

What are the legal remedies available to contractors and consultants to enforce payment?

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Smooth cash flow ensures the effective delivery of projects and is fundamental to develop and sustain a healthy, professional and competitive construction industry. The adverse effect of late or non-payment of contractors and consultants are well known to all in the construction industry. Late and non-payment problems have forced countries like the United Kingdom (UK), 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 local building and construction contractors and consultants have the same problems as their international counterparts (if not more so) when it comes to payment of work completed or services rendered. In light of the above this article investigates the legal remedies available to enforce right of payment for work completed or services performed, to determine the effectiveness of the said remedies, and to suggest what possible solutions there are in order to improve payment practices in the South African building and construction industry.

INTRODUCTION

The adverse effects of non-payment and/or late payment by employers or 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). Both reports were in response to, *inter alia*, the problems experienced due to late or non-payment in the construction industry of the United Kingdom (UK). Late and non-payment problems have forced countries like the UK, Singapore, New Zealand and Australia to legislate their construction-specific statutory payment security regime. These legislations purposely enact provisions to address issues on prompt payment in the construction industry to eliminate poor payment practices and to improve the contractor's cash flow.

From a South African perspective it appears from a Construction Industry Development Board (CIDB) survey, conducted by Marx (2009) and Consulting Engineers South Africa (CESA), that South African contractors and consultants have the same problems as their international counterparts when it comes to payment of work completed or services provided. In the

light of the CIDB and CESA findings and the growing international trend to implement construction-specific legislation in order to, *inter alia*, ensure/facilitate prompt payment practices in the construction industry, it has been decided to address, for this article, 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 or services performed, and how effective are they in enforcing said right of payment?"

The research for this article was delimited as follows:

The study was 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 local contractors and consultants were interviewed.

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

- JBCC Series 2000: Principal Building Agreement, edition 5.0, 2007, published by the Joint Building Contracts Committee, South Africa [JBCC PBA]
- The General Conditions of Contract for Construction Works, 1st edition, 2004,



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published by the South African Institution of Civil Engineering [GCC 2004]¹

- New Engineering Contract 3: The Engineering and Construction Contract, June 2005, published by the Institution of Civil Engineers, UK [NEC3 ECC]
- Conditions of Contract for Construction for Building and Engineering Works designed by the Employer, 1st edition, 1999, published by the International Federation of Consulting Engineers, Switzerland [FIDIC Red].

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

- CIDB Standard Professional Services Contract [CIDB PSC]
- Client / Consultant Professional Services Agreement, 2nd edition, published by the Professional Consultants Services Committee c/o JBCC, South Africa (PROCSA 2009).

LITERATURE SURVEY

Marx Report (2009)

Construction Industry Indicators (CIIs) have been developed by the Department of Public Works and the CIDB, with assistance from the Council of Scientific and 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 CIIs measure the performance of the construction industry by measuring client satisfaction with:

1. the project milestones achieved
2. construction costs versus budget
3. contractors' performance
4. consultants' performance
5. the quality of materials used.

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

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

- There was a decrease from 24% to 9% in the number of all projects where payments were made timeously 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. 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. It is of great concern that only 44% of all contractors in 2007 were paid on time within 30 days (Marx 2009, Tables 15 and 17).

With regard to consultants, the following was reported:

- The consultants' fees were paid within 30 days for only 45% to 51% of all projects completed between 2004 and 2007 (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 three months on 14% of all their projects. On 14% of all public private partnership projects the consultants were only paid four 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).
- In 2009 only 52% of all contractors were paid on time, within 30 days, with the metropolitan and regional/district councils being the worst performers (Marx 2011).

Master Builders South Africa (MBSA) Draft Report (2009)

In response to the Marx report, the MBSA conducted 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.

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

- Of all the projects surveyed, those in the Free State reported the most frequent delays in payments (93%), followed by the Northern Cape (74%). The province reporting the least frequent delays was Gauteng (24%). There were also three

provinces in which some projects were listed as "never experiencing delays". These projects were in Gauteng (43%); KwaZulu-Natal (29%) and Mpumalanga (9%).

- Nationally, across all clients (all projects included in the survey), 54% of projects were paid within 30 days, 26% between 31 and 60 days, 13% between 61 and 90 days, 3% between 91 and 120 days and 4% after 120 days.
- Projects handled by the national government and private sector seem to have the best payment record with 85% and 79% of payments respectively made within 30 days. The remaining 15% of national government projects are paid between 31 and 60 days, while some payments in the private sector are delayed for more than 120 days.
- Payments for local and provincial government projects mostly occur between 31 and 60 days. (45% and 44% respectively), with only 38% and 23% of payments respectively made within 30 days from date of invoice. The remaining 15% of local government projects are only paid between 90 and 120 days, and 2% only after 120 days.
- Sub-contractors are also affected by delayed payments, as only 50% of payments were made within 30 days from date of invoice.

CESA Report (June 2009)

An Economic and Capacity Survey is conducted by CESA every six 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 are distributed to all member firms of CESA.

According to the survey of June 2009, consulting engineers reported a percentage fee income outstanding for 90 days or more of 9.5%. The comparative figure for June 2007 was 10.3%, 11.3% for December 2007, 11.1% for June 2008 and 12% for December 2008 (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 were outstanding for 90 days or more. For provincial government the figure was 3.8%, local government 13.2%, state-owned enterprises 1.4%, private sector 11.9% and foreign employers 13% (CESA 2009, Table 15).

Maritz Paper (2007)

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:

- Of the respondents 63% and 26% 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).
- Of the respondents 50% and 13% respectively agree and strongly agree that “allowing all disputed matters to come before adjudication would also reduce payment disputes” (Maritz 2007, Table 2).
- Of the respondents 39% and 30% respectively agree and strongly agree that “South Africa should introduce a Construction Industry Payment and Adjudication Act similar to those in the UK, Australia, New Zealand and Singapore” (Maritz 2007, Table 3).

Maiketso and Maritz Paper (2009)

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 researcher, *inter alia*, reviewed the contractual, institutional and legislative framework for adjudication in South Africa. The following findings are relevant to this paper:

- Of the respondents 75% agreed that “South Africa needs a Payment and Adjudication Act similar to that in the UK”. This finding correlates with the Maritz paper as discussed above (Maiketso *et al* 2009, Table 2).
- Of the respondents 60% agreed that “such legislation should address minimum payment terms, 90% agreed with statutory adjudication, and 95% agreed with remedy in case of non-payment” (Maiketso *et al* 2009, Table 2).

Common-law position of building and civil engineering contractors

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), where 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 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. 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 2003, Vol. 2(1) par 457).

The general principles of the South African law apply to building and construction contracts. In the case of standard construction contracts and where contracts with identical or similar wording have been interpreted by the courts, the courts will consider previous decisions in its judgements.²

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

- The terms of the contract relied upon.
- 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 Another implied term of the contract is 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
- 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 (*quantum meruit*).
- Performance: The contractor must allege and prove that he has done all that was required to be done in terms of the contract.⁵

Statutory position of building and civil engineering contractors

The CIDB Act 38 of 2000 and its regulations

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 practice contractor recognition scheme, and a register of projects linked to a best practice project assessment scheme. Both these registers are

central to the implementation of the integrated strategy.

Payment legislation

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

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

- Housing Grants, Construction and Regeneration Act 1996 – UK
- Building and Construction Industry Security of Payment Acts 1999–2009 (various states) – Australia
- Construction Contracts Act 2002 – New Zealand
- Building and Construction Security of Payment Act 2004 – Singapore.

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

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 allow for interim payments, a claim for partially completed work done would be met with the *exceptio non adimpleti contractus*.⁶ Only upon completion of the work as a whole would the contractor be entitled to payment.

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

This certificate entitles the contractor to payment of the amount certified within a set

number of days. Failing payment, the contractor may sue the employer on the strength of the certificate, and the strength of the certificate alone. The claim would be one based on the express terms of the contract. It is not an enrichment claim, even though the amount may be certified as a “reasonable estimate of the total of the work and materials”.⁷

From the comparison made of the four CIDB-endorsed construction contracts, the following general observations were made:

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

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 provide for the payment of interest in specific circumstances at a quantified rate.⁸

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

- All of the CIDB-endorsed contract documents provide for the payment of default interest (“finance charges”).
- The circumstances when default interest may be charged are defined.
- The time from when interest accrues is defined.
- The rate of interest chargeable is defined.

Payment guarantee

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

Of the four CIDB-endorsed contract documents, only the FIDIC Red and the JBCC PBA contracts expressly provide for the use of payment guarantees. See clause 3.1, JBCC

PBA, and the example clause on page 17 of the guidance notes of the FIDIC Red. Both contracts have *pro forma* payment guarantee forms that could be used by the parties.

Right to terminate

In the case where the work is only partially complete, the contractor’s claim for interim payment of the partially completed work could be met with a counter claim from the employer based on *exceptio non adimpleti contractus*.⁹ 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.

The following aspects should be considered in the case where a contractor wants to leave site or terminate the contract as a result of the employer’s failure to make payment for work completed.

- When the party wishes to enforce a termination clause, the conditions for its implementation have to be strictly complied with.¹⁰
- In the case where it is required by the contractor to give the employer notice of his intention to terminate the contract as a result of the employer’s failure to make the required payment, the notice to be given should be an express, extra-judicial announcement, and such notice cannot be implied or given by notice of motion.¹¹
- In the absence of a contractual termination clause, a contractor will not be able to terminate a contract if an employer fails to make an interim payment. The rationale for this is as follows:
 - In the case of an interim certificate, the contractor has not completed the work in total, and until he has completed the work the contractor has not performed in terms of the contract.
 - If the contractor abandons site, as a result of the non-payment by the employer, the contractor will be in material breach of his obligations to deliver the completed work to the employer.
 - If the contractor terminates the contract, his termination may be held to be a repudiation of the contract, in other words, an indication that he no longer intends to be bound by the terms of the contract, and this would afford the employer the right either to accept such repudiation, bringing the contract to an end, or to refuse to accept the repudiation in which

case the contract remains alive and both parties are obliged to continue to honour their obligations to each other. In either event, the employer would be entitled to such damages as he could show he has sustained as a consequence of the repudiation.

Other remedies to enforce payment

Evidence from the employer regarding financial arrangements for the project

The FIDIC Red provides for evidence to be provided by the employer to the contractor whereby, *inter alia*, the employer proves that it has access to or has 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 the capability of the employer to pay for work completed by the contractor.

Similar provisions could not be found in the JBCC PBA, NEC3 ECC and GCC 2004 documents.

Contractor’s lien

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.¹² Relevant to a contractor, the contractor has two kinds of *liens* at his disposal: enrichment *liens* or debtor and creditor *liens*.¹³ 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.¹⁴ Otherwise the contractor may rely on the debtor and creditor *lien*. Commonly this *lien* is referred to as the contractor’s *lien* (Finsen 2005). 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 him.¹⁵ 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.¹⁶

Provisional sentence

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).

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).

Summary judgement

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 judgement 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).

Order of court

It is common practice in South Africa to make an arbitration award an order of the court. An arbitration award can be made an order of the court of competent jurisdiction by any party.¹⁷ An award that has been made an order of the court can be enforced in the same way as any judgement or order to the same effect. After an award has been made an order of the court, the party enforcing its rights can, for example, issue a writ of execution to be executed by the sheriff of the court.

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

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

QUESTIONNAIRE SURVEY

Introduction

In addition to the literature study for this article, 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.

Population size and response

Two different sets of questionnaire forms were used in the survey; one for consultants and the other for contractors. The sampling geographic area was limited to level 5 to level 9 contractors registered with 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. 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 1 summarises matters pertaining to population size and response.

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 was developed through the following processes to ensure accuracy:

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

- Launching the questionnaire to the respondents.

Structure of the questionnaire

Both the questionnaires for consultants and contractors comprised five distinct sections, as follows:

- **Section 1** established the background information of the respondent.
- **Section 2** established the levels of use and knowledge of the respective CIDB-endorsed contracts. For the consultants' questionnaire the respondents were requested to rate their knowledge and use of the CIDB PSC and the PROCSA 2009. For the contractors' questionnaire respondents were requested to rate their knowledge and use of the JBCC PBA, GCC 2004, NEC3 ECC and FIDIC Red.
- **Section 3** was used to rate the sufficiency of the remedies in terms of the CIDB-endorsed contracts. For the consultants' 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 contractors' 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.
- **Section 4** rated the attitude and perceptions of the respondents regarding the effectiveness of litigation in securing payment for professional services and construction work duly executed.
- **Section 5** proposed possible solutions on how to improve current payment practices in the South African construction industry. For both the consultants' and the contractors' questionnaires the respondents' opinions regarding the introduction of statutory prompt payment

Table 1 Population size and response statistics for the questionnaire survey

| Sampling group | Total contacted | Successful | Percentage |
|---|-----------------|------------|------------|
| Contractors' questionnaires to level 5 – 9 CIDB registered contractors | 569 | 48 | 8.4% |
| Consultants' questionnaires to CESA registered consultants | 274 | 28 | 10.2% |
| Contractors' questionnaires to experts in the field of construction law | 5 | 4 | 80.0% |
| Consultants' questionnaires to experts in the field of construction law | 5 | 4 | 80.0% |

Table 2 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 insist on the provision of payment guarantees from the client? | No | 6 | 6 | 1 | 1 |
| | | % | 43 | 43 | 7 | 7 |

Table 3 Interest on late payment/finance charges provisions and provision of payment guarantees (contractors)

| | | | 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 insist on the provision of payment guarantees from the client? | No | 27 | 27 | 18 | 0 |
| | | % | 38 | 38 | 25 | 0 |

provisions were measured. In addition the respondents were also requested to indicate what the prompt payment process should provide for as a minimum. Considering that there would be a wide range of expected or possible responses, questions that were open-ended were avoided. For most of the questions a 5-point Likert scale ranging from 'very low sufficiency' to 'very high sufficiency' or 'strongly agree' to 'strongly disagree' were used. The

questionnaire was accompanied by a covering letter which explained the reasons for and background of the research.

Data analysis

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

FINDINGS OF THE QUESTIONNAIRE SURVEY

Tables 2 to 9 present a summary of the findings of the questionnaire survey.

CONCLUSIONS AND RECOMMENDATIONS

Selected conclusions from the questionnaire survey conducted

- Some of the most relevant trends indicated by the questionnaire survey are:
- Of the consultants and the contractors surveyed 72% and 74% respectively responded that they never or rarely charge interest on late payments.
 - Of the consultants and the contractors surveyed 86% and 76% respectively responded that they never or rarely insist on the provision of payment guarantees.
 - Both groups of consultants and contractors surveyed regard litigation in South Africa as ineffective in securing payment for professional services and construction work duly executed.
 - Of the consultants surveyed 12% disagreed with the statement that statutory prompt payment provisions will improve late payment practices in the South African construction industry.

Table 4 Attitude and perceptions regarding the effectiveness of litigation (consultants)

| | | | 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 court 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 5 Attitude and perceptions regarding the effectiveness of litigation (contractors)

| | | | 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 |

- 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.
- 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.

- Of the consultants surveyed 22% disagreed with the statement that councils or 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).

- Of the contractors surveyed 100% agreed with the statement that the CIDB should be enabled to suspend the registration of defaulting main contractors (main contractors that do not promptly pay sub-contractors).

Table 6 Possible solutions to improve current payment practices in the construction industry (consultants)

| | | | 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 / membership 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 7 Possible solutions to improve current payment practices in the construction industry (contractors)

| | | | 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 registration of defaulting main contractors (main contractors that do not promptly pay sub-contractors). | No | 0 | 0 | 0 | 8 | 43 |
| | | % | 0 | 0 | 0 | 16 | 84 |

Table 8 Possible prompt payment provisions (consultants)

| | | | 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 9 Possible prompt payment provisions (contractors)

| | | | 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 contractor 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 <i>lien</i> . | 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 |

Recommendations

The following recommendations are proposed:

- A commission should be established to investigate errant payments.
- The South African construction industry should embark on a process of drafting and implementing prompt payment legislation.
- From the questionnaire survey it appears that said legislation should provide for, *inter alia*, the following:
 - Protection of both the contracting and consulting fraternities
 - Statutory adjudication or a similar dispute resolution mechanism to ensure swift dispute resolution of payment disputes
 - A right to regular payment
 - A right to a defined time frame for payment
 - A right to interest on late payments
 - The provision of escrow accounts, or similar trust accounts, to the benefit of the contractor and for retention money retained from the contractor
 - A restriction of the right to set-off or to withhold sums due

- 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
- Statutory provision for a contractor's *lien*
- A right to allow for stage payments for material in advance of their arrival on the construction site
- A right to suspend work coupled with the right to reimbursement and additional time as a result of the suspension and remobilisation
- Prohibition of "pay-when-paid" clauses.

Further research

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

- The impacts that late or non-payment may have on sub-contractors and sub-consultants were not investigated. Further research should be conducted to ascertain to what extent sub-contractors and sub-consultants make use of the

CIDB-endorsed contract documents.

Failure to use the documents could mean that sub-contractors 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.

- The Consumer Protection Act (CPA) will 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 were not investigated. It is proposed that further research should be conducted in order to determine the impact of the CPA and the extent thereof on the South African construction and building industry.
- For this study a first order comparison was made between existing prompt payment legislation in the UK, Australia, New Zealand and Singapore. More in-depth 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.

NOTES

- 1 At the time of the study (2009) the GCC 2004 was researched. Since then, the second edition of the GCC was published in 2010 (GCC 2010). Since the clauses pertaining to non- or late payment are similar to the ones in the GCC 2004, it is the opinion of the authors that the findings relevant to the GCC 2004 are also relevant to the GCC 2010.
- 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)
- 5 *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391
- 6 *Qwa Qwa Regeringsdiens v Martin Harris & Seuns OVS* 2000 (3) SA 339
- 7 *Simmons v Bantoesake Administrasieraad (Vaaldriehoekgebied)* 1979 1 SA 940 (T)
- 8 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).
- 9 *Hauman v Nortje* 1914 AD 293 at 296.
- 10 *De Wet NO v Llys NO en andere* 1998 (4)

- 11 *Shroobree NO Simon* 1999 (2) SA 488 (SE). See also clauses 55.1 and 56.1 of the GCC 2004 and clauses 36.3 and 38.2 of the JBCC PBA
- 12 *Astralita Estates (Pty) Ltd v Rix* 1984 (1) SA 500
- 13 *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 SA 77 (A) 85
- 14 *Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons* 1970 (3) SA 264 (A)
- 15 *Ploughall (Edms) Bpk v Rae* 1971 (1) SA 887
- 16 *UP Construction v Cousins* 1985 (1) SA 297 (C) 299
- 17 Section 31 of the Arbitration Act 42 of 1965

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