion but not unheard of.

² Another example, generally speaking, is if a contractor refuses to commence with the works as and when required by the contract, this may be seen as an act of repudiation. However, if the contract prescribes the actions the employer must follow in such circumstances, the employer may not elect to terminate in terms of the common law (by accepting the repudiation and terminating).

There are a number of considerations in this regard such as whether dispute resolution provisions survive such termination, whether limitations of liabilities remain enforceable and whether defects liability still applies. Most of these questions will be very specific to the contract between the parties and the facts and circumstances relating to the termination thereof. There are, however, some general principles, which are addressed below.

Mutual Agreement to Terminate

Very often, for a number of reasons, parties may decide to end the contractual relationship by agreement. Where a contract is terminated by mutual agreement between the parties all the rights and obligations of the parties' and the provisions of the contract come to an end. This is because the mutual agreement to terminate, constitutes an agreement itself.

In **Atteridgeville Town Council and Another v Costa Livanos t/a Livanos Brothers Electrical**³ ("Atteridgeville"), the Court in addressing the same question with regards to repudiation, stated the following with regards to termination by mutual consent:

"The reason for this is that mutual agreement to cancel a contract (or consensual cancellation) is a contract whereby another contract is terminated (Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration 1987 (4) SA 569 (A) at 588I). This brings to an end the rights and obligations of both parties to the earlier contract, and I there is no longer any debt or right of action in existence. Neither is left

*with any claim against the other arising from the earlier contract*⁴"

If the parties both wish to terminate the contractual relationship but still wish that certain provisions of the contract remain in place (for example, the dispute resolution provisions), or they still intend to pursue certain claims against each other, then this intention needs to be clearly expressed in the agreement to terminate.

Termination for Repudiation

Where a contract is terminated in terms of Common Law on the ground of repudiation of the contract by the other party, the primary obligations come to an end, however, certain secondary obligations remain in place. The dispute resolution provisions shall, unless expressly excluded, remain valid even after termination for repudiation.

In **Atteridgeville**⁵ the Court addressed the issue of whether the arbitration clause survive termination for repudiation, endorsing an earlier decision⁶, stating:

3 Atteridgeville Town Council and Another v Costa Livanos t/a Livanos Brothers Electrical 1992 (1) SA 296 (A)

4 Atteridgeville Town Council and Another v Costa Livanos t/a Livanos Brothers Electrical 1992 (1) SA 296 (A) at 304

5 Atteridgeville Town Council and Another v Costa Livanos t/a Livanos Brothers Electrical 1992 (1) SA 296 (A)

6 Scriven Bros v Rhodesian Hides & Produce Co Ltd and Others 1943 AD 393

*“It is true that a repudiation of a contract by one party may relieve the other party of the obligation to carry out the other terms of the contract after the date of repudiation, but the repudiation does not destroy the efficacy of the arbitration clause. The real object of that clause is to provide suitable machinery for the settlement of disputes arising out of or in relation to the contract, and as that is its object it is reasonable to infer that both parties to the contract intended that the clause should operate even after the performance of the contract is at an end”*⁷

The Court in **Atteridgeville**, did, however, state that whether the arbitration clause survives termination for repudiation is *“subject to any manifestation of a contrary intention in the arbitration clause”*⁸. In other words, the courts will look at the arbitration clause itself to determine whether it was the parties’ intention that the arbitration clause should terminate in the event of termination of repudiation. In the absence of such intention, however, the arbitration clause would survive termination.

Another important point to note in relation to termination for repudiation is that the courts have held that a repudiating party cannot rely on a benefit of the contract following such termination.

In **Vromolimnos (Pty) Ltd and Another v Weichbold**⁹, the Court addressed the question of whether a repudiating party should be afforded the notice period contained in the contract, to retract such repudiation and whether the repudiating party could rely on a forfeiture clause in the contract following termination for repudiation, the Court stated:

*to retract his repudiation before it is accepted by the innocent party and he cannot rely, as in this case, on the provisions of a general forfeiture clause in the contract. He is not entitled to reprobate and approbate.”*¹⁰

The situation, although dependant on the wording of the particular contract in question, would be the same with regards to defects liability. Defects liability or liability for defects in the works already completed, whether or not the defects liability period has commenced in respect of those works, is a contractual construct and an obligation owed by the Contractor to the Employer. Therefore, should the Employer repudiate the contract, based on the above, the Employer will not be able to hold the contractor to its defects liability obligations.¹¹

Repudiation is where a party shows an intention to no longer be bound by the provisions of the contract so a party cannot express such intention and then insist that the other party is bound to certain provisions of the contract which offer some form of benefit to the repudiating party.

7 Atteridgeville Town Council and Another v Costa Livanos t/a Livanos Brothers Electrical 1992 (1) SA 296 (A) 305

8 Atteridgeville Town Council and Another v Costa Livanos t/a Livanos Brothers Electrical 1992 (1) SA 296 (A) at 305

9 Vromolimnos (Pty) Ltd and Another v Weichbold and Another 1991 (2) SA 157 (C)

10 Vromolimnos (Pty) Ltd and Another v Weichbold and Another 1991 (2) SA 157 (C) at 163. See also Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration 1987 (4) SA 569 (A) where the court held that a limitation of liability clause does not survive termination on the grounds of repudiation.

11 Note that this would not apply in respect of professional indemnity, where liability is entrenched in statute and not merely contractual.

This creates a number of practical issues, however, an analysis of those issues exceeds the scope of this article.

Fraudulent Misrepresentation

It may be the case where one party discovers that that other party had made a material, fraudulent misrepresentation in the conclusion of the contract. A fraudulent misrepresentation which induces the contract (material and relied upon by the other party) gives rise to the right to terminate or more correctly stated, to rescind the contract. In such event, all the contractual rights and obligations come to an end, including the dispute resolution provisions, limitations of liabilities and indemnities. This is because those provisions are contained in a contract that has been rescinded. There can accordingly be no survival of a provision of a contract (dispute resolution provisions, limitation of liability etc) when that contract was founded on fraudulent misrepresentation.

Conclusion

Despite the difficulties experienced during a contract, including the conduct and attitude of the other party, the decision to terminate a contract should never be made on impulse. Termination, both valid and invalid termination, can have far reaching consequences so it is important to ascertain what rights you do have and will have prior to taking the steps to terminate.

When dealing with termination for reasons which fall outside of the provisions of the contract, the rights

and obligations that survive such termination will depend on a number of factors and a central feature of the assessment thereof will be based on the intention of the parties as contained in the particular contract.