

**WHEN CLIENTS DO NOT PAY: A CRITICAL ANALYSIS OF THE LEGAL
REMEDIES AVAILABLE TO THE SOUTH AFRICAN BUILDING AND CIVIL
ENGINEERING CONTRACTORS AND CONSULTANTS**

by

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DECLARATION

I declare that this research is entirely my own, unaided work, except where otherwise stated. All sources referred to are adequately acknowledged in the text and listed.

I accept the rules of assessment of the University of Pretoria and the consequences of transgressing them.

This treatise is being submitted in partial fulfilment of the requirements for the degree of MSc (Project Management) at the University of Pretoria.

It has not been submitted for any degree or examination at any other university.

SIGNATURE

DATE

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ABSTRACT

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

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Smooth cash flow ensures the effective delivery of projects and is essential 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 Australia to introduce legislation to regulate the payment of contractors and consultants in terms of a building or a 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 construction 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, the purpose of this treatise was to:

1. Investigate 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;

2. To determine the effectiveness of said remedies and the enforcement thereof;
and
3. Suggest possible solutions on how to improve current payment practices in the South African building and construction industry.

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LIST OF ABBREVIATIONS

Abbreviation	Abbreviation Description
CESA	Consulting Engineers South Africa.
CIDB PSC	CIDB Standard Professional Services Contract as published by the Construction Industry Development Board of South Africa.
CIDB	Construction Industry Development Board of South Africa.
CII's	Construction Industry Indicators that have been developed by the Department of Public Works and the CIDB.
CPA	Consumer Protection Act 68 of 2008.
FIDIC Red Book	Conditions of Contract for Construction for Building and Engineering Works designed by the employer, 1st edition, 1999 as published the International Federation of Consulting Engineers, Switzerland.
GCC 2004	General Conditions of Contract for Construction Works, 1st edition, 2004, published by the South African Institution of Civil Engineering.
JBCC PBA 2007	JBCC Series 2000: Principal Building Agreement, edition 5.0, 2007 as published by the Joint Building Contracts Committee, South Africa.
NEC3 ECC	New Engineering Contract 3: The Engineering and Construction Contract, June 2005, published by the Institution of Civil Engineers, United Kingdom.
NEC3 PSC	New Engineering Contract 3: Professional Service Contract, June 2005, published by the Institution of Civil Engineers, United Kingdom.
PROCSA (2009)	Client / Consultant Professional Services Agreement, 2 nd edition, 2008, published by the Professional Consultants Services Committee c/o JBCC, South Africa.
SACQSP	South African Council for the Quantity Surveying Profession

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CHAPTER 1

INTRODUCTION

1.1 Introduction

The purpose of this chapter is to:

1. Describe the milieu of the problem statement;
2. State the research hypothesis;
3. State the research assumptions;
4. Define the delimitations of the research; and
5. Show why the research is important.

1.2 The milieu of the problem statement

Good cash flow management is essential 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 (Construction Industry Review Committee. 2001, par. 5.77).

The adverse effects of non-payments and / or late payment by employers on contractors and consultants 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 Australia to legislate their construction specific statutory payment security regime. The purpose of said legislation is to address issues on prompt payment in the construction industry, to eliminate poor payment practices and to smoothen the contractor's cash flow.

From a South African perspective it appears from a Construction Industry Development Board (CIDB) survey conducted by Marx (2009) that contractors and consultants have similar problems than their international counterparts when it comes to payment of work

completed / services provided. It was found, *inter alia*, that 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. Only 44% of all contractors in 2007 were paid on time within 30 days. With regard to the payment of professional fees, it was found that 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. It was further established by Marx that the tendency for late payment of consultants has grown if the 2007 results are compared with the 2006 results.

In the light of the above stated CIDB 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 the following problem statement:

“What are 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 and how effective are they in enforcing said right of payment?”

1.3 Sub-problems

As the problem statement represents a potentially complex set of issues, the problem statement is divided into three sub-problems.

Sub-problem 1: “What are the legal remedies available to the South African building and civil engineering contractors to enforce their right of payment for work completed in terms of a CIDB form of contract for civil engineering and building work and how effective are they in enforcing said right of payment?”

Sub-problem 2: “What are the legal remedies available to the South African building and civil engineering consultants to enforce their right of payment for services provided in terms of a CIDB endorsed form of contract for the provision of professional services and how effective are they in enforcing said right of payment?”

Sub-problem 3: “What other legal remedies are available to the South African building and civil engineering contractors and consultants to enforce their right of payment for work completed / services provided and how effective are they in enforcing said right of payment?”

1.4 Hypothesis

The research is aimed at collecting and analysing data which, upon interpretation, would allow the acceptance or rejection of the following main hypothesis:

“The legal remedies available to the South African building and civil engineering contractors and consultants are effective in enforcing their right of payment for work completed / services performed.”

Three sub-hypotheses that correlate with the three sub-problems stated above were developed in order to test the main hypothesis. The three hypotheses are:

Sub-hypothesis 1: “The legal remedies available to the South African building and civil engineering contractors in terms of a CIDB endorsed form of contract for civil engineering and building work are effective in enforcing their right of payment for work completed.”

Sub-hypothesis 2: “The legal remedies available to the South African building and civil engineering consultants in terms of a CIDB endorsed form of contract for the provision of professional services are effective in enforcing their right of payment for services provided.”

Sub-hypothesis 3: “The other legal remedies available to the South African building and civil engineering contractors and consultants are effective in enforcing their right of payment for work completed / services provided.”

1.5 Delimitations

The research delimitations are as follows:

1. 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.

2. The legal remedies in terms of the following CIDB endorsed forms of contract for construction and building work were researched:
 - a. JBCC Series 2000: Principal Building Agreement, edition 5.0, 2007, published by the Joint Building Contracts Committee, South Africa (JBCC PBA 2007);
 - b. The General Conditions of Contract for Construction Works, 1st edition, 2004, published by the South African Institution of Civil Engineering (GCC 2004);
 - c. New Engineering Contract 3: The Engineering and Construction Contract, June 2005, published by the Institution of Civil Engineers, United Kingdom (NEC3 ECC); and
 - d. Conditions of Contract for Construction for Building and Engineering Works designed by the employer, 1st edition, 1999, published the International Federation of Consulting Engineers, Switzerland (FIDIC Red book).
3. The legal remedies in terms of the following CIDB endorsed forms of contract for the provision of professional services were researched:
 - a. CIDB Standard Professional Services Contract (CIDB PSC); and
 - b. Client / Consultant Professional Services Agreement, 2nd edition, 2008, published by the Professional Consultants Services Committee c/o JBCC, South Africa (PROCSA 2009).
4. The Consumer Protection Act 68 of 2008 (CPA) will place onerous obligations and prohibitions on suppliers and employers and will have a significant impact on the way business is conducted in South Africa. It is foreseen that the CPA will also have a major impact on the South African construction and building industry. The impact of the CPA and the extent thereof on the South African construction and building industry was not investigated and was excluded from the ambit of this study.

1.6 Assumptions

It is not the purpose of this research to determine the extent and severity of late payment of contractors and consultants for work completed / services provided in South Africa. The findings of the CIDB, Consulting Engineers South Africa (CESA) and Master Builders

South Africa (MBSA) reports are assumed to be representative of actual conditions in the South African construction industry.

1.7 Importance of study

“Poor payment practices in the construction industry give rise to substantial additional financing and transaction costs. More importantly certainty over how much and when payment is made builds trust between supply team members and underpins collaborative working to achieve value for money projects for clients” (Guide to Best ‘Fair Payment’ Practices published by the UK Office of Government Commerce, July 2007).

This study is important to the construction industry for the following reasons:

Firstly it draws attention to current payment trends in the South African construction industry. Secondly it reflects on the effectiveness of legal remedies available to enforce the right of payment for construction work completed and professional services provided, and thirdly, by researching payment practices in other countries, possible recommendations on how payment practices in the South African construction industry could be improved are proposed.

CHAPTER 2

LITERATURE SURVEY

2.1 Introduction

The structure of the literature survey is as follows:

- Section 2.2 provides an overview of recent and relevant research pertaining to payment practices in the South African construction industry.
- Section 2.3 discusses the common-law position of building and civil engineering contractors.
- Section 2.4 discusses the statutory position of building and civil engineering contractors.
- Section 2.5 provides an overview of the building and civil engineering consultant under the South African law.
- Section 2.6 and 2.17 serves as an analysis of the remedies to enforce payment in terms of the CIDB endorsed contracts.
- Section 2.8 looks at other remedies to enforce payment for the services rendered / construction work completed.
- Section 2.9 provides an overview of existing, prompt payment legislation in other countries.

2.2 Recent and relevant research pertaining to payment practises in the South African construction industry

2.2.1 Marx Report (2009)

a. Introduction

Construction Industry Indicators (CII's) have been developed by the Department of Public Works and the CIDB with assistance from the Council of Scientific & Industrial Research (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 CIDB CII's measure the performance of the South African construction industry by measuring client satisfaction with the project milestone dates achieved, construction

costs versus budget, contractors' performance, consultants' performance, and the quality of materials used. The contractors' satisfaction is measured, *inter alia*, by their profitability, the quality of the contract documentation, the efficiency, openness and transparency of the contract adjudication process, the management of variation orders, payment delays and the performance of their materials suppliers.

The CIDB CII's 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. The report "Results of the 2008 survey of the Construction Industry Indicators and comparison with the 2005 & 2007 survey results" was published by the CIDB in March 2009.

The following is a summary of the findings relevant to this research:

b. Findings regarding payment delays experienced by contractors

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 within 14 days, if the 2004 results are compared with the 2007 results (Marx. 2009, tables 15 and 17). In 2007 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 (Marx. 2009, tables 15 and 17). 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 was 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. Only 44% of all contractors in 2007 were paid on time within 30 days (Marx. 2009, tables 15 and 17).

c. Findings regarding late payment of consultants

Consultants' fees were paid within 30 days for only 45% to 51% of all projects completed between 2004 and 2007 (Marx. 2009, tables 37, 38 and 39). 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 was 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 (Marx. 2009, table 39). The tendency for late payment of consultants has grown if the 2007 results are compared with the 2006 results (Marx. 2009, tables 37 and 39).

2.2.2 MBSA Report (2009)

a. Introduction

In response to the Marx report, the 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. The survey included projects in the civil construction, residential building and non-residential building sectors.

The findings of this survey are contained in the report "Payment Quality Survey: Draft Report. Industry Insight" as published by the MBSA in 2009.

b. Survey findings relating to late payment of contractors and subcontractors

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

- (i) Of all the provinces surveyed, the Free State reported the most frequent delays in payments (93%) followed by the Northern Cape (74%). Gauteng experienced the least frequent delays in payment (24%). Three provinces reported projects that "never experiencing delays". These were Gauteng (43%); KwaZulu Natal (29%) and Mpumalanga (9%).

- (ii) The sample included only 10% of projects listed by subcontractors while the remaining 90% were listed by principal contractors. Projects in which delays were reported to be more frequent were more prevalent in those projects listed by principal contractors (46%). This was however not a conclusive figure due to the low representation of projects listed by subcontractors.
- (iii) Nationally and across all clients, 54% of all 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. It was further concluded that R117 million worth of projects were paid more than 120 days after date of invoice.
- (iv) 85% of payments made by National Government and 79% of payments made by the private sector were made within 30 days. The remaining 15% of National Government payments were made between 31 and 60 days, while some payments in the private sector were delayed for more than 120 days.
- (v) Most payments for local and provincial government projects were made between 31 and 60 days. 15% of the value of local government projects was only paid between 90 and 120 days after date of invoice. 2% of the value of provincial government projects was paid after 120 days.
- (vi) Only 50% of payments to subcontractors were made within 30 days from date of invoice.

2.2.3 CESA Report (2009)

An economic and capacity survey is conducted by 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 CESA. To eliminate possible distortions in the statistics

and prevent anomalies, only responses received from firms that have submitted questionnaires for the last two consecutive surveys were used.

In the report “Biannual Economic and Capacity Survey” published by CESA in 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 (CESA. 2009, table 15).

Relevant to 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% (CESA. 2009, table 15).

2.2.4 Maritz, MJ, 2007, “An investigation into the adjudication of disputes in the South African Construction Industry”

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:

1. 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” (Maritz. 2007, table 1).
2. 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” (Maritz. 2007, table 2).
3. 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 United Kingdom, Australia, New Zealand and Singapore” (Maritz. 2007, table 3).

2.2.5 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 what the requirements are for the South African construction industry to fully utilise and benefit from adjudication. The researchers, inter alia, reviewed the contractual, institutional and legislative framework for adjudication in South Africa. The following findings are relevant to this research:

1. 75% of the respondents agreed that “South Africa needs a “Payment and Adjudication Act” similar to that in the United Kingdom”. This finding correlates with the Maritz paper as discussed above (Maiketso *et al.* 2009, table 2).
2. 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” (Maiketso *et al.* 2009, table 2).

2.3 Common-law position of building and civil engineering contractors

2.3.1 The nature of the building and civil engineering contract

Building and civil engineering contracts are species of the genus *locatio conductio operis* (letting and hiring of work). *Locatio conductio operis* is a mutual agreement between one party, the employer, and the other, the contractor, of which the contractor undertakes to make his services available with regard to a physical material matter to an employer, for payment. A contractor who accepts work as a result of such a contract is under the obligation to build or repair, as the case may be, for payment, without working under the direct supervision of an employer (Joubert *et al.* 2003, vol. 13(1) par. 113). The contractor is bound to perform the work within the time fixed by the contract of work or within a reasonable time where no time has been specified.¹ When the end product is the erection of a building or a job of work of similar nature the agreement is commonly described as a building contract and when it has a significant civil engineering component, it is referred to as a civil engineering contract (Joubert *et al.* 2003, vol. 2(1) par. 457).

¹ *Toerien v Stellenbosch University* 1996 (1) SA 197 at 201

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 judgments.²

In general the following principles apply where a contractor claim for payment for work done in terms of a *locatio conductio operis* (Harms. 1998, p. 265). The contractor needs to allege and prove:

- (a) *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.
- (b) *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.³ 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 of skill and diligence to be employed is that possessed and exercised by other members of the trade to which the contractor belongs.⁴
- (c) *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 is silent with regard to remuneration, remuneration will be payable and should be fair and reasonable. 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

² *Smith v Mouton* 1977 (3) SA 2 at 12

³ *Colin v De Guisti* 1975 (4) SA 223

⁴ *Randaree NNO v WH Dixon & Associates* 1983 (2) SA (1)

remuneration.⁵ A claim for reasonable remuneration based on an implied term should be distinguished from a claim based upon unjust enrichment.⁶ With regard to remuneration for additional work done by the contractor (extras), the following apply: If the work is expressly or impliedly included in the contract, the work is not regarded as extras and no remuneration is payable. If the contract does not provide for extras, the contractor is entitled to fair and reasonable remuneration for additional work.⁷ If the contract makes provision for extras, then remuneration should be claimed in terms of the contract provisions. If the contract is silent with regard to remuneration for extra work, the contractor should be remunerated for additional work on a reasonable and fair basis.⁸ The contract may be varied in such a manner by the employer and carried out by the contractor, that it could be argued that the original contract was tacitly replaced by a new one in the terms of which the contractor is entitled to a reasonable remuneration.⁹

- (d) *Performance*: The contractor must allege and prove that he has done all that was required to be done in terms of the contract.¹⁰

2.4 Statutory position of building and civil engineering contractors

2.4.1 The CIDB Act 38 of 2000 and its regulations

The South African construction industry has been one of the least regulated industries as far as the statutory framework is concerned. Several pieces of legislation have historically been important to the industry, such as the Arbitration Act 42 of 1966 and the Conventional Penalties Act 15 of 1962. The Occupational Health and Safety Act and the

⁵ *Inkin v Borehole Drillers* 1949 (2) SA 366; *Chamotte (Pty) Ltd v Carl Coetzee (Pty) Ltd* 1973 (1) 644 at 649

⁶ *Inkin v Borehole Drillers* 1949 (2) SA 366

⁷ *Warner v Wright* 1908 EDC 14

⁸ *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 at 516

⁹ *Alfred McAlpine & Son (Pty) Ltd, supra*

¹⁰ *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391

National Building Regulations provided a general framework in respect of health and safety issues.

The CIDB Act 38 of 2000 was passed in October 2000. The Act provided for the establishment of the CIDB to implement an integrated strategy for the reconstruction growth and development of the construction industry. Further, the Act creates a register of contractors linked to a best practise contractor recognition scheme and a register of projects linked to a best practise project assessment scheme. Both these registers are central to the implementation of the integrated strategy.

The Act mandates the CIDB, *inter alia*, to:

- (a) Promote the contribution of the construction industry in meeting national construction demand and in advancing national development objectives (Section 4(a)).
- (b) Provide strategic leadership to the construction industry stakeholders to stimulate sustainable growth, reform and improvement of the construction sector (Section 4(b)).
- (c) Determine and establish best practise that promotes improved industry performance, procurement and delivery management (Section 4(c)).
- (d) Promote best practise through a number of legislated instruments, the uniform application of construction industry policy throughout all spheres of Government; sustainable growth; and appropriate research (Section 4(d)).
- (e) Promote, establish or endorse uniform standards and ethical standards that regulate the behaviour of those engaged in the construction procurement process (Section 4(e)).

The construction regulations apply to all sectors of the industry, both public and private, and impose obligations in areas where traditionally they would not have existed.

In principal the Act have the following implication:

- (a) A contractor may not undertake, carry out or complete any construction works or portion thereof in respect of a public sector contract unless it is registered with the CIDB and holds a valid registration certificate issued by the CIDB. A contractor who does so is guilty of an offence and liable to a fine (Section 4(f)).

- (b) Every organ of state must apply the register of contractors to its procurement processes and as such may not award a construction works contract to an unregistered contractor or to a registered contractor who does not possess the required contractor grading designation.
- (c) Every organ of state is required, where the value of a contract is equal to or exceeds a published minimum amount to advertise tenders and report the award and the cancellation or termination of contracts on the CIDB website (Section 18(1) of the CIDB Regulations 2004).
- (d) Persons in both the public and private sectors are required to comply with the provisions of the CIDB Code of Conduct for the parties engaged in construction procurement (Section 1 of the CIDB Code of Conduct for all parties in construction procurement).
- (e) Any person or organ of state who:
 - (i) Supplies the CIDB with false information to mislead the CIDB;
 - (ii) Fails to register a project in terms of the Act or its regulations;
 - (iii) Awards a construction works contract contrary to the provisions of the Act or its regulations; and
 - (iv) Fails to comply with the provisions of the Code of Conduct or the Act or its regulations,is guilty of an offence and is liable to a fine (Section 30 of the CIDB Regulations 2004).
- (f) The CIDB published a Code of Conduct for all parties involved in construction procurement (CIDB Code of Conduct for all parties in construction procurement). The Code aims to foster good corporate governance in construction and applies to all parties involved in public and private sector. Among others, the code requires parties in any private or public construction related procurement to “behave equitably, honestly and transparently; avoid all conflicts of interest and

not maliciously or recklessly injure or attempt to injure the reputation of another party”.

- (g) The Standard for Uniformity in Construction Procurement published in terms of Act 38 of 2000 established a uniform framework for procurement and minimum requirements for the solicitation of tender offers, the use of standard forms of contract and the formatting and compilation of procurement documents. The Standard confines the choices available to clients in the forms of contract that they may use, regulates the process of offer and acceptance and informs and shapes the development of standard documentation developed by industry stakeholders.

2.4.2 Payment 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. In several other countries acts, addressing this need for prompt payment, were endorsed.

2.5 Position of the building and civil engineering consultants under the South African law

2.5.1 Position of architects

According to Harms (1999, p. 38), an architect must allege and prove the following in order to recover fees for professional services rendered:

- (a) He is a registered architect;
- (b) His mandate and terms;
- (c) The completion of the mandate in a proper and workmanlike manner; and
- (d) An undertaking by the employer to pay for the work.

a. Registered architect

Section 22 of the architects' Act 35 of 1970 required that architects must be registered to perform for gain any kind of work reserved in terms of this Act. It was specifically stated in section 22(1)(b) of Act 35 of 1970 that any unregistered person who for gain performed any kind of work reserved for architects would also be guilty of an offence. This Act was

replaced by the Architectural Profession Act 44 of 2000. Section 26(3) of the Architectural Profession Act 44 of 2000 provides that a person who is not registered in terms of this Act may not, *inter alia*, perform any kind of work identified for any category of registered persons. The identification of work provision in terms of the Act 44 of 2000 (Work Framework) provides for categories of work within which registered persons are permitted to operate. The proposed framework was gazetted in February 2007 for comment from registered persons and members of the public by 9 March 2007. A total of 221 responses were captured. Relevant changes were made to the documents and they were resubmitted to the Council for the Built Environment (CBE) in June 2007 (SACAP 2009). To date the identification of Work Framework has not been legislated. It could therefore be argued that, in the absence of a Work Framework, a person who is not registered as an architect could still do any architectural work. This legislative loophole will be closed when the Work Framework has been legislated.

b. His mandate and terms

In *Esbach v Steyn*¹¹ the Appeal court have confirmed the decision of the court *a quo* that for a claim for professional architectural services, the onus is on the architect to prove the terms of his mandate.

c. The completion of the mandate in a proper and workmanlike manner

In *Du Plessis v Strydom*¹² it was found that where a architect issues summons against his employer for fees, the onus is on the architect to prove that he carried out the mandate proficiently, timeously and in accordance with the guidelines given to him for the scheme. It was further held that if the architect proves the above stated, he will then be entitled to the relevant prescribed fees.

d. An undertaking by the employer to pay for the work

The undertaking may be express or by implication. In *Eaton & Louw v Arcade Properties (Pty) Ltd* it was found that where nothing was said on the quantum of fees applicable, the

¹¹ *Esbach v Steyn* 1975 (4) SA 506 H

¹² *Du Plessis v Strydom* 1985 (2) SA 142 F

implication is that fees would be payable in terms of the tariff. If in issue, the onus rests on the architect to prove that nothing was said about fees. The South African Council for the Architectural Profession (SACAP) has recommended a tariff of fees in respect of services provided by a person registered in terms of section 7(3)(b) of the Act 44 of 2000. Rule 5.5 of the rules in terms of the Act 44 of 2000 provides that “where an architect and his client have not agreed on fees chargeable in a specific case, he shall not undertake professional services for fees otherwise than on the basis of the tariff of the fees published in terms of section 7(3)(b) of the Act 44 of 2000: Provided that nothing in this regulation shall be construed as prohibiting negotiations or an agreement between an architect and, his client on fees chargeable in a specific case on some basis other than the published tariff.” In assessing what is fair and reasonable remuneration it is has frequently been suggested that courts should apply the prescribed or similar tariff of fees. However, and in contrast with *Du Plessis v Steyn*, the courts in many instances have persistently declared that they are not bound to apply the prescribed tariffs.¹³

2.5.2 Position of quantity surveyors under the South African law

According to Finsen (2007, p. 36) the quantity surveyor is the client’s mandatory and acts as his consultant. The quantity surveyor is not an agent of his employer and does not have the power to create contractual obligations to bind his client.

In terms of section 18 of the Quantity Surveyors Act 36 of 1970, the quantity surveyor was required to be registered. Section 17(3)(c) determined, *inter alia*, that it was a criminal offence for any person to perform work for reward reserved for quantity surveyors.

Act 36 of 1970 was repealed by the Quantity Surveying Profession Act 49 of 2000. Act 49 of 2000 is almost exactly the same in form and substance as the Architectural Profession Act 44 of 2000. Section 18 of Act 49 of 2000 defines the categories in which a person may register in the quantity surveying profession. Section 26 deals with matters pertaining to the identification of the type of work which may be performed by persons registered in any of the categories referred to in section 18. Section 26(3) further

¹³ *Kock v SKF Laboratories (Pty) Ltd* 1962 (3) SA 764 E and *Maw v Keith – Reed* 1975 (4) SA 603 C

determines that any person who is not registered in terms of the Act may not, *inter alia*, perform any kind of work identified for any category of registered person. The South African Council for the Quantity Surveying Profession (SACQSP) ID of Work Policy for persons registered in terms of the Quantity Surveying Profession Act 2000 was approved / ratified by the full council on 13 March 2009 and, published in the Government Gazette on 24 July 2009, permitting a period for 30 days for receipt of public comment. No adverse comment or objection was received by the SACQSP by the expiry of the 30 day period permitted for public comment (Le Roux, 2010).

According to Harms (1999, p. 348) the rights and duties of quantity surveyors are similar than those of architects. In general, and depending on the terms of the contract with the employer, the same or similar facts as for architects needs to be proved in order to recover fees for professional services provided. It follows, as for architects; the following must be proved by the quantity surveyor:

- (a) He is a registered surveyor;
- (b) His mandate and terms;
- (c) The completion of the mandate in a proper and workmanlike manner; and
- (d) An undertaking by the employer to pay for the work.

In addition, it is submitted by Ramsden (2008, p. 139) that the legal effect of the scale of fees as prescribed under Act 49 of 2000 is the same as in the case of architects.

2.5.3 Position of engineers under the South African law

Prior to 2000 the engineering profession was regulated by the Engineering Profession of South Africa Act 114 of 1990. Section 16(1) of Act 114 of 1990 determined, *inter alia*, that subject to the provisions of section 60(2) and any exemption granted in terms of the Act, any person not registered in terms of the Act is guilty of an offence. Act 114 of 1990 was repealed and replaced by the Engineering Profession Act 46 of 2000. The Engineering Profession Act is almost exactly the same in form and substance as the Architectural Profession Act 44 of 2000 (Ramsden. 2008, p. 141). Section 18 of the Act provides for the categories in which a person may be registered in the engineering profession. Section 26 of the Act deals with matters pertaining to the identification of the type of engineering work which may be performed by persons registered in any of the

categories referred to in section 18. To date a framework of work identified in terms of section 26 of the Act has not been legalised. It could be argued then, that in the absence of such a legalised framework, that a person who is not registered as professional engineer could still do any engineering work. This legislative loophole will be closed when such a framework has been legislated.

According to Harms (1999, p. 182) the legal position of consulting engineers are very similar than those of architects. In general, and depending on the terms of the contract with the employer, the same or similar facts as for architects needs to be proved in order to recover fees for professional services provided. It follows, as for architects; the following must be proved by the consulting engineer:

- (a) He is a qualified engineer;
- (b) His mandate and terms;
- (c) The completion of the mandate in a proper and workmanlike manner; and
- (d) An undertaking by the employer to pay for the work.

2.6 Remedies to enforce payment in terms of the CIDB endorsed standard building and construction contracts

The CIDB endorsed construction contracts provides for several possible remedies to enforce payment for construction work duly completed.

The following is a comparison and / or discussion of such remedies:

2.6.1 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 does allow for interim payments, a claim for partially completed work done would be met with the *exceptio non adimpleti contractus*.¹⁴ Only upon completion of the work as a whole would the contractor be entitled to payment.

¹⁴ *Qwa-Qwa Regeringsdiens v Martin Harris & Seuns OVS 2000 (3) SA 339*

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 provides 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. Any tax liability in respect of the work completed and materials supplied is added. From this assessment will be deducted retention when applicable, sums previously paid and any amounts in dispute. An interim certificate is not conclusive as to the items of work done, their value or of the amount certified (Finsen. 2007, p. 156). It is not a final settlement in respect of the items of work certified; in essence it is merely an advance on the final contract sum.¹⁵

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."¹⁶

In order to ensure prompt and timeous payment, there should be certainty over how much and when payment will be made.¹⁷ Certainty of payment is of particular importance in contracts where there is no certification by a neutral person, like an engineer or architect. In such situations, the payment framework can fail to create a clear understanding between the parties as to what is the sum due.¹⁸

¹⁵ *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufactureres (Pty) Ltd* 1986 (4) SA 510 (N) 516, 1988 (2) SA 563

¹⁶ *Simmons v Bantoesake Administrasieraad (Vaaldriehoekgebied)* 1979 (1) SA 940 (T)

¹⁷ Guide to Best "Fair Payment" Practices of the Office of Government Commerce in UK. (HKR, 30)

¹⁸ Chapter 2 of the UK consultation on Proposals to Amend Part II of the Housing Grants Construction and Regeneration Act 1996 and the scheme for Construction Contracts (England and Wales) Regulations 1998 in June 2007. HKR, 31

Table 2-1 is a comparison of the key features of the four CIDB endorsed construction contracts relevant to interim and final payment of work completed.

From the comparison made the following general observations are made:

1. Payment certificates are certified by independent persons;
2. The frequency of interim payment certificates are defined in the contract;
3. It is clear when the interim payment certificates should be issued by the employer;
4. 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;
5. It is clear when the interim payment certificates should be paid by the employer;
6. It is clear when the final payment certificates should be issued by the employer; and
7. It is clear when the final payment certificates should be paid by the employer.

Table 2-1: Interim and final payment of work completed

Aspect	JBCC PBA 2007	GCC 2004	FIDIC Red book	NEC3 ECC
Is the payment certificate certified by an independent person?	Yes, the principal agent certifies the payment certificates (clause 31.1).	Yes, the engineer certifies the payment certificates (clause 49.1).	Yes, the engineer certifies the payment certificates (clause 14.6).	Yes, the project manager certifies the payment certificates (clause 51.1).
Frequency of interim certificates	Monthly (clause 31.1).	Monthly (clause 49.1).	Monthly, unless a schedule of payments frequency is specified (clause 14.3 and 14.4).	As per the assessment interval (clause 50.1).
When the interim should be issued to the employer?	Not later than the day of the month stated in the contract data (clause 31.3).	Within 7 days after the receipt by the engineer of the contractor's statement as per clause 49.1 (clause 49.4).	The engineer shall, within 28 days after receiving a statement and supporting documents, issue to the employer an interim payment	The project manager certifies a payment within one week of each assessment date (clause 51.1).

Aspect	JBCC PBA 2007	GCC 2004	FIDIC Red book	NEC3 ECC
			certificate (clause 14.6).	
Provision for materials on site	Yes (clause 31.6.2).	Yes (clause 49.2).	Yes (clause 14.5 c).	Yes (clause 73.1).
Provision for materials off site	Yes (clause 31.6.5).	No provision is made.	Yes (clause 14.5 a and b).	Yes (clause 71.1).
When will the contractor be paid?	Within 7 calendar days of the date of issue of the interim certificate (clause 31.9).	Within 28 days after receipt by the employer of the payment certificate signed by the engineer (clause 49.4).	Within 56 days after the engineer receives the statement and supporting documents as provided for in the contract (clause 14.7 b).	Within 3 weeks of the assessment date or as agreed upon in the contract data (clause 51.2).
When will the final payment certificate / completion certificate be issued?	The principal agent shall issue the final account within 90 days of the date of practical completion (clause 34.1).	Within 14 days after the contractor has submitted his final statement (clause 49.10).	Within 28 days after receiving the final statement and written discharge in accordance with sub-clause 14.11 [<i>application of final payment certificate</i>]	The project manager certifies completion within one week of completion (clause 30.2). Assessment occurs at completion of the whole of the works (clause 50.1).
When will the final payment certificate be paid?	Within 7 calendar days of the date of issue of the final payment certificate (clause 34.10).	Within 28 days after the payment certificate was issued (clause 49.10).	Within 56 days after the engineer receives the payment certificate (clause 14.7 c).	Payment will happen within 3 weeks of the assessment date or as agree upon in the contract data (clause 51.2).

2.6.2 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 rate¹⁹. Table 2-2 is a comparison of the key features of the four CIDB endorsed construction contracts relevant to the payment of default interest on late payments. From Table 2-2 the following general observations can be made:

1. The circumstances when default interest may be charged are defined.
2. The time from when the interest runs is defined.
3. The rate of interest chargeable is defined in the contracts.

Table 2-2: Interest on late payment

Aspect	JBCC PBA 2007	GCC 2004	FIDIC Red book	NEC3 ECC
Does the contract allow for interest on late payments?	Yes (clause 31.11).	Yes (clause 49.7.2).	Yes (clause 14.8).	Yes (clause 51.2).
Does the contract stipulate when the interest starts to run?	Yes, the interest shall be compounded monthly from the date for payment up to and including the date on which the contractor is to receive payment (clause 31.11).	Interest is payable from the date on which payment should have been made (clause 49.7.2).	Financing charges will be compounded monthly and will run from the specified date of payment (clause 14.8).	Interest is assessed from the date by which the late payment should be made and is included in the first assessment after the late payment is made (clause 51.2).
Interest rate applicable for late payments?	160% of the bank rate applicable when borrowing money from the	The prime overdraft rate certified by the contractor's bankers	Annual rate of three percentage points above the discount rate of the central	Interest is calculated on a daily basis at the interest rate defined

¹⁹ 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)

Aspect	JBCC PBA 2007	GCC 2004	FIDIC Red book	NEC3 ECC
	central or reserve bank of the relevant country (clause 31.11).	(clause 49.7.2).	bank in the country of the currency of payment (clause 14.8).	in the contract data and is compounded annually (clause 51.4).

2.6.3 Payment guarantee

A guarantee can be defined as a contractual undertaking that a certain fact, unconnected with the guarantor's performance or with that of a third person, is or will be as stated or promised to be.

A guarantee impose an absolute liability, that is the giver of a guarantee is bound even if what he / she guaranteed was impossible at the time of contracting or became impossible afterwards.

The giver of a guarantee will not be able to render the impossible possible but where he / she fails to make good the guarantee he / she will be liable for breach of contract (Joubert *et al.* 2003, vol. 5(1) par. 203).

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 price of the 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 Red book 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 this research to determine the following:

1. The frequency of use of payment guarantees in South Africa.

2. In case where payment guarantees are not used, to identify the reasons why contractors do not demand payment guarantees from employers.
3. The level of satisfaction of users of the payment guarantees.

2.6.4 Right to terminate

a. Common law position

The common law position with regard to contractor's right to terminate the contract in the case of non-payment can be summarised as follows:

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*.²⁰ Following from this common law position, a contractor cannot 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.

b. Termination in terms of a cancellation clause (*lex commissoria*)

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:

1. When the party wishes to enforce a cancellation clause, the conditions for its implementation have to be strictly complied with.²¹
2. 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

²⁰ *Hamman v Nortje* 1914 AD 293 at 296

²¹ *De Wet No v Uys No en andere* 1998 (4) SA 694 (T)

required payment, the notice to be given should be an express, extra-judicial announcement and such notice cannot be given impliedly or by notice of motion.²²

3. 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. This follows from the common law position that contractors have to complete the complete construction contract before he will be entitled for payment for the work done.

Table 2-3 is a short comparison between the relevant clauses of the four CIDB endorsed contracts relevant to the suspension of work and / or cancellation of the contract by the contractor where the employer fails to pay an interim payment certificate.

²² *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

Table 2-3: The suspension of work and / or cancellation of the contract by the contractor where the employer fails to pay

Aspect	JBCC PBA 2007	GCC 2004	FIDIC Red book	NEC3 ECC
Is it possible for the contractor to suspend work when the employer fails to make payment?	Yes, clause 31.15. The contractor may suspend the works if the principal agent fails to issue an interim payment certificate.	Although clause 39.1.3 allows for the suspension of the works on the instruction of the engineer by reason of “some default or breach of the contract on the part of the contractor”, the contract does not contain a similar provision that allows the contractor to suspend work in the case where the employer fails to make payment to the contractor.	Yes, clause 16.1 provides that the contractor may suspend work where the engineer fails to certify an interim payment certificate or the employer fail to provide evidence that financial arrangement have been made and are being maintained or where the employer fails to make payment in respect of an advance payment, interim payment certificate or final payment certificate.	No
Number of days notice to be provided where the contractor wants to suspend work where the employer failed to make payment.	Clause 31.15: Not less than 3 working days	Clause 16.1: Not less than 21 calendar days		
Is it possible for the contractor to terminate / cancel the contract if the employer fails to make payment?	Yes, the contractor may terminate the agreement where: Clause 38.1.1: The employer fails to provide a payment guarantee.	Yes, clause 56.1.1.2: The contractor may cancel the contract where the employer persists in failing to pay the contractor the amount due in	Yes, clause 16.2: The contractor shall be entitled to terminate the contract if: 1. The contractor does not receive the reasonable evidence	Yes, clause 91.4: The contractor may terminate if the employer has not paid an amount certified by the project manager within 13 weeks of the date of the

Aspect	JBCC PBA 2007	GCC 2004	FIDIC Red book	NEC3 ECC
	<p>Clause 38.1.6: The employer fails to pay the amount certified in the interim payment certificate or the employer fails to act in resolution to a notice of suspension of the works, or the employer fails to pay the contractor the amount certified in the final payment certificate with 7 (seven) calendar days of the issue of the final payment certificate.</p> <p>Clause 38.1.7: The principal agent fails to issue a statement to the contractor showing the formulation of the amount identified and certified to each n/s subcontractor.</p> <p>Clause 38.18: The principal agent fails to issue any payment certificate.</p> <p>Clause 38.19: The principal agent fails to issue any completion certificate.</p>	<p>terms of any payment certificate issued by the engineer, within the time of payment provided in the contract, or in terms of clause 56.1.1.3 where the employer persists to interfere with or obstruct the issue of any certificate.</p>	<p>in terms of sub-clause 2.4 [employers financial arrangements];</p> <p>2. The engineer fails to issue an interim payment certificate; or</p> <p>3. The employer fails to pay on interim payment certificate.</p>	<p>certificate.</p>

Aspect	JBCC PBA 2007	GCC 2004	FIDIC Red book	NEC3 ECC
Notice periods applicable	Clause 38.2: First the contractor should give a notice of default. If such default should continue for 10 working days the contractor may give notice of termination.	The contractor may, by written notice to the employer, cancel the contract after 14 days notice. (clause 56.1)	<ol style="list-style-type: none"> 1. Failure to comply in terms of sub-clause 2.4 [employers financial arrangements]: 42 days after given notice under sub-clause 16.1 [contractors entitlement to suspend work]; 2. Engineer fails to issue the payment certificate: 56 days after receiving of statement and supporting documents. No notice needed; and 3. Employer fails to pay an interim payment certificate: 42 days after the date for payment has expired. No further notice required. 	Employer fails to pay interim on amount certified by project manager. No notice needed, the contractor may terminate after 13 weeks of the date of the certificate date. (clause 94.1)
Is it possible for the contractor to suspend work when the employer fails to make payment?	Yes, clause 31.15: The contractor may suspend the works if the principal agent fails to pay an interim payment certificate.	Although clause 39.1.3 allows for the suspension of the works on the instruction of the engineer by reason of "some default or breach of the contract on the part of the contractor", the contract does not contain a similar provision that allows the contractor to suspend work in the	Yes, clause 16.1 provides that the contractor may suspend work where the engineer fails to certify an interim payment certificate or the employer fail to provide evidence that financial arrangement have been made and are being maintained or where the employer fails to make	No

Aspect	JBCC PBA 2007	GCC 2004	FIDIC Red book	NEC3 ECC
		case where the employer fails to make payment to the contractor.	payment in respect of an advance payment, interim payment certificate or final payment certificate.	

2.7 Remedies to enforce payment in terms of the CIDB endorsed contract for professional services

The CIDB endorsed contracts for the provision of professional services provide for several possible remedies to enforce payment for construction work duly completed.

The following is a comparison and / or discussion of such remedies.

2.7.1 Right to interim payments

Both the CIDB endorsed contracts for professional services provide for the payment of interim invoices.

Table 2-4 is a comparison of the two CIDB endorsed contracts with regards to payment of interim accounts.

From the comparison made the following general observations are made:

- Both documents provide for interim invoices.
- Invoices can be submitted on a monthly basis.
- Invoices need to be paid within 30 days.

Table 2-4: Comparison of clauses pertaining to interim monthly accounts for fees and reimbursements

Aspect	CIDB PSC 2005	PROCSA 2009
Does the contract allow for interim accounts?	Yes. Remuneration and reimbursement of service providers (clause 14.2).	Yes. Payments (clause 13.1).
Frequency of interim accounts	Monthly (clause 14.2).	Monthly (clause 13.1).
When should the invoice be paid?	Within 30 days (clause 14.2).	Within 30 days (clause 13.2).
Does the contract provide for a notice of dispute in the case where an invoice is disputed?	Yes. Employer to give notice before due date of payment together with the reasons why the invoice or part thereof is disputed. Employer should not delay payment of balance of invoice (clause 14.3).	Yes. The client should give notice with reasons within 30 days and should not delay payment of the undisputed part (clause 13.3).

2.7.2 Right to interest on late payments

Where a party has been deprived of the use of his capital for a period of time the courts accept, without requiring special proof, that such party has suffered a loss. It is also further accepted that in the normal events such party will be compensated for his loss by an amount of *mora* interest.²³

When it comes to the charging of interest on late payments, the following statutes are applicable:

- The Prescribed Rule of Interest Act 55 of 1975, and
- The Usury Act 73 of 1968.

a. The Prescribed Rule of Interest Act 55 of 1975

From a contractor / employer perspective the following principles apply when it comes to the payment of interest on late payments.

1. Interest in terms of Act 55 of 1975 starts to run from the date that judgment has been obtained. In other words, the contractor needs to first obtain a judgment from a court for the outstanding amount and from the date of judgment, interest at the rate as prescribed in the Act (currently 15.5% per annum) starts to run (Visser *et al.* 2003, p. 185).
2. The contractor who has obtained a judgment is from that moment entitled to interest as prescribed. Only under special circumstances may a court order a different rate (higher or lower) to be used for interest calculations. It is not sure what is meant by “special circumstances” (Visser *et al.* 2003, p. 185).
3. Considering common law principles, *mora* interest is simple and should not be compounded (Visser *et al.* 2003, p. 186).

b. The Usury Act 73 of 1968

Act 73 of 1968 limits the rate of interest which may be charged for late payments and further stipulates that the rates used should be disclosed.

²³ *Bellairs v Hodnett and Another* 1978 (1) SA 1109 at 1147C-14

The Act gives the creditor an *ex lege* right to claim *mora* interest. Such interest may be recovered on the initial unpaid amount, for the duration of the delay in payment, at the rate allowed by the Act (Visser *et al.* 2003, p. 186).

Table 2-5 is a comparison of the two CIDB endorsed contracts for professional services.

The following general observations are made:

- Both documents provides for the payment of interest on late payments.
- Interest is payable from the payment due date.
- The rate applicable is the prime interest rate of the consultant’s bank plus 2%.

Table 2-5: Payment of interest on late payments of professional fee accounts

Aspect	CIDB PSC 2005	PROCSA 2009
Does the contract allow for interest on late payments?	Yes (clause 14.2).	Yes (clause 13.2).
Does the contract stipulate when the interest needs to be paid?	Yes. From the due date of payment (clause 14.2).	Yes. From the due date of payment (clause 13.2).
Interest rate applicable for late payments?	The prime interest rate charged by the consultant’s bank plus 2 % (clause 14.2).	“Two (2) percentage points above the rate of interest applicable from time to time to prime borrowers at the consultant’s bank” (clause 13.2).

2.7.3 Written proof of funding available for on-going requirements of the project

Clause 3.3.1 of PROCSA 2009 provides for the provision of written proof of funding available for on-going requirements of the project. The CIDB PSC does not provide for a similar provision.

2.7.4 Suspension and / or termination of the contract as a result of non-payment by the client / employer

Table 2-6 is a comparison of the CIDB endorsed contracts with regard to provisions concerning the suspension and / or termination of services as a result of non-payment by the client / employer. The following general observations can be made:

- PROCSA 2009 in its clause 17 provides expressly for both the suspension of services and the termination of the contract in the case on non-payment by the employer.
- CIDB PSC only provides for the termination of the contract (clause 8.4.3 a).

Table 2-6: Comparison of clauses pertaining to the suspension / termination of services where the employer fails to make payment for services rendered

Aspect	CIDB PSC 2005	PROCSA 2009
Is it possible for the consultant to suspend work when the employer fails to make payments?	No clear right exists to this effect.	Yes (clause 17.4.1).
Number of days notice required where the consultant want to suspend work where the employer fails to make payment.	Not applicable	No information is provided.
Is it possible for the consultant to terminate / cancel the contract if the employer fails to make payment?	Yes, but the service provider needs to provide 30 days written notice (clause 8.4.3a).	Yes, such right is implied in clause 17.1. Notice of breach required whereby employer is requested that the breach be remedied with 14 days.

2.8 Other remedies to enforce payment

2.8.1 Evidence from employer regarding its 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 has to prove that it has access to the funds necessary to pay the contract price. Clause 2.4: “Employer’s Financial Arrangements” reads as follows:

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.

A specific objective of this research is to determine if:

1. This clause could be improved / made more effective,
2. South African contractors would prefer to have similar clauses in the other CIDB endorsed contracts.

2.8.2 Contractor's lien

a. Introduction

A *jus retentionis* (right of retention) entitles the holder of that right to retain possession of property until expenditure of money or monies' worth incurred by him in respect of that property is reimbursed to him.²⁴ Relevant to a contractor, the contractor has two kinds of *liens* to his disposal: enrichment *liens* or debtor and creditor *liens*.²⁵ Where the contractor's expenditure preserved the property or enhanced its market value the contractor has, to the extent of the true owner's enrichment, an enrichment *lien* valid against all comers, including the employer.²⁶ Otherwise the contractor may rely on the debtor and creditor *lien*. Commonly this *lien* is referred to as the contractor's *lien* (Finsen. 2007, p. 67). A contractor's *lien* is his legal right to retain possession of a construction site until the employer has paid to him monies which are lawfully due to

²⁴ *Astralita Estates (Pty) Ltd v Rix* 1984 (1) SA 500

²⁵ *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 SA 77 (A) 85

²⁶ *Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons* 1970 (3) SA 264 (A)

him.²⁷ The *lien* is designed to buttress the contractor's claim for payment and is not a cause of action in itself but a course of resistance should the employer demand repossession of the premises without tendering payment for the work done on it. A contractor's *lien* is separate from and does not cover a retention fund.²⁸

b. Possession

Continued physical control and occupation of the building site is a prerequisite for the exercise by the contractor of its *lien*. A temporary absence, as occurs at the end of a working day, will not interrupt the *lien* provided the contractor remains engaged in the work and in its assertion of its occupation of the site.²⁹ But where work is suspended, and certainly where it is voluntarily abandoned, the *lien* may be lost.³⁰ Where a contractor is wrongfully dispossessed his *lien* will survive if the contractor's possession is reinstated with the *mandament van spolie*.

c. Multiple liens

Possession of the construction site need not be exclusive to one contractor.³¹ Where the employer engages several independent contractors to complete different sections of the work, whether as principals or as subcontractors, each one of them may enjoy a *lien* over the whole or a severable part of the structure, provided each retains possession of his part of the site and asserts his or her rights pertaining to that part of the site against the employer or owner.

d. Waiver

A contractor may waive its *lien*, either before or after the work has been done. An undertaking to someone who advanced funds to the contractor to waive any *liens* in connection with the work for which the funds were destined will not necessarily constitute

²⁷ *Ploughall (Edms) Bpk v Rae* 1971 (1) SA 887

²⁸ *UP Construction v Cousins* 1985 (1) SA 297 (C) 299

²⁹ *Scholtz v Faifer* 1910 TPD 243

³⁰ *Beetge v Drenka Investments (Isando) (Pty) Ltd* 1964 (4) SA 62 (W)

³¹ *Nienaber v Stuckey* 1946 AD 1049

a waiver of the contractor's *ius retentionis* against the owner of the property where the work is done.³²

e. Court's discretion

Notwithstanding the existence of a *lien* a court has the discretion to order the contractor to restore possession of the building site to the employer, subject to adequate security being furnished by the employer for the payment of the outstanding balance of the purchase price owing to the contractor.³³ But such an order is not likely to be made when the contractor holds an architect's certificate in respect of almost the entire amount claimed by the contractor.³⁴

2.8.3 Provisional Sentence

a. Introduction

Provisional sentence, as provided for by Rule 8 of the High Court Rules (the Rules), is an extraordinary procedure which is available to a creditor (the plaintiff) who has liquid documentary proof of his claim against his debtor (the defendant).

The requirements of a document which will found an action for provisional sentence, called a "liquid document", are discussed in detail below, but typical examples are a cheque, acknowledgement of debt or in this case an interim or final payment certificate to a contractor (Erasmus. 2007, p. B1-65).

This procedure is designed to give a plaintiff who is armed with a liquid document, and who accordingly has strong *prima facie* proof of his claim, a speedy provisional judgement without the expense and delay which an ordinary trial action would entail (Erasmus. 2007, p. B1-62).

³² *Ploughall (Edms) Bpk v Rae* 1971 1 SA 887 (W); *NBS Bank Bpk v Dirma Bk* 1998 (1) SA 556 (T)

³³ *Grafton House Ltd v White & Co* 1923 WLD 117; *Spitz v Kesting* 1923 WLD 45. See also *Hotel Victoria (Rhodesia) Ltd v Alexander* 1952

³⁴ SA 637 (SR); *Lamontville African Transport Co (Pty) Ltd v Mtshali* 1953 (1) SA 90 (N); *Hochmetals Africa (Pty) Ltd v Otavi Mining Co Pty Ltd* 1968 (1)

b. A liquid document

A liquid document has been defined as one which evidences by its own terms, without the need for extrinsic evidence, an unconditional acknowledgment of indebtedness in an ascertained sum of money, the payment of which is due.³⁵ The document must be signed, or deemed to be signed, by the defendant or his agent. From this definition it is clear that a liquid document must contain the following three basic qualities:

1. The document must reflect an acknowledgment of indebtedness

It has been held to be sufficient if the acknowledgment of debt is given in respect of an undertaking by the creditor to advance an amount of money in the future, provided the undertaking to advance the money is binding and unconditional in an amount confirmed *ex facie* the document (Erasmus. 2007, p. B1-64).

Where it is clear from the document that the acknowledgment of indebtedness includes not only the existing indebtedness but also possible amounts in the future that may be advanced at the creditor's discretion and these amounts are not specified in the document, the document is not liquid (Erasmus. 2007, p. B1-64).

2. The acknowledgment of debt must be unconditional

An exception to this rule is where payment is subject to the fulfilment of a simple condition. A simple condition is one which is inherently capable of speedy proof by means of an affidavit, for example the failure to pay an instalment of interest on due date, or the giving of a notice (Erasmus. 2007, p. B1-64).

3. The acknowledgment of indebtedness must be for a specific or ascertained sum of money

A document which refers to an unspecified sum cannot be rendered liquid by a certificate of indebtedness; even if a clause in the document says such certificate will be valid proof for purposes of provisional sentence.³⁶ A plaintiff can claim

³⁵ *Rich and Others v Lagerwey* 1974 (4) SA 748 (A) at 754 H

³⁶ *Woolach v Berclays National Bank Ltd, supra*

less than the amount specified in the document, for example where part of it has been paid, without explanation.

c. Payment certificates

Provisional sentence can be granted on a payment certificate because it presents an acknowledgement of debt signed by the employer's duly authorised agent. The construction contract which authorises the architect / engineer or quantity surveyor to issue the certificate need not to be attached to the provisional sentence summons.³⁷

In *Smit v Mouton*³⁸ a summary of the rules relating to certificates can be found which include:

1. The architect is nominated by the employer and acts as the agent of the employer in issuing certificates. He does not act as a quasi arbitrator.³⁹
2. The employer is bound by the act of his agent in issuing certificates. The signing of a certificate is tantamount to the signing of an acknowledgement of debt.
3. As a general rule an employer may not dispute the correctness of a final certificate.⁴⁰
4. The employer is bound to pay in accordance with the tenor of an interim certificate issued in terms of a contract. It is apparently not a defence that work was defective or that the employer has an unliquidated counterclaim for damages. A liquidated counterclaim may be set off against the amount in the certificate.⁴¹

³⁷ *LTA Construction Ltd v Provincial Administration of KwaZulu – Natal* 1997 (1) AllSA 503 (N); *LTA Construction Ltd v Provincial Administration of KwaZulu – Natal* 1997 (1) 1997 (1) SA 633

³⁸ *Smith v Mouton* 1977 (3) SA 9

³⁹ *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321

⁴⁰ *Ocean Diners (Pty) Ltd v Golden Hill Construction CC* 1993 (3) SA 331

⁴¹ *Aliwal North Municipality v Crawford* 1964 (1) SA 344

d. After provisional sentence has been granted

A defendant against whom provisional sentence has been granted must pay the amount of the judgment plus taxed costs, and the plaintiff is entitled to issue a writ and levy execution thereon as in the case of an ordinary judgment. However, against such payment or execution, the defendant can demand security *de restituendo* (ie security from the plaintiff that the plaintiff will be able to repay him if he successfully defends the main action) (Rule 8(9)).

The furnishing of security is an integral part of provisional sentence proceeding, and if the plaintiff fails to do so then the defendant is excused from paying.⁴² The defendant may only enter the principal case if he has paid the judgment in full or if the plaintiff has failed, on demand, to furnish security (Rule 8(10)).

2.8.4 Summary judgement

a. Introduction

Rule 32 of the Rules is a procedure which enables a plaintiff with a clear case to obtain the swift enforcement of his claim against a defendant who has no real defence to that claim. The courts have stressed the fact that the remedy provided by this rule is an extraordinary and stringent remedy because it makes inroads into a defendant's rights to have his case heard and that if summary judgment is granted the effect of the order is to close the doors of the court to the defendant. It is therefore only accorded to a plaintiff who has an unanswerable case because the defendant has no defence to it (Erasmus. 2007, p. B1-206).

b. Claims upon which summary judgment is competent

According to Rule 32(1) a plaintiff is only entitled to claim summary judgment if the defendant has delivered a notice of intention to defend and if the plaintiff's claim falls within one of the following categories:

⁴²CGE Rhoades Construction Co (Pty) Ltd v Provincial Administration, Cape 1976 4 SA 925 C

1. A claim for a liquidated amount in money.
2. A claim based on a liquid document.
3. A claim for delivery of specified movable property.
4. A claim for ejectment.
5. Consequential claims for interest and costs.

Where the plaintiff's summons contains more than one claim and one or some of the claims do not fall within the abovementioned categories (eg a claim for damages) the plaintiff is entitled to claim summary judgment only in respect of those claims which fall within the defined categories set out above. The other claims will then proceed to trial in the ordinary manner.⁴³

c. Court's powers

If the defendant gives security and satisfies the court that he has a *bona fide* defence, the court must give leave to defend in which event the action proceeds in the usual way (Rule 32(7)).

If the defendant does not furnish security and does not satisfy the court that he has a *bona fide* defence, the court may grant summary judgment in favour of the plaintiff (Rule 32(5)). The court has a discretion not to grant summary judgment. A summary judgment is a final judgment and a defendant disenchanted with the result may apply for leave to appeal against the judgment.

2.8.5 Order of court

a. Introduction

It is common practise in South Africa to make an arbitration award an order of court. Section 31 of the Arbitration Act 42 of 1965 provides that an arbitration award could 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 judgment or order to the same effect. After an award has been made an order of the court, the party

⁴³ *Spilhaus & Co Ltd v Coreejees* 1966 (1) SA 525 (C) at 528

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 court, resulting from a successful arbitration award or any other procedure, can enforce the order by applying for the following:

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

b. A writ of execution followed by an attachment of assets of the defaulting employer

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 in the law of jurisdiction⁴⁴.

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 20 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...

(Section 3 of the State Liability Act 20 1957)

In terms of this Act the position of the State therefore differs from that of an ordinary judgment debtor. The Act in its current form contains a blanket ban which effectively places the State and its officials above the law and beyond the very orders which should bind it or hold it accountable (Dugmore, AG. 2005).

⁴⁴*Eilon v Eilon* 1965 (1) SA 703 (A) 725

c. Dingaan Hendrik Nyathi v The MEC, Department of Health, Gauteng and Others

On 2 June 2008 the constitutional court has handed down a judgement that could strengthen the position of a contractor or consultant to whom the State owes money. 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 judgment is that the State is likely to have to comply with judgments 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 were 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*, 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.”

Up to December 2010 no changes to current legislation or new legislation has been effected to allow for the issue of a writ of execution against the State.

2.9 Prompt Payment Legislation: An international perspective

2.9.1 Existing Prompt Payment Legislation

Several countries have enacted acts of parliament in order to overcome problems related to non-payment of contractors and consultants in the building and civil engineering industry. The first country to introduce prompt payment legislation was the United Kingdom with its Housing Grants, Construction and Regeneration Act of 1996. In 1999 the Australians have followed with the Building and Construction Industry Security of Payment Act of 1999 for New South Wales. To date the following countries, or states of countries, have enacted “prompt payment” legislation:

- United Kingdom: Housing Grants, Construction and Regeneration Act 1996 (UK Act)
- Australia, New South Wales: Building and Construction Industry Security of Payment Act 1999 amended in 2002 (NSW Act)
- Australia, Victoria: Building and Construction Industry Security of Payment Act 2002 (Victoria Act)
- New Zealand: The Construction Contracts Act 2002 (NZ Act)
- Australia, Queensland: Building and Construction Industry Payments Act 2004 (Queensland Act)
- Western Australia: Construction Contracts Act 2004 (WA Act)
- Australia, Northern Territory: Construction Contracts (Security of Payment) Act 2004 (NT Act)
- Australia, Tasmania: Building and Construction Industry Security of Payment Act 2009 (Tasmania Act).
- Australia, Australian Capitol Territory: Building and Construction Industry Security of Payment Act 2009 (ACT Act)
- Australia, South Australia: Construction Industry Security of Payment Act 2009 (SA Act)
- Singapore: Building and Construction Industry Security of Payment Act 2004 (Singapore Act)

The following is a short description of the key “prompt payment” features of some of the above mentioned acts:

Housing Grants, Construction and Regeneration Act 1996 (UK Act)

- The UK Act only applies to written construction contracts (Section 107).
- The Section 104 of the UK Act defines a “construction contract” as:
 - “... an agreement with a person for any of the following –

- (a) the carrying out of construction operations;
- (b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;
- (c) providing his own labour, or the labour of others for the carrying out of construction operations.”

and provides that the term shall be taken to include:

“... an agreement –

- (i) to do architectural, design, or surveying work, or
- (ii) provide advice on building, engineering, interior or exterior decoration or on the laying out of landscape,

in relation to construction operations.”

- Sections 113(1) and (6) outlaws “pay-when-paid” clauses except in the case of insolvency.
- The Act contains default provisions regarding the amount of any instalment / stage / periodic payment (Section 109).
- Part II, paragraph 9 of the statutory scheme for England contains detailed procedures for making payments. Notices of non-payment must be in accordance with sections 111 (1) to (3).
- Remedies available to a claimant / payee in the event of non-payment by the respondent / payer include:
 - a. The right to suspend the performance of the payee’s obligations (Section 112).
 - b. The right to refer the breach by the payer’s obligation to adjudication (Section 108).
- In both England and Wales, a payee have a common law right to sue on a debt due basis.

Building and Construction Industry Security of Payment Act 1999 amended in 2002
(NSW Act, Australia)

- The NSW Act applies to any construction contract (Section 7).
- Section 4 defines a “construction contract” as:

“... a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party.”
- Section 6 defines “related good services” as meaning:

“... any of the following goods and services -

 - (a) goods of the following kind -
 - (i) materials and components to form any part of any building, structure or work arising from construction work;
 - (ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;
 - (b) services of the following kind -
 - (i) the provision of labour to carry out construction work;
 - (ii) architectural, design, surveying or quantity surveying services in relation to construction work;
 - (iii) building, engineering, interior or exterior decoration or landscape advisory services in relation to construction work,
 - (c) goods and services of a kind prescribed by regulations for the purpose of the subsection.”
- Section 12 outlaws “pay-when-paid” clauses.
- Section 8 provides for a clear right to payment. Sections 9 and 10 stipulate the manner of calculation of the sums due and section 11 stipulates the date of payment.

- Remedies available to a claimant in the event of non-payment by the respondent include:
 - The right to refer the breach by the respondent's obligation to adjudication (Section 17).
 - The right to suspend the performance of the claimants' obligations (Section 27).
 - The right to sue in on a debt due basis for an unpaid amount [Sections 15(2)(a)(i) and 16(2)(a)(i)].

Building and Construction Industry Security of Payment Act 2002 (Victoria Act, Australia)

- The Victoria Act applies to any construction contract (Section 7).
- Section 4 defines a "construction contract" as:

"... a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party."
- Section 6 defines "related good services" as meaning:

"... any of the following goods and services -

 - (a) goods of the following kind -
 - (i) materials and components to form any part of any building, structure or work arising from construction work;
 - (ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work;
 - (b) services of the following kind -
 - (i) the provision of labour to carry out construction work;
 - (ii) architectural, design, surveying or quantity surveying services in relation to construction work;
 - (iii) building, engineering, interior or exterior decoration or

landscape advisory services in relation to construction work,

(c) goods and services of a kind prescribed by regulations for the purpose of the subsection.”

- Section 13 outlaws “pay-when-paid” clauses.
- Section 9 provides for a clear right to payment. Sections 10 and 11 stipulate the manner of calculation of the sums due and section 12 stipulates the date of payment.
- Remedies available to a claimant in the event of non-payment by the respondent include:
 - The right to suspend the performance of the payee’s obligations (Section 29).
 - The right to refer the breach by the payer’s obligation to adjudication (Section 18).
 - The right to sue in on a debt due basis for an unpaid amount [Sections 16(2)(a)(i) and 17(2)(a)(i)].

The Construction Contracts Act 2002 (NZ Act)

- The NZ Act applies to any construction contract (Section 9).
- The NZ Act, in contract, limits the term “construction contract” to “a contract for carrying out construction work” (Section 5). None of what the NSW and Victoria Acts call, “related goods and services” are covered by the NZ Act.
- Section 13(1) determines that “a conditional payment provision of a construction contract has no legal effect ...”
- Section 16 provides for a clear right to payment. Section 17 stipulates the manner of calculation of the sums due and section 18 stipulates the date of payment.

- Remedies available to a claimant in the event of non-payment by the respondent include:
 - The right to suspend the performance of the payee's obligations (Section 72).
 - The right to refer the breach by the payer's obligation to adjudication (Section 25).
 - The right to sue in on a debt due basis for an unpaid amount [Sections 23(2)(a) and 24(2)(a)].

Building and Construction Industry Payments Act 2004 (Queensland Act, Australia)

- The Queensland Act applies to any construction contract (Section 3).
- The Queensland Act (Section 9 and Schedule 2 and Section 11) defines a "construction contract" and "related goods and services" in essentially the same terms as the NSW and Victoria Acts.
- Section 16 outlaws "pay-when-paid" clauses.
- Section 12 provides for a clear right to payment. Sections 13 and 14 stipulate the manner of calculation of the sums due and section 15 stipulates the date of payment.
- Remedies available to a claimant in the event of non-payment by the respondent include:
 - The right to suspend the performance of the claimant's obligations (Section 33).
 - The right to refer the breach by the respondent's obligation to adjudication (Section 20(2)(a)(ii)).
 - The right to sue in on a debt due basis for an unpaid amount [Sections 19(2)(a)(i) and 20(2)(a)(i)].

Construction Contracts Act 2004 (WA Act)

- Section 3 of the WA Act defines a "construction contract" as:

“... a contract or other agreement whether in writing or not, under which a person (the contractor) has one or more of these obligations –

- (a) to carry out construction work;
 - (b) to supply to the site where construction work is being carried out any goods that are related to construction work by virtue of section 5(1);
 - (c) to provide, on or off the site where construction work is being carried out, professional services that are related to the construction work by virtue of section 5(2);
 - (d) to provide, on the site where construction work is being carried out, on-site services that are related to the construction work by virtue of section 5(3)(b).”
- Section 9 outlaws “pay-when-paid” clauses.
 - Section 15 provides for a clear right to payment. Sections 16 and 17 stipulate the manner of calculation of the sums due and section 18 stipulates the date of payment.
 - Remedies available to a claimant in the event of non-payment by the respondent include:
 - The right to suspend the performance of the claimant’s obligations (Section 42).
 - The right to refer the breach by the respondent’s obligation to adjudication (Section 25).
 - The right to sue in on a debt due basis for an unpaid amount [Sections 15(2)(a)(i) and 16(2)(a)(i)].

Construction Contracts (Security of Payment) Act 2004 (NT Act, Australia)

- The NT Act applies to any construction contract (Section 7).
- Section 5(1) of the NT Act define a “construction contract” as

“... a contract or other agreement whether in writing or not, under which a person (the contractor) has one or more of these obligations –

- (a) to carry out construction work;
 - (b) to supply to the site where construction work is being carried out any goods that are related to construction work;
 - (c) to provide, on or off the site where construction work is being carried out, professional services that are related to the construction ;
 - (d) to provide, on the site where construction work is being carried out, on-site services that are related to the construction work.”
- Section 12 outlaws “pay-when-paid” clauses.
 - Division 2 Section 17 provides for a clear right to payment. Sections 19 and 20 stipulate the manner of calculation of the sums due and the date of payment.
 - Remedies available to a claimant in the event of non-payment by the respondent include:
 - The right to suspend the performance of the claimant's obligations (Section 44).
 - The right to refer the breach by the respondent's obligation to adjudication (Section 27).
 - The right to sue in on a debt due basis for an unpaid amount [Sections 15(2)(a)(i) and 16(2)(a)(i)].
 - An adjudicator's determination may be enforced as a judgement for a debt in a court of competent jurisdiction (Section 45).

Building and Construction Industry Security of Payment Act 2004 (Singapore Act)

- The Singapore Act applies to a written construction contract only (Section 4).
- Section 4 (2)(a) of the Singapore Act determines that the Act does not apply to:

“...any contract for the carrying out of construction work, or the supply of goods or services in relation to, any residential property (within the meaning of the Residential Property Act (Cap. 274)) which do not require the approval of the Commissioner of Building Control under the Building Control Act (Cap. 29)...”

- Section 9 (1) provides that a “pay-when-paid” provision of a contract is unenforceable.
- Section 5 provides for a clear right to payment. Sections 6 and 7 stipulate the manner of calculation of the sums due and section 8 stipulates the date of payment.
- Although the Singapore Act only provides for a right to adjudication in the case of non-payment, the payee have a common law right to sue on a debt due basis.

2.9.2 Current developments in Prompt Payment Legislation

The latest developments in the Prompt Payment Legislation include 3 new acts for Australia (Tasmania, the Australian Capital Territory and Southern Australia) and draft legislation for Malaysia.

The Building and Construction Industry Security of Payment Act 2009 (Tasmania Act)

The Tasmanian Security of Payment Act has commenced operation in December 2009 (McTigue. 2010). A key point of difference between the Tasmanian Act and the security of payment regimes in other Australian jurisdictions (Victoria, New South Wales and Queensland) is that the Tasmanian Act applies to building work or construction work that is performed on residential structures where one party is the owner (Section 5).

The Building and Construction Industry (Security of Payment) Act 2009 (Australian Capitol Territory)

The Act will apply to contracts entered into after 1 July 2010 and is based largely on the NSW legislation. The Act will be reviewed by the relevant Minister on 1 July 2012 (McTigue. 2010).

Construction Industry Security of Payment Act 2009 (South Australia)

The South Australian parliament is yet to proclaim a commencement date for the “Building and Construction Industry Security of Payment Act 2009 (SA)”. The South Australian Act (SA Act) is also based on the NSW legislation.

The SA Act will be reviewed by the relevant Minister at the end of three years following the date on which the SA Act comes into operation (McTigue. 2010).

Construction Industry Payment and Adjudication Act (CIPAA) for Malaysia

The Construction Industry Development Board of Malaysia (CIDB-Malaysia) and Malaysian construction industry is currently in the process of developing a Construction Industry Payment and Adjudication Act (CIPAA) for Malaysia (CIDB Malaysia Official Portal. 2010).

The first draft of the CIPAA Act has the following key features:

- The Act strives to outlaw the practice of “pay-when-paid” and other similar conditional payment provisions from construction contracts (Section 6).
- The Act provides for statutorily implied terms of progress payment but only in the absence of express terms (Section 8).
- The Act provides default mechanisms to establish payment processes and time frames for contracts that do not stipulate appropriate payment terms (Sections 9, 10 and 11).
- The Act provides for procedures when there is payment default. Said procedures should deal with contracts that have or does not have express contractual terms on payment (Section 12).
- The Act introduces a new mechanism for settling construction disputes through an interim but binding dispute resolution process called adjudication (Part III of the Act).
- Lastly, the Act will also provide security and remedial provisions to recover payment not received, which are presently unavailable in the Malaysian construction industry (Part IV of the Act).

2.10 Summary

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).

South African building and construction contractors and consultants have similar problems than their international counterparts when it comes to payment of work completed / services provided. From the surveys conducted by Marx for the CIDB and CESA it is clear that:

- 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; and
- The statements above are applicable to both the South African construction consultant and the contractor.

If one looks at existing remedies in law to obtain payment for outstanding fees / payment certificates, it appears that the obtainment of an order for payment from a court is not necessary the end of the legal process. In the recent past instances have occurred where state departments (and other legal persona) have bluntly refused to obey orders of court. Up to June 2008 it was not possible to obtain an order of execution against the property of the State. This position has changed and although legislation has not been passed to the effect, it is now possible to institute execution steps against the State

Late and non-payment problems have forced countries like the United Kingdom, Singapore, New Zealand and Australia to legislate their construction specific statutory payment security regime. The United Kingdom was first to introduce prompt payment legislation and was followed by the New South Wales state in Australia. The trend has been followed in New Zealand, other states and territories of Australia and Singapore. Except for New Zealand (which is a hybrid of the United Kingdom and New South Wales Acts), the regime in each jurisdiction closely follows either the United Kingdom or the

New South Wales model. Currently, the CIDB-Malaysia and Malaysian construction industry is in the process of developing a CIPAA for Malaysia.

CHAPTER 3

RESEARCH METHODOLOGY

3.1 Introduction

In addition to the literature study, 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 consultants and the other for contractors.

3.2 Population size and response

The questionnaire survey was conducted amongst both contractors and consultants in the South African building and construction industry. The sampling geographic area included all level 5 to 9 contractors registered at the CIDB and all consultants registered at CESA. An e-mail explaining the purpose of the questionnaire together with the relevant questionnaire was mailed to all contractors and consultants in the sampling area. Copies of the explanatory letters and questionnaires are attached as Appendix A1 to A4 respectively. In addition, attorneys, advocates and other legal advisors with expert knowledge in the field of construction law and related matters were also contacted and requested to participate in the survey. Table 3-1 summarises matters pertaining to population size and response:

Sampling group	Total contacted	Successful	Percentage
Contractor's questionnaires to level 5 – 9 CIDB registered contractors	569	48	8.4%
Consultant's questionnaires to CESA registered consultants	274	28	10.2%
Contractor's questionnaires to experts in the field of construction law	5	4	80%
Consultant's questionnaires to experts in the field of construction law	5	4	80%

3.3 Questionnaire design

In conjunction with and under the guidance of the University of Pretoria's Department of Statistics a survey was developed to answer the research problem statement or to test the research hypothesis.

The questionnaire design and administration incorporated considerations of threats to validity and research ethics.

The questionnaire encompassed a series of questions presented in Appendix A3 and A4 respectively. The questionnaire was developed through the following processes to ensure accuracy:

- a) Reviewing the related academic literature, articles, as well as previous relevant researches to identify pertinent variables to the study;
- b) Drafting questionnaire based on the identified variables;
- c) Submitting the draft to the study leader and the Department of Statistics for comment and possible recommendations;
- d) Pre-testing the questionnaire to ensure that the questionnaire is understandable to the respondents; and
- e) Launching the questionnaire to the respondents.

3.4 Structure of the questionnaire

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

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

Section 1 establishes the background information of the respondent.

Section 2 establishes 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 PROCSA 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 Red book. Five rating scales were used ranging from "very low" to "very high".

Section 3 is 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 on-going requirements, payment guarantees, suspension of services and termination of services were rated. For the contractor's questionnaire clauses pertaining to issues of interim payment certificates, payment of interest on late payments, payment guarantees, suspension and / or termination of work were rated. Five scales were used: Very low sufficiency, low sufficiency, average sufficiency, high sufficiency and very high sufficiency.

Section 4 rates the attitude and perceptions of the respondent regarding the effectiveness of litigation in securing payment for professional services and construction work duly executed. The respondent's opinion was measured by using a five point scale ranging from "strongly disagree" to "strongly agree".

Section 5 proposes possible solutions on how to improve current payment practices in the South African construction industry. For both the consultant's and the contractor's questionnaires the respondents' opinion regarding the introduction of statutory prompt payment provisions were measured.

3.5 Data analysis

Completed questionnaires were collected and submitted to the Department of Statistics. The data was subsequently analysed statistically and a content analysis was employed for qualitative results.

CHAPTER 4

FINDINGS OF THE QUESTIONNAIRE SURVEY

Table 4-1 to Table 4-18 present a summary of the findings of the questionnaire survey.

Table 4-1: Respondents perceived knowledge of the CIDB contracts for professional services (Consultants)

How would you rate your knowledge of the following CIDB endorsed contracts for professional services?			Very low	Low	Average	High	Very high
A1	CIDB Standard Professional Services Contract, 2 nd edition, 2005, published by the Construction Industry Development Board of South Africa [CIDB PSC 2005]	No	8	8	16	4	0
		%	22	22	44	11	0
A2	Client / Consultant Professional Services Agreement, 2 nd edition, 2008, published by the Professional Consultants Services Committee c/o JBCC, South Africa [PROCSA 2009]	No	11	11	14	2	1
		%	28	28	36	5	3

Table 4-2: Respondents perceived knowledge of the CIDB contracts for construction work (Contractors)

How would you rate your knowledge of the following CIDB endorsed standard building and construction contracts?			Very low	Low	Average	High	Very high
A1	JBCC Series 2000: Principal Building Agreement, edition 5.0, 2007, published by the Joint Building Contracts Committee, South Africa [JBCC PBA 2007]	No	3	3	34	11	0
		%	6	6	67	22	0
A2	The General Conditions of Contract for Construction Works, 1 st edition, 2004, published by the South African Institution of Civil Engineering [GCC 2004]	No	2	2	31	15	3
		%	4	4	58	28	6
A3	New Engineering Contract 3: The Engineering and Construction Contract, June 2005, published by the Institution of Civil Engineers, United Kingdom [NEC3 ECC]	No	5	5	32	11	3
		%	9	9	57	20	5
A4	Conditions of Contract for Construction for Building and Engineering Works designed by the employer, 1 st edition, 1999, published the International Federation of Consulting Engineers, Switzerland [FIDIC Red book]	No	2	2	34	11	4
		%	4	4	64	21	8

Table 4-3: Sufficiency of clauses pertaining to the rendering of interim monthly accounts for fees and reimbursements (Consultants)

Rate each of the following procedures in respect of their sufficiency to ensure the rendering of interim monthly accounts for fees and reimbursements throughout the duration of the project.							
			Very low sufficiency	Low sufficiency	Average sufficiency	High sufficiency	Very high sufficiency
A1	CIDB PSC 2005: Clause 14.1 Remuneration and reimbursement of services provider	No	2	2	18	9	0
		%	6	6	58	29	0
A2	PROCSA 2009: Clause 13.1 Payments	No	2	2	17	5	2
		%	7	7	61	18	7

Table 4-4: Sufficiency of clauses pertaining to the rendering of interim monthly certificates (Contractors)

Rate each of the following procedures in respect of their sufficiency to ensure on-time and regular issue of interim payment certificates.							
			Very low sufficiency	Low sufficiency	Average sufficiency	High sufficiency	Very high sufficiency
A1	JBCC PBA 2007: Clause 31.0 Interim Payment	No	12	12	31	8	0
		%	19	19	14	13	0
A2	GCC 2004: Clause 49 Interim Payments	No	14	14	29	9	0
		%	21	21	44	14	0
A3	FIDIC Red book: Clause 14: Contract Price and Payment	No	3	3	15	5	0
		%	12	12	58	19	0
A4	NEC3 ECC: Clause 5: Payment	No	4	4	16	3	1
		%	14	14	57	11	4

Table 4-5: Sufficiency of clauses pertaining to the payment of interest on late payment of professional fee accounts (Consultants)

Rate each of the following contract clauses dealing with the payment of interest on late payments of professional fee accounts in respect of their sufficiency to ensure prompt payment of professional fee accounts.							
			Very low sufficiency	Low sufficiency	Average sufficiency	High sufficiency	Very high sufficiency
A1	CIDB PSC 2005: Clause 14.2 Remuneration and reimbursement of services provider	No	6	6	13	10	1
		%	17	17	36	28	3
A2	PROCSA 2009: Clause 13.2 Payments	No	6	6	13	7	2
		%	18	18	38	21	6

Table 4-6: The use of interest on late payment / finance charges provisions and provision of payment guarantees (Consultants)

			Never	Rarely	Often	Always
A1	How often do you / your company charge interest on late payment of professional fee accounts?	No	9	9	5	2
		%	36	36	20	8
A2	How often do you / does your company insists on the provision of payment guarantees from the client?	No	6	6	1	1
		%	43	43	7	7

Table 4-7: Sufficiency of clauses pertaining to the payment of interest on late payment of payment certificates (Contractors)

Rate each of the following contract clauses dealing with the payment of interest on late payments / provision of finance charges for late payments in respect of their sufficiency to ensure prompt payment of the payment certificates							
			Very low sufficiency	Low sufficiency	Average sufficiency	High sufficiency	Very high sufficiency
A1	JBCC PBA 2007: Clause 31.11	No	22	22	3	3	1
		%	43	43	6	6	2
A2	GCC 2004: Clause 49.7.2	No	14	14	6	5	1
		%	35	35	15	13	3
A3	FIDIC Red book: Clause 14.8	No	10	10	11	2	1
		%	29	29	32	6	3
A4	NEC3 ECC: Clause 51.2, 51.3 and 51.4	No	12	12	9	5	1
		%	31	31	23	13	3

Table 4-8: The use of interest on late payment / finance charges provisions and provision of payment guarantees (Contractors)

Findings pertaining to the use of interest on late payment / finance charges provisions and provision of payment guarantees						
			Never	Rarely	Often	Always
A1	How often do you / your company charge interest on late payment of professional fee accounts?	No	28	28	13	7
		%	37	37	17	9
A2	How often do you / does your company insists on the provision of payment guarantees from the client?	No	27	27	18	0
		%	38	38	25	0

Table 4-9: Sufficiency of clauses pertaining to the suspension of services and / or termination of the contract by the consultant as a result of non-payment by the client (Consultants)

The following contract clauses, <i>inter alia</i> , deal with the suspension of services and / or termination of the contract by the consultant as a result of non-payment by the client. Rate the provisions of each in respect of their sufficiency to ensure prompt payment of professional fee accounts.							
			Very low sufficiency	Low sufficiency	Average sufficiency	High sufficiency	Very high sufficiency
A1	CIDB PSC 2005: Clause 14.1 Remuneration and reimbursement of services provider	No	11	11	8	10	0
		%	28	28	20	25	0
A2	PROCSA 2009: Clause 13.1 Payments	No	11	11	7	10	0
		%	28	28	18	26	0

Table 4-10: Sufficiency of clauses pertaining to the suspension of work and / or termination of the contract by the contractor as a result of non-payment by the client (Contractors)

The following contract clauses, <i>inter alia</i> , deal with the suspension of work and / or termination of the contract by the contractor as a result of non-payment by the employer / client. Rate the provisions of each in respect of their sufficiency to ensure prompt payment of the payment certificates.							
			Very low sufficiency	Low sufficiency	Average sufficiency	High sufficiency	Very high sufficiency
A1	JBCC PBA 2007: Clause 38: Termination by the contractor – employer’s default and Clause 31.16.3: Suspension of work	No	3	3	19	13	16
		%	6	6	35	24	30
A2	GCC 2004: Clause 56: Cancellation by the contractor	No	3	3	13	34	2
		%	5	5	24	62	4
A3	FIDIC Red book: Clause 16.1 Contractor’s Entitlement to Suspend Work and Clause 16.2 Termination by contractor	No	3	3	19	26	2
		%	6	6	36	49	4
A4	NEC3 ECC: Clause 91.4: Termination	No	2	2	20	25	3
		%	4	4	38	48	6

Table 4-11: Sufficiency of clauses pertaining to the settlement of disputes (Consultants)

The following contract clauses, <i>inter alia</i> , deal with the settlement of disputes. Rate these provisions in terms of their sufficiency to ensure prompt payment of professional fee accounts.							
			Very low sufficiency	Low sufficiency	Average sufficiency	High sufficiency	Very high sufficiency
A1	CIDB PSC 2005: Clause 12: Resolution of disputes	No	12	12	11	7	0
		%	29	29	26	17	0
A2	PROCSA 2009: Clause 13.1 Payments	No	12	12	10	6	1
		%	29	29	24	15	2

Table 4-12: Sufficiency of clauses pertaining to the settlement of disputes (Contractors)

The following contract clauses, <i>inter alia</i> , deal with the settlement of disputes. Rate each in terms of their sufficiency to ensure prompt payment of payment certificates.							
			Very low sufficiency	Low sufficiency	Average sufficiency	High sufficiency	Very high sufficiency
A1	JBCC PBA 2007: Clause 40: Settlement of disputes	No	2	2	11	38	0
		%	4	4	21	72	0
A2	GCC 2004: Clause 58: Settlement of disputes	No	3	3	11	38	0
		%	5	5	20	69	0
A3	FIDIC Red book: Clause 20: Claims, Disputes and Arbitration	No	1	1	13	34	2
		%	2	2	25	67	4
A4	NEC3 ECC: Option W1: Dispute resolution	No	1	1	8	36	5
		%	2	2	16	71	10

Table 4-13: The attitude and perceptions regarding the effectiveness of litigation in South Africa

(Consultants)

Please rate your opinion in respect of litigation in South Africa aimed at securing payment for professional services rendered.			Strongly disagree	Disagree	Neutral	Agree	Strongly agree
A1	Litigation takes a long time and a successful verdict may often come too late to prevent financial harm to your company	No	0	0	0	8	24
		%	0	0	0	25	75
A2	Because of the high non-recoverable costs of litigation, a successful verdict may often be a paper victory. (A worthless judgement)	No	2	2	0	7	23
		%	6	6	0	21	68
A3	State departments and municipalities often ignore an order of cur and therefore a successful verdict together with an order of court may often be a paper victory. (A worthless judgement)	No	0	0	9	7	16
		%	0	0	28	22	50
A4	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	No	0	0	1	6	25
		%	0	0	3	19	78

Table 4-14: The attitude and perceptions regarding the effectiveness of litigation in South Africa

(Contractors)

Please rate your opinion in respect of the effectiveness of litigation in South Africa in securing payment for construction work duly executed.			Strongly disagree	Disagree	Neutral	Agree	Strongly agree
A1	Litigation takes a long time and a successful verdict may often come too late to prevent financial harm to your company	No	0	0	1	13	38
		%	0	0	2	25	73
A2	Because of the high non-recoverable costs of litigation, a successful verdict may often be a paper victory. (A worthless judgement)	No	0	0	3	15	34
		%	0	0	6	29	65
A3	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)	No	0	0	6	30	16
		%	0	0	12	58	31
A4	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	No	0	0	4	25	23
		%	0	0	8	48	44

Table 4-15: Possible solutions to improve current payment practices in the South African construction industry (Consultants)

What is your attitude and perceptions regarding other possible solutions to improve late payment practices in the South African construction industry.			Strongly disagree	Disagree	Neutral	Agree	Strongly agree
A1	Statutory prompt payment provisions will improve late payment practices in the South African construction industry	No	2	2	13	17	0
		%	6	6	38	50	0
A2	A commission should be established to investigate errant payments	No	5	5	2	17	8
		%	14	14	5	46	22
A3	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)	No	4	4	9	10	8
		%	11	11	26	29	23

Table 4-16: Possible solutions to improve current payment practices in the South African construction industry (Contractors)

What is your attitude and perceptions regarding other possible solutions to improve late payment practices in the South African construction industry.			Strongly disagree	Disagree	Neutral	Agree	Strongly agree
A1	Statutory prompt payment provisions will improve late payment practices in the South African construction industry	No	0	0	0	14	36
		%	0	0	0	28	72
A2	A commission should be established to investigate errant payments	No	0	0	0	8	43
		%	0	0	0	16	84
A3	The CIDB should be enabled to suspend the licenses of defaulting main contractors (main contractors that do not promptly pay subcontractors)	No	0	0	0	8	43
		%	0	0	0	16	84

Table 4-17: Possible prompt payment provisions (Consultants)

To what extent should statutory prompt payment provisions provide for the following:							
		To a very small extent	To a small extent	To an average extent	To a large extent	To a very large extent	
A1	Statutory adjudication or a similar dispute resolution mechanism to ensure swift dispute resolution of payment disputes	No	2	2	2	14	7
		%	7	7	7	52	26
A2	A right to regular payment	No	0	0	3	7	22
		%	0	0	9	22	69
A3	A right to a defined time frame for payment	No	0	0	2	10	20
		%	0	0	6	31	63
A4	A right to interest on late payments	No	1	1	2	11	17
		%	3	3	6	34	53
A5	A restriction of the right to set-off or withhold sums due	No	1	1	4	8	13
		%	4	4	15	30	48
A6	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	No	0	0	2	8	22
		%	0	0	6	25	69
A7	A right to suspend services coupled with the right to reimbursement and additional time as a result of the suspension	No	1	1	0	8	23
		%	3	3	0	24	70
A8	Prohibition of "pay-when-paid" clauses	No	2	2	3	7	15
		%	7	7	10	24	52

Table 4-18: Possible prompt payment provisions (Contractors)

To what extent should statutory prompt payment provisions provide for the following:							
			To a very small extent	To a small extent	To an average extent	To a large extent	To a very large extent
A1	Statutory adjudication or a similar dispute resolution mechanism to ensure swift dispute resolution of payment disputes	No	1	1	0	23	28
		%	2	2	0	43	53
A2	A right to regular payment	No	0	0	2	22	28
		%	0	0	4	42	54
A3	A right to a defined time frame for payment	No	0	0	2	19	31
		%	0	0	4	37	60
A4	A right to interest on late payments	No	1	1	0	33	18
		%	2	2	0	62	34
A5	The provision of escrow accounts, or similar trust accounts, to the benefit of the contractor and for retention money retained from the contractor	No	1	1	4	28	19
		%	2	2	8	53	36
A6	A restriction of the right to set-off or withhold sums due	No	0	0	2	21	29
		%	0	0	4	40	56
A7	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	No	0	0	4	15	33
		%	0	0	8	29	63
A8	Statutory provision for a contractor's lien	No	1	1	5	13	33
		%	2	2	9	25	62
A9	A right to allow for stage payments for material in advance of their arrival on the construction site	No	1	1	4	14	33
		%	2	2	8	26	62
A10	A right to suspend services coupled with the right to reimbursement and additional time as a result of the suspension	No	0	0	6	14	32
		%	0	0	12	27	62
A11	Prohibition of "pay-when-paid" clauses	No	0	0	4	14	34
		%	0	0	8	27	65

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

5.1.1 Conclusions from the literature survey

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 consultants and the contractors.
- South Africa does not have construction specific legislation to address the need for prompt payment of building and civil engineering contractors.
- Obtaining an order for payment from a court is not necessary the end of the legal process to obtain payment for outstanding fees / payment certificates. In the recent past instances have occurred where state departments (and other legal persona) have bluntly refused to obey orders of court. Up to June 2008 it was not possible to obtain an order of execution against the property of the State. In June 2008 the Constitutional Court has declared section 3(2) of the State Liability Act, which limits the State's liability, unconstitutional. In August 2009 the Minister for Justice and Constitutional Development has successfully 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. In the interim, the court had laid down the requirements for execution steps against the State. The requirements was confirmed in *The Department of Transport & Roads, North West Provincial Government and 5 others v Kaulani Civils North (Pty) Ltd and 4 others*

5.1.2 Conclusions from the analysis done on the CIDB endorsed construction documents

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

Interim Payment Certificates

1. Payment certificates are certified by independent persons.
2. The frequency of interim payment certificates is defined.
3. It is clear when the interim payment certificates should be issued by the employer.
4. 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 materials off site.
5. It is clear when the interim payment certificates should be paid by the employer.
6. It is clear when the final payment certificates should be issued by the employer.
7. It is clear when the final payment certificates should be paid by the employer.

Interest on Late Payment

1. All four the CIDB endorsed construction contracts contain provisions that provide for the payment of default interest (“finance charges” in the case of the FIDIC Red book).
2. The circumstances when default interest may be charged are defined.
3. The time from when the interest runs is defined.
4. The rate of interest chargeable is defined.

Payment Guarantee

Of the four CIDB endorsed contract documents, only the FIDIC Red book and the JBCC PBA 2007 contracts expressly provide for the use of payment guarantees.

5.1.3 Conclusions from analysis done on the CIDB endorsed contract documents for professional services

Interim Payment

1. Both documents provide for interim invoices.
2. Invoices can be submitted on a monthly basis.
3. Invoices need to be paid within 30 days.

Interest on Late Payment

1. Both documents provide for the payment of interest on late payments.
2. Interest is payable from the payment due date.
3. The rate applicable is the prime interest rate of the consultant's bank plus 2%.

Payment guarantee and written proof of funding available

1. Clause 3.3.1 of PROCSA 2009 provides for the provision of written proof of funding available for on-going requirements of the project. The CIDB PSC does not contain a similar provision.
2. Clause 3.3.2 of PROCSA 2009 provides for a guarantee for payment of fees and disbursements.

Suspension and / or termination of the contract as a result of non-payment by the client / employer

1. PROCSA 2009 in its clause 17 provides expressly for both the suspension of services and the termination of the contract in the case of non-payment by the employer.
2. CIDB PSC only provides for the termination of the contract (clause 8.4.3 a).

5.1.4 Selected conclusions from the Questionnaire Survey conducted

1. Of the consultants and the contractors surveyed 72% and 74% respectively never or rarely charge interest on late payments.
2. Of the consultants and the contractors surveyed 86% and 76% respectively never or rarely insist on the provision of payment guarantees.
3. 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.
4. Of the consultants surveyed only 12% disagreed with the statement that statutory prompt payment provisions will improve late payment practices in the South African construction industry.

5. Of the contractors surveyed 100% agreed with the statement that statutory prompt payment provisions will improve late payment practices in the South African construction industry.
6. Of the consultants and the contractors surveyed 68% and 100% respectively agreed with the statement that a commission should be established to investigate errant payments.
7. Of the consultants surveyed only 22% 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 subconsultants).
8. Of the contractors surveyed 100% agreed with the statement that the CIDB should be enabled to suspend the licenses of defaulting main contractors (main contractors that do not promptly pay subcontractors).

5.1.5 Conclusions pertaining to research hypothesis

The research was aimed at collecting and analysing data which, upon interpretation, would allow the acceptance or rejection of the following main hypothesis:

“The legal remedies available to the South African building and civil engineering contractor and consultant are effective in enforcing their right of payment for work completed / services performed.”

Three sub-hypothesis were developed in order to test the main hypothesis. The three hypotheses are repeated below for sake of clarity:

Sub-hypothesis 1: “The legal remedies available to the South African building and civil engineering contractor in terms of a CIDB endorsed form of contract for civil engineering and building work are effective in enforcing its right of payment for work completed.”

Sub-hypothesis 2: “The legal remedies available to the South African building and civil engineering consultant in terms of a CIDB endorsed form of contract for the provision of professional services are effective in enforcing its right of payment for services provided.”

Sub-hypothesis 3: “The other legal remedies available to the South African building and civil engineering contractors and consultants are effective in enforcing their right of payment for work completed / services provided.”

From the analysis conducted on the CIDB endorsed documents and the findings of the questionnaire survey conducted it is concluded that the CIDB endorsed documents are effective and sufficient in itself in order to ensure prompt payment of contractors and consultants. In general it could be stated that said documents cannot be improved further in order to make the documents more effective to ensure prompt payment of contractors and consultants. For these reasons sub-hypothesis 1 and 2 are accepted.

It appears from the literature study and the questionnaire survey conducted that the problem pertaining to the non-payment or late payment does not lie with the remedies in terms of the CIDB endorsed documents and other remedies in terms of the South African law, but with the enforcing of said remedies. 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. For these reasons sub-hypothesis 3 is rejected.

5.2 Recommendations

The following is recommended:

1. A commission should be established to investigate errant payments.
2. The South African construction industry should embark on a process of drafting and implementing prompt payment legislation.
3. From the questionnaire survey it appears that said legislation should provide for, inter alia, the following:
 - a. Protection of both the contractor and the consultant.
 - b. Statutory adjudication or a similar dispute resolution mechanism to ensure swift dispute resolution of payment disputes.
 - c. A right to regular payment.
 - d. A right to a defined time frame for payment.
 - e. A right to interest on late payments.

- f. The provision of escrow accounts, or similar trust accounts, to the benefit of the contractor and for retention money retained from the contractor.
- g. A restriction of the right to set-off or to withhold sums due.
- h. Provision for a mechanism that will ensure that an employer cannot withhold payment from a contractor unless he has given an effective notice of his intention to withhold such payment.
- i. Statutory provision for a contractor's lien.
- j. A right to allow for stage payments for material in advance of their arrival on the construction site.
- k. A right to suspend work coupled with the right to reimbursement and additional time as a result of the suspension and remobilisation.
- l. Prohibition of "pay-when-paid" clauses.

5.3 Further research

Some of the findings of this study provide possible directions for further research in the following areas:

1. The research for this study was limited to selected South African building and civil engineering contractors and consultants. The impact that late or non-payment may have on subcontractors and sub consultants were not investigated. In addition and also for further research purposes, it could also be ascertained to what extent subcontractors and sub consultants make use of the CIDB endorsed contract documents. Failure to use the documents could mean that subcontractors and sub consultants will not have access to standard contractual remedies available in the case of late or non-payment of professional fees and payment certificates.
2. As stated earlier it is foreseen that the CPA will also have a major impact on the South African construction and building industry. For the purposes of this study the impact of the CPA and the extent thereof was not investigated. It is proposed that further research should be conducted in order to determine impact of the CPA and the extent thereof on the South African construction and building industry.

3. For this study a first order comparison was made between existing prompt payment legislation in the United Kingdom, Australia, New Zealand and Singapore. It is suggested that more in-debt research should be conducted in order to identify lessons learned from countries that have already implemented prompt payment legislation. The lessons could provide useful guidance to South African legislators if prompt payment legislation is considered.
4. Using the lessons learned in 3, draft prompt payment legislation could be developed specifically for the South African building and construction industry. Said draft legislation could be used as a discussion document between Government and the respective building and construction industry organisations and regulatory bodies.

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ANNEXURE A – RESEARCH PROJECT COVER LETTER: CONSULTANT



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7 May 2010

RESEARCH PROJECT:
WHEN CLIENTS DO NOT PAY: A CRITICAL ANALYSIS OF THE LEGAL REMEDIES
AVAILABLE TO THE SOUTH AFRICAN BUILDING AND CIVIL ENGINEERING
CONSULTANT

We are currently undertaking the above-mentioned research project.

The purpose is to critically analyse the legal remedies available to the South African building and civil engineering consultant to enforce their right of payment for services provided, 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.


It would be greatly appreciated if you could kindly complete the **questionnaire** enclosed. This should take between **fifteen** and **twenty** minutes. After completing it, please e-mail or fax it back to the researcher before 23 May 2010.

For further information, please do not hesitate to contact us as follows:

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We thank you for participating in the research.


.....
Prof MJ Maritz


.....
Mr DC Robertson

ANNEXURE B – QUESTIONNAIRE: CONSULTANT

ANNEXURE C – RESEARCH PROJECT COVER LETTER: CONTRACTOR



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7 May 2010

RESEARCH PROJECT:
WHEN CLIENTS DO NOT PAY: A CRITICAL ANALYSIS OF THE LEGAL REMEDIES
AVAILABLE TO THE SOUTH AFRICAN BUILDING AND CIVIL ENGINEERING
CONTRACTOR

We are currently undertaking the above-mentioned research project.

The purpose is to critically analyse the legal remedies available to the South African building and civil engineering contractors to enforce their right of payment for work completed, 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.


It would be greatly appreciated if you could kindly complete the **questionnaire** enclosed. This should take between **fifteen** and **twenty** minutes. After completing it, please e-mail or fax it back to the researcher before 23 May 2010.

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We thank you for participating in the research.


.....
Prof MJ Maritz


.....
Mr DC Robertson

ANNEXURE D – QUESTIONNAIRE: CONTRACTOR