



CONSTRUCTION AND ENGINEERING ALERT

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WAIVING A LIEN GOODBYE

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Standard form construction contracts such as the Joint Building Contracts Committee (JBCC) make provision for a payment guarantee by the employer in exchange for the waiver of the contractor's lien.

In project financed transactions the lenders will usually require the employer to ensure that the contractor expressly and explicitly waives its lien in favour of the lender, in order to protect the lender's interests in the event that the employer fails to pay the contractor.



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Standard form construction contracts such as the Joint Building Contracts Committee (JBCC) make provision for a payment guarantee by the employer in exchange for the waiver of the contractor's lien. The Constitutional Court in *Standard Bank of SA v D Florentino Construction CC & Others* 2008 (5) SA 534 (C) held that that the provision of a payment guarantee is pursuant to a contractual obligation, as opposed to the mere operation of law, and accordingly, the provision of payment security is not necessarily a legal requirement to ensure a valid waiver of lien.

In project financed transactions the lenders will usually require the employer to ensure that the contractor expressly and explicitly waives its lien in favour of the lender, in order to protect the lender's interests in the event that the employer fails to pay the contractor. A general waiver of lien does not necessarily amount to a general renunciation of the contractor's retention rights, and such a waiver ought to identify the specific entities in whose favour the rights of retention have been waived.

Parties may place limitations on the enforceability of the waiver and may include reciprocal rights. In *NBS Bank Bpk v Dirma BK en 'n Ander* 1998 (1) SA 556 (T), for example, the waiver of lien was only effective to the extent that the bank had actually foreclosed

on the property which was subject to a mortgage bond. A party who is seeking the waiver of a lien is generally advised not to make the operation of the waiver subject to the happening of a certain trigger event.

In the absence of a contractor consenting to waive its lien, but in the event that a contractor nevertheless voluntarily relinquishes possession of the employer's property for a period of time, such conduct will be deemed to be a waiver by the contractor of its right of retention. A contractor who refuses to relinquish possession of the employer's property after it has waived its lien is acting unlawfully.

Lenders are advised to protect their interests by ensuring the following set of conditions are attached to all loan agreements related to construction contracts:

- (i) insist upon receipt of a waiver of lien from all parties concerned, including any subcontractors, before any money is advanced under the loan;
- (ii) expressly record that such waiver shall be in favour of the lender; and
- (iii) require that the waiver of lien be unconditional.

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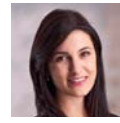
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