

Nuts and bolts of south africa's construction law law contract essay

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Introduction

Generally recognized, the construction sector is very large, diverse and complex. Its size and complexity is further complicated by the vast number and range of employees in the sector and the significant differences in the size and nature of its member organization, it is therefore only natural that the construction law field too becomes very large, diverse and complex, with many aspects, such as legal, human resource, financial and insurance present in any contract. It has to be said that for a major contributor to the GDP, It is also an underdeveloped field in South Africa. Our British counterparts have specialist technology and construction courts, which South Africa relies on for judgments and inputs to form a basis for resolving disputes, with a Society for Construction Law, which conducts research into classic construction disputes and, from there, provides best practices and guidelines for resolving those, South Africa has brazenly followed suite with the establishment of the Construction Industry Development Board (CIDB). Although a creature of statute, the Construction Industry Development Board is a Schedule 3A public entity Act 38 of 2000 with an aim to promote a regulatory and developmental framework that builds: The construction delivery capability for South Africa's social and economic growth. A proudly South African construction industry that delivers to globally competitive standards. The CIDB's focus is on Sustainable growth, capacity development and empowerment Improved industry performance and best practice A transformed industry, underpinned by consistent and ethical procurement practices Enhanced value to clients and society South Africa has a vast pool of construction and engineering professionals, the same can be said for its

Legal resource, the unfortunate situation is that South African universities do not currently offer any courses specifically focused on construction law, this often leads to the failure of construction contracts as the school now involved in the creation of Construction and Engineering contracts are not fully conversant nor educated in the legal field, it is for this reason that there is a lacuna between the personnel dealing with the technical aspects of a construction project and those dealing with the commercial aspects, this lacuna will be rectified when the respect for the legal profession returns to the construction contract and the need for the return of the legal professional. It is not possible to expect a Quantity Surveyor, or a Project Manager nor a Supply Chain official to have the holistic understanding of the general principles of the law, individual business divisions, although important in the formation of a contract, often do not have an understanding of what the others are doing and it is important to bridge this gap. The adversarial nature of South African law leaves many legally un-guarded contractual clauses, the contractual disputes more often than not commence at the pre-negotiation phase of the contract and those issues, due to the lack of legal knowledge. What is however appealing about this is that our courts are relieved by the alternative dispute resolution channels that are introduced in terms of contract. The solution to these problems and challenges begin with legal education even with the eventuality of alternative dispute resolution. It would be too idealistic for the industry to expect the contractor, engineer and even the project manager to educate themselves on technical and business aspects of a project and be fully conversant with the law governing. Strangely enough there is a trend in the

industry where contractors have become more commercially perceptive and resorting to employing lawyers and legal advisors to review the contracts and terms even at a pre-tender stage. Where there is a conversancy with the law, the contract, at the negotiation stage can be drafted in such a manner to proactively avoid contractual pit-falls that are prevalent in the industry. Those which emanate during the implementation phase could well be managed and mitigated within the precepts of the contract. For the fear of this research paper being too labored with all the aspects that could possibly be applicable to the construction industry, I have divided it into 6 parts namely: Part I THE CONTRACT Part II LIABILITY Part III PERFORMANCE Part IV BREACH, TERMINATION, AND DAMAGES Part V CLAIMS Part VI DISPUTES Below, brief summation of what each part encompasses Part I THE CONTRACT In this part we recognize, identify and discuss the general principles of contract law within which construction contracts are located. Appraise the various types and standard forms of construction contracts in common use in the construction industry demonstrating a critical awareness of: (i) the main contractual framework established in the main standard form of construction contract and (ii) the significance of specific contractual terms within a construction contract. In this I explore the following forms of construction contracts: JBCC Principal Building Agreement. JBCC Minor Works Agreement. FIDIC: Conditions of Contract for Construction (Red Book) GCC: General Conditions of Contract for Construction NEC: Engineering and Construction Contract (ECC) As a highlight, I will: Critically assess the role, obligations and responsibilities of the employer and the contractor under construction contracts. Identify, evaluate and critically assess, key matters arising during

the course of a construction contract. Context of construction contracts (general principles of contract law including formation and contractual capacity); types of construction contracts; standard forms of contract; employer's obligations (including site possession); contractor's obligations; time, variation, certification and payment provisions and ending a construction contract (including delay, expense, damages and practical completion). Part II LIABILITY Professional architects, engineers, quantity surveyors, project managers and other consultants often find themselves doing work which could expose them to legal liability. Few understand the risks to which they are exposed or the standard of skill and care which the law expects. In this part I focus on negligence and liability of professionals. Their relationship with the employer, contractor and members of the public is considered. The standard of skill and care expected of professionals; To whom this duty of skill and care is owed; The consequences if the standard of skill and care is not met; and How to limit and otherwise manage the exposure of professionals to claims.

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Part III PERFORMANCE The payment certificate's function is to record the factual situation existing at a point in time during the progress of the works and for the certifier to give, in effect, his opinion as to the item / s being certified i. e. the value of the work performed to a certain point in time. Most standard forms contain provisions stating that payment certificates issued prior to the final payment certificate are interim, can be adjusted in subsequent certificates and do not constitute acceptance of the work certified. Once a payment certificate has been issued it acquires a special

status in our law. The payment certificate constitutes a promise to pay the amount so certified. As such, if an employer fails or refuses to pay a correctly issued payment certificate, the contractor acquires a special set of remedies in our law. These remedies include: Order of specific performance; Provisional sentence summons; and Summary judgment.

Part IV BREACH, TERMINATION, AND DAMAGES

There are three general categories of contract damages: 1) damages for defective workmanship 2) schedule related damages, and 3) damages for failure to perform. In this part I will review the cases and basic legal principles applicable to these three types of construction contract claims.

Part V CLAIMS

Understand the basics of claim types and entitlements - the legal basis of construction claims. It is unfortunate that there are no simple answers in contractual claims when the contract is legally unguarded: One may find the situation of having an entitlement but no damages or in the antithesis, damages but no entitlement. Unless you have both, you should not expect recovery under a contract claim - there are however ways to ensure that in the event of claims, that the disputes are mitigated and if not, that those which arise have contractual standing.

Part VI DISPUTES

In this part I attempt to eradicate the sentiment attached to alternative dispute resolution, the concept of which has often been left to the final chapters of textbooks, (and admittedly in this paper too) and often briefly explained. My aim here is to provide an in-depth knowledge and comparative understanding of South African and English and international alternative dispute resolution laws. (1392/40000 words)