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May 2003

CONSTRUCTION LAW BULLETIN

AGGRIEVED TENDERERS AND DAMAGES

The Supreme Court of Appeal[1] has held that it is not competent for an unsuccessful tenderer to claim damages for loss of profit arising from the non-award to him of a tender despite the tender award to the successful tenderer having been wrong.

Whilst the case was decided before the promulgation of the Preferential Procurement Act, the principles remain applicable.

The court explained that the point of departure in deciding whether such damages are recoverable must be the legislation itself. If the legislation itself specifically permits such claims, they are naturally sustainable. However, in the absence of any such express provision, the court considered that there were no underlying constitutional law principles or values which dictated that such compensation should be available.

In coming to its decision, the court placed considerable weight on the fact that to permit such claims would result in a substantial imposition on the public purse. The State would have to pay the successful tenderer the tender amount in contract whilst having to pay an equivalent sum in delict to the aggrieved tenderer.

The court left open the question however of whether or not an unsuccessful tenderer could seek to recover its out of pocket expenses as distinct from a loss of profit claim.

[1] Olitzki Property Holdings v State Tender Board & Others SCA

COMPLETING UNFINISHED WORKS

From time to time contractors have to take over and complete the unfinished works of other contractors. This calls into question the adequacy of the first contractor's work. The completing contractor has to be alive to the risk of taking on such work which might render him responsible for the defective work of his predecessor.

In a recent English case[2] the court had to consider the issue where the contractual position as between the second contractor and the client had not dealt with the issue clearly and precisely. The dispute arose out of the second contractor's claim against the client for payment in remedying the first contractor's defective work.

The court ultimately found in favour of the second contractor and held that on the facts there was no clear indication in the contractual arrangement between the second contractor and the client that the second contractor would undertake responsibility for the work of his predecessor. It found that "taking on and completing" the works did not encompass a liability for pre-existing defective work. The court in adopting a practical approach found that, if a client wished to achieve this objective, then there should be a clear indication to that effect in the contract with the second contractor.

Such matters should not be left to interpretation and contractors taking on unfinished work would be well advised to ensure that the responsibility for the first contractor's defective work is unequivocally excluded.

[2] CJ Pearce v The Oakbridge Building Ltd TCC.

EXPERTS' FEES

A recent case dealt with the question as to whether an award of costs by an arbitrator automatically included the costs of expert witnesses.[3]

The court held that, whilst an arbitrator has the necessary discretion to order that the losing party pays the expert witness costs incurred by the winner, unless specific reference is made in the arbitrator's costs award, such costs are not taken to be included in the costs award.

An arbitrator's discretion to award costs is to be exercised judicially upon a consideration of all the relevant facts and in accordance with recognised principles. One such settled principle in law, and which applies to court cases, is that the qualifying costs of expert witnesses are not recoverable unless they are specially awarded.

In the case in question, the winner of the arbitration had applied to court for a ruling that the arbitrator's costs award encompassed the costs of its expert witnesses[4], alternatively for an order remitting the award back to the arbitrator for him to make a ruling on the winner's entitlement to recover his expert witnesses' costs.

The loser argued that the Arbitration Act only allows remittal to an arbitrator of matters which were referred to arbitration and, as the issue of costs was not such a matter, the application was incompetent. The Appeal Court rightly gave this argument short shrift holding that it would be anomalous if the Arbitration Act only intended that the principal award could be remitted for reconsideration but not the ancillary award of costs. The court held that all matters that are capable of forming the subject of an arbitrator's award are capable of being remitted to him for reconsideration.

The Arbitration Act requires applications for remittal to be made within six weeks of the award. In this case the application was made 22 weeks after the award. The Arbitration Act however provides that the time limit referred to can, on good cause being shown, be extended by the court.

"Good cause" is a phrase of wide import that requires a court to consider each case on its merits in order to achieve a just and equitable result in the particular circumstances. The reason why a special order for costs was not sought in the matter was due to the winner's attorneys erroneously overlooking the necessity for obtaining such an order. Although this was careless, the court considered that no prejudice, in the sense in which it is understood in law, would be caused to the loser by having the award remitted for reconsideration by the arbitrator. The winner on the other hand would clearly be materially prejudiced as it would have to forfeit the prospect of recovering substantial costs to which it might otherwise be entitled.

The court also found that the winner's attorneys had acted promptly once they became aware of the problem and therefore the delay in making the application for remittal should be condoned. The court however directed the winner to pay the costs of the application for remittal.

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[3] South African Forestry Company Ltd v York Timbers Ltd Supreme Court of Appeal.
[4] This ruling was refused by the court.