SOME DIFFERENCES BETWEEN CONTRACTORS AND SUBCONTRACTORS

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KEY WORDS

JBCC, NEC3, FIDIC, Subcontract, Subcontractors, Subcontracting, Contractor, Construction contracts, Interim payment certificates, construction tenders, enrichment, liens, security for payment, construction risks, vicarious performance, construction programmes, penalties, damages,

TERMS AND ABBREVIATIONS USED

In general the MBSA Domestic Subcontract document is intended for and used with the JBCC Principal Building Agreement. By the very nature of the documents concerned, the projects on which they are used are not 'minor' and there are generally professional practitioners serving as principal and other agents. Because of this, the general assumption in the contents hereof is that such is the case.

Because of the different terminologies used in different contracts, the terms used in this document align with those contained in the JBCC suite of documents insofar as the designations of the various types of party to the contract are concerned; i.e. **principal contractor** and **domestic subcontractor**, **principal contract** or **principal building agreement (PBA)** and **domestic subcontract**, **employer**, **principal agent**, etc.

Generally this article refers to the JBCC suite of documents as it is extensively used on construction contracts and references to other contracts are only made obiter.

MBSA, PBA, NSCA, followed by a number (e.g. MBSA 1.1) is used to refer respectively to the Master Builders South Africa Domestic Subcontract Agreement (Jan 2008), The JBCC July 2007 Principal Building Agreement and N/S Subcontract Agreement, clause bearing that number.

FIDIC, followed in applicable cases by PBA or SCA refers to FIDIC Conditions of Contract for Construction for Building and Engineering Works' Building Agreement Designed by the Employer (1999 Edtn) or the Subcontract Agreement (2009 Edtn) and followed by the clause number where applicable.

Similarly **NEC3** refers to the NEC3 Engineering and Construction Contract suite of documents (2006 Edtn).

For abbreviations of references listed in the Bibliography see that section at the end of the article.

INTRODUCTION

Information regarding the contractual environment specifically applicable to the domestic or non-nominated subcontractor seems to be fairly scarce whilst it is in this field that many emerging and unsophisticated enterprises have to face contractors who are probably somewhat more legally wise

and who use their control of the money stream to their best advantage. This latter is, no doubt, just a manifestation of the free-market system working through supply and demand to achieve balance. However, many developed countries have found that it is necessary to balance the market with a well-structured, easily accessible, legal framework that prevents or at least discourages excesses[1]. The contractors obviously optimise this position of power and this does not always advance the targets of the economy as it can lead to business failures, particularly in smaller, more vulnerable enterprises. The rule of caveat subscriptor is beyond doubt unassailable from most points of view but in an economy that is trying to build small entrepreneurs there is probably a dire need for constraints or, alternatively, support systems. Some of these constraints do exist in the form of the Bill of Rights and the Promotion of Administrative Justice Act (3 of 2000). However none of them provide a safety net against the rules of caveat subscriptor or the any of the rules for interpreting contracts and the rather limited requirements of acting in good faith and boni more that are applied by our Courts. Again, there is good reason for this and it is not desirable to have these rules easily displaced but then there have to be rules that prevent an abuse of a position of bargaining power[2]. The sharpest and wisest minds have already looked at the merits and opportunities for such intervention and have not been able to reach any satisfactory conclusions and the matter has remained as inconclusive as ever before[3]. This article does not wish to address the very difficult problem of fair contract legislation but rather to somewhat superficially highlight the areas where the subcontractor's position is different from the contractor's and thereby to provide interested parties with insight into problem areas.

This article specifically does not include any reference to notice periods or forfeiture clauses.

1. THE PURPOSE AND NEED FOR SUBCONTRACTING

1.1 The principles regarding outsourcing

The principles regarding subcontracting are the same generally as any outsourcing of production capacity. The significance of the principles for outsourcing is that they need to be understood when contractors are procuring the services of a subcontractor, failing which it becomes just an exercise in trying to obtain the cheapest price without looking for the balance between costs and benefits.

1.2 Reasons for subcontracting

Contractors have been subcontracting work over the ages and it is probable that this tendency will continue to grow and extend into services related to the construction activities such as programme management as well as professional services such as specialist supervision, management and production assessment (e.g. quantity surveying) services. The decision to subcontract work is generic in principle i.e. contractors may decide that they will always subcontract certain types of work

[1] E.g. law re fair contracts in USA, and legal interpretation in UK.

[2] In Barkhuizen v Napier 2007 5 SA 323 at para. [87] the court stressed that the principle of pacta sunt servanda was approved but also seemed to suggest at para. [73] and [59] that in assessing the subjective fairness of forfeiture clauses, the relative positions of the parties and their backgrounds are relevant to the assessment of extent to which failure might be exculpable. The dissenting judgments also seemed to indicate a more lenient subjective approach.

[3] See Christie pp. 12 - 15

because of the general benefits but it may also be project specific i.e. there may be specific client requirements for the direct (employment contracts) or indirect employment (subcontracts) of local labour or the remoteness of a site may impose restrictions on the ability to subcontract work. However, certain general and primary principles are applicable and are listed below.

1. **Reduction of risk**. This attaches primarily but not exclusively to the following risks:
    a. **Risk of defective work**. By subcontracting work the contractor reduces exposure to the costs of rectification of defective work. Not quite as clearly recognised is the risk of the exclusion from one valuation to another of work previously certified but subsequently excluded because of an alleged defect. This can have devastating effects on cash flow.
    b. **Risk of delays to work**. This risk relates to the risk of completing work within programmed time frames.
    c. **Risk of damage or destruction prior to hand-over (works risk)**. Where any activity of a subcontractor results in damage to his own or other works the contractor can hold the subcontractor accountable for any prejudice suffered which could entail either the actual costs of repairs if not recoverable through the insurance cover or the excess on the insurance claim and any unrecoverable costs of delays or acceleration.
    d. **Employment risk**. This risk attaches to the direct employment of personnel and the liabilities which are placed on an employer as well as the administrative costs of compliance with the various applicable laws. Because of onerous risks in this regard, contractors as employers in a very unstable and fluctuating industry, are turning to subcontracting as far as is reasonably possible.
    e. **Valuation risk**. This risk relates to the cash flow problems inherent in construction contracts and the payment procedures which are pertinent thereto. There are two clearly discernible risks within this context:
        i. **Under-certification risk**. Payment certificates are estimates of the work done and payments on account. It is not abnormal for valuations to be below the actual cost of the work, particularly on contracts on provisional bills where work should be remeasured as it progresses but rarely is. It also entails the timing risk with regards to when the work is assessed and valued against the reality of month-end invoicing by creditors such as materials suppliers e.g. a large consignment of goods can be delivered after the assessment is made but within the month of assessment.
        ii. **Cash flow/timing risk**. This risk arises from the time it takes between valuation date and date for payment. The time involves two components which are the time taken between the assessment and the issue of the actual payment certificate and the time between the issue of the certificate and the date on which payment is due. In modern contracts these times are being stretched[4] leaving the contractor in constant negative cash flow with regards to labour and supply only costs. By subcontracting work, the delay is absorbed by the subcontractor.
        iii. **Correction of over-certification**. This is one of the most destructive actions if a contractor is unaware of it. The reason could be the decision to deduct money

[4] See for example the 70 day period between claim and payment dates of FIDIC SCA 14.6.

for an alleged defect or it could be the result of the correction of a rate or quantity of work that has been recalculated and decreased.

f. **Pricing risk**. This is the risk associated with estimating/pricing construction work. Pricing is generally done in competition with other contractors, therefore pricing has to be reasonably sharp and predicting costs of executing construction works is extremely complex. Not only does the work have to be done at economic rates but the overhead costs of the execution of the project have to be correctly estimated. By subcontracting works, the contractor effectively limits the risk pertaining to the execution of the subcontracted works, in addition to, hopefully, acquiring the focus and specialisation of a specialist and freeing own resources to focus on the core business of a contractor.

g. **Administrative risk**. The underpinning administrative burden required to properly manage, monitor and administer the subcontract works as a specific component of the overall project. By subcontracting work, the contractor is able to limit his administrative burden to a supervisory one, the extent of this input being determined by the terms of the subcontract. An increasingly significant administrative burden is the burden of providing early warnings of problems which requires extensive in depth study of construction information issued so as to identify incorrect or poor designs and discrepancies and errors, particularly between information supplied by different agents, at an early stage before fruitless expense is incurred in remedying such defects.

2. **Enhancement of competitive edge**. This is probably a very difficult exercise and results in a somewhat subjective analysis. However, despite this challenge, it is critical that a contractor understands and analyses the effects of this principle if the competitive edge is to be maintained. It also indicates to a contractor how he should negotiate and structure the deal to obtain the greatest cost saving by reducing over-resourcing/inefficient resourcing or duplication of resources. It is also, unfortunately, a sadly neglected aspect of the contractor's cost management programme. This in turn is probably due to the fact that management skill and time are required to arrive at the best option. In times of strong competition, it is possible to obtain very low prices from subcontractors who can then operate at a loss should the project not run as smoothly as priced for. This consideration is somewhat cynical but nevertheless very real and relevant.

This list lays no claim to being comprehensive and is merely provided as a backdrop to the contractual relationship.

1.3 The interaction between the needs of the subcontractor and the contractor

The contractor's primary needs are similar to the employer's namely the completion of the subcontract works on time, on budget and to specification.

On the other hand, the subcontractor, in bearing all the risks listed above, requires the contractor to provide an environment of certainty and wherein the planning of the subcontract works allows for maximum cost and time efficiency.

Both these needs are founded on good management of the project by the contractor. If that is not in place, the best management of the subcontract cannot be much more than just an exercise in damage control.

2. POSITIONING OF THE DOMESTIC SUBCONTRACTOR

2.1 The principal contracting agreement

The principal building agreement is a contract for the letting and hiring of labour and services. The Roman law basis for this was known as a contract of locatio conductio operis[5] the locator being the party who lets out the work whilst the conductor is the party who executes the work. This is an important factor in contracting as certain basic principles were incorporated into such contracts which survive in SA law to this day as terms implied by law. A few of the most important of these principles were:

- The conductor is liable for the production of a specific result and the locator has no control over the manner of executing the opus.
- The locator only pays for the goods when they are completed and defect free.
- The conductor carries the risk of loss or damage to the goods until they are taken over by the locator as well as the delictual risk of loss or injury to third parties caused by his operations.

These basic principles have to be replaced by contract terms varying them if the parties do not wish to contract on such terms. Amongst many other factors, this is one of the reasons building contracts are so complex as it is no easy matter to cater for the interests of both the locator and the conductor in a balanced way when the conductor pays for an opus which may not even be satisfactory when it is eventually handed over to him. As a further complication, the conductor is able to vary the required performance at his own discretion as well as determine what he will pay for the variations (but obviously within the framework set by the contract and common law restricting a party from being sole judge in his own case).

2.2 Legal position of subcontracting

Subcontractors are always faced with the existence of one more contract than contractors. The subcontract is generally (and should be) subject to the conditions of the principal contract which means the contractor expects the subcontractor to assume his responsibilities on his behalf subject to specific inter-party terms and conditions as per the subcontract[6]. The precedence of documents generally defines the conditions of the subcontract as taking precedence over the terms of the principal contract[7].

[5] This definition is not necessarily pure as the true form excludes the supply of materials (see S v Progress Dental Laboratory (Pty) Ltd 1965 3 SA 195 (T)).
[6] See MBSA 3.10, FIDIC SCA 2.2.
[7] See MBSA 3.10, FIDIC SCA 2.2.

2.2.1 Cession, delegation and assignment

To understand the terms often used to deal with subcontracting it is probably necessary to very briefly explain a few terms that are used in the industry. To do this simply, the explanations in Wille serve the purpose admirably:

*"… **Cession** simply means a transfer or making over, and just as the word 'delivery' is used to denote the transfer of a corporeal thing, so cession is employed to denote the transfer of an incorporeal thing. In the present connection 'cession' will accordingly be used to signify an act of transfer by means of which a personal right flowing from a contract is transferred from a creditor (the 'cedent') to a third party (the 'cessionary')."*[8]

*"**Delegation** is a new contract whereby the original debtor provides a third person who is accepted by the creditor in her place as the debtor, and she herself is discharged from liability under the contract."*[9]

*"**Assignment** is the complete substitution of a third person (the 'assignee') for one of the parties to a contract (the 'assignor'). The assignee steps entirely into the shoes of the assignor, replacing him both as creditor and debtor under the contract."*[10]

Subcontracting is none of these as the subcontractor acquires no rights or obligations in relation to any third party involved in the principal building agreement[11]. It is generally specifically stated in the contract documents that there shall be no privity of contract between the subcontractor and the employer[12]. The fact that the contractor is required to procure for the subcontractor the same rights as the contractor has in terms of his contract with the employer or that, with the permission of the contractor, the subcontractor is entitled to act against the employer in the name of the contractor[13] does not create any privity of contract between the subcontractor and the employer leading to a direct right of action. Furthermore, courts have shown a disinclination to recognise any delictual or enrichment liability between employer and subcontractor[14].

Generally the courts interpret the intention of the parties without reference to the actual name used by the parties to identify the document. Therefore a court might interpret a cession form as an assignment if the terms of the document do not constitute a cession, etc. Sometimes there is

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[8] Wille p 841
[9] Wille p 840
[10] Wille P 847
[11] PBA Clause 23.2 states that: "*All work or installations and the associated risks related to domestic subcontractors shall be the direct responsibility of the contractor*".
[12] MBSA Clause 3.11
[13] Common law allows this but see also MBSA 40.9 and MBSA 13.1. The difficulty of this process is that the Employer may have other defences or counter claims against the contractor which would then of necessity also become part of the action in which the subcontractor is trying to enforce his rights on a completely different cause. In a case where the contractor has forfeited his right to a claim in terms of the contract whilst the subcontractors has not, the claim would be unenforceable against the employer and no action can be contemplated.
[14] See Lillicrap Wassenaar and Partners v Pilkington Bothers (SA) (Pty) Ltd 1985 1 SA 475 (A) 479 "It is wrong in principle to allow a contracting party, whose rights and obligations have been determined by his agreement … to circumvent the consensual definition of the parties' rights and obligations by proceeding in delict." See further at 483 C-E comments about policy considerations against the extension of a subcontractor's liability into delict. This is probably true in reverse for the employer and his agents. See also Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd En 'N Ander 1996 4 SA 19 (A) regarding the denial of an enrichment action by a subcontractor against an employer.

mention of 'assignability' to indicate the potential for subcontracting but this does not mean that it is assignation (see Hudson p. 716 on British Waggon Co v Lea (1880) 5 QBD as discussed hereunder).

2.2.2 Vicarious performance

Hudson (p. 716) refers to subcontracting as 'vicarious performance of contractual liabilities' as a means of explaining the subcontractor's position. In vicarious performance there is a contracting party that undertakes to effect certain work but does not actually carry out the work itself, relying rather on a third party or parties for all or aspects of the work. The question whether subcontracting is permissible depends on the contract but the JBCC PBA at Clause 23.0 implies that it is intended that Domestic Subcontractors will be used at the discretion of the principal contractor. There are consultants who require the contractor to advise which subcontractors he intends employing on each project but this is not specifically required in the standard clauses of the JBCC suite[15].

In general, subcontracting may not be permissible in circumstances where *"the personal skill, financial credit or other characteristics of the contracting party are regarded as the essence of the contract."* (Hudson p. 717 quoting from British Waggon Co v Lea (1880) 5 QBD). However the basic question still remains as to what exactly the contractor may not subcontract because it lies at the essence of his responsibilities. Patently, such a consideration would be driven by the specific terms and circumstances of the PBA. It may be that this would be the general administration, co-ordination and control of the works on site so as to bring them to proper and timeous completion as suggested in Hudson at p. 718. This debate is not mundane to the subject matter of this article and does not justify further discussion.

2.3 Specified terms of appointment in the PBA

PBA Clause 23.1 states that the contractor is required to appoint domestic subcontractors on conditions that **"*are fair and equitable*"** and **"*compatible with this*** [Principal Building] ***Agreement*"**. There is no sanction for a failure to comply with this clause and it is questionable whether any agent would wish to become involved in the relationship between a contractor and his domestic subcontractors. The question as to what constitutes non-compliance and whether the Employer, through the Principal Agent, could be said to have a legal duty to the subcontractor to act against the contractor if notified of a breach of this clause is outside the scope of this article.

FIDIC PBA (clauses 4.4 and 4.5) does not prescribe or envisage any form of oversight over the contractor's relationship with his domestic subcontractors outside specific requirements to protect the employer's rights in the event of work executed after cancelation of the principal contract or liability beyond the Defects Notification Period.

NEC3 PBA (clause 26) has a right to oversight of the terms and conditions of the subcontract but limits the grounds for rejection to an opinion that "*they will not allow the Contractor to Provide the Works"* or to a failure to include a term requiring the parties to *"act in a spirit of mutual trust and co-*

[15] GCC (Clause 6.2), NEC3 (Clause 26.0) and FIDIC (Clause 4.4) all require the contractor to obtain approval before appointing a subcontractor. The JBCC PBA does not have such a clause (on the understanding of assignation (clause 13.1) as defined by Wille supra) but retains a modicum of influence via clause 15.9 by requiring daily records to be kept. Interestingly only FIDIC (clauses 4.4 and 15.2(d)) and the GCC (Clause 6.1) specifically prohibit subcontracting of the whole works.

operation". The only sanction afforded is listed under Clause 91.2 (Reasons for termination) at R13 and this is limited to an appointment for "substantial work" before the project manager has accepted the appointment. The NEC3 contract being an English contract seems to be infused with the concept of substantial performance which has stemmed from the English Law doctrine of substantial performance[16].

3. IMPORTANT DIFFERENCES BETWEEN THE CONTRACTOR AND SUBCONTRACTOR

3.1. Tendering

There is a major difference between the contractor's and the subcontractor's tendering procedure.

3.1.1 Documentation

In essence this difference revolves around the fact that a contractor tenders on a comprehensive document and that includes the tender conditions. Where the tender document is a bill of quantities, it incorporates all the terms and conditions which the contractor will be deemed to have provided for in his tender. Subcontractors mostly do not receive a copy of the entire tender enquiry document and the contractor merely states in his enquiry that the subcontractor is free to visit his premises and acquaint himself with the specific terms and conditions applicable to the tender. This is at best wishful thinking as few subcontractors have the time to visit each contractor's office to view the terms and conditions of each tender enquiry and normally a lot more practical information is required to finalise the responsibilities of each party on the project. Besides this, contractors generally only use the tendering process to obtain prices for their own tender to the employer. In the event a contractor is awarded the contract, an entirely new round of negotiations and pricing takes place with suppliers and subcontractors. It is therefore a waste of time for a subcontractor to spend too much time on ascertaining the exact details and terms for any pricing. Instead, the subcontractor tends to provide a price on a set of standard terms and qualifications that suit it or which are proposed by a body representing the interests of the specific type of subcontractor (e.g. the SARCEA conditions of tender for reinforcing subcontractors). In fact, there is merit in drafting any price and qualifications in such a way as to constitute no more than an invitation to treat, as the contractor does not appoint a subcontractor on the basis of an enquiry for tendering purposes, and the subcontractor is then not in a position where a contractor can create a binding contract just by accepting the tender. In this way the subcontractor also leaves the door open to negotiate with the contractor on the specific terms for a project.

3.1.2 Tendering procedure

As already pointed out above, contractors generally have two entirely separate processes when dealing with subcontractors. The first process is the gathering of as many tenders as possible to establish the best price available and to decide how the contractor will price the work in his own

[16] This can be seen in clause 91.2 (R11) in the requirement of 'substantial' failure to comply with his obligations. In South African Law the doctrine has been rejected in BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A) at 431.

tender to the employer. The second process only takes place when the contractor is awarded the project. At this stage he starts negotiating with subcontractors and suppliers to get the best possible deal. During this process, there is a lot more discussion on the final pricing and specific terms and detail on how the project will be executed (e.g. hoisting facilities available, site offices, laydown areas, site security, availability of utilities, etc.). As stated above, subcontractors would be well advised to avoid committing to an offer until the contractor has committed to award the subcontract to them as well as the terms of the award so that, if conditions become onerous or work load increases due to the award of other projects, the subcontractor does not find himself in a position where the contractor can bind him by merely accepting an offer.

Similarly, the subcontractor should keep in mind that in general and where there is no commitment to hold the offer good for a specific period of time which has not yet expired, when a contractor places an order with a subcontractor on terms that differ from the terms quoted by the subcontractor, the order could well be a counter-offer that destroys and replaces the original offer. The offeree is now the subcontractor who has no obligation to revive the original offer nor does he have an obligation to even respond to the counter-offer.[17]

3.2 Payment

3.2.1 Application procedure

The subcontractor is in the position of having to first submit an application for payment to the contractor so that the latter can, in turn, add it to his application to the employer or his agent. This means that work assessment is done at an earlier stage of the month[18] which in turn results in the subcontractor only applying for a percentage of the costs which he will incur by month-end. There is therefore always a shortfall between claimed revenue and actual costs for the month It is often said that it only applies to the first month but it is in reality an on-going and repetitive cash-flow shortfall which has to be financed by the subcontractor (always bearing in mind that supplier accounts run from month end and wages impinge on cash flow as they become due).

Additionally, the subcontractor finds himself in a situation wherein the contractor will sometimes not pay unless a claim has been received by due date. This is unlike the situation of the principal contractor who is entitled to a valuation of the works regardless of whether he submits an application or not.[19] The contractor who receives payment in terms of PBA Clause 31.2 for work done by a domestic subcontractor and then refuses to pay the subcontractor because of the latter's

[17] See Collen v Rietfontein Engineering Works 1948 1 SA 413 (A) at 420 and with reference to Watermeyer v Murray 1911 AD 61: "*It must also be remembered that a counter-offer is in general equivalent to a refusal of an offer and that thereafter the original offer is dead and cannot be accepted until revived."*

[18] See MBSA Clauses 31.1 contains the same timing as PBA 31.1 but, inevitably, contractors require at least seven days' notice from the subcontractor. By (questionably) advancing the date for the issue of a payment certificate in MBSA 41.5.3 the contractor can require an earlier date from the subcontractor than he himself is faced with. Although the date is later linked to potential penalty interest for late payment (see comments on payment procedure), contractors normally solve this by giving themselves an extra week by amending the time for payment clauses. The N/S Subcontractor, by having more ready access to the professional team as well as a payment notification from the Principal Agent is not in the same position.

[19] See PBA Clause 31.2 *"The **principal agent** shall not be relieved of his responsibility to issue an interim **payment certificate** [31.4] whether or not such information is provided by the **contractor**."* This is not replicated in MBSA Clause 31.2.

failure to submit a claim could find himself embarrassed in terms of clause 31.5 which is not subject to any prior condition provided the subcontractor finds out about it. In the case of the N/S Subcontractor, clause 31.13 provides for notice by the principal agent to the subcontractor of the amount certified, but this is not always adhered to by the professional team.

3.2.2 Addressee

There is a very relevant difference between the party to whom the contractor normally submits his application for payment, normally an independent professional, and the party to whom the subcontractor submits his application, namely the contractor who has no specific professional requirement of fair valuation[20] even though such an obligation could probably be imputed[21].

3.2.3 Payment certificate – documentation, quantum and procedure

Whilst the contractor has the benefit of a payment certificate issued by an independent agent in accordance with the PBA and worded as per the recommended JBCC pro forma document, and resulting in a liquid document upon which summary judgment can be taken, the payment procedure for the subcontractor does not provide the necessary wording nor is it always adhered to by contractors.[22]

On the other hand, the subcontractor has a right to suspend performance of the works when the contractor does not comply with his payment requirements[23] and to then terminate if the default persists[24]. The problem most commonly faced by the subcontractor is that he does not know or have access to the quantum and timing of payments to the contractor. He is also not privy to reasons for non-payment to the contractor which might be of the latter's own making e.g. poor workmanship, penalties, etc. He furthermore does not have access to the principal agent to discuss any alleged or actual under-certification. In the event of a dispute however, this information can be called for as part of the discovery process, therefor an off the record comment from the agent could be of great value during the later dispute resolution process and the subcontractor should always seek to have a good communication line to the agents.

With regards to the quantum of the payment of the subcontractor, the contractor is faced with two options in practice namely to pay the lesser of:

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[20] See Finsen 2, p. 171 "*A principal Agent, in issuing a payment certificate, … does so as an agent of the employer, not as a quasi-arbitrator. He must approach the task as an expert using his professional skill and knowledge … However, as agent of the employer, he must nevertheless act independently in determining his valuation, …"* The author refers to Hoffman v Meyer 1956 2 SA 752 (C) but the recent case of MSC Depots (Pty) Ltd v WK Construction (Pty) Ltd & another (157/10) [2011] ZASCA 115 (08 June 2011) in which the employer was accused of interfering in the certification of work reinforced this principle.

[21] Although not entirely clear cut, the principle of good faith between contracting parties would require a contractor to act reasonably and honestly with a subcontractor. Furthermore, and maybe even more uncertain in its application to payments to subcontractors, the maxim of *imperitia culpae adnumerator* as imported into our law requires that a person who undertakes an activity for which expert knowledge is deemed to be negligent if he acts without the expertise and causes prejudice (see Neethling p. 140).

[22] MBSA Clause 31.5 contains the sums that must be reflected in the payment advice statement but not the wording that it has to be couched in. Even if the contractor complies with the prescriptions of the clause, it does not necessarily contain the wording required for presentation in an action for summary judgment.

[23] MBSA 38.1.4, 5 and 6 and subject to notice in terms of MBSA 38.2. NSCA 38.1.3 to 7

[24] MBSA and NSCA 38.3

- the amount certified by the principal agent for the subcontracted work after deduction of his mark-up or of
- the amount calculated to be due on the basis of priced re-measurement of work done.

Some contracts provide for the direct payment of subcontractors where the contractor fails to pay a subcontractor. Without entering into the detail of it, these clauses are not often applied by the professional team because of the complexity of arguments the contractor can raise against such a course of action as well as the danger of preferential treatment of a creditor in liquidation cases. A discussion of these points does not fall within the scope of this article.

3.3 Completion and Programme

3.3.1 Interim Completion

The subcontractor has an 'Interim Completion' tool to cater for the position where the subcontract works are completed but the contractor is unable to achieve or has not yet achieved a state of practical completion[25]. This tool is linked to the programme, adjustments to completion dates and to damages (which could include the contractor's penalty prejudice). Variations can still be issued after the date of Interim Completion because the employer is entitled to issue variations up to the date of practical completion. The right of a subcontractor to claim re-establishment costs for instructions after interim completion would resort under MBSA 32.5 and the contractor should be entitled to recover such costs under the similarly numbered clause of the PBA as the right to issue an instruction up to the date of practical completion (PBA 24.6) does not exclude liability for costs resulting from such instruction under clause 32.5.

3.3.2 Programme

All subcontract documents call for the subcontractor to provide a programme for the execution and completion of the subcontract works. It is submitted that this is sometimes not applicable and that there are two distinct situations that occur with regards to subcontract programmes although some subcontracts could comprise elements of both. These are:

1. A subcontract involving a manufacturing component that occurs independently of the contract works and that then links into the works. An example of this would be an air-conditioning plant installation. Alternatively a subcontract could include various consecutive but distinct activities which bring the subcontract works to a stage where it links back to further activities carried out by others in terms of the contractor's programme. In such cases there is a necessity for a programme with its own critical path that shows how the subcontract will match and link into the contractor's works programme and can be monitored.
2. A subcontract involving work that at all times is dependent on the contractor providing an accessible area wherein or whereon the subcontract works can be installed and completed within a determined period where after other trades follow. An example of this would be a reinforcing contract or a plastering contract. In such cases there is no question of a subcontractor providing his own programme with its own critical path as he must at all times keep up with the contractor's programme. There can only be reference to a resourcing programme to keep up with the contract works programme when this situation occurs.

[25] MBSA 23.0, NEC3 SCA 11.2, FIDIC SCA Annex C (Optional).

3.3.3 Liability for failure to meet programme

Unlike the contractor who is liable only when the contracted date for practical completion is not met, the subcontractor is liable for failures to meet stage completion. The JBCC documents provide for agreement of dates in MBSA 15 after which the subcontractor becomes liable for damages in the event of a failure to meet the date without proper cause[26]. Clause 15 requires the dates to be agreed but this probably devolves to an acceptance of a programme and is normally a matter that the contractor must prove. Such proof is often not directly available, requiring deductions to be made from indirect evidence.

FIDIC and NEC3 provide for a definition in the initial documentation of each stage completion and a date for it as well as the penalties which will apply to a failure to meet the date[27]. Once again the stages can be left to be dealt with in terms of programmed activities but where penalties are to apply, it is necessary to comply with the Conventional Penalties Act 15 of 1962 and it may be near impossible for a contractor to establish the prejudice he will suffer as it should but may not necessarily include penalties invoked against him in terms of the PBA. Similarly, a delay may result in prejudice to other subcontractors which cannot be foreseen at the time of contracting. It is difficult to understand why a contractor should prefer penalties to damages in the case of subcontractors' failure to meet stage completion.

3.4 Penalties and damages

The contractor is normally only liable for penalties in the event of his failure to meet the completion date[28]. The different contracts have different ways of providing for penalties and damages where the contract is terminated by the employer[29]. Certain contracts make provision for a penalty for poor performance[30]. Normally, the principle remains that penalties are applied from date when the completion date is missed which to a large extent links to the principles of locatio conductio operis[31].

The subcontract differs in that in the case of the JBCC the subcontractor is liable for damages, which could include the contractor's penalty liability, in the event of not meeting the date for stage completion as well as dates for making good completion lists[32]. The FIDIC and NEC contracts provide for a definition of the specific key or target dates and defined penalties for each defined stage. Only FIDIC at clause 8.7 allows for a cap on the amount of damages that may be deducted. This is very important to subcontractors as the penalty is normally set for the entire project whereas the involvement of the subcontractor is normally of a much smaller, and in some instances negligibly minute, value. There does not seem to be any protection in law to a subcontractor in this situation and he could find himself financially ruined. However, from the contractor's point of view, the risk of prejudice exists regardless of the size of the subcontract and a minute subcontracted task can be critical to a major contract's completion, therefore this principle is well founded.

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[26] MBSA 30.1, N/S SCA 30.1.1.
[27] FIDIC 8.2 (which requires each stage to be defined and a date provided, NEC3 see X5 and 7
[28] PBA 30.0, NEC3 Option X7, FIDIC 8.7, GCC 43.0.
[29] PBA 36.5.8, NEC3 93, FIDIC 15.4, GCC 55.2.
[30] NEC3 Option X17 relates to substandard performance.
[31] With the notable exception that all contracts provide for termination of the contract in the event of unsatisfactory performance, a possible digression from the Roman law principle.
[32] MBSA 30.0,FIDIC 8.7 (see Guidance notes p. 11 on clause 8.2 wherein it is recommended that stage completions be defined as sections), etc.

3.5 Security for payment and liens

The subcontractor is normally precluded by the contractor's terms from any security for payment. Furthermore, pursuant to Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd en 'n Ander 1996 4 SA 19 (A), it has been decided that, where work is done for a contractor employed by the Employer, the subcontractor has no enrichment claim against the Employer. Therefore the subcontractor does not have an enrichment lien over his works against the Employer under normal circumstances.

Where the work done is identifiable and is separate and movable, a subcontractor could have a debtor and creditor lien against the contractor and a right to remove the goods where this right is conferred in terms of the delivery and contract[33]. However, this matter is very complicated and case law is not clear on it.

The essential probability is that, in most cases, a subcontractor has no lien over his installation and is reliant on the contractor for payment. Where the employer fails to pay, he may expect the contractor to properly exercise his lien but failure does not release the contractor from liability.

4. CONCLUSION

Whilst the above is not a comprehensive and all-inclusive listing of the differences, it highlights the considerably greater risks to which a subcontractor is exposed and it is essential that these be attended to in the contract documentation.

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[33] See Pellow v Club Refrigeration CC [2004] (469/03) ZASCA (29 September 2004)

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FIDIC Fédération Internationale des Ingénieurs-Conseils (FIDIC). *Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer*. First Edition, 1999.

NEC3 SCA Thomas Telford Ltd (a wholly owned subsidiary of the Institution of Civil Engineers), *NEC3, Engineering and Construction Subcontract).* Third Edition, June 2005 (with amendments 2006).

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