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FIRST AID FOR CONTRACTS

Fifth Edition – May 2018

NEC4: BREACHES BY THE EMPLOYER AND A DEPARTURE FROM THIS PRINCIPLE OF FAIRNESS

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The NEC4, like its predecessors, has been drafted with the objective of 1) facilitating better and more efficient contract management between the parties to a construction project and 2) ensuring that the parties play their roles and carry out their responsibilities under the contract.

One of the key mechanisms which the NEC employs to achieve these goals is the compensation event provision.

This article seeks to explain what would appear to this observer to be an anomaly in regard to compensation events administered under the NEC4, namely the following:

1. under which circumstances the Project Manager is required to notify the Contractor of a compensation event;
2. where the Employer is in breach of contract (compensation event clause 60.1(18)), which party must give notification under these circumstances;
3. whether a Contractor will be time-barred from his claim should he not give notification to the Project Manager of the Employer's breach, and
4. whether the common law alters this position.

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WHAT IS A COMPENSATION EVENT?

The NEC4 provides a list of specific compensation events under clause 60.1.

A compensation event is an event which occurs, that is not caused by the fault of the Contractor, which entitles the Contractor to be compensated for any effect the event has on the Price, the Completion Date or Key Date. If a compensation event occurs the Price, Key Dates or the Completion Date may therefore be re-evaluated, and the Contractor may be entitled to an extension of time and/or additional payment.

The NEC4 lists 21 compensation events, as opposed to the previous 19 events under the NEC3.

The two additional compensation events are clause 60.1(20) and 60.1(21).

- Clause 60.1(20) allows the Contractor to recover the cost of preparing a quotation for a proposed instruction. This is a welcome provision as many projects may be subjected to repeated requests for quotations, which can have the effect of distracting from efficient contract management.
- Clause 60.1(21) allows the Employer to add additional compensation events in the Contract Data.

The list of compensation events includes; acts, omissions and liabilities in respect of various parties to the contract being:

- the Employer;
- the Project Manager;
- the Supervisor;
- Others; and
- Other events that are beyond the control of either party.

CLAUSE 61 - NOTIFYING COMPENSATION EVENTS

61.1 By the Project Manager

Clause 61.1 states that if a compensation event arises from the Project Manager or the Supervisor in the following instances:

- issuing an instruction or notification;
- issuing a certificate; or
- changing an earlier decision

the Project Manager will be required to notify the Contractor of the compensation events.

61.3 By the Contractor

Therefore, the Contractor will be required to give notification to the Project Manager for all other compensation events, apart from the instances listed above.

EMPLOYER’S BREACH OF CONTRACT AND “TIME-BARRING”

In terms of clause 60.1(18), if the Employer breaches the contract, which breach does not fall under one of the other compensation events, the Contractor is obligated to notify the Employer of his breach as a compensation event.

Clause 61.3 states:

"The Contractor notifies the Project Manager of an event which has happened or which is expected to happen as a compensation event if

- The Contractor believes that the event is a compensation event and
- The Project Manager has not notified the event to the Contractor.
- If the Contractor does not notify a compensation event within eight weeks of becoming aware that the event has happened, the Prices, the Completion Date or a Key Date are not changed unless the event arises from the Project Manager or the Supervisor giving an instruction or notification, issuing a certificate or changing an earlier decision."

In the event that the Contractor does not give the required notification within eight weeks of the Employer's breach, he will not be entitled to rely on the compensation event under clause 60.1(18), and he will be time-barred. The NEC4 under these circumstances, like the NEC 3 previously, does not provide a remedy to the Contractor in terms of the contract.

COMMON LAW REMEDIES

On a strict interpretation of clause 61.3, the Employer is provided with a complete defence in instances where he has breached the contract, and the Contractor has failed to give notification of the compensation event (60.1(18)) within the prescribed time frame.

Clause 61.3 is a condition precedent, therefore if the Contractor fails to comply with such conditions as set out under clause 61.3, then its right to claim for the compensation event will be forfeited.

As a result, the Contractor does not have any remedies available to him, should he not comply with the prescribed time frame under the NEC4.

This appears, to this observer, manifestly unfair that the Employer can escape the consequences of his wrong doing by way of a technical defence.

In terms of the common law the Contractor may be able to raise the following possible defences in circumstances where the Employer wishes to rely on his own breach: 1) Prevention Principle, 2) *Exceptio non adimpleti contractus ("exceptio")* and 3) Principles of good faith.

The prevention principle is based on the premise that one cannot be entitled to benefit from one's own breach. If the Employer by his own acts or omissions, has prevented the Contractor from carrying out its obligations in terms of the contract, the principle of prevention, prevents the Employer from benefiting in these circumstances.

The case of *Gaymark Investments (Pty) Ltd v Walter Construction Group Ltd* (1999) 18 BCL 449, illustrates the application of the prevention principle.

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The court enforced the prevention principle and held that the principle took precedence over notification provisions which were drafted as a condition precedent. The Employer in this case was prevented from relying on the Contractor's failure to serve the notice within the required time frame, and the Contractor's claim was upheld.

The finding as per the case of *Gaymark*, has been debated at lengths under English courts. Some courts have adopted a similar approach to the *Gaymark* case, however, some courts have completely rejected it.

Lord MacFayden held in *City Inns Ltd v Shepherd's Construction*[1], that the Employer was entitled to rely on the Contractor's failure to submit his claim, when claiming damages against the Contractor. He stated that *"…the fact that the Contractor is laid under an obligation to comply with clause 13.8.1 [obligation to notify], rather than merely given an option to do so, does not in my opinion deprive compliance with clause 13.8.1 of the character of a condition precedent to entitlement to an extension of time. Non-compliance with a condition precedent may result in a party losing a benefit which he would have otherwise gained or incurring a liability which he would otherwise have avoided."* The Contractor in this instance can only blame himself for losing his right to claim.

In *Multiplex Construction v Honeywell Control Systems* [2007] EWHC 447 (TCC), Justice Jackson held that *"whatever may be the law of the northern territory of Australia, I have considerable doubt that Gaymark represents the law of England. Contractual terms requiring a Contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the Employer the opportunity to withdraw instructions when financial consequences become apparent. If Gaymark is good law, then a contractor could disregard with impunity any provision making proper notice a condition precedent. At his option the Contractor could set time at large."* Therefore, condition precedent provisions remain valid despite the Contractor's misfortune of being time-barred.

It remains to be seen, whether South Africa will adopt the same approach as the decision made under the *Gaymark* case.

Nonetheless, South African courts in recent case law have adopted an approach to time bar clauses, in which they will consider whether the clause is seen to be reasonable and enforceable in light of the surrounding circumstances, whilst taking into account the principles of reciprocity, good faith and ubuntu. This is further explained below.

The *exceptio* is based on the principle of reciprocity in contract law. It can be explained as the intention between the parties that an exchange of performances will occur between them. In order to succeed with using the *exceptio* as a defence, the Contractor will need to establish that the contract is one to which the principle of reciprocity is applicable.

1 [2003] ScotCS 146.

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In the case of *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*[2], Jansen JA states that, *"The basis of this defence (exceptio) is the acknowledgement that with certain contracts (reciprocal contracts) from which reciprocal obligations flow, an exchange of performances is intended Amongst other things, this has the consequence that one party is not obligated to tender his performance unless the other performs in return… For the sake of convenience this will be termed the 'reciprocity principle' from here on in this judgment, while the right to retain performance which flows from this, will be termed the 'right of retention'…"* [3]

The constitutional court held in *Botha v Rich*[4] that, *"it is an accepted principle of our law that where a contract creates reciprocal obligations, own performance or tender of own performance by a claimant is a requirement for the enforceability of her claim for counter-performance. This is an instance of the principle of reciprocity."*

The NEC4 contract comprises of reciprocal obligations between the parties. Consequently, in circumstances where the Employer has breached the contract (under clause 60.1(18)), the Contractor may rely on the *exceptio* as a defence, as the Employer has not yet performed his reciprocal obligations under the contract.

Furthermore, in *Barkhuizen v Napier*[5], the Constitutional Court held that when dealing with time bar clauses, the right to freedom to contract (*pacta sunt servanda*) and the right of access to court must be weighed up against each other, as well as, the fact that enforcing a clause which limits one's right to seek judicial redress, is not contrary to public policy, and is fair, reasonable and just in the circumstances. The court further reiterated the principle of reciprocity and stated that in order to ensure that the principle of reciprocity is followed, the performance of one party cannot be enforced without the performance of the other party, therefore the obligations of the parties must be reciprocal.

In further cases, courts have stated that bilateral contracts are contracts where two parties have cooperatively contracted with each other, in order to benefit both parties and they must have regard to the other party's interests. The law of contract includes the concepts of justice, reasonableness and fairness[6]. The law of contract must be *"infused"* with constitutional values[7]. Parties must act in good faith towards each other when contracting and contracts that are bilateral must benefit both parties and be reciprocal. The courts will further take into account constitutional values, ubuntu, good faith and fairness under the circumstances of each case.

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2 1979 (1) SA 391 (A).

3 Andrew Hutchison "Reciprocity in Contract Law" 2013.

4 Botha and Another v Rich N.O. and Others 2014 (4) SA 124 (CC) at para 43-46.

5 2007 (5) SA 323 (CC).

6 Tuckers Land and Development Corporation (Pty) Ltd v Hovis 1980 (1) SA 645 (A).

7 Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC) and Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd 2017 (4) SA 243 (GJ).

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CONCLUSION

It appears that under the NEC4 contract there is no remedy available to the Contractor should the Employer breach the contract and rely on the time bar as per clause 61.3.

The Contractor should not lose his entitlement to notify and claim a compensation event, as the Employer should not benefit from his own breach.

However, in terms of the common law, the Contractor may have possible remedies and defences available to him, in terms of the prevention principle, the *exceptio* as well as the principles of good faith and reciprocity. The Contractor may have recourse to pursue a damages claim provided that the Employer has failed to comply with a reciprocal obligation, even where it may be time barred.

It must be noted that the Contractor should not abuse the remedies available to him. He should comply with the notice provisions under the contract to claim recovery of time and/or money, as the Employer has no contractual liability towards him without a notice.

Notwithstanding, the various remedies available to the Contractor under the common law, he will face extreme difficulty in convincing the court that they should not apply the contract as it stands. The Contractor will have a burdensome task of justifying its failure to serve its notice timeously and proving that in terms of the particular circumstances it would be unfair, unjust, against public policy and the principles of ubuntu to enforce the time bar provision.

Nevertheless, in terms of the NEC4 it seems to be best to adopt a cautious approach. If the Contractor becomes aware of a possible compensation event, he should notify it as soon as possible, in order to prevent further disputes arising. A prudent Contractor will need to be familiar with his contract provisions and ensure efficient contract management in order to keep himself out of dangerous waters under the NEC4.

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