Short notes on:

**CONTRACTOR DISPUTE RESOLUTION IN TERMS OF THE BUILDING CONTRACT**

**Introduction**

Building disputes happen fairly often and, in many cases, when not settled, end up before an arbitrator due to the provisions of the type of building contract entered into. Sometimes, even before a court of law. The main reason behind this seems to be two-fold.

Firstly, due to the fact that most construction work involves various unforeseen events, with the result that the contract and time-frame of the building project needs to be altered, and the alterations, or variations (as the term is used in the industry) is not always recorded to writing. Secondly, the ambiguity of the contract used, which does not clearly set out the procedures for variation of an agreement and the recording of a dispute or referral of the dispute to arbitration.

In a 2013 decision by the Supreme Court of Appeal in *Radon Projects (Pty) Ltd v N V Properties (Pty) Ltd and another*¹ (“SCA”), the court dismissed an order by the Eastern Cape High Court in Grahamstown, which in essence, held that an arbitrator’s appointment was premature. The court held² that at the beginning of any arbitration, a party may challenge the jurisdiction of the arbitrator. It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally.

Before proceeding to look at the background in the above judgment, by digressing slightly, but as a matter of interest, it is noteworthy that Nugent AJ, mentioned³ that it has now become common internationally, and in some countries, even by legislation, for disputes to be resolved provisionally

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¹ 2013 (6) SA 345 (SCA)
² 2013 (6) SA 345 (SCA) par 30
³ 2013 (6) SA 345 (SCA) par 4

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by adjudication. Whereas, in South African law, unless specifically provided for in the terms of the building contract, adjudication is not a legal requirement. The advantage is that adjudication provides for a speedy mechanism for settling disputes under construction contracts on a provisional interim basis. This is perhaps something the legislature may consider, which could possibly cause matters to be dealt with more effectively.

**Background of the Radon Projects-case**

The parties entered into a Joint Building Contracts Committee (“JBCC”) Principal Building Contract 2004 (4 ed). An arbitrator was appointed when disagreements arose regarding the employer’s liability for various claims lodged by the contractor. Prior to the practical completion of the project, the contractor submitted various extension of time claims in terms of the agreement. In the majority of the claims the principal agent either; failed to make a decision, or rejected the claims by the contractor. The contractor subsequently failed to give the necessary notice to challenge the principal agent’s decisions in terms of the agreement, with regards to the disputed claims which had been referred to the principal agent. According to the employer, there was thus no arbitral dispute between the parties because the principal agent’s decision was final.

The applicant (the employer in this case), based on the above argument, objected to the arbitrator’s appointment on the following two grounds:

a) the dispute arose before practical completion of the works; and

b) The respondent (the contractor) was purporting to revive claims that had been finally disposed of by the principal agent during the course of construction.

The High Court agreed with the employer, and held that in respect of the claims where the contractor has not complied with the agreement, it has forfeited those claims. It ordered that there was thus no “arbitral dispute”.
The Supreme Court of Appeal ruling

The employer, further to the above, also alleged that, even if a dispute came into existence, it was not competent to submit it to arbitration due to the dispute arising prior to the practical completion of the project, and that it was thus required to be resolved by adjudication. The SCA dismissed this objection by the employer on the grounds that the manner of resolving the dispute depends on whether it was submitted for resolution before or after practical completion of the project, not on when it arose. If a party wanted a dispute resolved before practical completion, adjudication was the way to go. The contractor thus has the option to complete the work and then submit the dispute to arbitration.

It was held that, whether the contractor’s claims had merit or not, was no reason why the arbitrator should not have jurisdiction to consider them. If the claims did not have merit, then it only meant that the employer might have a good defence, and the arbitrator may dismiss the claims.

The decisions made by the principal agent under the JBCC in relation to the initial claims that were refused during construction, became final and binding and no dispute capable of being submitted to arbitration came into existence in relation to those claims. But those are not the claims that was the issue before the court. The contractor alleged an entitlement to submit revised claims to the principal agent, which it did when it submitted its ‘consolidated claim’. Those are the claims that became disputed once the principal agent failed to respond to the contractor’s request for a decision.

A dispute thereupon arose as to the validity of those claims, which was one “arising out of or concerning the agreement” – it is only because the agreement exists that the dispute has arisen – that is subject to resolution by arbitration.
Conclusion

The above example indicates that disputes arising from a building agreement during a project may be very technical and difficult to resolve, even if the process is followed according to the relevant agreement used. It is therefore wise and, in most circumstances, more cost efficient to have a qualified professional go through the intended contract prior to either party signing the document.

Also, obtain legal advice during the construction phase, especially in circumstances where there are numerous claims, extensions and alteration or variation orders involved. Contact a professional at SchoemanLaw Inc. to guide you through the relevant contracts and procedures, as well as help you understand the consequences of building contracts.