MDA PRESENTS

FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

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MIND THE GAP IN THE GENERAL CONDITIONS 2010 AND 2015

Author: Tamlynn Caelers-Avis

Adjudication has become a firm feature of construction contracts, both bespoke and standard form. The reason for this being the expeditious and cost-effective nature of resolving a dispute in this manner and allowing parties to continue with the contract while the dispute is being resolved.

The General Conditions of Contract for Construction, both the 2010 and 2015 editions, (the GCC), provides in clause 10.5 for adjudication as a method of dispute resolution either via a standing adjudication board or ad-hoc adjudication. Should the contract stipulate a standing adjudication board, clause 10.5.1 requires that "*if the Contract Data provides for dispute resolution by a standing Adjudication Board, the Employer together with the Contractor, shall, within 56 days of the Commencement Date, appoint the member or members of the Adjudication Board*".

But what happens in the case where the parties choose to have a standing adjudication board but then fail to appoint such board within the prescribed time, is the matter then automatically referred to *ad-hoc* adjudication?

The GCC is silent on this point, and therefore there is a *lacuna* or gap in the contract in this regard. Where a *lacuna* exists in a contract, one must either import a tacit or implied term into the contract to deal with such *lacuna*.

In the case of *Umgungundlovu District Municipality v Mlo, New Boss & Zamisanani JV* [2021] ZAKZPHC 50 *and others*, which was dealt with by the Pietermaritzburg High Court, the Employer and the Contractor entered into a GCC 2010 contract for the upgrade of the Nkanyenzi Community Water Supply Scheme. This Contract called for the appointment of a standing DAB.

In May 2020, the Employer sought to terminate the Contract on the basis that the Contractor had failed to comply with its obligations and had therefore repudiated the Contract. The Contractor denied that it had repudiated and instead argued that it was the Employer that was in fact repudiating the contact through their termination attempt which had not followed the correct procedure.

The Contractor raised a dissatisfaction claim, under clause 10.2 of the GCC, and thereafter sought to refer the purported unlawful termination to adjudication. The Contract Data attached to the contract which the parties stated in clause 10.5.3 that adjudication was the method of dispute resolution and that "*the number of Adjudication Board Members to be appointed is one (1).*" Therefore, the parties had agreed to adjudication by a standing adjudication board.

However, it came to light that the Parties had failed to appoint the adjudication board.

In light of this failure, the Contractor proceeded on the assumption that the ad hoc adjudication procedure should be followed.

The Employer did not agree to this proposition and refused to take part in the proceedings, arguing that the failure to appoint a standing adjudication board had resulted in the dispute resolution provisions of the GCC becoming invalid or inoperative.

This meant that neither adjudication nor arbitration would apply to the subject dispute.

This was the main dispute that was then referred to the Pietermaritzburg High Court. In addition, it was also argued by the Employer that the dispute being of a legal nature and not a technical nature meant that the High Court was better suited to hear the matter.

In August 2021, the court found in favour of the Employer, and it held that the where the Parties had not appointed a standing adjudication board, the GCC did not provide for automatic *ad-hoc* adjudication.

Accordingly, unless the parties had agreed to enter into an addendum to vary the Contract to allow for *ad-hoc* adjudication, neither party could force the other party to proceed on this basis, as the GCC itself did not provide for the process to automatically revert to ad hoc adjudication.

The Court also found that in the event that an adjudicator was appointed by the court and the process of *ad-hoc* adjudication being followed would amount to the court creating a new contract for the parties.

Therefore, it is apparent that in a situation where the Contract prescribes a standing adjudication board but the Parties do not appoint the members of such board within the prescribed time, the parties to the contract must either agree to vary the contract to allow for *ad hoc* adjudication or the dispute must be referred to court.

The Court held further, as the parties could not proceed with adjudication, there were no grounds for the matter to be referred to arbitration either as arbitration was only available to deal with disputes that adjudication had not resolved. Therefore, as result of the non-compliance of the parties in appointing a standing adjudication board, the dispute resolution provisions of the contract could not be followed, the dispute was unable to be referred to adjudication or arbitration and fell to be litigated on in court.

Further, after argument was made by the Employer that a standing adjudication board was appointed to deal with "*technical issues*" and that on good cause shown, even if an arbitration clause exists and a dispute is referred in terms of such clause, such clause can be set aside, the suitability of arbitration as means to resolve the parties' dispute was discussed. It was held that given the nature of and facts pertaining to the matter, the appropriate forum for resolution was in fact the High Court and that the matter should not be referred to arbitration in any event.

Whatever our opinion may be concerning the merits of this decision, it is likely that this part of the ruling could be challenged given that arbitration and adjudication often pertain to points of law and are presided over by advocates and judges who have the requisite knowledge to render a decision in respect of a point of law. However, this topic requires an entire article dedicated to it.

This judgement now offers direction as to how parties should proceed if standing adjudication has been selected but no adjudication board appointed. It remains to be seen whether the drafters of the GCC will issue an amendment to deal with the *lacuna* that exists in the contract. It also serves as reminder of the importance of reading and complying with the terms of a contract. Should a Contractor or an Employer find themselves in a position where they choose dispute resolution by a standing adjudication board, they must ensure agreement is reached in respect of the appointment of its members or, if unable to do so, agree to vary the contract to allow for *ad-hoc* adjudication or they will find themselves forced to engage in litigation in the High Court which can turn out to be a far more protracted and expensive process.