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Subcontracting portions of a construction project is a well-established practice in South Africa and is an important and effective means of involving small-, medium- and micro-sized enterprises (SMMEs) in the construction industry.

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Cession versus cession: Dates and wording matter

The lesson to be taken from this judgment is that it's important to ensure the wording of security documents is correct.

When faced with competing cessions, first in time does not automatically mean first in line.

In *Silostrat (Pty) Ltd and Others v Strydom NO and Others* [2021] (SCA) 93 the Supreme Court of Appeal (SCA) first had to interpret the competing cessions before it could consider the relevance of their timing. The lesson to be taken from this judgment is that it's important to ensure the wording of security documents is correct. This is especially so as we increasingly rely on precedents to achieve efficiency.

The Silostrat case involved a heavily indebted maize farmer (Kirsten) who had continued to execute cession agreements over his future maize crops in favour of his various creditors. In 2010 he began executing annual cessions in favour of Suidwes Landbou in order to secure a revolving credit loan. The last of these cessions was concluded on 28 October 2014, in which he ceded his 2015 maize harvest. In 2011 he ceded to Standard Bank his right to the future income he would earn from "*agricultural producers*" in respect of agricultural produce purchased from these producers and sold on to buyers. Finally, on 5 October 2014, he ceded his right to the income he would earn from his 2015 maize harvest to Technichem Oesbeskerming.

Despite these cessions, Kirsten concluded three forward contracts in which he agreed to sell his 2015 maize harvest to Silostrat. Silostrat, in turn, agreed to sell the harvest on to a third party. Kirsten, however, failed to deliver the harvest to Silostrat, and rather delivered it to Suidwes in terms of the 28 October 2014 cession. To fulfil its obligation to the third party, Silostrat was forced to buy maize from another supplier and sell this on, making a loss in the process.

Kirsten's sequestration followed. As a result, there were four claims in the High Court against his insolvent estate's 2015 crop and/or the proceeds received from the sale of the crop to Suidwes.

Standard Bank contended that, despite its cession recording its entitlement only to Kirsten's right to income from the selling on of produce he received from agricultural producers, this should be interpreted as a cession of his future

Cession versus cession: Dates and wording matter...*continued*

With regard to the Suidwes appeal, it found that the annual cessions executed in favour of Suidwes were not evergreen, and instead expired at the end of the year for which they were executed.

maize crops. Suidwes argued that its annual cessions were evergreen, and, since these went back to 2010, predated Technichem and Standard Bank's cessions. Technichem claimed that the Standard Bank cession was void for vagueness, the Suidwes cessions were not evergreen, and its 5 October 2014 cession predated the 28 October 2014 cession. Silostrat meanwhile claimed contractual damages for the loss it had suffered due to Kirsten's breach of contract.

The High Court upheld Silostrat's claim, but determined that this would be administered by the trustees of Kirsten's insolvent estate. The court also rejected Standard Bank's interpretation of its 2011 cession, and rejected the argument by Suidwes that its annual cessions were evergreen. The High Court found that the competing claims to Kirsten's 2015 maize harvest were in terms of the 5 October 2014 cession in favour of Technichem and the 28 October 2014 cession in favour of Suidwes. In light of this, it ruled that Technichem's cession predated the Suidwes cession, and was thus the stronger claim.

On appeal, the SCA upheld the High Court's decision. With regard to Standard Bank's appeal, the SCA found that on an ordinary interpretation of the wording of the cession, Standard Bank's right was limited to that portion of future income derived from the selling on of produce Kirsten had received from *"agricultural producers"*. With regard to the Suidwes appeal, it found that the annual cessions executed in favour of Suidwes were not evergreen, and instead expired at the end of the year for which they were executed. Thus, any claim Suidwes had to Kirsten's 2015 maize harvest was on the basis of its 28 October 2014 cession.

Therefore, as in the High Court, the SCA found Technichem's claim to be stronger as the cession of Kirsten's 2015 maize harvest was executed in its favour before the cession in favour of Suidwes. This decision serves to illustrate the confluence of legal principles relevant to contractual interpretation and the ranking of personal rights.

Belinda Scriba and Nicholas Carroll

INSURANCE

Assessing insurance claims in light of intentionally missed premium payments

The beneficiaries subsequently submitted a claim under the insurance policy, which was declined by the insurer on the basis that at the time of the insured's death the policy had been cancelled.

In instances where someone fails to pay an insurance premium and it amounts to a repudiation of an insurance contract, the insurer need not provide an extension for the payment of a premium (grace period) regardless of the wording of the policy. This was held in the recent decision of the Supreme Court of Appeal (SCA) in the matter of *Discovery Life Limited v Hogan and Another* (389/2020) [2021] Zasca 79 (11 June 2021).

In this case, the insured took out a life insurance policy with the insurer in December 2015 and had nominated her parents as the beneficiaries of the policy. On 6 August 2018, in a telephone discussion with a representative of the insurer, and subsequently in a letter on 15 August 2018, the insured communicated to the insurer that she wished for her policy be cancelled with immediate effect.

Representatives of the insurer then wrote to the insured's broker on two occasions informing the broker firstly, that the insured's policy would be cancelled but that a notice period of 30 calendar days applied in terms of the policy (16 August letter), and secondly, that the effective date of the termination would be 1 October 2018, and the last day of cover would be 30 September 2018, with the last premium due on 3 September 2018 (28 August letter).

The insured had, however, instructed her banker on 23 August 2018 to stop payment of the debit order in respect of the premium due for September 2018. After receiving notice that the September premium was not paid, the insurer wrote a letter to the insured on 10 September 2018 and informed her that her policy was cancelled with effect from 1 September 2018.

The insured died on 22 September 2018. Following her death, the insured's beneficiaries (on advice from the insured's broker) paid the September premium to the insurer on 27 September 2018. On 28 September 2018 the insurer sent a letter to the insured requiring the insured to complete and sign a declaration of health form, but it received no response.

The beneficiaries subsequently submitted a claim under the insurance policy, which was declined by the insurer on the basis that at the time of the insured's death the policy had been cancelled.

Following the declined claim, the beneficiaries launched an application in the Gauteng Division of the High Court, for the payment of the proceeds of the policy with interest.

They successfully contended that in addressing the 16 August and 28 August letters to the insured's broker, the insurer had made an election to hold the insured to the terms of the policy and that at the

INSURANCE

Assessing insurance claims in light of intentionally missed premium payments...*continued*

It is important to note from this case that an insurance policy, despite its nuances through the development of other branches of the law, still firmly falls under the principles of contract law.

stage the premium was paid the policy remained in force. They further argued that the insurer failed to notify the insured of the unpaid September premium and failed therefore to provide the insured with a 30-day grace period prior to cancelling the policy, as was required by the terms of the policy.

SCA findings

In the SCA it was stated that the central issues to be decided were firstly, whether the insured's instructions to her bank to stop payment of the September premium amounted to a repudiation considering her previous communication to the insured about cancelling her policy, and secondly, if so, whether the terms of the policy governing non-payment of premiums find application in instances of repudiation.

In dealing with the first inquiry, the court considered the material terms of the policy and the conduct of the respective parties. In doing so, the court applied an objective test in which the focus was not on the state of mind or intention of the repudiating party but rather on how someone in the position of the innocent party would perceive the conduct of the repudiating party.

In applying the test, the court considered all the circumstances that took place preceding the termination of the policy by the insurer. The court found that the insured had no intention of honouring the terms of the policy that required her to give 30 days' notice of termination and to pay the premium for September. It held that as the insured deliberately repudiated the terms of her policy, the insurer was entitled to accept the repudiation and cancel the policy.

The court also determined that, notwithstanding the express provisions of the policy requiring the insurer to provide the insured a 30-day grace period in relation to unpaid premiums (which is also outlined in Rule 15A of the Policyholder Protection Rules for Long-term Insurance), it does not apply in instances where the insured repudiates the agreement.

Comment

It is important to note from this case that an insurance policy, despite its nuances through the development of other branches of the law, still firmly falls under the principles of contract law. The law of contract is settled on the consequences of repudiation and this was confirmed by the SCA in this case.

Byron O'Connor and Lubabalo Mbolekwa

CONSTRUCTION

Employers' direct payments to subcontractors in times of financial distress: A penniless pursuit

In recent years, several large South African construction companies have buckled under economic distress, often resulting in protracted business rescue proceedings and terminations of the main contracts by employers.

Subcontracting portions of a construction project is a well-established practice in South Africa and is an important and effective means of involving small-, medium- and micro-sized enterprises (SMMEs) in the construction industry. Subcontracting is generally required in complex construction projects where the main contractor needs to acquire specialist capabilities to perform certain portions of the work. In other contracts, there may be a need to subcontract portions of the work to increase the contracting capacity of the main contractor or to satisfy the client's expectations relating to the use of local SMMEs or to meet Broad-Based Black Economic Empowerment requirements.

In recent years, several large South African construction companies have buckled under economic distress, often resulting in protracted business rescue proceedings and terminations of the main contracts by employers. In the case of ongoing projects, this would likely result in direct engagement between the employer and SMMEs to achieve continuity of the project prior to the appointment of a new contractor. In such circumstances, it is not uncommon for a subcontractor to seek payment directly from the employer for work done but not paid for by the main contractor.

Does the subcontractor have recourse against the employer?

Privity of contract is a well-established legal principal in South African law that means only the parties who voluntarily enter into an agreement are bound and have obligations and rights under that agreement. The subcontractor enters into an agreement with the main contractor to perform certain works on the project. The main contract for the works is separate from that of the subcontractor agreement and there is no direct contractual relationship between the employer and the subcontractor. This means the employer is under no legal obligation to the subcontractor and the subcontractor has no contractually enforceable rights against the employer, even for payment for work completed under the contract and unpaid by the main contractor.

The Supreme Court of Appeal (SCA) case of *Concrete Construction (Pty) Ltd v Keidan & Co (Pty) Ltd* 1955 (4) SA 315 (A), concerned an employer that intended to erect a building in Johannesburg costing £127,500. A subcontractor had secured a contract to supply and bend steel for reinforcement for the building following negotiations with the architect (acting as an agent of the employer), the main contractor and the building owner. The question before the SCA was with whom did the subcontractor contract.

The SCA, contrary to the court of first instance, found that there was no room for an inference by the subcontractor that it was contracting directly with the employer. The SCA ruling stated that the cost of the subcontractor's deliveries appearing in the main contractor's monthly certificates would make it clear to him that he was a subcontractor.

In our experience, to achieve continuity of a project and avoid delays in construction, situations can arise whereby an employer contemplates making direct payment to subcontractor(s). Generally, the employer is neither obliged nor entitled to remedy the failure of the main contractor to make payment to the subcontractor unless the main contract expressly permits it to do so or cessions in respect of direct payment to the subcontractors are entered into

CONSTRUCTION

Employers' direct payments to subcontractors in times of financial distress: A penniless pursuit...*continued*

Employers are under no contractual obligation to make direct payment to subcontractors since the contractual relationship exists between the main contractor and the subcontractor.

between the employer and the main contractor. However, the legal challenge arises when the employer, in the absence of an agreement with the main contractor, makes direct payment to the subcontractor and subsequently seeks to recover such payments from the main contractor.

The only exception, which is outlined below, is where the contract expressly provides for direct payment. Such a provision would generally include a right for the employer's agent to request proof that amounts included in any previous interim payment certificate in respect of work, materials, or services supplied by any subcontractor have been paid. If the contractor is unable to provide such proof, the employer may pay the amount in question directly to the subcontractor and deduct that amount from any future payment due to the main contractor under the contract.

The JBCC Principal Building Agreement (JBCC PBA) (Edition 6.2, 2018) is the most commonly used standard form construction contract in South Africa. The JBCC PBA provides a mechanism for an employer to make direct payment to a subcontractor where the contractor has defaulted in terms of its payment obligations. Clauses 14.5 and 15.5, which refer to nominated and selected subcontractors respectively, allow for the employer to instruct the principal agent to certify direct payment to the subcontractor and recover such amount from the main contractor in instances where the contractor fails to provide proof of payment to the subcontractor within five working days of a notice by the principal agent. Clause 27.2.7 further entitles the employer to recover expenses or loss incurred, or to be incurred, resulting from amounts paid directly to subcontractors on default by the contractor.

In terms of these provisions, the JBCC PBA has a mechanism to safeguard the employer in instances where direct payments are made to the subcontractor, by creating an avenue for the employer to recover this money from the contractor.

In conclusion, employers are under no contractual obligation to make direct payment to subcontractors since the contractual relationship exists between the main contractor and the subcontractor. In circumstances where the employer elects to make direct payment to the subcontractors for various proactive and practical reasons, without agreement with the main contractor, attempts at recovery of those monies from the main contractor is likely to be a penniless pursuit. For this reason, the inclusion of a direct payment clause does provide a potential safeguard in instances where employers make direct payment to subcontractors.

Joe Whittle, Krevania Pillay and Stefan Zimmermann

2021 RESULTS

CDH's Dispute Resolution practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2021.
Tim Fletcher is ranked as a Leading Individual in Dispute Resolution in THE LEGAL 500 EMEA 2021.
Eugene Bester is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2021.
Jonathan Witts-Hewinson is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2021.
Pieter Conradie is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2021.
Rishaban Moodley is recommended in Dispute Resolution in THE LEGAL 500 EMEA 2021.
Lucinde Rhoodie is recommended in Dispute Resolution in THE LEGAL 500 2021.
Kgosi Nkaiseng is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2021.
Tim Smit is ranked as a Next Generation Partner in THE LEGAL 500 EMEA 2021.
Gareth Howard is ranked as a Rising Star in THE LEGAL 500 EMEA 2021.

CDH's Construction practice is ranked in Tier 2 in THE LEGAL 500 EMEA 2021.
Clive Rumsey is ranked as a Leading Individual in Construction in THE LEGAL 500 EMEA 2021.
Joe Whittle is recommended in Construction in THE LEGAL 500 EMEA 2021.
Timothy Baker is recommended in Construction in THE LEGAL 500 EMEA 2021.

The LEGAL 500 EMEA

2021 RESULTS

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 1: Dispute Resolution.

CHAMBERS GLOBAL 2018 - 2021 ranked our Dispute Resolution practice in Band 2: Insurance.

CHAMBERS GLOBAL 2017 - 2021 ranked our Dispute Resolution practice in Band 2: Restructuring/Insolvency.

CHAMBERS GLOBAL 2020 - 2021 ranked our Corporate Investigations sector in Band 3: Corporate Investigations.

Chambers Global 2021 ranked our Construction sector in Band 3: Construction.

Chambers Global 2021 ranked our Administrative & Public Law sector in Band 3: Administrative & Public Law.

Pieter Conradie ranked by CHAMBERS GLOBAL 2019 - 2021 as Senior Statespeople: Dispute Resolution.

Clive Rumsey ranked by CHAMBERS GLOBAL 2013-2021 in Band 1: Construction and Band 4: Dispute Resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2021 in Band 3: Dispute Resolution.

Tim Fletcher ranked by CHAMBERS GLOBAL 2019 - 2021 in Band 3: Dispute Resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2020 - 2021 in Band 3: Construction

Tobie Jordaan ranked by CHAMBERS GLOBAL 2020 - 2021 as an up and coming Restructuring/Insolvency lawyer.

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2020 1st by BEE Deal Value.
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2020 3rd by M&A Deal Value.
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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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