

Arbitrarily speaking ...

Chairman's Address Judge Fergus Blackie



This is my first Address to the Association as Chairman.

I would like to use the occasion to introduce some of the ideas that the Executive of the Association is discussing and planning for the future of the Association.

The need and focus of the people who started the Association was for the Association to concentrate on proper arbitration in building disputes. This is still the basis and focus of the Association.

The Association today is the primary source of both arbitrator training as well as appointments of arbitrators for the construction industry in South Africa.

The Association has a well-established training programme for prospective arbitrators. Each year there are more applicants for the training course than the year before. Since 2009 the number of candidates for admission to that programme has increased dramatically.

The number of disputes referred to the Association from the construction industry with requests for appointment of its members as arbitrators has risen steadily.

I think this is the right time to express my and your thanks and appreciation to the past three executive Chairmen of the Association - Eyvind Finsen, Pat Lane, and Chris Binnington for their leadership and valuable contribution to the Association and also to the late Professor Christie, the Honorary President of the Association, who, died last year, all of whom have helped to bring the Association to this point.

In this newsletter I want to look at the future.

I think this is the right time to express my and your thanks and appreciation to the past three executive Chairmen of the Association

This letter falls into two parts.

The first part concerns the objectives I would like to achieve for the Association over the next three years, assuming I am reappointed chairman for another couple of years. The second part concerns possible strategic directions that the Association should consider.

In the first part I propose a three year development programme.

As a first step Exco has appointed an Executive Director. This was not my initiative. I believe the idea came originally from Pat Lane. It was Chris Binnington who made it reality. The post was advertised. There were a number of applications and Zarina Kellerman was appointed.

The first year (2011) will be essentially devoted to consolidating and improving or extending the Association's domestic base - developing its image, profile and exposure, its administrative and teaching services and its contacts with as many professional bodies as possible.

One of the initiatives that has taken place was a workshop held in Johannesburg in association with Eversheds attorneys and Tokiso Dispute Settlement to which business people were invited and in which the advantages of ADR generally and mediation and arbitration in particular were presented and discussed.

David Butler, the vice chairman, presented a paper on arbitration. The workshop was well attended and, I believe, well received. It is hoped that a similar workshop will be held later this year in Cape Town through the Stellenbosch University Business School.

A little later I will refer to other developments that hopefully will come about in our own teaching and professional development programmes.

Next year (2012) we will be looking more at regional and international development for the Association. We plan to hold a regional/ international conference on arbitration. There has been some very preliminary discussion with AFSA about linking up for that conference. That possibility is being explored but is at a very early stage. Even if the link does not take place, the conference will go ahead. From the third year onwards I would like to



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Upcoming Events

11 May 2011

An evening lecture presented by Professor Michael Katz on the new Companies Act.

25 May 2011

The AGM will take place at the Polo Room, the Inanda Club, 17h30 for 18h00. Members are urged to attend.

13 July 2011

An evening lecture presented by Dr David Klatzow.

17 August 2011

A simulated arbitration to be presented by the Executive Committee.

14 Sept 2011

An evening lecture presented by Professor David Butler.

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see the Association taking a more active role in international arbitration affairs such as members of the Association attending and presenting papers at relevant major international conferences as a way of increasing our exposure and image in that field.

Of course, none of the proposals I have set out will take place rigidly in calendar years. There will be early beginnings and overlap. The important thing to my mind is to set the objectives and carry them through.

The second part of this letter starts with the AGM dinner last year. At that dinner, Professor Boule, the speaker and the Nelson Mandela Professor of Law at the University of Witwatersrand, told us that:

“Many arbitration organisations around the world have wrestled with two kinds of tensions:

The first is being specialised in particular areas of arbitration, such as building and civil engineering, or providing services in a range of other areas as well....

The second is the balance between the specialist provision of arbitration services and embracing the full range of alternative dispute resolution processes, including conciliation, adjudication, case appraisal, neutral evaluation and in particular mediation.”

In other words, should arbitration associations retain their particularity or become comprehensive commercial dispute resolution bodies?”

I would like to look at both those questions and explore them with you. I propose to look at them in the reverse order to that of Professor Boule.

I must stress that the ideas that I am setting out in this discussion are my own. They have only been dealt with in very general ways in Exco and in private discussions with members.

The point I am looking at now is ‘... the balance between (providing) the specialist provision of arbitration services and embracing the full range of alternative dispute resolution processes, including conciliation, adjudication, case appraisal, neutral evaluation and in particular mediation.’

Our base is in construction arbitration. What we are currently doing, we do well. I believe we would be very foolish to do anything to jeopardise that base.

But is that enough in today’s circumstances? In addition to providing and improving the provision

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of specialist services in construction arbitration, should we not be looking at (in Professor Boule’s words) ‘embracing’ (in construction disputes) ‘the full range of alternative dispute resolution processes, including conciliation, adjudication, case appraisal, neutral evaluation and in particular mediation.’ I believe we should. Here are some of my reasons.

At present, in addition to requests for the appointment of arbitrators, we get requests for the appointment of adjudicators and some requests for the appointment of mediators in construction disputes.

We have some members of the Association who are adjudicators and others who are mediators and one or two who are both. But the Association does not train its members in either skill nor are they part of our advertised speciality.

I return to Professor Boule, “...in the bigger picture of comparative and international dispute resolution (two) trends are clear:...The first is the shift towards more comprehensive service-providing bodies.... (T)he general trend is for professional and service-providing bodies to develop into more inclusive and comprehensive dispute resolution bodies, with wider rather than narrower ambits in all respects.”

I will come back to the second trend later in this talk. For the moment I want to look only at the first.

I must stress that the ideas that I am setting out in this discussion are my own. They have only been dealt with in very general ways in Exco and in private discussions with members.

We must look carefully at what is happening in the outside world. It is not just a question of slavishly following international fashion. But there are good reasons for us to follow that trend.

Within South Africa nearly all existing construction contracts have dispute resolution clauses which provide for discussion (or negotiation), mediation, adjudication and arbitration in various combinations, alternatively or sequentially, as means of settling disputes. Recently some members of the Association have been involved in discussion with the JBCC as to the most efficient way to combine those procedures to produce the best results in dispute resolution.

There is clearly a need for all types of dispute

resolution techniques in construction contracts. These contracts and contacts provide us with the means and vehicle within which to expand our services. In other words, the opportunities are already there for this Association to expand its services. It is a matter of picking up those opportunities. I believe we should do so.

More and more South African companies are operating outside South Africa either into the region, further into Africa or internationally in the widest sense of that word. If the trend internationally is to provide comprehensive dispute resolution services, in the interests of those we serve here we cannot afford to be left behind.

To develop those services seem to me to our best way to attract more South Africans to use the Association’s services and for South Africa to be attractive to outsiders as a venue for dispute resolution.

How do we go about this expansion of services?

Clearly we cannot do it overnight. My suggestion is that initially we regard training in negotiation, mediation and adjudication as specialist post Fellowship add-on courses, fulfilling a similar role to Lee Harding’s specialist Construction Law course.

Our existing tutors, to whom I would like to pay a special tribute for the hard work that they do, already have a heavy load in staffing the existing Certificate, Fellowship and Specialisation courses. I do not see them as being able to cope with much more at the moment.

However, where we cannot ourselves provide training in negotiation, mediation and adjudication, we can look at and use existing university part time courses or other training facilities, which we are satisfied are up to standard, to provide add-on qualifications for Fellows so that those who are interested can qualify for appointments by us in those fields. That will provide a nucleus on which we can build.

... all our Fellows will be fully equipped in all forms of dispute resolution and we will provide a comprehensive service in dispute resolution ...

Subsequently, we can bring those subjects and courses into the pre Fellowship training. That will mean that, in time, all our Fellows will be fully equipped in all forms of dispute resolution and we will provide a comprehensive service in dispute resolution to the construction industry.

That is what I would like to recommend to you as a way to develop.

At this stage I am expressing no more than something to look at, investigate and discuss.

I am going to turn now to the second point of tension for arbitration associations mentioned by Professor Boule: "(S)hould arbitration associations retain their particularity or become comprehensive ... dispute resolution bodies?"

It seems to me that whatever decision we make in regard to the first tension that I have described, the resolution of that tension should have priority. Let us not lose the opportunity of achieving perfection in

what we have in chasing after alternatives. However, there is sense in looking at unexplored markets.

Our training courses provide training in general arbitration. If we decide we are going to look at providing services outside the construction industry, the obvious first choice is to go into commercial dispute resolution. However, both AFSA and Tokiso are already in that field.

If we decide to spread ourselves from construction arbitration, I would suggest sports arbitration as something we could look at as a start. Sport is big in South Africa. It is also big business. There are individuals who do sport dispute resolution but there is no organization specializing in sports dispute resolution. We already have members of the Association, who are connected with one or

other of the major sporting bodies or with sports arbitration in general.

At this stage I am expressing no more than something to look at, investigate and discuss. But it seems to me to be a good way to improve our profile, expand our services and also to attract more people into dispute resolution and our Association.

To round up, I have set out for you firstly, the programme that I would like to follow with the Association over the next three years and secondly, two ideas as to how the Association should develop strategically.

I hope both are of interest you and they will lead to the greater success for the Association. •

Introducing the Executive Director



The Association of Arbitrators has appointed Zarina Kellerman as its executive director, responsible primarily for marketing of the Association in the local and international arenas.

Zarina is a lawyer by training and holds a BA LLB from the University of the Witwatersrand, an FA Arb from the Association of Arbitrators and is currently studying towards an LLM MSc in International Construction and Arbitration Law. Zarina is also a qualified mediator through the United Nations. She has at least nine years' experience in the commercial litigation

field, having worked at Edward Nathan & Friedland, Knowles Husain Lindsay and more recently as a partner at Eversheds South Africa.

Says Judge Fergus Blackie: "Zarina is a welcome addition to the team at the Association of Arbitrators. As an Executive Committee, we believe that she is the right person to assist us in taking the organisation forward."

Ms Kellerman is very optimistic about the opportunity to work with the Association of Arbitrators in its attempts to reposition itself. "It is always easy to work with like-minded people who are open to new ideas and are willing to change". •

Construction Guarantor Escapes

article by Alastair Hay



The Supreme Court of Appeal ("SCA"), towards the end of last year, dealt with an interesting case involving a JBCC construction guarantee.¹

At issue was whether in the circumstances of the case the guarantor, Renasa Insurance Company Ltd ("Renasa"), was entitled to avoid liability under the guarantee vis-à-vis a claim by the employer.

The Facts

In February 2007 a JBCC Building Agreement was concluded between Dormell Properties 282 (Pty) Ltd ("the Company") and Synthesis Projects Cape (Pty) Ltd ("Synthesis") as contractor for the construction of a shopping centre known as Cobble

Walk in Durbanville. At the time the Company had already been converted to a close corporation, Dormell Properties 282 CC ("the CC"). As such the contract should have reflected the name of the CC.

Perpetuating the error, in March 2007 a fixed amount JBCC guarantee was issued by Renasa in relation to the contract in favour of the Company. The error was again perpetuated in December 2007 when a replacement guarantee was issued in favour of the Company following expiry of the first guarantee. This replacement guarantee specified an expiry date of 28 February 2008.

The construction of the shopping centre did not go according to plan. It was apparent at the beginning of February 2008 that practical completion would not be achieved before the expiry date of the guarantee, namely 28 February 2008. In light of this the principal agent demanded that Synthesis

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arrange for the construction guarantee to be extended until 15 April 2008, failing which the CC would cancel the contract.

Synthesis took the view that it was not obliged to extend the guarantee. Consequently, acting on behalf of the CC, the principal agent cancelled the contract on 28 February 2008 and submitted a demand on

¹ *Dormell Properties 282 CC v Renasa Insurance Company Ltd and Others* SCA Case No 491/09, Judgment date 1 October 2010.

the same day to Renasa for payment of the amount available under the guarantee, some R6,6m.

The basis for this demand was the fact of the cancellation of the contract by the CC. In terms of the standard JBCC construction guarantee, one of the grounds for calling up the guarantee is the cancellation by the employer of the contract.

Synthesis disputed the CC's right to cancel the contract which it treated as a repudiation of the contract on the basis of which it terminated the contract on 28 February 2008.

Renasa rejected the claim under the guarantee on the grounds that:

- the guarantee had expired at midnight on 27 February 2008; and
- the CC was not entitled to claim under the guarantee as it had been issued in favour of the Company.

Synthesis made common cause with Renasa and also disputed that it had been in breach of the contract so as to entitle the CC to have cancelled it.

The arbitrator found that the CC had had no right to cancel and that the termination of the contract by Synthesis was valid.

The CC countered with an application for the rectification of the guarantee contending that it was the intention of all concerned that it (the CC) should be the beneficiary of the guarantee.

In our law if a written contract does not reflect the true intention of the parties to it but has been signed by them in the mistaken belief that it does, it may be corrected by a court to reflect the true intention.

The issue initially came before the Johannesburg High Court. It held that the CC was not entitled to rectification of the guarantee and that in any event the guarantee had expired at midnight on 27 February 2008 before it had been called up. The CC appealed this decision to the SCA.

The SCA held that the court of first instance was wrong to apply what is known as the civil method of computation of time which provides for one to include the first day but exclude the last day.

In the meantime the dispute between the CC and Synthesis regarding the validity of the CC's cancellation of the contract had been referred to arbitration. Along the way Synthesis was placed into liquidation but the liquidators continued with the arbitration.

The arbitrator found that the CC had had no right to cancel and that the termination of the contract by Synthesis was valid.

Renasa asked the SCA to admit this new evidence for purposes of adjudicating the appeal despite the events having occurred after the decision of the Johannesburg High Court which was the subject matter of the appeal.

In appropriate cases Appeal Courts can admit new evidence provided there is an acceptable explanation for the fact that the evidence was not adduced in the first court and if the evidence is material.

The CC did not object to this new evidence and the SCA proceeded with the appeal in light of the new information.

Appeal Court Findings

On the issue of the expiry of the guarantee the SCA held that where time has to be computed in accordance with a contract, one looks firstly at the terms of the contract. In this case the contract clearly expressed the expiry date of the guarantee as being 28 February 2008 and there was accordingly no warrant for construing the guarantee as having expired prior to that date. In the SCA's view the CC would have had the whole of 28 February 2008 within which to make a claim under the guarantee.

The SCA held that the court of first instance was wrong to apply what is known as the civil method of computation of time which provides for one to include the first day but exclude the last day. It held that this only applies where something must be done within a certain number of days from a stated event which was not the case with the guarantee in question.

On the issue of rectification, the SCA held that it was obvious to all of the parties that the beneficiary of the guarantee was intended to be the employer under the contract. As the CC was as a matter of law the employer, it was the one entitled to the benefits of the guarantee and the guarantee fell to be rectified accordingly.

The SCA however held that the effect of the arbitrator's award in favour of Synthesis was to destroy the basis upon which the CC had called up the guarantee, namely the CC's cancellation of the contract, and as such the CC had lost the right to enforce the guarantee.

The court nonetheless affirmed the nature of the JBCC guarantee as being a demand guarantee akin to a letter of credit. In other words all that is required ordinarily to obtain payment is compliance with the formalities specified in the guarantee.

In this case, giving effect to the guarantee, the court held, would merely mean that the CC would be obliged to immediately refund the money to Renasa as it is an accepted principle of such guarantees that where it is subsequently shown that the call on the guarantee was unjustified, the recipient must refund the money.

In the light of this, the SCA took the view that it would be an exercise in futility to allow the CC to claim payment under the guarantee but at the same time be obliged to refund the money. The court accordingly ruled that Renasa was not obliged to pay out under the guarantee and dismissed the CC's appeal. •



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"BEHIND THE SCENES."—*First Judge.* "Breach of promise still running?" *Second Judge.* "Going wonderfully. No standing room. "What are you doing?" *First Judge.* "A building contract. Wretched business: not a soul in the place!"