When clients do not pay: a critical analysis of the legal remedies available to the South African building and civil engineering contractors and consultants

Prof. Marthinus J Maritz¹, Adv Dirk C Robertson²

¹Head of Department, Department of Construction Economics, Faculty of Engineering, Built Environment and Information Technology, University of Pretoria, Pretoria, 0002, RSA
²Greene Consulting Engineers, Centurion, Pretoria, 0171, RSA

Emails: tinus.maritz@up.ac.za; dirk@greenegroup.co.za

Abstract:
Smooth cash flow ensures the effective delivery of projects and is fundamental to develop and sustain a healthy, professional and competitive construction industry. The adverse effect of late or non-payment of contractors and consultants are well known to all in the construction industry. Late and non-payment problems have forced countries like the United Kingdom, Singapore, New Zealand and certain states of Australia to introduce legislation to regulate the payment of contractors and consultants in terms of a building or construction contract. From South African specific surveys conducted by the Construction Industry Development Board (CIDB) and Consulting Engineers South Africa (CESA) it appears that South African building and civil engineering contractors and consultants have similar problems, if not more so, than their international counterparts when it comes to payment of work completed or services rendered. In light of the above this paper investigates the legal remedies available to the South African building and civil engineering contractors and consultants to enforce their right of payment for work completed/services performed, to establish how effective the enforcement is, and to suggest what possible solutions there are in order to improve payment practices in the South African building and construction industry.

Keywords:
Construction contracts, construction industry, legal remedies and payment.

1. Introduction

Good cash flow management is fundamental to develop and sustain a healthy, professional and competitive construction industry. Smooth cash flow ensures the effective delivery of projects. The prospect of prompt payment for completed works offers a strong incentive to consultants and contractors to deliver quality service.¹

The adverse effects of non-payments and/or late payment by Employers on Contractors and Consultant are well known to all in the construction industry. Several related studies have

been conducted in developed countries which addressed the problems related to payment issues in the construction industry. Examples are the Latham Report (Latham, 1994) and the Egan Report (Egan, 1998). Late and non-payment problems have forced countries like the United Kingdom, Singapore, New Zealand and certain states in Australia, e.g. New South Wales to legislate their construction specific statutory payment regime. These legislations purposely enact provisions to address issues on prompt payment in the construction industry to eliminate poor payment practices and smooth the contractor’s cash flow.

From a South African perspective it appears from a CIDB survey conducted by Marx² and the Consulting Engineers South Africa (CESA) that Contractors and Consultants have similar problems to their international counterparts when it comes to payment of work completed/services provided.

In the light of the above stated CIDB and CESA findings and the growing international trend to implement construction specific legislation in order to, inter alia, ensure/facilitate prompt payment practices in the construction industry, it has been decided to address, for this paper, the following problem statement:

“What are the legal remedies available to the South African Building and Civil Engineering Contractor and Consultant to enforce their right of payment for work completed/services performed and how effective are they in enforcing said right of payment.”

The structure of this paper is as follows:

- Section 2 summarises and addresses recent surveys and research relevant to payment practices and trends in the South African construction industry.
- Section 3 provides an overview of the common-law position of the South African building and civil engineering contractor.
- Section 4 provides and overview of the statutory position of the building and civil engineering contractor.
- Section 5 summarises and addresses the remedies available to contractors in South Africa to enforce payment in terms of the CIDB endorsed standard building and construction contract.
- Section 6 investigates other possible remedies in order to enforce payments that were not addressed in Section 3, 4 or 5.
- Sections 7 and 8 discuss the structure and findings of a survey that was conducted among South African contractors and consultants.

The research for this paper was delimited as follows:

The study is limited to selected South African building and civil engineering contractors and consultants. Although extensive use was made of international literature for the literature survey, only South African contractors and consultants were interviewed.

The legal remedies in terms of the following CIDB endorsed forms of contract for construction and building work were researched:

- New Engineering Contract 3: The Engineering and Construction Contract, June 2005, published by the Institution of Civil Engineers, United Kingdom. [NEC3 ECC]

The legal remedies in terms of the following CIDB endorsed forms of contract for the provision of professional services were researched:

- CIDB Standard Professional Services Contract [CIDB PSC]; or

2. Literature survey

2.1 Marx Report (2009)³

Construction Industry Indicators (CII’s) have been developed by the Department of Public Works and the CIDB with assistance from the CSIR to play a useful role in developing a sustainable industry and to be adopted as a tool for improving performance in the South African construction industry.

The CII’s measured above have been captured since 2003, and are currently being captured in partnership with the Department of Quantity Surveying and Construction Management of the University of the Free State. A full report was published in March 2009 on the results of the 2008 survey for projects completed in 2007.

Regarding payment delays experienced by contractors for the years 2004 to 2007, the following was reported:

There was a decrease from 24% to 9% in the number of all projects where payments were made timely within 14 days, if the 2004 results are compared with the 2007 results. ⁴

³ Marx HJ, 2009, Results of the 2008 survey of the CIDB Construction Industry Indicators and Comparison with the 2005 & 2007 survey results, University of the Free State
the private sector clients were the worst early payers, with payments made within 30 days on only 35% of their projects. The best performing client categories with 59% and 56% of project payments made within a month were the public-private partnerships and provincial departments respectively. The percentage of projects with payments that took more than 30 days increased from 2004 to 2007 from 43% to 56%. In 2007 the contractors for 20% of all public corporation projects and 21% of all private sector and provincial department projects were only paid after 60 days. There is an encouraging reduction in the percentage of payments done later than 120 days from 13% to 3% if the 2004 and 2007 projects are compared. It is of great concern that only 44% of all contractors in 2007 were paid on time within 30 days. Contractors refrain from standing up to their contractual right to be paid on time for fear of losing job opportunities in the future.

With regard to consultants, the following was reported:

The consultants’ fees were paid within 30 days for only 45% to 51% of all projects completed between 2004 and 2007. In 2007 the provincial and national departments were the slowest payers of fees with fees only paid after more than 60 days on 30% and 22% of all their projects respectively. This is followed by the regional/district councils and public private partnership client categories where the consultants were only paid after 3 months on 14% of all their projects. On 14% of all public private partnership projects the consultants were only paid 4 months after submission of fee accounts. The tendency for late payment of consultants has grown if the 2007 results are compared with the 2006 results.

2.2 MBSA, 2009, “Payment Quality Survey” Draft Report

In response to the Marx report, the Master Builders South Africa (MBSA) has performed a survey amongst its members to ascertain the prevalence of delayed or non-payment as well as the possible causes of the delayed or non-payment.

A questionnaire was distributed amongst its members.

From the draft report issued by the MBSA the findings from the survey is summarised as follows:

- Of all the projects surveyed, those in the Free State reported the most frequent delays in payments (93%) followed by the Northern Cape (74%). The province reporting the least frequent delays was Gauteng (24%). There were also three provinces in which some projects were listed as “never experiencing delays”. These were Gauteng (43%); KwaZulu Natal (29%) and Mpumalanga (9%).

- Nationally, across all clients, (all projects included in the survey) 54% of projects were paid within 30 days; 26% between 31 and 60 days; 13% between 61 and 90 days; 3% between 91 and 120 days and 4% more than 120 days

---

4 Table 15 and 17, Marx HJ, supra
5 Table 15 and 17, Marx HJ, supra
6 Table 15 and 17, Marx HJ, supra
7 Table 37, 38 and 39, Marx HJ, supra
8 Table 39, Marx HJ, supra
9 Table 37, and 39, Marx HJ, supra
The National Government and Private Sector seems to have the best payment record with 85% and 79% of payments respectively made within 30 days. The remaining 15% of National Government projects are paid between 31 and 60 days, while some payments in the private sector are delayed up to 120 plus days.

Payments for local and provincial government projects mostly occur between 31 and 60 days. (45% and 44% respectively) with only 38% of payments respectively made within 30 days from date of invoice. 15% of the value of local government projects is only paid between 90 and 120 days after date of invoice. While 2% of the value of provincial government projects are only paid after 120 days.

Sub-contractors seem to be affected by delayed payments as only 50% of payments are received within 30 days from date of invoice.

2.3 CESA Biannual Economic and Capacity Survey (June 2009)

An Economic and Capacity Survey is conducted by the Consulting Engineers South Africa (CESA) every 6 months. The purpose of this survey is to report on the prevailing conditions in the consulting engineering industry. The survey addresses aspects like financial indicators, human resources, capacity utilisation and competition in tendering and pricing. Questionnaires were distributed to all member firms of the Consulting Engineers South Africa.

According to the latest survey (June 2009), consulting engineers reported a percentage fee income outstanding for 90 days or more of 9.5%. The comparative figure for June 2007 was 10.3%, 11.3% for December 2007, 11.1% for June 2008 and 12% for December 2008. If one looks at the employers, the situation is as follows:

For June 2009, 7.3% of fee claims submitted to central government is outstanding for 90 days or more. For provincial government the figure is 3.8%, local government 13.2%, state owned enterprises 1.4%, private sector 11.9% and foreign employers 13%.


The purpose of this paper was to provide an overview of the development of adjudication as an alternative dispute resolution process in South Africa and its effectiveness in solving disputes in the local construction industry. The following findings are relevant to this research:

- 63% and 26% of the respondents respectively agree and strongly agree that “there exists a chronic problem of delayed and non-payment in the South African construction industry affecting the entire delivery chain.”
- 50% and 13% of the respondents respectively agree and strongly agree that “allowing all disputed matters to come before adjudication would also reduce payment disputes.”

---

11 Table 15: CESA, 2009, “CESA Biannual Economic and Capacity Survey”
12 Table 15 supra
13 Table 15 supra
15 Table 1: Maritz, M.J. 2007
39% and 30% of the respondents respectively agree and strongly agree that “South Africa should introduce a Construction Industry Payment and Adjudication Act similar to those in the UK, Australia, New Zealand and Singapore.”

2.5 Maiketso NC, Maritz MJ, 2009, “What are the requirements for the South African construction industry to fully utilise adjudication?”

The purpose of this research was to investigate whether the requirements are for the South African construction industry to fully utilise and benefit from adjudication. The researcher, inter alia, reviewed the contractual, institutional and legislative framework for adjudication in South Africa. The following findings are relevant to this paper:

- 75% of the respondents agreed that “South Africa needs a “Payment and Adjudication Act” similar to that in the UK”. This finding correlates with the Maritz paper as discussed above.
- 60% of the respondents agreed that “such legislation should address minimum payment terms, 90% agreed with statutory adjudication, and 95% agreed with remedy in case of non-payment and other countries.”

3. Common-law position of building and civil engineering contractors

The general principals of the South African law apply to building and construction contracts. In the case of standard construction contracts and where contracts with identical or similar wording have been interpreted by the Courts, the Courts will consider previous decisions in its judgements.

In general the following principals apply where a contractor claim for payment for work done in terms of a locatio conductio operis. The contractor needs to allege and prove:

- The terms of the contract relied upon: If the terms involve a negative the onus is on the contractor to prove the negative. For example if the employer alleges that the contract comprises of x + y and the contractor alleges it comprises of x only, the contractor must prove that y is not a term of the contract.
- The work that had to be performed: It is usually an implied term of the contract that the contractor will use materials that are suitable for the purpose of the works. If the employer supplies the material to the contractor for the works, it may be that the employer accepts the risks of inferior material. It is another implied term of the contract that the contractor will perform the work in a workmanlike fashion. The level

16 Table 2, Maritz MJ, supra
17 Table 3, Maritz MJ, supra
18 Table 2: Maiketso NC and Maritz, M.J, 2009. “What are the requirements for the South African construction industry to fully utilise adjudication?” International Conference: RICS COBRA 2009, Cape Town
19 Table 2: Maiketso NC and Maritz, M.J, supra
20 Table 2: Maiketso NC and Maritz, M.J supra
21 Smith v Mouton 1977 (3) SA 2 at 12
23 Colin v De Guisti 1975 (4) SA 223
of skill and diligence to be employed that possessed and exercised by other members of the trade to which the contractor belongs.\textsuperscript{24}

- \textit{The remuneration applicable:} The contractor must allege and prove 1) that the remuneration was, in terms of the contract payable, and 2) the amount of the remuneration payable. If the contract was silent with regard to remuneration, remuneration will be payable and should be fair and reasonable. Where the contract was silent on whether remuneration will be payable or not, remuneration will be payable. In such a case, it is an implied term that the remuneration will be reasonable. If in dispute, the onus will be on the contractor to prove that nothing was said concerning remuneration.

- \textit{Performance:} The contractor must allege and prove that he has done all that was required to be done in terms of contract\textsuperscript{25}

### 4. Statutory position of building and civil engineering contractors

South Africa does not have ‘construction specific’ legislation to address the need for prompt payment of building and civil engineering contractors. The Public Finance Management Act, 1999 (PFMA) determines that all contractual obligations (and accounts) must be settled within 30 days from its receipt. [Section 38(1)(f) read with Part 4, Regulation 8.2.3 of the Regulations.] These provisions are mandatory and an accounting officer of the guilty official may be found guilty of an offence in terms of the PFMA.

In several other countries acts, addressing this need for prompt payment in the construction industry were endorsed. Acts and the respective countries and states, which enacted them to address the problem of late and non-payment, are:

- Housing Grants, Construction and Regeneration Act 1996 – United Kingdom;

- Building and Construction Industry Security of Payment Act 1999 (NSW) – New South Wales, Australia;


- Building and Construction Industry Security of Payment Act 2004 (QLD) – Queensland, Australia;

- Construction Contracts Act 2002 – New Zealand;


\textsuperscript{24} Randaree NNO v WH Dixon & Associates 1983 (2) SA (1)

\textsuperscript{25} BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391
5. Remedies to enforce payment in terms of the CIDB endorsed standard building and construction contracts

5.1 Right to interim and final payment certificates

A contractor’s obligation to complete the work is generally indivisible. The mere completion of a specific subdivision of the work does not entitle a contractor for payment of the work done. In the absence of contractual provisions that do allow for interim payments, a claim for partially completed work done would be met with the *exceptio non adimpleti contractus.* Only upon completion of the work as a whole would the contractor be entitled to payment.

As a rule the average contractor does not have/command the necessary resources to complete a construction contract before requiring payment for the work completed. In order to provide the contractor with the necessary cash flow to complete the work, most construction contracts provide for the issue of interim payment certificates. In such a certificate the employer’s representative records his reasonable, but only approximate, assessment of the total of work executed and materials supplied up to a given date.

This certificate entitles the contractor to payment of the amount certified within a set number of days. Failing payment, the contractor may sue the employer on the strength of the certificate, and the strength of the certificate alone. The claim would be one based on the express terms of the contract. It is not an enrichment claim even though the amount may be certified as a “reasonable estimate of the total of the work and materials.”

From the comparison made between the four CIDB endorsement construction contracts, the following general observations were made:

- Payment certificates are certified by independent persons.
- The frequency of interim payment certificates are defined in the contract.
- It is clear when the interim payment certificates should be issued by the Employer.
- All four CIDB endorsed construction contracts allows for payment of materials on site and only the GCC 2004 does not expressly allow for payment of material off site.
- It is clear when the interim payment certificates should be paid by the Employer.
- It is clear when the final payment certificates should be issued by the Employer.
- It is clear when the final payment certificates should be paid by the Employer.

---

26 *Qwa Qwa Regeringsdiens v Martin Harris & Seuns OVS 2000 (3) SA 339*
27 *Simmons v Bantoesake Administrasieraad (Vaaldriehoekgebied) 1979 1 SA 940 (T)*
5.2 **Right to interest on late payments**

If the employer fails to pay money due under the contract the contractor may elect to charge interest on the amount due. The easiest way to recover interest would be in the case where the contract has express provisions that provides for the payment of interest in specific circumstances at a quantified rate\(^{28}\).

From a comparison made between the four CIDB endorsed construction contracts, the following general observations can be made relevant to interest on late payment:

- All four the CIDB endorsed construction contracts contain provisions that provides for the payment of default interest (“finance charges” in the case of the FIDIC Redbook).
- The circumstances when default interest may be charged are defined.
- The time from when the interest runs is defined.
- The rate of interest chargeable is defined in the contracts.

5.3 **Payment guarantee**

Relevant to the South African construction industry, a payment guarantee could be defined as a contractual undertaking by a third party, the guarantor, towards the contractor, that the guarantor will pay to the contractor the amount of works done under the construction contract, up to the guaranteed amount or a percentage of the price of the works done, in case the employer defaults in its payment obligations.

Of the four CIDB endorsed contract documents, only the FIDIC Redbook and the JBCC PBA 2007 contracts expressly provides for the use of payment guarantees. See clause 3.1, JBCC PBA 2007 and the example clause on page 17 of the guidance notes of the FIDIC Red book. Both contracts have *pro forma* payment guarantee forms that could be used by the parties.

It was a specific objective of the research to determine the frequency of use of payment guarantees in South Africa.

5.4 **Right to terminate**

The Contractors have to complete the complete construction contract before he will be entitled for payment for the work done. In the case where the work is only partially complete, the contractor’s claim for payment of the partially completed work could be met with a counter claim from the employer based on *exceptio non adimpleti contractus*.\(^{29}\) Following from this common law position, a contractor can not abandon site if the employer fails to pay the contractor for partially completed work.

All four the CIDB endorsed contract documents contain provisions that allow for the suspension of work and/or the cancellation of the contract in the case of failure by the employer to pay interim payment certificates.

---

\(^{28}\) Another cause of action for a claim for outstanding interest would be that the defendant was placed in mora on the date from which the interest is claimed. See Standard Bank of SA Ltd v Lotze 1950 (2) SA 698 (C)

\(^{29}\) Hamman v Nortje 1914 AD 293 at 296.
The following aspects should be considered in the case where a contractor wants to leave site/terminate the contract as a result of the employer’s failure to make payment for work completed.

- When the party wishes to enforce a cancellation clause, the conditions for its implementation have to be strictly complied with.  

- In the case where it is required by the contractor to give the employer notice of his intention to cancel the contract as a result of the employer’s failure to make the required payment, the notice to be given should be an express, extra-judicial announcement and such notice cannot be implied or given by notice of motion.

- In the absence of a contractual cancellation clause, a contractor will not be able to cancel a contract if an employer fails to make an interim payment. The rationale for this is as follows:
  
  o In the case of an interim certificate, the contractor has not completed the work in total, and until he has not completed the work, the contractor has not performed in terms of the contract.
  
  o If the contractor abandon site, as a result of the non-payment by the employer, the contractor will be in material breach of his obligations to deliver the work to the employer.
  
  o If the contractor the cancels the contract, his cancellation may be held to be a repudiation of the contract, in other words, an indication that he no longer intends to be bound by the terms of the contract, and this would afford the employer the right either to accept such repudiation, bringing the contract to an end, or to refuse to accept the repudiation in which case the contract remains alive and both parties are obliged to continue to honour their obligations to each other. In either event, the employer would be entitled to such damages as he has sustained as a consequence of the repudiation.

6. Other remedies to enforce payment

6.1 Evidence from the Employer regarding financial arrangements for the project

The FIDIC Red book provides for evidence to be provided by the Employer to the contractor whereby, inter alia, the Employer prove that it has access to/has the funds necessary to pay the contract price. Clause 2.4 Employer’s Financial Arrangements reads as follows:

---

30 Die Wet NO v Uys No en andere 1998 (4)
31 Shrosbree NO Simon 1999 (2) SA 488 (SE) See also clause 55.1 and 56.1 of GCC 2004 and clause 36.3 and 38.2 of JBCC.
“The Employer shall submit, within 28 days after receiving any request from the Contractor, reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the Contract Price (as estimated at that time) in accordance with Clause 14 [Contract Price and Payment]. If the Employer intends to make any material change to his financial arrangements, the Employer shall give notice to the Contractor with detailed particulars.”

The mechanism for the provision of evidence by the Employer is technically not a remedy to enforce prompt payment by the Employer, but it can certainly be regarded as a mechanism that will assist the contractor to identify, upfront, any possible risks pertaining to capability of the Employer to pay for work completed by the contractor.

Similar provisions could not be found in the JBCC PBA 2007, NEC ECC and GCC 2004 documents.

6.2 Order of court

It is common practice in South Africa to make an arbitration award an order of the court. An arbitration award can be made an order of the court of competent jurisdiction by any party. An award that has been made an order of the court can be enforced in the same way as any judgement or order to the same effect. After an award has been made an order of the court, the party enforcing its rights can, for example, issue a writ of execution to be executed by the sheriff of the court.

A contractor or consultant armed with an order of the court, resulting from a successful arbitration award or any other procedure, can enforce the order by applying for the following:

- A finding and order of contempt of court by and committal of the defaulting employer, or
- A writ of execution followed by an attachment of assets of the defaulting employer, and sale thereof.

The procedure whereby a successful litigant can enforce the judgement is crucial in the legal process. The idea that a court must be able to give an effective judgement is the major foundational concept to determine the jurisdiction. Effectiveness is intrinsically linked to execution, for if the court through its officers has no control over either the defendant or the defendant’s property, any judgement granted in favour of a plaintiff would amount to little more than a declaration of a theoretical benefit.

Up to June 2008 it was not possible to obtain an order of execution against the property of the State. Section 3 of the State Liability Act, 1957 (in its current form) provides that:

“No execution, attachment or like process shall be issued against the Defendant or Respondent in any action or proceedings or against the property of the State....”

32 Section 31 of the Arbitration Act 42 of 1965
33 Eilon v Eilon 1965 1 SA 703 (A) 725.
On 2 June 2008 and in the matter of Dingaan Hendrik Nyathi v The MEC, Department of Health, Gauteng and Others the Constitutional Court declared section 3(2) of the State Liability Act, which limits the State's liability, unconstitutional. The effect of this judgement is that the State is likely to have to comply with judgements sounding in money on demand in the same way as any ordinary debtor.

Failure of the State Attorney to honour a judgement debt has caused the Constitutional Court not only to declare unconstitutional certain legislation designed to limit the state’s liability, it ordered the Department of Justice to report back to it with a plan to ensure the speedy settlement of all unpaid court orders. It was estimated by the court that approximately 200 court orders was unpaid to date of the judgement. The Court further expressed strong views against officials who have become a law unto themselves and openly violate peoples’ rights.

The declaration of invalidity was suspended until 3 June 2009 to allow the State sufficient time to pass legislation that will provide for the effective enforcement of court orders against the State.

In August 2009 the Minister for Justice and Constitutional Development applied for an extension of the period of suspension of the order of constitutional invalidity. The extension of the period of suspension was extended in order to allow the State additional time to pass legislation that will provide for the effective enforcement of court orders against the State. As part of an interim order, the court had laid down the requirements for execution steps against the state. In the case of The Department of Transport & Roads, North West Provincial Government and 5 others v Kaulani Civils North (Pty) Ltd and 4 others, case number 70680/09, Bosman AJ confirmed and summarised said requirements as follows:

a. “To summarise, after a final order has not been satisfied within 30 days of the date of judgement, the judgement creditor may serve the Court in terms of the Rules on the relevant National or Provincial Treasury, the State Attorney, the Accounting Officer of the relevant National and Provincial Department as well as the Executive Authority of the department concerned.

b. The order served should be accompanied by a certificate by the Registrar certifying that no appeal, review or rescission proceedings are pending in respect thereof.

c. The relevant treasury shall forthwith within 14 days of service of the order, cause the debt to be settled, or make acceptable arrangements with the judgement creditor for settlement of the debt.

d. If (c) above has not been complied with, the judgement creditor may apply for a writ of execution in terms of Rule 45 of the Rules of Court against the movable property owned by the State and used by the relevant department.

e. The Sheriff shall, pursuant to the writ, attach but not remove the identifiable moveable property.

f. In the absence of any application contemplated in paragraph (g) (hereunder), the Sheriff may, after the expiration of 30 days from the date of attachment, remove and sell the attached movable property in execution.
g. During the periods referred to in (f), any party having direct and material interest may apply to the Court which granted the order, for a stay on grounds that the execution of the assets is not in the interest of justice.”

In June 2010, the period when this paper was written, no changes to current legislation or new legislation has been effected to allow for the issue of a writ of execution against the State.

7. Questionnaire Survey

In addition to the literature study for this paper, a questionnaire survey was conducted amongst randomly selected consultants and contractors in the South African construction industry. The questionnaire was designed to be brief, concise and straightforward to encourage a high response rate from the potential respondents. Two different sets of questionnaire forms were used in the survey; one for the consultants and the other for the contractors.

Both the questionnaire for the consultants and the contractors comprised of five distinct sections:

- **Section 1** established the background information of the respondent.
- **Section 2** established the levels of use and knowledge of the respective CIDB endorsed contracts. For the consultant’s questionnaire the respondents were requested to rate their knowledge and use of the CIDB PSC 2005 and the PROCS A 2009. For the contractors questionnaire respondents were requested to rate their knowledge and use of the JBCC PBA 2007, GCC 2004, NEC3 ECC and FIDIC Redbook.
- **Section 3** was used to rate the sufficiency of the remedies in terms of the CIDB endorsed contracts. For the consultant’s questionnaire the respondents were requested to rate the perceived sufficiency of certain contractual clauses to ensure prompt payment of professional fee accounts. Clauses pertaining to interim monthly accounts, interest on late payments, written proof of funding available for ongoing requirements, payment guarantees, suspension of services and termination of services were rated. For the contractors questionnaire clauses pertaining to issue of interim payment certificates, payment of interest on late payments, payment guarantees, suspension and/or termination of work were rated.
- **Section 4** rated the attitude and perceptions of the respondent regarding the effectiveness of litigation in securing payment for professional services and construction work duly executed.
- **Section 5** proposed possible solutions on how to improve current payment practices in the South African construction industry. For both the consultant’s and the contractor’s questionnaire the respondent’s opinion regarding the introduction of statutory prompt payment provisions were measured. In addition, the respondent was also requested to indicate what the prompt payment process should provide for a minimum.

Considering that there would be a wide range of expected or possible responses, questions that were open-ended were avoided. For most of the questions a 5-point Likert scale ranging
from ‘very low sufficiency’ to ‘very high sufficiency’ or ‘strongly approve’ to ‘strongly disagree’ were used. The questionnaire was accompanied by a covering letter which explained the reasons for and background of the research.

8. Trends indicated by the survey

Table 1 to 8 is a summary of the trends indicated by the survey.

Table 1: The use of interest on late payment/finance charges provisions and provision of payment guarantees (Consultant)

<table>
<thead>
<tr>
<th>Findings pertaining to the use of interest on late payment/finance charges provisions and provision of payment guarantees</th>
<th>Never</th>
<th>Rarely</th>
<th>Often</th>
<th>Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>A1 How often do you/your company charge interest on late payment of professional fee accounts.</td>
<td>No 9</td>
<td>9 5 2</td>
<td>5 3</td>
<td>3 2 8</td>
</tr>
<tr>
<td></td>
<td>% 36 36 2 0 8</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A2 How often do you/does your company insist on the provision of payment guarantees from the client?</td>
<td>No 6</td>
<td>6 1</td>
<td>2 5 0</td>
<td>0 7 7</td>
</tr>
<tr>
<td></td>
<td>% 43 43 7 7 7 7</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 2: The use of interest on late payment / finance charges provisions and provision of payment guarantees (Contractor)

<table>
<thead>
<tr>
<th>Findings pertaining to the use of interest on late payment / finance charges provisions and provision of payment guarantees</th>
<th>Never</th>
<th>Rarely</th>
<th>Often</th>
<th>Always</th>
</tr>
</thead>
<tbody>
<tr>
<td>A1 How often do you/your company charge interest on late payment of professional fee accounts.</td>
<td>No 28</td>
<td>28 1 3 7</td>
<td>3 7 7 9</td>
<td>7 9</td>
</tr>
<tr>
<td></td>
<td>% 37 37 1 7 9</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A2 How often do you/does your company insist on the provision of payment guarantees from the client?</td>
<td>No 27</td>
<td>27 1 8 0</td>
<td>1 8 0</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>% 38 38 2 5 0</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### Table 3: The attitude and perceptions regarding the effectiveness of litigation in South Africa (Consultants)

Findings with regard to the attitude and perceptions regarding the effectiveness of litigation in South Africa

<table>
<thead>
<tr>
<th></th>
<th>Strongly disagree</th>
<th>Disagree</th>
<th>Neutral</th>
<th>Agree</th>
<th>Strongly agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>A1</td>
<td>Litigation takes a long time and a successful verdict may often come too late to prevent financial harm to your company.</td>
<td>N 0 0 0 8 24</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>% 0 0 0 25 75</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A2</td>
<td>Because of the high non-recoverable costs of litigation, a successful verdict may often be a paper victory. (A worthless judgement).</td>
<td>N 2 2 0 7 23</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>% 6 6 0 21 68</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A3</td>
<td>State departments and municipalities often ignore an order of court and therefore a successful verdict together with an order of court may often be a paper victory. (A worthless judgement).</td>
<td>N 0 0 9 7 16</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>% 0 0 28 22 50</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A4</td>
<td>Once you / your company have/has instituted litigation against a party (including private companies, state departments and municipalities), chances are slim that you will get further work from that party in future.</td>
<td>N 0 0 1 6 25</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>% 0 0 3 19 78</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Table 4: The attitude and perceptions regarding the effectiveness of litigation in South Africa (Contractors)

Findings with regard to the attitude and perceptions regarding the effectiveness of litigation in South Africa

<table>
<thead>
<tr>
<th></th>
<th>Strongly disagree</th>
<th>Disagree</th>
<th>Neutral</th>
<th>Agree</th>
<th>Strongly agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>A1</td>
<td>Litigation takes a long time and a successful verdict may often come too late to prevent financial harm to your company.</td>
<td>No 0 0 1 3 38</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>% 0 0 2 25 73</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A2</td>
<td>Because of the high non-recoverable costs of litigation, a successful verdict may often be a paper victory. (A worthless judgement).</td>
<td>No 0 0 3 5 34</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>% 0 0 6 29 65</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A3</td>
<td>State departments and municipalities often ignore an order of court and therefore a successful verdict together with an order of court may often be a paper victory. (A worthless judgement).</td>
<td>No 0 0 6 30 16</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>% 0 0 12 58 31</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A4</td>
<td>Once you / your company have/has instituted litigation against a party (including private companies, state departments and municipalities), chances are slim that you will get further work from that party in future.</td>
<td>No 0 0 4 25 23</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>% 0 0 8 48 44</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Table 5: Possible solutions to improve current payment practices in the South African construction industry (Consultants)

<table>
<thead>
<tr>
<th>Findings on possible solutions to improve current payment practices in the South African construction industry</th>
<th>Strongly disagree</th>
<th>Disagree</th>
<th>Neutral</th>
<th>Agree</th>
<th>Strongly agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>A1 Statutory prompt payment provisions will improve late payment practices in the South African construction industry</td>
<td>No</td>
<td>22</td>
<td>18</td>
<td>17</td>
<td>0</td>
</tr>
<tr>
<td>%</td>
<td>6 6.38</td>
<td>50</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>A2 A commission should be established to investigate errant payments.</td>
<td>No</td>
<td>5 5.2</td>
<td>17</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>%</td>
<td>14 14.5</td>
<td>46</td>
<td>22</td>
<td></td>
<td></td>
</tr>
<tr>
<td>A3 Councils/professional bodies for professional consultants in the South African construction industry should be enabled to suspend the licences / membership of defaulting main consultants (main consultants that do not promptly pay sub-consultants).</td>
<td>No</td>
<td>4 4.9</td>
<td>10</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>%</td>
<td>11 11.1</td>
<td>26 26.29</td>
<td>23</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 6: Possible solutions to improve current payment practices in the South African construction industry (Contractors)

<table>
<thead>
<tr>
<th>Findings on possible solutions to improve current payment practices in the South African construction industry</th>
<th>Strongly disagree</th>
<th>Disagree</th>
<th>Neutral</th>
<th>Agree</th>
<th>Strongly agree</th>
</tr>
</thead>
<tbody>
<tr>
<td>A1 Statutory prompt payment provisions will improve late payment practices in the South African construction industry</td>
<td>No</td>
<td>0 0</td>
<td>0</td>
<td>14</td>
<td>36</td>
</tr>
<tr>
<td>%</td>
<td>0 0</td>
<td>0</td>
<td>28</td>
<td>72</td>
<td></td>
</tr>
<tr>
<td>A2 A commission should be established to investigate errant payments.</td>
<td>No</td>
<td>0 0</td>
<td>0</td>
<td>8</td>
<td>43</td>
</tr>
<tr>
<td>%</td>
<td>0 0</td>
<td>0</td>
<td>16</td>
<td>84</td>
<td></td>
</tr>
<tr>
<td>A3 The CIDB should be enabled to suspend the registration of defaulting main contractors (main contractors that do not promptly pay sub-contractors)</td>
<td>No</td>
<td>0 0</td>
<td>0</td>
<td>8</td>
<td>43</td>
</tr>
<tr>
<td>%</td>
<td>0 0</td>
<td>0</td>
<td>16</td>
<td>84</td>
<td></td>
</tr>
</tbody>
</table>
Table 7: Possible provisions of a statutory prompt payment provisions
(Consultants)

Findings with regard to the question: “To what extent should statutory prompt payment provisions provide for the following”

<table>
<thead>
<tr>
<th></th>
<th>To a very small extent</th>
<th>To a small extent</th>
<th>To an average extent</th>
<th>To a large extent</th>
<th>To a very large extent</th>
</tr>
</thead>
<tbody>
<tr>
<td>A1</td>
<td>Statutory adjudication or a similar dispute resolution mechanism to ensure swift dispute resolution of payment disputes.</td>
<td>No</td>
<td>2</td>
<td>22</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td></td>
<td>%</td>
<td>7</td>
<td>77</td>
<td>22</td>
</tr>
<tr>
<td>A2</td>
<td>A right to regular payment.</td>
<td>No</td>
<td>0</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td></td>
<td>%</td>
<td>0</td>
<td>0</td>
<td>9</td>
</tr>
<tr>
<td>A3</td>
<td>A right to a defined time frame for payment.</td>
<td>No</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>%</td>
<td>0</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>A4</td>
<td>A right to interest on late payments.</td>
<td>No</td>
<td>1</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>%</td>
<td>3</td>
<td>6</td>
<td>4</td>
</tr>
<tr>
<td>A5</td>
<td>A restriction of the right to set-off or withhold sums due.</td>
<td>No</td>
<td>1</td>
<td>14</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td></td>
<td>%</td>
<td>4</td>
<td>4</td>
<td>15</td>
</tr>
<tr>
<td>A6</td>
<td>Provision for a mechanism that will ensure that a client cannot withhold payment from a consultant unless he has given an effective notice of his intention to withhold such payment.</td>
<td>No</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>%</td>
<td>0</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td>A7</td>
<td>A right to suspend services coupled with the right to reimbursement and additional time as a result of the suspension.</td>
<td>No</td>
<td>1</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td></td>
<td>%</td>
<td>3</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>A8</td>
<td>Prohibition of “pay when paid” clauses.</td>
<td>No</td>
<td>2</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td></td>
<td>%</td>
<td>7</td>
<td>7</td>
<td>10</td>
</tr>
</tbody>
</table>
Findings with regard to the question: “To what extent should statutory prompt payment provisions provide for the following”

<table>
<thead>
<tr>
<th></th>
<th>To a very small extent</th>
<th>To a small extent</th>
<th>To an average extent</th>
<th>To a large extent</th>
<th>To a very large extent</th>
</tr>
</thead>
<tbody>
<tr>
<td>A1</td>
<td>Statutory adjudication or a similar dispute resolution mechanism to ensure swift dispute resolution of payment disputes.</td>
<td>No</td>
<td>1</td>
<td>10</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>%</td>
<td>2</td>
<td>20</td>
<td>43</td>
<td>53</td>
</tr>
<tr>
<td>A2</td>
<td>A right to regular payment.</td>
<td>No</td>
<td>0</td>
<td>0</td>
<td>22</td>
</tr>
<tr>
<td></td>
<td>%</td>
<td>0</td>
<td>0</td>
<td>42</td>
<td>54</td>
</tr>
<tr>
<td>A3</td>
<td>A right to a defined time frame for payment.</td>
<td>No</td>
<td>0</td>
<td>0</td>
<td>29</td>
</tr>
<tr>
<td></td>
<td>%</td>
<td>0</td>
<td>0</td>
<td>43</td>
<td>60</td>
</tr>
<tr>
<td>A4</td>
<td>A right to interest on late payments.</td>
<td>No</td>
<td>1</td>
<td>0</td>
<td>33</td>
</tr>
<tr>
<td></td>
<td>%</td>
<td>2</td>
<td>20</td>
<td>42</td>
<td>34</td>
</tr>
<tr>
<td>A5</td>
<td>The provision of escrow accounts, or similar trust accounts, to the benefit of the contractor and for retention money retained from the contractor.</td>
<td>No</td>
<td>1</td>
<td>14</td>
<td>28</td>
</tr>
<tr>
<td></td>
<td>%</td>
<td>2</td>
<td>28</td>
<td>33</td>
<td>36</td>
</tr>
<tr>
<td>A6</td>
<td>A restriction of the right to set-off or withhold sums due.</td>
<td>No</td>
<td>0</td>
<td>0</td>
<td>21</td>
</tr>
<tr>
<td></td>
<td>%</td>
<td>0</td>
<td>0</td>
<td>40</td>
<td>56</td>
</tr>
<tr>
<td>A7</td>
<td>Provision for a mechanism that will ensure that a client cannot withhold payment from a consultant unless he has given an effective notice of his intention to withhold such payment.</td>
<td>No</td>
<td>0</td>
<td>0</td>
<td>45</td>
</tr>
<tr>
<td></td>
<td>%</td>
<td>0</td>
<td>0</td>
<td>89</td>
<td>63</td>
</tr>
<tr>
<td>A8</td>
<td>Statutory provision for a contractor’s lien.</td>
<td>No</td>
<td>1</td>
<td>15</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>%</td>
<td>2</td>
<td>29</td>
<td>25</td>
<td>62</td>
</tr>
<tr>
<td>A9</td>
<td>A right to allow for stage payments for material in advance of their arrival on the construction site.</td>
<td>No</td>
<td>1</td>
<td>14</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>%</td>
<td>2</td>
<td>28</td>
<td>26</td>
<td>62</td>
</tr>
<tr>
<td>A10</td>
<td>A right to suspend services coupled with the right to reimbursement and additional time as a result of the suspension.</td>
<td>No</td>
<td>0</td>
<td>0</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>%</td>
<td>0</td>
<td>0</td>
<td>12</td>
<td>27</td>
</tr>
<tr>
<td>A11</td>
<td>Prohibition of “pay when paid” clauses.</td>
<td>No</td>
<td>0</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>%</td>
<td>0</td>
<td>0</td>
<td>8</td>
<td>27</td>
</tr>
</tbody>
</table>
9. **Summary and conclusions**

From the literature survey the following is concluded:

- There exists a chronic problem of delayed and non-payment in the South African construction industry.
- From 2004 to 2009 there was no substantial improvement in the problem of delayed and non-payment in the South African construction industry.
- The statements above are applicable to both the South African construction consultant and the contractor.
- South Africa does not have construction specific legislation to address the need for prompt payment of building and civil engineering contractors.

From the analyses conducted on the four CIDB endorsed construction documents the following general observations are made:

**Interim Payment Certificates**

- Payment certificates are certified by independent persons.
- The frequency of interim payment certificates is defined.
- It is clear when the interim payment certificates should be issued by the Employer.
- All four CIDB endorsed construction contracts allows for payment of materials on site and only the GCC 2004 does not expressly allow for payment of material of site.
- It is clear when the interim payment certificates should be paid by the Employer.
- It is clear when the final payment certificates should be issued by the Employer.
- It is clear when the final payment certificates should be paid by the Employer.

**Interest on Late Payment**

- All four the CIDB endorsed construction contracts contain provisions that provides for the payment of default interest (“finance charges” in the case of the FIDIC Redbook).
- The circumstances when default interest may be charged are defined.
- The time from when the interest runs is defined.
- The rate of interest chargeable is defined.

**Payment Guarantee**

Of the four CIDB endorsed contract documents, only the FIDIC Redbook and the JBCC PBA 2007 contracts expressly provides for the use of payment guarantees.
Some of the most relevant trends indicated by the Questionnaire Survey are:

- 72% of the consultants and 74% of the contractors interviewed never or rarely charges interest on late payments.
- 86% of the consultants and 76% of the contractors interviewed never or rarely insist on the provision of payment guarantees.
- Both groups of consultants and contractors surveyed regard litigation in South Africa as ineffective in securing payment for professional services and construction work duly executed.
- 12% of the consultants interviewed disagreed with the statement that statutory prompt payment provisions will improve late payment practices in the South African construction industry.
- 100% of the contractors interviewed agreed with the statement that statutory prompt payment provisions will improve late payment practices in the South African construction industry.
- 68% of the consultants and 100% of the contractors interviewed agreed with the statement that a commission should be established to investigate errant payments.
- 22% of the consultants interviewed disagreed with the statement that councils/professional bodies for professional consultants in the South African construction industry should be enabled to suspend the licences/memberships of defaulting main consultants (main consultants that do not promptly pay sub-consultants).
- 100% of the contractors interviewed agreed with the statement that the CIDB should be enabled to suspend the registration of defaulting main contractors (main contractors that do not promptly pay sub-contractors).

10. References


Finsen, E. 2007. The building contract - A commentary on the JBCC Agreements. 2nd ed. Cape Town: Juta & Co Ltd


