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Arbitrarily speaking ...

Newsletter of the Association of Arbitrators (Southern Africa)



OUTGOING CHAIRMAN'S LETTER

As members will know, for the past three years I have been hinting, strongly, that it would be appropriate for my chairmanship to come to an end. At the first EXCO following this year's AGM, and having given the situation very careful thought, I advised my fellow EXCO members that I would not again stand as chairman for the forthcoming year. It has been a tremendous honour and a great privilege to have acted as chairman of the Association since my nomination on 19th June 1997 when the then chairman, Advocate Patrick Lane SC proposed me and Professor David Butler seconded that proposal.

During my tenure as chairman I have seen the Association go from strength to strength financially. I have also had the opportunity to observe the tremendous enthusiasm and willingness to participate in the Association's activities by members of the Association which enables our learned Association to continue to promote the objectives which were initially set by a small group of construction professionals and thereafter embodied into our constitution. I cannot take credit for the success which the Association has enjoyed although occasionally I have perhaps sewn a seed here and there by way of an idea which has turned to fruition as a consequence of the aforementioned

enthusiasm. In the thirteen years of my chairmanship I have benefitted tremendously from the guidance of senior members of the Association and also the incredible support and efficiency of the Secretariat who have constantly strived to make my task easier by dealing with all the day to day administration so effectively. There have of course been some downsides to the chairmanship most notably the occasion where the Association featured in a reported judgment where my actions in calling for a deposit prior to appointing an appeal tribunal were considered to be *ultra vires* our Rules at the time and resulted in an adverse cost award in the Durban High Court after the disputing parties had reached a settlement in respect of everything other than costs, outside the Court. Since then our rules have been amended and new editions of the Rules have been published. The Committee is currently considering a 7th edition to deal with certain shortcomings identified after the publication of the 6th edition and I think it is fair to say that the Association Rules Committee, very ably led by Advocate Patrick Lane SC, has constantly strived to place us at the forefront of Rules for the Conduct of Arbitrations which reflect current internationally recognised best practice.

Perhaps the biggest disappointment during the tenure of my chairmanship has been the appalling reluctance of the various Ministers of Justice who have come and gone during my chairmanship to properly appreciate the role which arbitration can fulfil as a sensible alternative to court litigation for the resolution of commercial matters. Despite excellent draft pieces of legislation in respect of both domestic and international arbitration acts in which this Association primarily through the efforts of Professor David Butler, had a major hand in preparing, and notwithstanding the recommendations of the Law Commission, these excellent pieces of legislation have been pushed to the bottom of the Minister's pile whilst other legislation, frequently exceedingly poorly drafted, resulting in numerous challenges in the constitutional court, has been rushed through parliament. The existing act is now 45 years old and surely our government can appreciate that it must be, and is, hopelessly outdated. Furthermore government's reluctance to promulgate legislation in regard to arbitration will not stop parties using the process more particularly given the inordinate delays in bringing matters to trial in the High Courts of South Africa where trial dates in excess of two years from the date on which the application for a trial date is made have now become common place. The role of arbitration to assist in de-bottle necking

the court system, particularly given the wealth of expertise which exists within South Africa insofar as the practice of arbitration is concerned, simply confirms that our government has been negligent in ignoring and indeed frustrating the promulgation of this updated legislation. Hopefully a more enlightened Minister of Justice in the near future will remedy this sorry state of affairs.

It was my pleasure to propose vice chairman, Judge Fergus Blackie as the new chairman at the recent executive committee meeting and his chairmanship was unanimously approved. It was also a pleasure and a privilege to propose Professor David Butler as the new vice chairman, a role of course which he has previously fulfilled, and one which I know will bring considerable benefits to the Association in the year ahead.

I will continue to serve the Association in whatever capacity is deemed appropriate and hope to remain as a member of EXCO for the foreseeable future subject of course to the support of members insofar as my re-election to EXCO is concerned.

Sincerely,

CHRIS BINNINGTON

CORRESPONDENCE COURSES 2011

The Association will continue to present its correspondence courses next year to its members.

The course currently comprises the Certificate

Course in Arbitration, the Fellowship Admission Course in Arbitration and the post Fellowship Specialisation in Construction Law course.



The Certificate Course in Arbitration comprises two modules; the Introduction to the Theory of Law and the Law and Practice of Arbitration 1.

The Fellowship Admission course similarly comprises two modules; Law of Contract (2) and Delict and the Law and Practice of Arbitration (2) which includes Evidence in Arbitration Proceedings.

The Specialisation in Construction Law is intended for practitioners in the construction industry or those wishing to gain a better understanding of the legal principles and case law in this field of law.

Further information can be obtained on our website (www.arbitrators.co.za) or any interested persons can contact the secretariat.

THE PROFESSIONAL SERVICES AGREEMENT — NO PRICE NO PAY?

INTRODUCTION

If an engineer, architect, or any professional for that matter, agrees to do work for a client and there is no agreement on the remuneration payable, does that mean that the professional is not entitled to payment for any work done? This is the question that the KwaZulu-Natal High Court, Durban, had to answer earlier this year.¹

BACKGROUND

The plaintiff in the case, being a firm of engineers with specialist knowledge in concrete and its rehabilitation, was requested by the defendant, a body corporate of a high rise building on the KwaZulu-Natal South Coast, to investigate and advise on the deterioration of the concrete in the building. Extensive spalling was occurring in the concrete.

The parties agreed on a fixed fee for the plaintiff's investigation of the problem. However, the parties' agreement was less precise with regard to how the plaintiff would be remunerated in relation to the repair work that would inevitably flow from the plaintiffs

investigation and the recommendations made.

The plaintiff offered to draw up a specification in respect of the required remedial work as well as a bill of quantities, invite specialist contractors to tender for the work, prepare appropriate contract documentation, assess and adjudicate the tenders and make a recommendation as to who the defendant should employ. The plaintiff also offered to supervise the execution of the required works.

The plaintiff proposed that it should be paid a fee equal to 11% of the successful tenderer's contract price payable in stages, 35% upon completion of the drawing up of the specifications and tender documentation, 10% upon completion of the adjudication and contract award by the defendant and the balance of 55% for supervision as the works progressed.

After the plaintiff had completed its investigation, the agreed fee for which was paid, the defendant instructed the plaintiff to proceed with the preparation of the documentation and the calling for tenders which the plaintiff duly did.

¹ Structest cc v Body Corporate of High Tide

The plaintiff adjudicated the various tenders received and made its recommendation to the defendant as to who it should appoint to carry out the work.

At this point the trustees of the defendant, who had undergone a change in composition, took fright at the cost and decided to abandon the project.

The defendant then took the rather uncharitable view that it was not obliged to pay the plaintiff any further fees for the work performed by it.

The defendant's attitude was predicated on the notion that the plaintiff had been working on risk, despite that never having been discussed between the parties, and on the basis that as no contract had been awarded, there was no means of calculating any amount payable to the plaintiff based on the plaintiff's fee proposal.

After terminating the plaintiff's services, the defendant employed a third party to do a less extensive and accordingly much cheaper repair exercise.

THE LAW

The situation is not a novel one. It first arose in a Transvaal case in 1903.²

The facts in this case were similar in that an architect had at the request of a client prepared various drawings for a proposed structure that the client wished to erect. The client in this case decided to sell his property and not proceed with the construction of the proposed buildings. He also took the view that he did not have to pay the architect for the work that the architect had done.

The judge in the case said:

² *De Zwaan v Nourse* 1903 TS 814

"Now the general principle is uncontested that where one man hires the service of another to perform work he is liable to pay, where no stipulation is made as to the amount, such sum as will fairly remunerate the person whose services he takes advantage of, unless there are circumstances or special terms negating clearly any idea of payment."

In other words, in these circumstances, in the absence of clear proof that a professional is undertaking work without a requirement that he be paid for the work, the professional will be entitled to payment.

The law implies a term into the contract entitling the professional to be remunerated.

The next question of course is what amount the professional is entitled to be paid in these circumstances.

The professional is entitled to be paid a fair and reasonable remuneration for the work done. This amount is determined by the court with reference to the available evidence having regard to the general norms in the field concerned.

THE DECISION

The judge determined that there was no evidence put forward by the defendant which could establish that the plaintiff had been working on risk and did not expect to receive payment for work done if the project failed to proceed to finality.

The judge found that the express terms of the agreement between the parties were insufficient to fix the remuneration payable to the plaintiff. However, he concluded that despite this the plaintiff was entitled to be paid a reasonable fee for the work done up to the point when the defendant decided to abandon

the process.

In calculating the amount of the fee which he considered appropriate, the judge used the amount of the lowest tenderer's price which the plaintiff had recommended for acceptance. He calculated the total fee on that amount at 11% and then took 45% of that as representing a fair estimate of the amount of work done by the plaintiff up to the stage when the plaintiffs services had been terminated.

In the result the court gave judgment in favour of the plaintiff for the amount of its fee calculated as aforesaid.

CONCLUSION

In the absence of clear evidence to the effect that a professional is undertaking work on sk, a professional will be entitled to be remunerated in circumstances where:

- a project fails or is left incomplete

after part of it has been carried out; or

- the contract between the parties is insufficiently precise to fix the remuneration payable to the professional for the work done.

The same considerations apply in circumstances where a building or civil engineering contractor undertakes work without there being agreement on the contract price payable. The contractor will similarly be entitled to be paid on a fair and reasonable basis.

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