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DO THE FLOODS EXPERIENCED IN KZN ON 11 AND 12 APRIL 2022 CONSTRAIN THE CONTRACTOR TO CLAUSE 23.1.1 OR CAN IT MAKE A CLAIM UNDER CLAUSE 23.3 FOR ADDITIONAL TIME AND ADJUSTMENT TO THE CONTRACT VALUE UNDER THE JBCC PBA'S EDITIONS 6.1 AND 6.2?

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South Africa's province of KwaZulu Natal ("KZN") has seen heavy rains resulting in rivers bursting their banks, wreckage and damage to infrastructure. In the beginning of 2022, the reported estimated costs to repair damages to housing stood at R3.3 billion with the Department of Agriculture KZN estimating an amount of R50 million required to mitigate KZN's farmers loss of infrastructure¹.

With that being said, a "1 in 200-year flood" has a one in two hundred or 0.5% chance of being equalled or exceeded in any given year² – describing the floods which plagued KZN on 11 and 12 April 2022. According to reports, these floods led to in excess of 300mm of rainfall being dumped over a 24-hour period (just on 11 April 2022). This was equal to about

75% of the country's average annual precipitation, with the national Weather Service stating that the amount of rain was "of the order of values normally associated with tropical cyclones".³ So, what did this mean for the construction industry in KZN, and more so contractors? The impact to construction companies included damage to equipment and infrastructure, not being able to gain access onto sites and delays in any ability to execute works.

1 Eyewitness News *Flood damage to KZN farms estimated to cost billions of rands* Nhlanhla Mabaso <https://ewn.co.za/2022/01/13/damage-to-kzn-farms-due-to-flooding-estimated-at-billions-of-rands>

2 Office of the Queensland Chief Scientist *Understanding floods* <https://www.chiefscientist.qld.gov.au/publications/understanding-floods/chances-of-a-flood>.

3 BBC Reality Check *Durban floods: Is it a consequence of climate change?* By Peter Mwai <https://www.bbc.com/news/61107685>.

In light of the above, one needs to consider whether a 1 in 200-year flood entitles contractors to a claim for an extension of time, and whether this claim can be coupled with a claim for additional costs (an adjustment to the contract value). In this article, we will consider whether the floods in KZN constituted adverse weather conditions in terms of clause 23.1.1, or whether contractors could make a claim under clause 23.3 under editions 6.1 and 6.2 of the JBCC Agreement.

Definitions and applicable authority

The JBCC Agreement does not define “rain”, “floods” nor “adverse weather conditions”. To ascertain whether the floods as described above constitute “adverse weather conditions” (clause 23.1.1) or “further circumstances” (clause 23.3), we need to examine a few definitions against the rules of contract interpretation.

As a verb, Cambridge defines a flood as “to cause to fill or become covered with water, especially in a way that causes problems” or “to fill or enter a place in large numbers or amounts.”⁴ As a noun, a flood is “a large amount of water covering an area that is usually dry”.⁵

The University of Berlin’s Department of Earth Sciences draws the following differences between weather and weather conditions:

“Weather is the combination of the current meteorological components, e.g. temperature, wind direction and speed, amount and type of precipitation, sun shine hours, etc. The weather is defining a short

time period up to several days.

A weather condition is the regional weather during a defined time period from one up to several weeks. Weather condition is describing typical weather phenomena, such as a series of thunderstorm in hot summer, foggy month in autumn or other weather conditions which are typical for a specific region and/or season.”⁶

Adverse is defined as “unfavourable to one’s interests”⁷.

As a start, authority provides that the interpretation of a contract must be aimed at determining the common intention of the parties as expressed in the terms of the contract – as taken from Rand Rietfontein Estates Ltd v Cohn⁸. The following considerations were also highlighted in the case of Natal Joint Municipal Pension Fund v Endumeni Municipality⁹:

“...from the outset one considers the context and the language together, with neither predominating over the other...

4 <https://dictionary.cambridge.org/dictionary/english/flood>.

5 <https://dictionary.cambridge.org/dictionary/english/flood>.

6 [https://www.geo.fu-berlin.de/en/v/iwm-](https://www.geo.fu-berlin.de/en/v/iwm-network/learning_content/environmental-background/basics_climategeography/definitions/index.html#:~:text=Weather%20condition%20is%20the%20regional,specific%20region%20and%2F%20season)

[network/learning_content/environmental-background/basics_climategeography/definitions/index.html#:~:text=Weather%20condition%20is%20the%20regional,specific%20region%20and%2F%20season](https://www.geo.fu-berlin.de/en/v/iwm-network/learning_content/environmental-background/basics_climategeography/definitions/index.html#:~:text=Weather%20condition%20is%20the%20regional,specific%20region%20and%2F%20season).

7 Collins English Dictionary Sixth Edition 2003.

8 1937 AD 317 326.

9 2012 (4) SA 593 (SCA).

...Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production... A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."

The forementioned authority is supported by Christie¹⁰, setting out useful rules for interpretation. Let's take a look at those applicable to the topic at hand.

Equitable interpretation – This rule suggests that once the meaning of a provision has been determined, it cannot be departed from simply based on equitable grounds. Put differently, one cannot depart from the actual meaning of a contractual provision "out of sympathy" for either party.¹¹ Where there is ambiguity as to the meaning of a 200-year flood and whether it constitutes an adverse weather condition or further circumstances not provided in clause 23.1, an equitable interpretation will be preferred over that of an unequitable one.¹²

Generalia specialibus non derogant – With this rule greater weight is to be given to special provisions than to general provisions of a contract. That is to say, "the parties cannot have intended that a general provision should apply to a case covered by special words." This rule thus supports the view that where the special provision is "adverse weather conditions" and the general provision includes "further circumstances",

clause 23.3 cannot not apply where clause 23.1.1 can be relied on.

Avoidance of inconvenience – Christie avers that a court will favour the interpretation of a term, which is less inconvenient.¹³ We see that this rule accords with the cases of Cargo Africa CC v Gilbeys Distillers & Vintners (Pty) Ltd¹⁴ and Concord Insurance Co Ltd v Oelofsen¹⁵, where the courts affirmed that an interpretation of a contract must not be followed if it would make a mockery of the contract.

Application of authority

Clause 23.1.1 requires the delay to practical completion to be caused by adverse weather conditions and from the above, such conditions are to be the regional weather during a defined time period from one up to several weeks. The events of 11 and 12 April 2022 were not experienced up to several weeks – though they were adverse in nature. The JBCC's definition of force majeure includes events such as floods – which supports the contractor's entitlement to making a claim for the revision of the date for practical completion.

10 Christie's Law of Contract in South Africa is well established as a leading authority in the field of contract law.

11 Christie's Law of Contract in South Africa Seventh Edition page 256.

12 Christie's Law of Contract in South Africa Seventh Edition page 256.

13 Christie's Law of Contract in South Africa Seventh Edition page 257.

14 1998 4 SA 355 (N) 368G.

15 1992 4 SA 669 (A) 674C.

This comes as the JBCC Agreement provides in clause 23.1.6 that one of the grounds for an extension of time to the date of practical completion is a force majeure event. However, the JBCC notes that a contractor's claim must focus on the delay caused and not on the quantum or severity of the weather condition. The committee also affirms that the mere fact that it rained on a particular occasion is not grounds for an extension of the construction period.¹⁶

Clause 23.3 is two folded, providing that *"further circumstances for which the contractor may be entitled to a revision of the date for practical completion and an adjustment of the contract value are delays to practical completion due to any other cause beyond the contractor's reasonable control that could not have reasonably been anticipated and provided for" and "the principal agent shall adjust the contract value where such delay is due to the employer and/or agent"*. Hence, for a delay due to a 1 in 200-year flood to entitle the contractor to a claim under this clause, it must be a further circumstance to those provided under clause 23.1 and be due to the employer and/or its agents.

We know that consideration is to be given to the language used in the light of the ordinary rules of grammar. From the definitions discussed earlier above and in ascertaining the meaning of adverse weather conditions – we see that a claim in terms of clause 23.1.1 requires:

- a) A weather condition which is a typical weather phenomenon – such as rain (resulting in a flood) – being experienced for several weeks during a

specific season in KZN.

- b) The adversity of a weather condition experienced resulting in a delay in carrying out the works.

In considering sensible and businesslike results, we cannot envisage a situation where delays caused by floods would be seen as being in the reasonable control of a contractor or could have been reasonably anticipated and provided for, in addition to the delay being due to the employer. A situation such as this would also undermine the purpose of the JBCC Agreement, published in the interests of standardisation and good practice with an equitable distribution of contractual risk in the built environment.¹⁷

The JBCC goes on to advise that the word *"adverse"* in subclause 23.1.1 does not refer only to rain and that other forms of intemperate weather would obviously all qualify as *"adverse"*. From this, we see how clause 23.1.1 includes rain and but it is not clear whether its effects being floods, are included. The JBCC does not deal with nor examine what makes adverse weather exceptional and even advises parties not to change the wording of 23.1.1 to include *"exceptional"*.¹⁸

16 JBCC Advisory Note: Edition 6.2 Principal Building Agreement – Nominated/Selected Subcontract Agreement - Minor Works Agreement (Clause 17.0) 23.0 Revision of the date for Practical Completion – Weather https://jbcc.co.za/advisory_notes/JBCC_ADVISORY_NOTE_23.0ED6.2.pdf.

17 JBCC Memorandum of Incorporation <https://www.jbcc.co.za/docs/JBCC%20MOI%2029%20APRIL%202020%20FINAL.pdf>.

18 JBCC Advisory Note: Edition 6.2 Principal Building Agreement – Nominated/Selected Subcontract Agreement - Minor Works Agreement (Clause 17.0) 23.0 Revision of the date for Practical Completion – Weather https://jbcc.co.za/advisory_notes/JBCC_ADVISORY_NOTE_23.0ED6.2.pdf.

Having regard to the authorities discussed above, we cannot see a contractor's claim due to a 1 in 200-year flood being successful under clause 23.3. This is given the meaning of a flood, its nature as well as the extreme unlikelihood of a contractor attributing the delays due to such floods to an employer or its agents.

For a claim in terms of clause 23.1.1, the weather condition will need to be adverse/ negative in and be typical for a specific region and/ or season – with reference to KZN in this instance. Contractors are therefore advised to ensure they are able to prove the delay suffered accords with that of an “*adverse weather condition*” and not just adverse weather. As floods are included as a force majeure event under clause 23.1.6, the contractor is advised to make a claim in terms of this clause, as it in any event entitles the contractor to the same thing – additional time. This is particularly significant where the contractor is not able to demonstrate delays due to adverse weather conditions but rather a force majeure event (with floods included in the definition).

Allocation of risk

English courts have confirmed that “*there are cases where the loss should be shared, and there are cases where it should be wholly borne by the employer. There are also cases which do not fall within either of these conditions which are the fault of the contractor, where the loss of both parties is wholly borne by the contractor. But in the cases where the fault is not that of the contractor the scheme clearly is that in certain cases the loss is to be shared: the loss lies where it*

falls.”¹⁹ With this, an employer will not have the option of claiming liquidated damages from the contractor and likewise the contractor will not be entitled to make its claims for expense and loss. The contractor is well informed of its obligation in respect of the care of the works in clause 8.1 of JBCC Agreement, and their liability is in any event not unlimited (clause 8.4). Furthermore, the contractor is also not liable for the cost of making good physical loss and repairing damage to the works caused by or arising from the instances listed in clause 8.5.

In the case of Masstores (Pty) Ltd v Murray & Roberts Construction Ltd. (Pty) Ltd and Another²⁰, it was held that:

“First, the very way in which the contract is structured so as to allocate risks between the parties suggests that it is the event or circumstance that gives rise to liability rather than blameworthy conduct in the form of negligence or otherwise.”

¹⁹ Henry Boot v Central Lancashire New Town Development Corp (1980) 15 B.L.R.

²⁰ (573/2007) [2008] ZASCA 94; 2008 (6) SA 654 (SCA) ; [2009] 1 All SA 146 (SCA).

In Perre v Apand Pty Ltd²¹, the court affirmed that:

“Business people frequently take, or are easily able to take, steps to minimise their business or economic losses. Taking these steps will often be a more efficient way of dealing with the risk of these losses than requiring defendants to have regard to the risk that others may suffer economic loss. The economic efficiency of a society requires that the person best able to deal with or avoid the consequences of an economic risk from a cost view should be responsible for the risk and its consequences.”

It is thus clear that the allocation of risk is the only basis for liability under the contract, and a contractor will only take responsibility for the works in accordance with clause 8. The contractor assumes the risk only to the works, until completed and handed over to the employer, with the exception to this being the contractor’s entitlement in terms of clause 23.3.

Conclusion

In conclusion, the adverse weather conditions which gave rise to the KZN April 2022 floods, exceptional or not, only entitle a Contractor to a revision of the date for Practical Completion without an adjustment of the Contract Value under Clause 23.1.1 or 23.1.6 of the JBCC PBA. Clause 23.3 does not assist the Contractor as the “[f]urther circumstances” referred to must be circumstances “other” than those listed in Clauses 23.1 and 23.2.

There are numerous ways that a contractor may be able to submit claims but it all comes down to how a contractor submits its claims. Whether in terms of clause 23.1.1 or 23.1.6, contractors must be able to show that progress of the works towards practical completion was delayed, reasonable practical steps were taken to avoid or reduce the delay, and the delay claimed would be a delay to practical completion. We therefore advise contractors to always get in touch with construction contracts specialists to assist with the preparation and submission of claims.

²¹ 1999 HCA 36, (1999) 198 CLR 180, [1999] 73 ALJR 1190 at paras. 118-120 (part of which was quoted with approval by Brand JA in Cape Empowerment Trust Ltd v Fisher Hoffman Sithole [2013] ZASCA 16, [2013] 2 All SA 629 (SCA), 2013 (5) SA 183 at para. 28 and in Country Cloud Trading CC v MEC: Department of Infrastructure Development [2013] ZASCA 161, 2014 (2) SA 214 (SCA); [2014] 1 All SA 267 at para. 30.