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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (*NB* For ease of reference throughout the chapter, we refer to "construction contracts" as an abbreviation for construction and engineering contracts.)

There are four types of standard construction contracts used in South Africa, which are:

1. The Joint Building Contracts Committee (the "**JBCC**") contracts.
2. The General Conditions for Construction (the "**GCC**") contracts.
3. The New Engineering Contracts (the "**NEC**") suite of contracts.
4. The International Federation of Consulting Engineers ("**FIDIC**") suite of contracts.

The NEC and FIDIC suite of contracts include contracts that places both design and construction obligations on the contractor, specifically the NEC Engineering and Construction Contract and the FIDIC Silver Book Conditions of Contract for EPC/Turnkey Projects. Whilst the suites provide additional contracts for design and construction, these are not commonly used in South Africa.

The NEC suite of contracts includes a design-only contract, specifically the NEC Professional Services Contract. This agreement is, however, not commonly used. The Professional Consultants Services Agreement Committee ("**PROCSA**") suite of contracts tends to be used for the appointment of professionals responsible for design aspects.

The NEC suite of contracts includes a management contracting contract. This is, however, seldom used in South Africa. With that said, the majority of construction projects in South Africa are implemented in this manner, with the main contractor appointing a series of subcontractors who perform a large portion of the works. The main contractor, however, remains responsible for the subcontractors and the risk and liability remains with the main contractor as if it performed all the works.

The JBCC contracts provide for a concept called "nominated" and "selected" subcontractors. Nominated subcontractors are chosen by the employer and selected subcontractors are agreed between the employer and the contractor. The risk and liability imposed on the main contractor differs in respect of these subcontractors and there is less risk on a contractor for a nominated subcontractor than a selected subcontractor.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

This is not a common arrangement in South Africa and is something we have seldom come across in the private sector. However, it is an arrangement used by state entities and is referred to as public-private partnerships. There are National Treasury Guidelines that govern public-private partnerships, which is a unique contractual relationship that results in a private party typically using state property and attending to design, construction and management of that property on a long-term basis.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

The JBCC and GCC contracts are predominantly used within South Africa.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

The public works projects tend to utilise the standard forms of construction contracts. It is very rare for bespoke agreements to be drafted for public works. The JBCC and GCC contracts are predominantly used for building works. The GCC and NEC contracts are commonly used for civil works.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

There are no mandatory legal requirements that must be

reflected in a construction contract; they can be concluded orally, tacitly or on an implied basis. A construction contract will be legally binding on the parties if:

1. there has been a clear offer and acceptance where the parties intended to create legally binding obligations;
2. the terms of the agreement are clear and certain and there was consensus between the parties at the time the agreement was concluded;
3. the obligations are possible of performance and the parties have capacity to contract; and
4. the agreement is lawful.

1.6 In your jurisdiction, please identify whether there is a concept of what is known as a "letter of intent", in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

We do not see letters of intent utilised for construction projects. It is common practice, however, for letters of award to be issued to successful bidders in a tender process. Whether or not these are binding in the private sector will be dependent on the facts. However, in the public sector, these letters have been held to be binding on the parties regardless of whether a full contract is ever subsequently concluded.

We recently represented a contractor in a court case where the Judge found that it would be constitutionally impermissible for government entities to unilaterally withdraw letters of award as members of the public are entitled to finality and certainty when dealing with government entities.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

The contracts will specify who is required to take out the relevant insurances. Generally, there are two types of insurances taken out – public liability insurance and contract works insurance.

Where contractors are required to take out the relevant insurances, contractors will generally obtain "contractors all risk" insurance, which provides cover for physical loss or damage to the construction works as well as cover for third-party claims arising from damage to property, injury and death.

All contractors are required in terms of the Compensation for Occupational Injuries and Diseases Act to insure their workers against occupational diseases, injuries and death, by registering them with and contributing to the Compensation Fund.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

Contractors are obligated to comply with the Basic Conditions of Employment Act in respect of those working on site as its own employees. This Act provides the minimum terms and conditions that must be applied when establishing employment practices such as working hours, overtime, leave and termination. Contractors are not required to comply with these obligations in respect of independent contractors or subcontractors. Subcontractors will have this duty in respect of their own employees.

Contractors will also be obligated to comply with the South African National Minimum Wage Act, which stipulates the minimum wage that must be paid to workers. Compliance with this Act is often included as a contractual term, and contractors will accordingly need to ensure that any subcontractors they appoint also comply.

Contractors will be required to pay income tax in respect of their employees. They will also be required to contribute in respect of every employee to the Unemployment Insurance Fund and the Compensation Fund. These obligations do not extend to independent contractors or subcontractors, who will have their own obligations in this regard.

The Occupational Health and Safety Act ("**OHSA**") requires employers to ensure the safety of persons at work and prevent hazards that may arise out of or in connection with the activities of persons at work. The contractor's obligations under OHSA apply in respect of all persons on site and not just their employees. The contractor may, however, exclude its liability for acts of certain persons on site, where it concludes an agreement in terms of section 37(2) of OHSA.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

The National Building Regulations and Building Standards Act sets various criteria to ensure that buildings are safe, structurally sound, and healthy to inhabit. There are also the Construction Regulations that have been gazetted in terms of OHSA. They provide requirements to ensure the safety and quality of construction projects as well as protecting workers, the public, and the environment.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

There is no common law basis to withhold retention; however, it is permissible where the contract provides for this. This is a common form of security implemented in South Africa. It is common practice for a portion of the retention to be released when the works have reached what is known as the stage of "practical completion", being the stage of completion when the works are considered fit for purpose.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

Yes, performance bonds are commonly utilised as security in

South Africa. These are generally referred to as guarantees. There are two types of performance bonds, known as "on-demand" and "surety" bonds. An on-demand bond is unconditional and may be called up without needing to prove a breach of contract. Surety bonds, on the other hand, are conditional on proving the contractor's default and liability before a call may be made.

It is extremely difficult to restrain a call on an on-demand bond. The only basis on which the courts will intervene and interdict payment is in circumstances of fraud. Establishing all the elements of fraud is not easy, as one has to show an intentional and unlawful misrepresentation. It is accordingly very rare for a court to interdict a call on an on-demand bond. It is for this reason that parties tend to insist on an on-demand bond.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

There are some instances where an employer will accept a guarantee being issued by a parent company on behalf of a subsidiary; however, this is not common practice.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

Contractors may retain ownership of goods and materials until they are paid for. Contractors can also exercise possession over the site even if the project is complete until such time as the contractor has been paid. This right is often waived in circumstances where an employer puts up other forms of security, such as a payment guarantee.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Yes. The standard form contracts utilised in South Africa all make provision for the appointment of a principal agent/engineer/employer's representative/project manager ("agent"), who shall act as an impartial agent of the employer in managing all or certain aspects of the project, depending on his authority in terms of the contract concluded with the employer. The contract concluded between the employer and the agent usually defines or limits the agent's authority. If that authority is breached, the employer may be able to challenge the agent's decision under the construction contract (if the contract makes provision for this) or the employer may have a claim against the agent directly. In certain circumstances, particularly for turnkey projects, the agent may be appointed by the contractor instead of the employer.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

Parties are free to contract on whatever terms they so wish. This, however, is not a common clause contained in contracts between employer and contractor, since the employer is usually self-funding the project. Instead, this type of clause is usually found in contracts concluded between contractor and subcontractor, recording that the contractor will only make payment to the subcontractor once it has received payment from the employer. Whilst this clause is enforceable, the condition typically requires the defaulting party to be pursued for payment and the non-paid party cannot sit idly by, suggest it has not been paid and then suggest it has no obligation to make payment.[1]

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

Yes. Liquidated damages/penalties/delay damages are permitted contractual terms. They are often included as a pre-determined estimate of the potential damages that may be suffered by the employer if the work is not completed on time. There is, however, no restriction on what may be agreed, save that the Conventional Penalties Act (the "**CPA**") prohibits the recovery of both a penalty and damages and permits a court to reduce a penalty if it is proven to be disproportionate to the actual harm suffered.[2]

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

Under the standard form contracts typically used in South Africa, an employer is generally entitled to vary the scope of works up until such time as completion/takeover has occurred. The general caveat, however, is that the employer cannot "substantially" change the scope of work. This is a rather opened-ended term that would have to be interpreted on a case-by-case basis, depending on the size and nature of the job.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

The standard form contracts used in South Africa typically allow for an employer to omit work from the contractor's scope.

Certain contracts, however, will only allow such omissions to occur provided that the employer does not intend to carry out the

work itself/by third parties. In almost all instances, the instruction to omit work would enable a contractor to make a claim for the profit that it would have made on that omitted portion.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

Yes, there is a common law obligation that the work will be carried out in a proper and workmanlike manner and that the parties will negotiate in good faith.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

The majority of construction-related disputes in South Africa are dealt with through alternative dispute resolution proceedings. Because of this, issues resolved at either adjudication or arbitration do not build the South African body of case law. This results in a situation where issues are frequently dealt with but do not result in South African jurisprudence. In these circumstances, we typically rely on foreign jurisprudence to guide the arguments. To this end, we typically adopt English principles and would be able to successfully argue that a contractor would be entitled to additional time, even if it was delayed, provided that the delay fell on the critical path and delayed the project further. The South African JBCC contract provides for certain extension of time claims that come with costs, and others that do not. It is typically the "employer's fault" claims that entitle the contractor to both time and costs.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

The Prescription Act provides that a party has a legal period of three years to institute action against another in order to attempt to recover an outstanding debt. The issue of prescription would have to be raised by the other side, alternatively the court, and would not automatically apply.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

The courts typically do not consider the form, structure and content of claims and notices brought under construction contracts as all disputes are typically referred to adjudication or arbitration. As previously mentioned, there is accordingly limited South African jurisprudence with regard to construction contracts. That said, we do tend to adopt the English requirements that the claim and unambiguous wording of a contract need to be complied with. There has, however, been a movement towards fairness in contract law and accordingly a time limit may be found unenforceable if it is proven to be unfair or against public policy.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

Under the South African JBCC and GCC contracts, a contractor typically does not assume any design responsibility. In those circumstances, the unforeseen ground conditions would be a risk carried by the employer. If, however, contracts such as the FIDIC Silver Book are utilised, that risk would be passed onto the contractor. There is no legislation in South Africa (unlike in Germany) that restricts or places limitations on the allocation of risk for these unforeseen ground conditions.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

It is typically the party that assumes design responsibility that would be responsible for updating the design or dealing with changes in law. If there is a legislative change in tax, the contractor would be entitled to claim the additional compensation.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

The party that designed the works typically retains ownership of their design until such time as it is paid for.

3.10 Is the contractor ever entitled to suspend works?

There is no common law entitlement that enables a contractor to suspend work for non-performance. A contractor would only have such contractual right in the event that it was referenced in the contract. Both the South African JBCC and GCC contracts typically allow for suspension in the event of non-payment. That said, if the contractual terms between the parties are unclear, South African law still recognises the principle of *exception non adimpleti*, which would entitle a party to withhold its own performance until such time as the other party has performed.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

The standard form contracts almost always require breach notices to be issued. There are, however, some instances that allow for immediate termination, such as where it has become physically impossible to carry on with the works for a protracted period.

South African law also recognises the concept of repudiation. This applies in circumstances where one party acts in such a way that they have made it unequivocally clear that they intend not to be bound by the provisions of the contract. In those circumstances, the non-defaulting party would be entitled to accept the repudiation, meaning that they would terminate the contract immediately and without sending notice.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

The NEC suite of contracts typically allows the employer to terminate for convenience whilst the other standard form contracts do not.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

A *force majeure* event would typically allow a contractor to seek an extension of time claim under the relevant contract. In the GCC, NEC and FIDIC, such extension of time claim would come with additional costs. Under the JBCC, such delay would only come with additional time. South African law does not typically allow a contract to be cancelled as a result of a *force majeure* event, save that in circumstances where it is physically impossible to proceed, a "supervening impossibility of performance" would justify the termination of a contract.

3.14 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

The "end user" will have no entitlement to make a claim against the contractor directly, given that there is no contractual nexus between the parties. To the extent that there is a defect or issue, the end user would have to make a claim against the developer, who could possibly in turn make a claim against the contractor. The only way a direct claim could be made is if a cession and assignment agreement is concluded between the contractor, developer and end user, which would afford the end user the same rights previously enjoyed by the developer.

3.15 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

Generally, in South Africa, there are no direct agreements and there are seldom collateral warranties. That said, in circumstances where a development is financed, a contractor would generally have to waive its rights to exercise a lien in favour of the bank funding the project. That bank would typically enjoy step-in rights in the event that the developer is negligent in his duties and/or is placed into business rescue/liquidation.

3.16 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

In South African law, the principle of set-off is acceptable and frequently utilised. In order for set-off to apply, there has to be a commonality between the parties as debtors and creditors, and the amount to be set off has to be a liquidated sum (i.e. a set/fixed amount, alternatively an amount directed by the court). Unquantified or illiquid damages, for example, could not be set off against an otherwise liquid claim.

3.17 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

There is a common law obligation to carry out the work in a proper and workmanlike manner and to proceed in good faith. The obligations may be amplified in the standard form contracts.

3.18 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

There are two useful judgments adopted in South African law that can be used to assist in the issue of interpretation.

The first is the judgment of *Endumeni*,[3] which records that a "practical and businesslike" interpretation is to be adopted when trying to interpret an ambiguous clause. This is obviously a significant shift away from the English approach of "dictionary" definitions.

Further, the judgment of *Comwezi*[4] records that the conduct of the parties pursuant to the conclusion of an agreement can also be utilised to interpret ambiguity.

3.19 Are there any terms which, if included in a construction contract, would be unenforceable?

If a clause is found to be unlawful, then it is possible for that specific clause to be struck from the contract on the basis that it is considered *pro non scripto*. If that clause goes to the heart of the contract or is otherwise material, then it is possible that the entire agreement will fall away.

3.20 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

Where construction contracts include an element of design responsibility, then that would generally require the designer to be registered as either an architect or a specific type of engineer (depending on the nature of the work to be designed). This type of professional may not practice as such unless they are specifically qualified and registered with the relevant professional institution. The limit of the contractor's liability is seldom capped, although in circumstances where separate agreements are concluded pertaining to design work, standard form contracts are often used. In those standard form contracts, there are typically limitations on the designer's liability (such as twice or thrice their fee).

3.21 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

Decennial liability is not automatically applied in South African law. The extent of liability for latent defects would depend on the terms of the agreement concluded between the parties. The duration that an employer would have to hold a contractor liable for a defect would be fact- and contract-specific.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

Construction disputes are usually resolved through mediation, adjudication or arbitration. Provision is made for alternative dispute resolution in all four standard form contracts used in South Africa.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

Yes, the four commonly used construction contracts make provision for adjudication. Prior to referring a dispute to adjudication, a party must usually give the other party notice of a dispute and try to resolve that dispute within an agreed period. If the dispute is not resolved, then either party may refer it to adjudication. The contracts or adjudication rules under the contracts usually prescribe how long the parties have to refer a dispute to adjudication, how the adjudicator may be appointed, how long the parties have to deliver their written submissions, and how much time the adjudicator has to deliver his award. It is widely accepted that adjudication is an informal, "quick and dirty" or "rough and ready" process that acts as an interim cashflow mechanism under construction contracts, and adjudication awards can be made an order of court on application to the High Court.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

Yes. The commonly used construction contracts all contain arbitration clauses. Different rules obviously apply. Alternatively, the parties agree to rules that will apply. Local or international rules are typically used. Arbitrations are run much like trials, with pleadings, documents, witness statements, expert reports, etc. being exchanged between the parties, and evidence being given at an oral hearing. Arbitration awards can be made an order of court on application to the High Court and with reference to the Arbitration Act. The parties usually agree on whether the arbitration award will be final and binding, or whether it will be subject to an appeal. An arbitration award can always be reviewed by the High Court (on application of the dissatisfied party) where grounds for review (such as bias, procedural irregularities, etc.) exist.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Yes, South Africa is a signatory state to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). The International Arbitration Act gives effect to South Africa's obligations under this Convention. In terms of this Act, an arbitration agreement and a foreign arbitral award must be recognised and enforced in South Africa. A foreign arbitral award may be relied upon by those parties to it by way of defence, set-off or otherwise in any legal proceedings and the award may be made an order of court and thereafter enforced in the same manner as any judgment.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

Disputes can be referred to the High Court for determination through application or action proceedings. There is no Construction Court. Application proceedings are launched when there is no material dispute of fact between the parties. Affidavits are filed by both parties, and there is no oral evidence. The matter is usually argued in court by an Advocate or an attorney with rights of appearance in the High Court. Application proceedings are a lot less time consuming and costly than action proceedings and can be wrapped up in six to 12 months. If there is a material dispute of fact between the parties, action proceedings are used. The parties file pleadings, exchange documents, and follow other pre-trial procedures, and oral evidence is given in court. Action proceedings usually take 18 to 24 months. Where a party is dissatisfied with the outcome of the High Court proceedings (in respect of both actions and applications), the judgment can be appealed by the dissatisfied party either to a full bench of the High Court or to the Supreme Court of Appeal. Each appeal process is typically dealt with within six to 12 months.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

This is wholly dependent on the country or the dispute resolution body. South African courts are obliged to comply with judgments issued by the International Court of Justice since it is a member state of the Rome Statute. Otherwise, foreign judgments are not directly enforceable in South Africa but may be enforced if certain requirements are met.[5]

4.7 Do you have any special statutory remedies and/or dispute resolution processes in your jurisdiction for building safety-related claims?

This is generally not a dispute between the employer and

contractor; however, the Department of Labour may instruct that work on site must cease where there is a safety concern. Where there is a safety issue that results in an injury or a building collapse, the Department of Labour may institute an inquiry, the outcome of which may result in criminal prosecution.

Endnotes

1 https://www.coxyeats.co.za/LegalUpdates/View/11/%22Pay%20when%20paid%22%20clauses

2 https://www.masterbuilders.co.za/news/666452/Conventional-Penalties-Act.htm

3 *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

4 *Comwezi Security Services (Pty) Ltd and Another v Cape Empowerment Trust Ltd* (759/2011) [2012] ZASCA 126 (21 September 2012).

5 See *Jones v Kork* 1995 (1) SA 677 (A).

Peter Barnard is a senior partner in the Construction, Engineering and Infrastructure Law team at Cox Yeats. With more than a decade of experience as an admitted attorney in South Africa, Peter has become a trusted industry leader in the realm of construction and procurement dispute resolution.

Peter specialises in commercial litigation and alternative dispute resolution proceedings in Africa, with a focus on built environment disputes. His clients include a wide spectrum of professionals, including engineers, architects, developers, consultants, contractors, subcontractors and suppliers.

Peter's expertise extends to drafting and litigation, arbitration and adjudication proceedings relating to building, engineering, commercial and insurance contracts. He has an in-depth understanding of the JBCC, FIDIC, GCC and NEC3 contracts.

Peter coined the term "construction mafia" in 2017 by becoming the first attorney to bring interdict proceedings against a business forum.

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Chantal Mitchell is a dynamic legal professional specialising in construction, procurement, and administrative law. Admitted as an attorney in 2018 and appointed a partner at Cox Yeats in 2021, Chantal has rapidly established herself as a trusted legal adviser in the construction and engineering sectors.

With expertise in commercial litigation, she represents a wide range of clients including developers, principal agents, building contractors, subcontractors, and professionals. Her practice is grounded in dispute resolution – often involving high-value, complex matters – and she also advises on commercial transactions.

Chantal is well-versed in standard form contracts such as the JBCC, FIDIC, NEC, and GCC, and regularly navigates legal challenges related to project disputes, tender processes, and regulatory compliance. She has acted in internal tender appeals and High Court reviews and frequently obtains interdicts to address site disruptions involving business forums and community groups.

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Claudelle Pretorius is a partner in the Construction, Engineering and Infrastructure Law team at Cox Yeats, and has quickly earned a reputation as a leading legal mind in South Africa's built environment sector. Admitted as an attorney in 2019, she brings extensive expertise in construction, engineering, procurement law, and commercial litigation, with a foundation that also includes employment law.

Claudelle has represented a wide range of clients – developers, contractors, subcontractors, and professionals – in complex adjudication, arbitration, and litigation proceedings, both locally and across the African continent.

She is particularly well-versed in the JBCC, NEC, GCC, FIDIC, EPC, and bespoke building contracts and is one of the few South African attorneys with experience in international arbitrations under the ICC and UNCITRAL rules.

Claudelle is known for her strategic, cost-effective approach to dispute resolution, and for guiding clients through high-value, multi-jurisdictional construction claims.

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