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# DISPUTE RESOLUTION ALERT

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### Let's kill all the lawyers

If the title of this article appealed to you, perhaps you've recently had to pay an attorney's invoice. Or you had to pay someone else's attorney's invoice? You might be thinking that Dick the Butcher, in Shakespeare's *Henry VI*, had a point: "Let's kill all the lawyers!" Fortunately for us attorneys – and as an aside – it has been reported that this line is often misinterpreted. Dick the Butcher was a follower of the rebel Jack Cade (who led a popular revolt in 1450 against the English government), and thought that if he disturbed law and order, he could become king. Shakespeare was suggesting that attorneys and judges help to maintain law and order! Phew!

### Careful how you cancel – a strict approach to following cancellation clauses in construction contracts

The temptation to terminate a construction contract out of pure frustration can be difficult to resist. It all starts with the project falling behind schedule, an aggrieved party granting an extension to complete the works, only for the extension to be insufficient for the contractor to meet the new deadlines and the project costs increasing day by day. The case of *Hodgkinson v K2011104122 (Pty) Ltd and another* [2019] 2 All SA 754 (WCC) (*Hodgkinson*) is a caution to parties employing contractors to pause and carefully consider the cancellation clause contained in the construction contract before acting on the impulse to cancel.

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## Let's kill all the lawyers

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In the current climate, everyone is looking for ways to cut costs and maximise efficiency and there are in fact several ways that you can cut your legal costs – all entirely within your control.

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If the title of this article appealed to you, perhaps you've recently had to pay an attorney's invoice. Or you had to pay someone else's attorney's invoice? You might be thinking that Dick the Butcher, in Shakespeare's Henry VI, had a point: "Let's kill all the lawyers!" Fortunately for us attorneys – and as an aside – it has been reported that this line is often misinterpreted. Dick the Butcher was a follower of the rebel Jack Cade (who led a popular revolt in 1450 against the English government), and thought that if he disturbed law and order, he could become king. Shakespeare was suggesting that attorneys and judges help to maintain law and order! Phew!

But let's be honest [insert lawyer joke here], attorneys (and litigators specifically) are often a grudge purchase. If you have to see a lawyer, it probably means that something has gone wrong and now you have to spend money to resolve it. In the current climate, everyone is looking for ways to cut costs and maximise efficiency and there are in fact several ways that you can cut your legal costs – all entirely within your control.

### A risk averse "friend" in the legal business

Having a close relationship with your attorney has several benefits and you should take advantage of the fact that attorneys have not (yet) been replaced by robots and you can simply call them up to ask for a quick view. Obviously that's not going to work if you want them to interpret a contractual provision, but if you're debating whether or not to respond to an aggressive email or to someone who might be setting you up to make some sort of admission – a quick call to your attorney could potentially save you a lot of management time and money later. Attorneys are there to advise on risk. Use them.

### Teach your attorney about your business and its challenges

Your attorney should be curious about your business. Invite them to see your production line, visit the mine or watch the manufacturing process and show them where your challenges lie so that they understand your risks. Teach them some of your industry jargon. Not only will it give them something to brag about at their next pub night but it's a business development opportunity for your attorney that they should never pass up. It may well save you time in the long run because you hopefully won't need a four-hour long consultation, if and when a problem does arise, to teach your attorney about how your foo foo valve relies on the thingy that broke off the what-not on your machine.

### Order your documents

It may sound lame, but this is a big one. When your attorney asks for "all the correspondence from X date to Y date", send the documents chronologically and clearly marked or ordered so that the attorney knows where to start. When attorneys prepare court papers, they need to tell a story and stories are best told from the beginning and in sequence. If an attorney has to spend hours trying to piece together what happened and the documents are unclear or poorly printed/scanned, there are going to be many emails coming your way asking for clarity and guess what - all of those emails add up to billable hours.

### Look before you leap

Litigation is expensive, both in money and in time, but there are many situations where it is objectively the right decision. Bear in mind though that stopping the process half-way through does not mean that the attorney can't charge you for the work already done and that you won't be

## Let's kill all the lawyers...continued

Decisions to litigate should be taken with the same level of measured calmness that should be applied to any investment decision.

liable for the other side's costs. If possible, rather take more time to consult with your attorney at the beginning of the matter so that you develop a strategy that is likely to give you the result you want, so that you understand all the risks before you start, and that you're happy to see this course of action through. Decisions to litigate should be taken with the same level of measured calmness that should be applied to any investment decision. Anger, revenge, pride and emotions of that ilk should not feature despite the fact that they are central in situations which usually give rise to litigation.

Sun Tzu was able to sum up the approach we advocate. *"To fight and conquer in all our battles is not supreme excellence; supreme excellence consists in breaking the enemy's resistance without fighting."* Donald Trump, not so much. *"Sometimes you need conflict in order to come up with a solution. Through weakness, oftentimes, you can't make the right sort of settlement, so I'm aggressive, but I also get things done, and in the end, everybody likes me."*

*Megan Badenhorst and Tim Fletcher*



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## Careful how you cancel – a strict approach to following cancellation clauses in construction contracts

The issue before the court was whether the employer elected to follow the terms of the cancellation clause in the agreement and was therefore bound to follow the cancellation clause or whether the employer was entitled to rely on the contractor's repudiation of the agreement as a ground for cancellation (and thereby avoid the requirements of the cancellation clause).

The temptation to terminate a construction contract out of pure frustration can be difficult to resist. It all starts with the project falling behind schedule, an aggrieved party granting an extension to complete the works, only for the extension to be insufficient for the contractor to meet the new deadlines and the project costs increasing day by day. The case of *Hodgkinson v K2011104122 (Pty) Ltd and another* [2019] 2 All SA 754 (WCC) (*Hodgkinson*) is a caution to parties employing contractors to pause and carefully consider the cancellation clause contained in the construction contract before acting on the impulse to cancel.

Cancellation of a contract is a general remedy for breach of contract recognised in South African law and is often referred to as a drastic remedy as it brings the contract to an end. Terminating a contract may not always be the commercially sensible remedy for breach of contract as it may further delay the completion of the project, increase the project cost and even expose a contracting party to liability. In favour of prolonging the life of a contract, an aggrieved party may opt to offer a contractor an opportunity to remedy the breach and then in the event of non-compliance, cancellation and damages. *Hodgkinson* addressed the following question: Under what circumstances can such an election be exercised when the agreement governing the parties' obligations sets out precise requirements for cancellation?

The central facts in *Hodgkinson* were that the plaintiff (*Hodgkinson*) employed the first defendant as a contractor to complete certain construction works on the terms and conditions set out in an agreement entered into between the two parties.

The relevant clause in the agreement provided that the employer must deliver a notice setting out the contractor's default and if the contractor failed to take steps to remedy the default within 14 days after receipt of the first notice, the employer could issue a second notice given within a further 7 days to terminate the agreement.

A few months after the commencement of the works, the employer delivered a written notice to the contractor (first notice) recording its defaults and informing it that unless it took practical steps to remedy the defaults within a period of 7 days, the employer would cancel the agreement. The contractor failed to remedy the defaults within 7 days. Ten days after the delivery of the first notice, the employer delivered another notice (second notice) informing the contractor that he was cancelling the agreement.

Both the first and second notice fell short of the requirements of the cancellation clause which required the contractor first to be given 14 days to remedy, and then a further 7 days' notice prior to cancellation.

The issue before the court was whether the employer elected to follow the terms of the cancellation clause in the agreement and was therefore bound to follow the cancellation clause or

## Careful how you cancel – a strict approach to following cancellation clauses in construction contracts

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The court narrowed its inquiry to not deal with whether there was a valid repudiation by the contractor, but rather whether the employer forfeited his entitlement to rely on the repudiation as a ground for cancellation because he elected to invoke the terms of the cancellation clause (by delivering a first and second notice).

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whether the employer was entitled to rely on the contractor's repudiation of the agreement as a ground for cancellation (and thereby avoid the requirements of the cancellation clause).

The grounds for cancellation put forward by the employer were twofold:

- The first ground was premised on the contractor failing to remedy the breaches set out in the first notice within a 7-day period and within the 14-day period contemplated in the cancellation clause. According to the employer, it did not matter that the period given to remedy the breach (7 days) was shorter than 14 days because the contractor in any event failed to remedy the default within the 14 day period.
- The second, alternative ground for cancellation, was that the contractor's conduct exhibited a deliberate and unequivocal intention not to be bound by the agreement - conduct that constituted repudiation of the agreement. The employer argued:
  - (i) the first notice constituted an offer to the contractor to remedy its default and not a notice in terms of the cancellation clause therefore the time frame to remedy the breach did not matter; and

- (ii) the second notice did not make reference to the cancellation clause and therefore the cancellation was on a different basis than the cancellation clause.

On this second ground, the court narrowed its inquiry to not deal with whether there was a valid repudiation by the contractor, but rather whether the employer forfeited his entitlement to rely on the repudiation as a ground for cancellation because he elected to invoke the terms of the cancellation clause (by delivering a first and second notice).

On the first ground for cancellation the court found that an aggrieved party cannot expect a defaulting party to read the first notice as if it conferred 14 days to remedy the breach instead of 7 days as stated in the first notice. The first notice was defective and consequently, the plaintiff was obligated to rectify its letter of demand to refer to 14 days in clear terms and in accordance with the cancellation clause.

On the second alternative ground for cancellation, the court held that the first and second notice conveyed an unclear message to the contractor because the notices complied substantially with the cancellation clause but the time periods did not comply with the time periods stipulated.

## Careful how you cancel – a strict approach to following cancellation clauses in construction contracts

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The aggrieved party must follow the clear route for cancellation prescribed by the cancellation clause. The defaulting contractor cannot be left to guess whether the cancellation clause is being invoked or not.

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The court found that in the face of a defective letter of demand it would be “untenable” to allow the employer to fall back on the claim that he had in fact intended to allow the contractor an opportunity to remedy the default and if the response was unsatisfactory change his election and cancel the agreement.

The logic endorsed by the court is as follows: When a contract contains a cancellation clause which covers repudiation by the contractor and allows an employer to offer to the contractor to remedy its default and entitles an aggrieved party to issue a notice to cancel following a failure to remedy the default, the aggrieved party must follow the clear route for cancellation prescribed by the cancellation clause. The defaulting contractor cannot be left to guess whether the cancellation clause is being invoked or not.

This case endorses and gives guidance in regard to the fundamental principles of the right to cancel as it pertains to the process that aggrieved parties should follow to enforce their right to cancel a contract against defaulting/repudiating parties where there is a governing cancellation clause. The approach of considering whether an agreement entitles a party to cancel in a certain manner rather than focusing on a party’s expression of an intention to cancel evidences the South African courts’ welcome protection of the principle of certainty in contract.

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*Timothy Baker and Siviwe Mcetywa*

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