

Does the proposed pre-liquidation composition proffer a solution to the No Income No Asset (NINA) debtor's quandary and, if not, what would?*

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OPSOMMING

Bied die voorgestelde akkoord voor likwidasië 'n oplossing tot die Geen Inkomste Geen Bates-skuldenaar se verknorsing en, indien nie, wat sal?

Die artikel handel oor die vraag of die bepalings van die voorgestelde statutêre akkoord voor likwidasië waarskynlik 'n oplossing tot die sogenaamde Geen Inkomste Geen Bates-skuldenaars se verknorsing sal bied. Bestaande skuldverligtingsmaatreëls bied geen verligting aan sodanige skuldenaars nie, ondanks die feit dat dié groep skuldenaars waarskynlik die grootste deel van skuldoortrokke Suid-Afrikaners uitmaak en hul uitsluiting moontlik ongrondwetlik is. Dié vraag word ondersoek aan die hand van bestaande statutêre skuldverligtingsmaatreëls, 'n ondersoek na die bepalings van die voorgestelde prosedure, internasionale beginsels en riglyne en 'n evaluasie van die prosedure binne die konteks van Geen Inkomste Geen Bates-skuldenaars. Daar word tot die gevolgtrekking gekom dat die onderhawige vraag ontkennend beantwoord moet word. Voorstelle vir die pad vorentoe word ook gemaak.

1 INTRODUCTION

The South African Law Reform Commission¹ has proposed that provision be made for a debtor to enter into a pre-liquidation composition² with his or her

* The article is partly based on Coetzee *A comparative reappraisal of debt relief measures for natural person debtors in South Africa* (LLD thesis UP 2015).

1 Hereafter "the Commission". The Commission was formerly known as the South African Law Commission. The Commission published a report titled the *Report on the review of the law of insolvency 2000*. It contained a draft bill as well as an explanatory memorandum – hence the "2000 Insolvency Bill" and "2000 Explanatory memorandum" respectively. The latest versions of the documents are unofficial working copies on file with the author (hereafter "Bill" or "2015 Insolvency Bill" and "2014 Explanatory memorandum" respectively). This article mostly refers to the 2015 Insolvency Bill except where it specifically states that the clause referred to is as provided for in the 2000 Insolvency Bill.

2 The 2015 Insolvency Bill uses the term "liquidation" when referring to both the liquidation of juristic persons and the sequestration of natural persons and partnerships. The title of the proposed measure, namely, "pre-liquidation composition" is confusing as it could mistakenly be interpreted to require a composition as a precondition for liquidation proceedings. A more appropriate title such as "statutory proposal" is suggested.

creditors.³ The proposed measure, which is intended to form part of the proposed Unified Insolvency Act, is supposed to afford debt relief to natural person debtors⁴ who cannot pay their debts,⁵ but who are unable to prove advantage for creditors and are consequently excluded from the liquidation process.⁶

In South African law, there are three statutory debt relief measures available to insolvent or over-indebted natural person debtors. However, many debtors do not qualify for relief in terms of any of these procedures. The majority of this excluded group of debtors, it is argued,⁷ is formed by those with no income and no assets (the so-called No Income No Asset (NINA) debtors).⁸ It is also argued that the exclusion of some insolvent debtors from any form of relief is unconstitutional as it unjustifiably and unfairly discriminates on the basis of the excluded debtors' socio-economic status.⁹ In turn, such discrimination entrenches the duality of the

3 The Commission initially proposed that provision be made for such composition by inserting a new s 74X into the Magistrates' Courts Act 32 of 1944: 2000 *Explanatory memorandum* and 2000 Insolvency Bill Sch 4. This proposal was also included in the report of the Centre for Advanced Corporate and Insolvency Law (SACIL) at the University of Pretoria titled *Final report containing proposals on a unified Insolvency Act* (January 2000) and in the latest version of the Insolvency Bill: see cl 118 of the 2015 Insolvency Bill. In the latter document it is envisaged that the proposed measure be included in the new Unified Insolvency Act and not the Magistrates' Courts Act. The Commission's initial proposal has also been amended in substance; see Roestoff and Jacobs "Statutêre akkoord voor likwidasie: 'n Toereikende skuldenaarremedie" 1997 *De Jure* 189 and Roestoff "Eenvormige insolvensiewetgewing in Suid-Afrika: Moet die administrasiebevel ingesluit word?" 2000 *De Jure* 131ff for discussions of the proposal in the 2000 Insolvency Bill. See further Steyn "Sink or swim? Debt review's ambivalent 'lifeline' – A second sequel to 'a tale of two judgments'" 2012 *PELJ* 220–222; Roestoff and Coetzee "Consumer debt relief in South Africa; Lessons from America and England; and suggestions for the way forward" 2012 *SA Merc LJ* 70–71; Coetzee and Roestoff "Consumer debt relief in South Africa – Should the insolvency system provide for NINA debtors? Lessons from New Zealand" 2013 *Int Insolv R* 199–200; and Boraine and Roestoff "Revisiting the state of consumer insolvency in South Africa after twenty years: The courts' approach, international guidelines and an appeal for urgent law reform" 2014 *THRHR* 527–528 as regards later drafts of the procedure that were yet again amended to the effect contained in the 2015 Insolvency Bill.

4 Companies and close corporations are specifically excluded; cl 118(1).

5 Cl 118(1).

6 See 2014 *Explanatory memorandum* 201 208.

7 Coetzee and Roestoff 2013 *Int Insolv R* 189.

8 Unfortunately, there are no empirical studies as regards the size of the South African NINA group of debtors. Inferences on the scope of the excluded group, therefore, are based on estimates: Coetzee "Is the unequal treatment of debtors in natural person insolvency law justifiable?: A South African exposition" 2016 *Int Insolv R* 36. Included in the NINA concept are the low income and low assets (the so-called Low Income and Low Asset (LILA)) debtors. In 1998, in England, the Department of Constitutional Affairs announced a review of the enforcement of civil court judgments, which amongst others re-evaluated the English administration order scheme. Independent research commissioned by the department identified three types of debtors, namely, the so-called "could pays", "can't pays" (ie, the NINA and LILA debtors) and "won't pays" – see also McKenzie Skene and Walters "Consumer bankruptcy law reform in Great Britain" 2006 *Am Bankr LJ* 477; Roestoff and Renke "Debt relief for consumers – The interaction between insolvency and consumer protection legislation" 2006 *Obiter* 108; and in general, Coetzee and Roestoff 2013 *Int Insolv R* 188.

9 Coetzee 2016 *Int Insolv R* 36.

South African economy – by keeping the indigent in a state of perpetual poverty.¹⁰

It is apparent from the Commission's proposals that it is mindful of the marginalisation of some debtors and the proposed pre-liquidation procedure reflects an effort to address such relegation. What must be determined is whether the Commission's proposals will reach their objective of assisting insolvent debtors who do not qualify for existing statutory debt relief procedures. The aim of this article is to attempt such a determination. Therefore, after providing a brief overview of existing debt relief measures for natural persons in order to illustrate the exclusion of the NINA group of debtors, the article discusses and analyses the proposed pre-liquidation composition procedure as a possible solution to the plight of this group of debtors. Although it is not the main focus of the article, the question whether or not the Commission's proposals conform to international principles and guidelines in relation to natural person insolvency is also considered. In this respect, the most recent authoritative report, namely, the 2011 World Bank¹¹ *Report on the treatment of the insolvency of natural persons*, serves as the primary source. The two editions¹² of the International Federation of Insolvency Professionals'¹³ *Consumer debt report: Report of findings and recommendations*, are referred to as a subtext where relevant. The article ends with conclusions and some suggestions for the way forward.

2 STATUTORY DEBT RELIEF MEASURES IN SOUTH AFRICA

Currently, there are three statutory debt relief measures available to over-committed debtors.¹⁴ These procedures stem from various pieces of legislation and only the sequestration procedure¹⁵ in terms of the Insolvency Act¹⁶ provides for a discharge of pre-insolvency debt.¹⁷ Since successful sequestration proceedings lead to a discharge of pre-sequestration debt, it is deemed to be the primary South African debt relief measure.¹⁸ However, a discharge is not the main aim of the procedure and merely a consequence thereof.¹⁹ In order to qualify for the "privilege" of a sequestration order and therefore also for the eventual discharge that it brings about, the applicant has to prove, amongst others, that sequestration will be to the advantage of creditors.²⁰ As Erasmus J remarked: "[T]he whole tenor of the Act, inasmuch as it directly relates to sequestration proceedings is

10 *Idem* 54.

11 World Bank Insolvency and Creditor/Debtor Regimes Task Force Working Group (hereafter "World Bank").

12 In 2001 and 2011 respectively.

13 Hereafter "INSOL International". The second edition of the report is mostly an expansion and clarification of the first report, accompanied by country reports: Van Appeldoorn in the foreword to the 2011 report.

14 See Steyn *Statutory regulation of forced sale of the home in South Africa* (LLD thesis UP 2012) 349ff for a comprehensive explanation and consideration of the statutory measures.

15 The sequestration procedure can be described as an asset liquidation procedure.

16 24 of 1936.

17 S 129.

18 See Coetzee and Roestoff 2013 *Int Insolv R* 193.

19 See *Ex parte Ford* 2009 3 SA 376 (WCC) 383 and *Ex parte Shmukler-Tshiko* 2013 JOL 29999 (GSJ) in general.

20 See ss 6, 10 and 12.

aimed at obtaining a pecuniary benefit for creditors.”²¹ This results in many debtors being excluded from the procedure. The other two statutory debt relief measures, which are (in light of the sequestration procedure) regarded as alternative measures, are the administration order procedure in terms of section 74 of the Magistrates’ Courts Act and the debt review procedure in terms of section 86 of the National Credit Act.²² Both these procedures are mainly repayment plans and do not provide any actual debt relief in the form of a discharge. It seems that these (alternative) procedures were not intended as remedies for hopeless financial situations and were devised to assist only the “mildly” over-indebted during a period of temporary financial misfortune. Indeed, the majority of hopelessly over-indebted natural persons do not have access to any statutory debt relief measures due to the cumulative effect of the differentiation brought about by the entry requirements of the individual procedures. In brief, the major stumbling block in obtaining a sequestration order is the already-mentioned “advantage for creditors” requirement. As the sequestration procedure is, in essence, an asset liquidation process, it differentiates between debtors on the basis of those with and those without assets. As far as the administration order procedure is concerned, only debtors with less than R50 000 in outstanding debts are allowed access to the procedure.²³ Consequently, this measure excludes those with outstanding debt of more than the threshold from its application. There are a number of obstacles regarding access to the debt review procedure, amongst others, that only credit agreements as defined in the NCA are subject to the procedure²⁴ and that agreements in terms of which credit providers have commenced individual enforcement procedures are excluded.²⁵ However, more relevant to the present discussion is the fact that both alternative procedures indirectly require the debtor to have some form of disposable income available, thus once again drawing a distinction between those debtors “with” and those “without” (income in this instance).²⁶ As was noted in the introduction to the article and is illustrated by the above explanation, the majority of debtors who are excluded from the broader natural person insolvency system resort under the NINA category of debtors.

3 PROPOSED PRE-LIQUIDATION COMPOSITION PROCEDURE

3.1 Proposed provisions, some commentary on the procedure and international principles and guidelines

The 2015 version of the proposed pre-liquidation composition procedure basically provides for a binding composition between a debtor who cannot pay his or her debts and creditors, where a debtor’s total debt amounts to less than R200 000,²⁷ if

21 *BP Southern African (Pty) Ltd v Furstenburg* 1966 1 SA 717 (O) 720.

22 34 of 2005 (“the NCA”). The consumer credit industry, including the debt review procedure, is regulated by the National Credit Regulator, an independent statutory body established through the NCA. The National Credit Regulator is only subject to the Constitution of the Republic of South Africa, 1996 and the law; s 12.

23 S 74(1)(b) read together with GN R1411 in *GG* 19435 of 30 October 1998.

24 See s 4.

25 See s 86(2).

26 See Coetzee and Roestoff 2013 *Int Insolv R* para III for a detailed discussion of the individual procedures’ entry requirements as well as their cumulative effect.

27 Cl 118(1). There was no monetary threshold in the 2000 Insolvency Bill. It is not clear why the threshold was included, especially since the credit industry is now accustomed to unlimited amounts of debt being restructured by means of the debt review procedure.

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accepted by the required majority in number and two-thirds in value of the concurrent creditors who vote on the composition.²⁸

It is clear that the procedure is aimed at negotiated settlements between parties. These procedures offer many (theoretical) advantages, for instance reduced stigma, lower costs and increased flexibility.²⁹ However, the World Bank *Report* states that the benefits of these endeavours are mostly illusory.³⁰ Some of the reasons for the scepticism are that it is difficult to reach agreement with all creditors and that informal procedures are usually plagued by delays. There is a further risk of creditors pressuring debtors to enter into non-viable plans. Nevertheless, the World Bank *Report* acknowledges that if such measures are employed, certain elements may enhance its effectiveness, but even then only those who experience mild or temporary financial difficulty are likely to succeed.³¹ As regards the proposed pre-liquidation procedure, the fact that it would render voluntary settlements binding on the minority and passive creditors is internationally regarded as an element that may enhance negotiated settlements.³² Also, the test to determine whether a debtor is “unable to pay debts” as defined in clause 2 includes the internationally-favoured liquidity test.³³

The Commission proposes that the debtor should initiate the pre-liquidation composition process by lodging a signed copy of the composition and a sworn statement with an administrator.³⁴ Administrators are to supervise the procedure³⁵ and must determine a date for the questioning of the debtor and the consideration of the composition by creditors.³⁶ This will take place at a

Further, as the courts are not involved, jurisdictional issues could not be the reason therefor.

28 Cl 118(17). Roestoff and Jacobs 1997 *De Jure* 195 and 207 submit that a mere majority in value and number is sufficient.

29 See World Bank *Report* 45–46 129 as regards the advantages of negotiated settlements.

30 *Idem* 45ff.

31 *Idem* 48–49 130.

32 See Coetzee *LLD thesis* 98 for a summary of internationally-favoured principles in this respect.

33 Cl 2(1) provides that “[a] debtor is unable to pay its debts upon proof that the debtor is generally unable to pay debts which are due and payable, or proof that the debtors’ liabilities exceed the value of the debtor’s assets”. See World Bank *Report* 62–63.

34 Cl 118(1). Such an offer may only be made once every six months. Once a composition is lodged, the debtor must not incur further debt without informing the prospective creditor of the pending composition and providing the insolvency practitioner with particulars concerning such debt: cl 118(3). It therefore seems that insolvency practitioners will act as intermediaries. A debtor must further not alienate, encumber or voluntarily dispose of assets that are made available to creditors in terms of the composition or act in any manner which can impede compliance therewith: cl 118(4).

35 See cl 118 in general. An administrator must not be disqualified from being a liquidator in terms of s 69 (s 69, amongst others, requires that the administrator must be part of a professional body that is recognised by the minister); must have agreed to act as such; and must have furnished security to the satisfaction of the Master: see cl 118(1). Administrators are entitled to remuneration payable in terms of the composition: cl 118(18)(c).

36 Cl 118(6). The administrator may also, at any time on application by the debtor or an interested person, direct the debtor to appear for further questioning as the court may consider necessary on notice to creditors: cl 118(19)(a). The reference to “court” is an obvious error.

hearing³⁷ which must proceed at a location that is accessible and convenient to creditors.³⁸

The proposed provisions further provide that no creditor may, without the court's permission, institute any action against the debtor or apply for the liquidation of his or her estate between the determination of a date for a hearing and the conclusion thereof.³⁹ A moratorium on debt enforcement is in line with international principles, although it should become effective once a debtor applies for the procedure.⁴⁰ The administrator will preside at the hearing where claims will be proven⁴¹ and, if needed, the debtor will be interrogated by the administrator, creditors and any other interested parties (with the permission of the administrator) as regards his or her assets, liabilities, present and future income (where applicable and including that of his or her spouse living with him or her), standard of living and the possibility of living more economically, and any other matter that the administrator may deem relevant.⁴² Once the composition has been accepted,⁴³ the administrator must certify it as such and send the certificate to the Master and creditors. Once the certificate has been sent, the composition is binding on all creditors who received notice of or who have appeared at the hearing.⁴⁴ However, in line with international principles and guidelines,⁴⁵ the claims or rights of secured or preferent creditors are only subject to the composition if they

37 Cl 118(10). Furthermore, such provision may exclude many destitute debtors from applying for the procedure in instances where they need to travel and do not have the financial means to do so. It would be more appropriate to follow the debtor's domicile.

38 The administrator must inform creditors of the time, date and location of the hearing at least 14 days prior thereto: cl 118(7). The fact that the location must be accessible to creditors is not practical as various creditors with different domiciles may be involved.

39 Cl 118(23). Where the estate of the debtor was liquidated before he or she complied with the composition, creditors' claims are restored to the extent that they have not been satisfied: cl 118(21).

40 INSOL International *Report* (2001) 16–17 and (2011) 17.

41 See further cl 118(11)–(13). A creditor may, by written power of attorney, authorise any person to appear at the hearing on his or her behalf: cl 118(14).

42 Cl 118(10)(e). The administrator may defer the hearing and the proposed composition may, with the debtor's permission, be amended or revoked: cl 118(15).

43 A composition may not be accepted where a creditor shows, to the satisfaction of the administrator, that one creditor will benefit over another while he or she would not have been entitled thereto on liquidation of the debtor's estate: cl 118(16).

44 Cl 118(17). After the composition has been accepted, the administrator must with six month intervals send an account of receipts, expenses and payments to creditors and the Master: cl 118(17)(a). If the Master is of the opinion that the account is incorrect, contains an improper charge or that the administrator has not acted in good faith or was negligent or unreasonable in incurring any costs in the account and that it should be amended, he or she may direct the administrator to do so and may further provide such directions in relation thereto as he or she may deem fit: cl 118(17)(b). The provisions of cls 89–92, 96(5), 96(7), 96(10) and (11) and 179 apply with the necessary amendments to an administrator: cl 118(17)(c). The clauses deal with bank accounts, investments, moneys belonging to the insolvent estate and estate accounts, distributions and contribution, except for cl 179 that deals with the review of proceedings. Cl 118(18)(a) provides that where provision is made for payment in instalments or otherwise, the composition has the effect of an order in terms of s 65 of the Magistrates' Courts Act in relation to such payments. Furthermore, any person who receives payments on behalf of creditors or a creditor who is entitled to benefit have the rights of a judgment creditor in terms of s 65; cl 118(18)(b).

45 World Bank *Report* 105–107 137–138.

consented thereto in writing.⁴⁶ The administrator may authorise the debtor, who on reasonable grounds is not able to comply with the composition, to lodge an amended composition.⁴⁷ The proposed provision for plan modification is in line with international principles and guidelines.⁴⁸

If the required majority of creditors do not accept the composition and the debtor cannot pay substantially more than what is offered in the composition, the second part of the procedure could be employed. In this respect, the (latest) proposal is that⁴⁹

- “(a) the administrator must declare that the proceedings in terms of this have ceased and that the debtor is once again in the position he or she was prior to the commencement thereof and lodge a copy of the declaration with the Master and known creditors by standard notice;⁵⁰ and
- (b) the Master⁵¹ may upon application by the debtor grant a discharge of debts of the debtor other than secured or preferred debts if –
 - (i) the debtor satisfies the Master that the administrator and all known creditors were given standard notice of the application for the discharge with a copy of the debtor’s application at least 28 days before the application to the Master; and
 - (ii) the Master is satisfied after consideration of the comments, if any, by creditors and the administrator and the application by the debtor –
 - (aa) that the proposed composition was the best offer which the debtor could make to creditors;
 - (bb) that the inability of the debtor to pay debts in full was not caused by criminal or inappropriate behaviour by the debtor;
 - (cc) that the debtor does not qualify to apply for an administration order in terms of section 74 of the Magistrates’ Courts Act 32 of 1944”.⁵²

⁴⁶ Cl 118(7).

⁴⁷ Cl 118(19)(b)(ii). The administrator may also revoke the composition in certain instances: cl 118(19)(b). A composition may be revoked for the following reasons: Where the debtor fails to comply with obligations in terms of the composition; where the debtor renders false information in his statement or during his questioning; and where the debtor benefits a creditor who is not in terms of the composition entitled thereto: cl 118(19)(c). Any creditor entitled to a benefit in terms of the composition may, on 14 days’ notice to the debtor, apply to the administrator to revoke the composition where the debtor does not comply therewith. Such creditor must lodge an affidavit in support of his or her application and the administrator must order the revocation if the debtor did not substantially comply with his obligations: cl 118(20). Once a composition is revoked, creditors’ claims are restored to the extent that they have not been satisfied: cl 118(21).

⁴⁸ World Bank *Report* 83–84 134–135. See also Boraine and Roestoff 2014 *THRHR* 539.

⁴⁹ Cl 118(22). The Commission’s proposal in the 2000 Insolvency Bill afforded the debtor the option of converting to liquidation and rehabilitation in terms of the proposed Insolvency Act in instances where the composition was not accepted by the required majority. For criticism of this proposal, see Roestoff and Jacobs 1997 *De Jure* 207 and Roestoff 2000 *De Jure* 131. The commentators, amongst others, submitted that the composition should lapse if not accepted by the required majority and that a debtor whose estate does not justify a *concursum creditorum* should fall back on existing debtors’ remedies. This submission was made as the writers foresaw possible abuse of the procedure as it could be used as a tool to obtain a liquidation order by circumventing the advantage for creditors’ requirement in the voluntary liquidation procedure. The commentators’ concerns have been addressed in the 2015 Insolvency Bill.

⁵⁰ In line with commentators’ proposals; *ibid*.

⁵¹ The Master was decided upon as a court application would be too costly. A decision by the Master is subject to review; 2014 *Explanatory memorandum* 209.

⁵² It appears strange that the debt review procedure in terms of the NCA is not mentioned.

The fact that the procedure provides for the possibility of formal procedures where negotiations fail is in line with international principles and guidelines.⁵³ However, it is unfortunate that the moratorium lapses at the time when the administrator declares that the proceedings have ceased even in instances where the debtor intends to apply to the Master for a discharge. This is because the proposal does not provide for the extension of the moratorium in such circumstances.

As regards the supervision of the procedure, the courts are to a large extent excluded from overseeing the process, which is in line with international principles and guidelines.⁵⁴ It is unfortunate that the proposed pre-liquidation procedure does not provide for a government regulator to oversee the procedure and no provision is made for low or cost-free assistance. This is because the World Bank *Report* notes that in countries where negotiated procedures are most successful, one of two elements can generally be detected – either negotiations are overseen or facilitated by a persuasive government regulator, or a central, well-established counselling agency has established productive relationships with creditors. The World Bank *Report* suggests that the assistance must be professional and low-cost or free.⁵⁵

3 2 Evaluation of the proposed pre-liquidation procedure in context of NINA debtors

Of special interest to the article is that, at first glance, the proposed provisions create the impression that they have the potential to provide the presently marginalised NINA group of debtors with a route to a discharge. In fact, the 2014 *Explanatory memorandum* submits that, in line with international developments in insolvency law, the procedure is intended to afford those who do not qualify for liquidation proceedings with “an opportunity for a fresh start which entails a discharge of debts”. However, although sub-clause 22 was probably inserted with the NINA category of debtors in mind, the proposed procedure most certainly is not suited to their needs. The major problem with the procedure in relation to NINA estates is that it does not make sense to force such debtors through its negotiation phase as they do not have any negotiating power. This is because they do not own, or have the expectation of gaining, anything of value to offer creditors. As the World Bank *Report* cautions, only debtors who experience mild or temporary financial difficulty are expected to succeed in negotiations and NINA debtors do not fall into this category. Also, as negotiations are doomed from the outset, the costs involved, for instance that of the administrator and insolvency practitioner as well as travelling expenses (as credit providers’ domiciles need to be followed) in employing the negotiation part of the procedure will all be for naught. Furthermore, NINA debtors are not in a position to finance the procedure and, in contrast with international principles and guidelines, no provision is made for free assistance to such debtors. Administrators would further not be willing to set security where there is insufficient value in the estate to cover costs. In short, only the discharge part of the proposed pre-liquidation procedure is suited to NINA circumstances, but it can only be accessed through the first (unsuitable) part of the procedure – which NINA debtors cannot afford. Therefore, the World Bank *Report*’s sentiment that the benefits of negotiated settlements

53 World Bank *Report* 48–49 130.

54 *Idem* 55–56.

55 *Idem* 48–49 130.

are mostly illusory is most relevant to and best illustrated by the plight of South African NINA debtors.

4 WAY FORWARD AND CONCLUDING REMARKS

The Commission's proposed pre-liquidation composition procedure has the potential to encourage credit providers rather to opt for a negotiated solution in instances where it would probably result in a better return (for creditors) when compared to the employment of one of the existing statutory debt relief measures. Although the World Bank *Report* generally regards such undertakings as wasteful, when measured against international principles and guidelines, the proposed procedure has various positive attributes that may potentially increase its effectiveness. These include provisions ensuring that passive creditors are unable to hinder agreements and that formal procedures could be invoked where negotiations fail. Unfortunately, the moratorium on debt enforcement does not take effect once an application is lodged and lapses even in instances where a debtor intends to apply to the Master for a discharge. Furthermore, no provision is made for legal aid or debt counselling and costs may pose an obstacle to solving financial problems by making use of the procedure.

The Commission's initiative in developing the proposed procedure is commendable in that it mostly conforms to international principles and guidelines. In addition, its implementation would be ground-breaking as it migrates from the South African natural person insolvency system's obsession with advantage for creditors. However, it will unfortunately not provide an effective debt relief measure for NINA estates. This is despite the fact that it was devised to assist those who do not qualify for liquidation proceedings, the majority of which is formed by the NINA group. In fact, the proposed provisions will (contrary to their objective) assist only those who already have some form of statutory recourse, in the form of existing primary and/or secondary debt relief measures, available. This is mainly because debtors need some form of negotiating power, namely, income and/or assets (which would generally render them suitable candidates for existing procedures) to succeed in the negotiation phase of the proposed procedure. Also, the second part of the procedure, which makes provision for a discharge by the Master once negotiations have failed (and which have the potential to assist NINA debtors) will only be accessible to NINA debtors once they have proceeded through the negotatory negotiation phase. Over and above the reservation relating to unsuitability, the procedure involves costs which would result in waste where it is clear that the first part of the procedure would in all probability be unsuccessful. NINA debtors further do not have the means to pay for such (unnecessary) expenses.

Consequently, it is recommended that the proposed pre-liquidation composition procedure be removed from the Insolvency Bill as it only adds to the myriad of existing measures already available to individuals with assets and/or income. Existing measures should rather be combined and refined than to add another layer to the already-confusing situation as regards standing measures. In relation to NINA debtors, it is proposed that a *sui generis* procedure should rather be implemented to cater for this group's specific needs. In this respect, the National Credit Regulator could be considered as a supervising body as it already regulates the consumer credit landscape in South Africa, which includes the debt review procedure. When devising such measure, special attention should be given to minimise the costs relating to the procedure as NINA debtors should have access to cost-free assistance.

Construction works: Defects liability before and after the issuing of the final completion certificate*

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OPSOMMING

Konstruksiewerke: Aanspreeklikheid vir gebreke voor en na uitreiking van die finale voltooiingsertifikaat

Aanspreeklikheidsbepalings vir gebreke in konstruksiewerke verskil aansienlik van mekaar in die bepalinge wat alledaags in die kommersiële omgewing gebruik word. Aanspreeklikheid vir gebreke in konstruksiewerke word in standaardvormkontrakte geregleer volgens die verskillende voltooiingstydperke. In hierdie artikel word die verskillende aanspreeklikheidsperiodes of voltooiingstydperke soos vervat in die *JBCC* en *GCC* met mekaar vergelyk. Daar word kortliks ook verwys na die assessering van 'n eis vir skadevergoeding gebaseer op kontrakbreuk asook deliktuele aanspreeklikheid en wat kontrakteurs kan doen ten einde moontlike toekomstige eise te vermy of te beperk.

1 INTRODUCTION

1.1 General

Procurement is the process which creates, manages and fulfils contracts relating to the provision of goods, services and construction works or disposals, or any combination thereof. Procurement is a key process in the delivery and maintenance of construction works as organisations invariably require goods and services from other organisations to satisfy their needs.

There is seldom a direct acquisition of construction works as client needs vary considerably. Professional services are required, as necessary, to plan, budget, conduct condition assessments of existing works, scope requirements in response to the owner or operator's brief, propose solutions, evaluate alternative solutions, develop the design for the selected solution, produce production information enabling construction and confirm that design intent is met during construction.¹

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¹ Maritz and Putlitz "Recent developments in standard construction procurement documents in South Africa" 2014, paper presented at ICEC IX World congress 20–22 October 2014.

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For the design intent to be met the works must be handed over by the contractor to the employer, free of defects. Defects in construction projects are a persistently worrying problem despite continually improving technology, education and legislation.² The South African construction industry is not an exception. Quality of construction is determined by the management and operative capabilities of the contractor, and by the supervisory capabilities provided by the designer with regard to the standards required. The amount of supervision required depends on the nature of the works. The building of a house may require visits every two weeks; while engineering operations may require constant attention from a resident staff.³ This is implied in contractual documents such as the local standard-form construction contracts of the Joint Building Contracts Committee⁴ and the General Conditions of Contract,⁵ both developed through consultative processes among constituent representative groups under the auspices of the JBCC and the South African Institution of Civil Engineering⁶ respectively, thereby reflecting current South African industry norms and practices with regard to, *inter alia*, defects management.

Procurement documents should provide clear conditions explaining obligations, roles and responsibilities and payment conditions to keep risks to a minimum. In addition to providing clarity, the contract must divide the risks equitably between the contractor and the employer. The risk allocation must be balanced with the aim of keeping the contract fair. A fair contract promotes a successful project.⁷

Notwithstanding the foregoing, construction contracts are often breached by either the contractor or the employer in innumerable ways. In order to place the prejudiced party in the position where he should have been if it was not for the failure of the defaulting party, contractual remedies are available. For instance, where there are defects in the contract works, that is to say where the works itself, or the materials used, or the workmanship is not in accordance with the contract, the employer may claim damages from the contractor.⁸

The contractor's first and most obvious obligation is to carry out the agreed works and to do so with satisfactory materials and workmanship.⁹ It is implied by law that materials and workmanship will be free from defects and suitable for

In *MSC Depots (Pty) Ltd v WK Construction (Pty) Ltd* 2011 2 SA 417 (ECP) confirmed in *MSC Depots (Pty) Ltd v WK Construction (Pty) Ltd* 2011 JDR 0678 (SCA) counsel for the appellant argued that if a design is defective it is impossible for the contractor to act with "due diligence" or "due skill". However, the court did not consider the fact that the design was defective because it did not have an effect on the legal issue before the court.

2 Although the Consumer Protection Act 68 of 2008 normally applies to contracts between a consumer (the employer) and a supplier (the contractor), a discussion thereof is not included in this article.

3 Uff *Construction law: Law and practice relating to the construction industry* (2009) 303.

4 JBCC (6 ed 1 March 2014, hereafter JBCC).

5 *General conditions of contract for construction works* (3 ed 2015, hereafter GCC).

6 Hereafter SAICE.

7 Klingenberg and Wium "The GCC 2010 as a modern construction contract and the impact of alterations to clauses", paper presented at the eighth Built Environment conference ASOCSA 27–29 July 2014.

8 See, eg, cl 17.3 read with cl 27.2.3 of the JBCC.

9 *Simon v Klerksdorp Welding Work* 1944 TPD 52.

the purpose for which they are used.¹⁰ The contractor is deemed to be an expert of building, and is expected to ensure that the materials that he acquires for the works are not defective and that they will be fit for their purpose. If they turn out to be unsuitable, the contractor is obliged to replace them with suitable materials or he will be liable for damages.¹¹ The quality for producing a satisfactory standard of workmanship is difficult to define and the standards by different supervising consultants may differ.¹² Where materials or workmanship are matters for the opinion of the architect,¹³ they are to be to his reasonable satisfaction.¹⁴ The contractor will not be liable for latent defects if the materials or workmanship meet the standard as required by the agent of the employer.¹⁵ In the absence of a contractual stipulation, materials or workmanship are to be to a standard appropriate to the works.¹⁶

If defective work is delivered it must be rectified in order to comply with the contract. The employer's measure of damages would *prima facie* be the cost of remedying the defects so as to conform to the contract.¹⁷ This "general rule" may be departed from if the cost of remedying the defect is disproportionate to the end to be attained,¹⁸ in which event damages will be measured according to the difference between the value of the structure as it stands as against its value in terms of the contract.¹⁹

1 2 Standard-form construction contracts

The standard-form construction contracts all include a period of time within which defective work must be rectified by the contractor. The JBCC and GCC contracts provide for a "defects liability period". In the case of JBCC, it is for a minimum period of ninety days commencing at the date work was completed and a certificate of practical completion issued.²⁰ In the case of GCC, the duration of the defects liability period is the choice of the employer and must be stated in the contract data, commencing from the date of the certificate of completion.

10 See, eg, *Simon v Klerksdorp Welding Work* 1944 TPD 52; *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A); Finsen *The building contract. A commentary on the JBCC agreements* (2005) 77.

11 *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A); *Young and Marten Ltd v McManus Child Ltd* 1968 2 All ER 169. If the material is defective the contractor has a claim against the supplier for replacement of the defective material and a claim for damages he suffered as a result of the defective material.

12 Finsen 78.

13 Or engineer/project manager.

14 Uff 394.

15 The contractor is liable for patent defects. See Finsen 78.

16 At common law, an implied warranty is given by the contractor. See *Simon v Klerksdorp Welding Works* 1944 TPD 52; *Hughes v Fletcher* 1957 1 SA 326 (SR).

17 *Cardoza v Fletcher* 1943 WLD 94; *Plymouth Court (Pty) Ltd v Bergamasco* 945 CPD 53; *Huges v Fletcher* 1957 1 SA 326 (SR); *Schmidt Plant Hire (Pty) Ltd v Pedrelli* 1990 1 SA 398 (D).

18 *BK Tooling v Scope Precision Engineering* 1979 1 SA 391 (A); *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A) 687.

19 *Schmidt Plant Hire (Pty) Ltd v Pedrelli* 1990 1 SA 398 (D). See also Ramsden McKenzie's *Law of building and engineering contracts and administration* (2014) 104–107.

20 Cl 21.1.

The contractor is obliged to make good any defects which appear in this period. Similar provisions are included in most other standard-form contracts.²¹

Standard-form contracts are popular amongst both project owners and industry for the following reasons: They help reduce procurement and contract administration costs, they are generally well understood by users, and using these results in fewer disputes on matters of interpretation. The purpose of standard-form contracts is to facilitate the contractual arrangements between parties in a project and to regulate the relationships between the contracting parties, particularly in respect of risk, management and responsibility for design and execution thereof. Standard-form contracts contain ready-made terms and conditions when making a contract. These standards are commonplace in construction transactions and generally accepted by the different contracting parties. However, it would be practically impossible to devise a standard-form contract that would account for all eventualities that might occur in a construction project as there are several factors that affect what type of contract is suitable for a certain project, such as the amount of involvement from the client, technical complexity and the location and size of the project. In the initial stage of the design phase, the client has to adopt a suitable contractual arrangement for the project and a corresponding standard form contract.²²

The advantage of using standard-form contracts may, however, be impaired when amendments and supplementary or “special” conditions are included that significantly alter the standard general conditions, as there is a complex interaction between many of the terms.²³ The *Latham report*²⁴ recommended the use of standard-form contracts without amendments. Amendments to these contracts were also criticised in *Royal Brompton Hospital National Health Service Trust v Hammond* by Lloyd QC who held as follows:²⁵ “A standard form is supposed to be just that. It loses its value if those using it or, at tender stage those intending to use it, have to look outside it for deviations from the standard.”

Most standard-form contracts incorporate a set of conditions the primary purpose of which is to allocate risks and to set out fair, equitable, efficient, economic and transparent contract administrative procedures. There are no hard and fast rules as to what should be included in a standard-form contract. According to Uff, most sets of conditions follow a standard pattern and typically contain stipulations that deal with the following: General obligations to perform the work; provisions for instructions, including variations; valuation and payment; liabilities and insurances; provisions for quality and inspections; completion, delay and extension of time; role and powers of the certifier or project manager; and disputes.²⁶

This article focuses on the express provisions with regard to quality, completion, identification of defective work and assessment of cost for remedial work as

21 See, eg, The International Federation of Consulting Engineers (also known as FIDIC) and The New Engineering Contract (also known as NEC).

22 Maritz and Putlitz (fn 1 above).

23 See, in general, Ndekurigi and Rycroft *JCT 05 Standard building contract: Law and administration* (2009).

24 Latham *Joint review of procurement and contractual arrangements in the United Kingdom construction industry final report* July 1994.

25 2001 EWCA Civ.

26 Uff 277–278.

provided for in local standard-form contracts in South Africa, namely, the JBCC and the GCC. These contracts are discussed in separate sections under the period headings of (a) prior to practical completion; (b) during the defects liability period; and (c) after the issue of the final completion certificate, respectively.

1 2 1 Overview of the JBCC

The suite of construction contract documentation prepared under the auspices of the JBCC released the First Edition in 1991 and the latest edition in March 2014 as the Sixth Edition. The JBCC concentrates on the compilation of current contract documentation with an equitable distribution of contractual risk in the building industry. The contract documentation is approved by the Construction Industry Development Board²⁷ and is used extensively in both the public and private sectors across the South African construction industry. The primary documentation is supported by a set of standard forms that significantly simplify the administration of the contract.

The JBCC Principal Building Agreement²⁸ is the cornerstone of the JBCC. The JBCC PBA is designed to be used with or without bills of quantities and consists of nine sections including the definitions of all the primary elements and phrases. The subsequent sections are closely ordered to the generic project life cycle.

The procedures described in the JBCC agreements in order to achieve each of the completion stages must be applied strictly to minimise disagreements at a later stage. Other than payment, completion is the most important aspect of the agreement and therefore, care should be taken in certifying any of the degrees of completion.²⁹

1 2 2 Overview of the GCC³⁰

For several decades SAICE developed, published and maintained conditions of contract for civil engineering works. Several editions of the *General conditions of contract for civil engineering works* were published by SAICE, culminating in a sixth edition published in 1990. The latter was replaced in 2004 with the *General conditions of contract for construction works, first edition* “to satisfy the CIDB’s requirements for standard conditions of contract”.³¹ After six years of application primarily in civil engineering works the GCC, first edition 2004, was replaced with the GCC, second edition 2010, which fundamentally revised the first edition “to clear up responsibilities and to provide for wider spectrum of construction works”. In this regard, the GCC 2010 is suitable for both construction and building works contracts and although its focal point is on the contracting strategy of design by the employer, it is also suitable for the design and built

27 Hereafter “CIDB”.

28 Hereafter “JBCC PBA”.

29 For the JBCC construction and defects liability timeline, see *Guide to completion, valuation, certification and payment* JBCC 6 ed of 1 March 2014.

30 Words and expressions beginning with capital letters in the GCC represent the meaning as defined and set out in cl 1.1.1 of the GCC. For uniformity in this paper the words do not start with capital letters although they represent the meaning as defined and set out in cl 1.1.1 of the GCC.

31 South African Institution of Civil Engineering *General conditions of contract for construction works* (2012) iii, available at www.saice.org.za.

contracting strategy. Thus, in addition to the traditional civil engineering construction work, it is also appropriate for mechanical, electrical and building work.

However, after five years of application, it became clear that certain amendments were necessary and the GCC 2015 was prepared. Some of the most important amendments in this edition are: It permits the contractor to suspend the works if the employer fails to make payment on a payment certificate; it recognises the contractor's time risk allowances; it includes delay and cost due to excepted risks, like strikes and electricity outages, as circumstances in which the contractor may claim extension of time and additional compensation; it adds a variable construction guarantee to the list of securities; it allows for the selection of inflation indices that are appropriate to the type of works; and it replaced "engineer" with "employer's agent" throughout the document because of the wider application of the contract.

2 DEFECTS LIABILITY PRIOR TO PRACTICAL COMPLETION

2.1 JBCC

Before looking at the express provisions for completion and the rectification of defective or non-conforming materials and workmanship, it is relevant to see what exactly is covered by the definition of practical completion in the JBCC. Practical completion is defined as:

"The stage of completion as certified by the *principal agent* where the *works* or a *section* thereof has been completed free of patent *defects* other than minor *defects* identified in the *list for completion* and can be used for the intended purpose."³²

The date for practical completion is the most important "performance date" after which the employer may occupy the building in accordance with the pre-set timeline. The JBCC places great emphasis on the standard of work required at practical completion and that the principal agent, other agents and the contractor must work "as a team" towards achieving this milestone date. The construction period is defined in the contract data of the tender documentation. The contractor generally requires subcontractors to complete their work before practical completion, referred to as the interim completion date.³³ These dates must be agreed between the contractor and the subcontractors. The principal agent monitors progress and, together with other agents, provides regular direction to the contractor and subcontractors on the building standards and the state of completion of the works to be achieved.³⁴ The contractor brings the works to completion by the due date, but before that date timeously invites the principal agent to inspect the works in accordance with the programme and the (revised) date for practical completion.³⁵ Where the work does not conform to the set standard for practical completion, the principal agent shall issue one comprehensive list for defects to be rectified.³⁶

³² Cl 1.1. A word or phrase typed in *italics* has the meaning assigned to it in its definitions as set out in cl 1.1 of the JBCC.

³³ Cl 18.0 in the JBCC Nominated/Selected subcontract agreement.

³⁴ Cl 19.1.1.

³⁵ Cl 19.2.2.

³⁶ Cl 19.3.1.

The employer is obliged to give a willing and able contractor the opportunity to rectify defective work.³⁷ The employer may have the rectification of the works carried out by another contractor and the costs incurred thereto may be recovered from the contractor, if the contractor fails to rectify the defective work within a period of five working days from notification by the principal agent.³⁸ However, the employer must be mindful of his obligation to mitigate the contractor's loss.³⁹ If the employer acted unreasonably in not giving the contractor a fair opportunity to remedy the defects for which it was responsible, the employer would probably have failed to mitigate that loss.⁴⁰ The employer is generally limited to what it would have cost the original contractor to remedy the defects had it had the opportunity to do so.⁴¹

2.2 GCC

Before considering the provisions for rectification of defective work, it is necessary to explain the GCC completion stages, namely, practical completion, completion and final completion, followed by the latent defects period. A certificate must be issued by the employer's agent when the works comply with the contractual requirements as stipulated and required in the contract for the three different stages. Each of these certificates has a consequential incentive for the contractor as well as a lurking threat for the employer if the contractor does not deliver according to the required quality. Practical completion is defined as:

"Practical completion means that the whole or portion of the Works has reached a state of readiness, fit for the intended purpose, and occupation without danger or undue inconvenience to the Employer, even though some work may be outstanding."⁴²

The requirements for practical completion are set out by the employer in the contract data. Once achieved, the employer's agent issues the certificate of practical completion with a list of items that may stand over to be completed before the certificate of completion is issued. The requirement for a certificate of completion differs from the JBCC procedure for completion which only requires practical completion. The reason for this in GCC is that some work not critical for the employer to take occupation, for example in a roads contracts the finishing of slopes, borrow pits, *et cetera*, may follow after practical completion. The defects

³⁷ Although this is not a general duty/obligation of the employer, it is implied where specialised work is concerned. See *Reid v Springs Motor Metal Work (Pty) Ltd* 1943 TPD 154 158 and *Shiels v Minister of Health* 1974 3 SA 276 (RA). In *MSC Depots (Pty) Ltd v WK Construction (Pty) Ltd* 2011 2 SA 417 (ECP) para 22 the court *a quo* stated that where a contractor is willing and able to attend to defects that manifested themselves prior to final completion being reached in terms of clause 26, such contractor cannot be in breach provided he remedies such defects with due skill, diligence, regularity and expedition. The applicant was unable to prove that the respondent was unable or unwilling to rectify the defective work. Confirmed on appeal in *MSC Depots (Pty) Ltd v WK Construction (Pty) Ltd* 2011 JDR 0678 (SCA).

³⁸ CI 17.3.

³⁹ In respect of mitigation and assessment of damages in general, see *Cirano Investments 307 (Pty) Ltd v Execujet Aviation (Pty) Ltd* (10831/12) 2014 ZAGPJHC 182 (unreported, 22 March 2014). See also the Australian case of *The owner – Strata plan no 76674 v Di Blasio Construction Pty Ltd* 2014 NSWSC 1067 42–47.

⁴⁰ *Oksana Mul v Hutton Construction Ltd* 2014 EWHC 1797 (TCC).

⁴¹ The Royal Institute of British Architects 2014 *The RIBA J* 35.

⁴² CI 1.1.1.24.

liability period only commences on the issuing of the certificate of completion. As soon as is practical after the expiration of the defects liability period, the employer's agent issues the Final Approval Certificate. This is then followed by the remainder of the latent defects period.

It is a requirement that:

"The Contractor shall, save insofar as it is legally or physically possible, design (to the extent provided in the Contract), carry out and complete the Works and remedy any defects therein in accordance with the provisions of the Contract."⁴³

The quality of the work is clearly described as:

"All Plant to be supplied shall be manufactured, all workmanship shall be carried out and all materials shall be of the respective kinds specified in the Contract and shall comply with the requirements set in the Scope of Work and in the Employer's Agent's instructions. Failing requirements or instructions, the Plant, workmanship and materials of the respective kinds shall be suitable for the purpose intended."⁴⁴

The phrase "suitable for the purpose intended" implies a reasonable standard consistent with the standard of similar work. Poor workmanship, unsuitable materials or defects in the work are unacceptable.

If the contractor fails to rectify a defective plant, materials and work,⁴⁵ it amounts to a serious breach of contract which may result in termination of the contract by the employer.⁴⁶ This drastic step should only be resorted to in the extreme case of refusal to correct a defect. There are adequate measures that make provision for the contractor to correct defective work.⁴⁷

If the defective work fails the specified testing, the employer's agent has the power to order the contractor to rectify the work within a specific time at the cost of the contractor.⁴⁸ If the work fails a second time, the employer's agent has the options of further making good, acceptance at a reduced price, or rejection and replacement by acceptable work.⁴⁹

The removal of defective work shown up by routine testing does not usually present a problem as this is part of the contractor's risks and he should make provision for such events in his programme.⁵⁰ However, when tests have shown no failure and a defect only comes to light at a later stage, it would be advisable for the employer's agent to consult with the employer and the contractor to find an alternative acceptable solution. For example, instead of removing a bridge because of a defect in the foundation, the bridge could be strengthened to withstand the defect.

If the contractor fails to fix defective work within the time period stated, the employer's agent may, as a last resort before terminating the contract, employ others to fix such defective work and recover the costs from the contractor.⁵¹ As such action is optional, the employer's agent should carefully consider whether terminating the contract would not be a better option. For example, termination

43 Cl 4.1.1.

44 Cl 7.2.1.

45 Hereafter "work".

46 Cl 9.2.1.3.5.

47 Cl 7.6.1–7.6.4.

48 Cl 7.6.1.

49 Cl 7.6.2.

50 Cl 7.6.3.

51 Cl 7.6.4. See para 5 *infra* for a discussion of damages.

would be a better option for a recalcitrant contractor, whereas for a contractor who lacks expertise the better option would be to employ the necessary experts.⁵²

3 DEFECTS LIABILITY DURING THE DEFECTS LIABILITY PERIOD

3.1 JBCC

The defects liability period commences on the calendar day following the date of practical completion and ends at midnight 90 calendar days from the date of practical completion or when the work on the list for final completion has been satisfactorily completed, whichever is the later.⁵³

The principal agent shall forthwith, after practical completion has been achieved, issue the list for completion to the contractor. The list for completion is defined as: “A list issued by the *principal agent* where *practical completion* has been certified, listing *defects* and/or outstanding work to be completed.”⁵⁴

The principal agent issues only one list for completion to permit the contractor to complete all defective/outstanding work,⁵⁵ or where defects become apparent during the defects liability period the principal agent may instruct the contractor to attend to such items.⁵⁶ For instance, should a leak or any other event occur requiring immediate attention, this must be dealt with expeditiously in terms of a contract instruction from the principal agent to the contractor and/or subcontractor outside the list for completion.⁵⁷ The contractor must rectify the defects on the list for completion progressively, whilst at all times minimising inconvenience to the occupants. The principal agent may only add items that have become “patent” and of any further defects that have become evident since the last inspection⁵⁸ to the list for final completion, issued after the expiry of the defects liability period.⁵⁹ Final completion, therefore, follows a minimum of 90 calendar days after practical completion – to allow for the contractor to rectify all items on the list for completion and for the identification and rectification of latent defects not in evidence at practical completion and for working of items on the list for final completion. The list for final completion is defined as:

“An updated *list for completion* issued by the *principal agent* after the inspection of the *works for final completion*, where *final completion* has not been achieved, listing *defects* and/or outstanding work to be completed to achieve *final completion*.”⁶⁰

Final completion is defined as: “The stage of completion of the *works* as certified by the *principal agent* as being free of *defects*.”⁶¹

The definition of final completion requires the principal agent to certify “the stage of completion of the works to be free of defects”. The issued certificate of final completion is “conclusive as to the sufficiency of the works and that the

52 *Eribo v Odinaiya* 2010 EWHC 301 (TCC) 70.

53 Cl 21.1.

54 Cl 1.1.

55 Cl 19.3.4.

56 Cl 21.2.

57 Cl 17.1.11.

58 Cl 21.7.2.

59 Cl 21.6.

60 Cl 1.1.

61 Cl 1.1.

contractor's obligations have been fulfilled other than for latent defects".⁶² A careless signature by the principal agent may result in a claim for professional negligence by the employer.⁶³ There is no further recourse for the employer to bring a defective work claim as the final certificate,⁶⁴ once issued, cannot be withdrawn or amended.⁶⁵ The certificate can only be challenged on limited grounds,⁶⁶ for example, where the act of the agent involves fraud or where he acts outside the scope of his authority.⁶⁷ The certificate creates a new cause of action, is a liquid document and is the equivalent of cash.⁶⁸

3.2 GCC

The defects liability period commences when the certificate of completion is issued and lasts for the period stated in the contract data; this is usually 12 months for construction works.⁶⁹ The intention is that the work must be in the condition required by the contract at the expiration of the defects liability period.⁷⁰ If a defect becomes apparent during the defects liability period, the employer's agent must order the contractor to make good the defect at his cost. This does not only include defects attributable to the fault or failure of performance by the contractor, but also defects due to other causes. These other causes do not include "fair wear and tear", which means deterioration due to the occupation or use of the work by the employer. If damage caused by others is repaired by the contractor, the employer must pay for such repairs as it must be valued by the employer's agent in the same way as for a variation order.⁷¹

The defects liability period may be extended by an order in writing, given during the defects liability period, by the employer's agent in respect of the

62 CI 21.12.

63 *Hoffman v Meyer* 1956 2 SA 752 (C); *Sutcliffe v Thackrah* 1974 AC 727; *Smith v Mouton* 1977 3 SA 9 (W); *Cone Textiles (Pty) Ltd v Mather & Plant (SA) (Pty) Ltd* 1981 3 SA 565; *Ocean Diners (Pty) Ltd v Golden Hill Construction CC* 1993 3 SA 331 (A) 342C; *Van Immerzeel & Pohl v Samancor Ltd* 2001 2 SA 90 (SCA).

64 These rules do not only apply to final certificates but are also applicable to interim payment certificates. See *Basil Read (Pty) Ltd v Regent Devco (Pty) Ltd* 2011 JOL 27946 (GSJ) para 33; *Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 5 SA 1 (SCA); *Johnny Bravo Construction CC v Khato Consulting Engineers CC* (2315/2014) 2015 ZAFSHC 5 (5 February) para 13.

65 *Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 5 SA 1 (SCA) para 27; *MSC Depots (Pty) Ltd v WK Construction (Pty) Ltd* 2011 2 SA 417 (ECP) confirmed on appeal in *MSC Depots (Pty) Ltd v WK Construction (Pty) Ltd* 2011 JDR 0678 (SCA); *Axton Matrix Construction CC v Metsimaholo Local Municipality* 2012 JDR 1168 (FB) para 34; *Basil Read (Pty) Ltd v Regent Devco (Pty) Ltd* 2011 JOL 27946 (GSJ) para 33. See also Finsen *The building contract. A commentary on the JBCC agreements* (2005) 137 138.

66 *Martin Harris & Seuns OVS (Edms) Bpk v Qwa Regeringsdiens; Qwa Regeringsdiens v Martin Harris & Seuns OVS (Edms) Bpk* 2000 3 SA 339 (SCA).

67 *Smith v Mouton* 1977 3 SA 9 (W) 13A.

68 *Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd* 1986 4 SA 510 (N) 514–515; *Ocean Diners (Pty) Ltd v Golden Hill Construction CC* 1993 3 SA 331 (A) 304E; *Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 5 SA 1 (SCA) para 27, confirmed in *Axton Matrix Construction CC v Metsimaholo Local Municipality* 2012 JDR 1168 (FB) para 34.

69 CI 1.1.1.13.

70 CI 7.8.1.

71 CI 7.8.2.2.

following: Outstanding work specified in the certificate of completion in accordance with clause 5.14.4 and not completed within the allowed time; searching for a defect in terms of clause 7.7.1; and where the making good of defects, as ordered in writing by the engineer, is delayed by the employer's own fault.⁷²

If the contractor fails to do any remedial work within 28 days of receipt of a written notice from the employer's agent, the employer can get another contractor to rectify the work.⁷³ The employer can recover the cost from the contractor.⁷⁴

Closely linked to the defects liability period is retention money. The employer is allowed to retain a portion of the amounts of money due to the contractor for the duration of the defects liability period.⁷⁵ This retention money serves as a security for the employer if the defects that must be rectified, become apparent during this period. It is also an incentive for the contractor to attend diligently to the repair of defects because one half of the retention money is paid back after the certificate of completion is issued and the other half within 14 days after the end of the defects liability period.⁷⁶ However, if defects are not repaired yet, the employer may withhold so much of the retention money as representing the cost of such defects.⁷⁷

4 DEFECTS LIABILITY AFTER THE ISSUING OF THE FINAL COMPLETION CERTIFICATE

4.1 JBCC

A certificate of final completion issued by the principal agent shall be conclusive as to the sufficiency of the works and that the contractor's obligations to bring the works to practical completion and to final completion have been fulfilled other than for latent defects.⁷⁸ It is the nature of construction projects that faults and defects caused by failure in design, workmanship or materials may only become apparent many years after completion and it is not always evident whether they are caused by a design, workmanship or materials defect. These defects are known as latent defects. A typical example is misplaced reinforcement in concrete which will take time to show visible defects but will, eventually, damage the structure.

In the JBCC, the latent defects liability period for the works is restricted and shall commence at the start of the construction period and end five years from the certified date of final completion.⁷⁹ This limitation of liability varies the common law position in which the contractor would remain liable for latent defects for all time – or at least until the building is demolished.⁸⁰ An employer must institute an action against a contractor to rectify defects within three years from the date he becomes aware of the defect or could reasonably have become

⁷² Cl 7.8.1.

⁷³ Cl 7.8.3.

⁷⁴ Cl 7.8.3.1.

⁷⁵ Cl 6.10.3.

⁷⁶ Cl 6.10.5.

⁷⁷ Cl 6.10.5.1. In respect of retention money, see *Axton Matrix Construction CC v Metsimaholo Local Municipality* 2012 JDR 1168 (FB) para 20.2.

⁷⁸ Cl 12.2.17 and 21.12.

⁷⁹ Cl 22.1.

⁸⁰ See also Finsen 139.

aware of the existence of the defect.⁸¹ If no claim is instituted within three years, the claim prescribes.

Latent defects are defects that cannot be identified during normal inspections. It manifests after the final completion certificate has been issued and are dealt with during the latent defects liability period.⁸² The issuing of a final completion certificate under a building and construction contract does not terminate the contractor's obligation for damages arising out of defective work claims. The contractor is obliged to remedy all latent defects that appear up to the date of expiry of the latent defects liability period.⁸³

4.2 GCC

In the GCC, the defect period is the choice of the employer and is stipulated in the contract data. This period is normally determined by the type of work to be completed by the contractor. For civil works it is usually ten years; for buildings it is usually five years; and for mechanical and electrical works it is usually three years. The Prescription Act⁸⁴ allows the employer a period of three years from the date that the defect is discovered or could reasonably be discovered, to enforce his right to have the defect remedied by the contractor.⁸⁵

It is also necessary to explain what the meaning of a defect is in the GCC. A defect, for which the contractor must pay the cost of rectification, is work that was not carried out in accordance with the contract. Such a defect may occur because of the contractor's deficiencies in plant, materials or workmanship or not complying with the specifications. A latent defect is a defect that may not become apparent until sometime after completion of the works, but is implied to be attended to before issuing the certificate of completion. The term patent defect, meaning a defect that can be discovered by reasonable inspection, is not used in the GCC. In the GCC the latent defect period starts when the certificate of completion is issued and ends when the specified latent defect period expires as measured from the date of the final approval certificate.

5 DAMAGES AND CASE STUDIES

5.1 Assessment of a claim

The purpose of a claim for damages for breach of contract by the employer is to compensate the owner for the loss suffered due to delivery of defective work by the contractor. The central question is how to measure this loss in order to determine the *quantum* of the claim. The assessment of damages was described by Innes CJ in *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd*⁸⁶ as the "most difficult question of facts". The fundamental rule is that the innocent party should be placed in a position in which he would have been if there was proper performance in terms of the agreement, by the payment

81 Prescription Act 68 of 1969.

82 See cl 1.1 for the definition of latent defect.

83 Cl 22.3.

84 Act 68 of 1969.

85 Ramsden 116–125.

86 1915 AD 1.

of money and without undue hardship to the defaulting party.⁸⁷ Therefore, it is necessary to determine two financial positions of the employer. Firstly, the actual position of the employer after breach of the agreement by the contractor. Secondly, the hypothetical position where the employer would have been if it were not for the defective work and breach of contract.⁸⁸

A claim for defective work by the employer is usually for the cost or estimated cost necessary for rectification of the defective work in order to place himself in the position where he would have been if there was proper performance in terms of the agreement. This claim normally consists of the cost of demolition and re-building of the work and necessary incidental costs.⁸⁹ However, if it is unreasonable or unnecessary to expect rectification of the defective work by the contractor the court will award, instead of the cost of rectification, the difference in value between the intended value of the work and the actual value of the work delivered with defects.⁹⁰ Therefore, the employer is entitled to the extent of diminution in the value of the work if rectification amounts to undue hardship to the contractor. In some other jurisdictions, the court will allow a nominal amount as damages if there is no difference between the values.⁹¹

Some examples from litigation in other jurisdictions are instructive of problems encountered in this regard. *Bellgrove v Eldridge*⁹² is the leading authority in Australia on the assessment of damages for defective work. In this case, the respondent counterclaimed against the builder for the cost of demolition and re-building of the house as a result of faulty construction of foundations due to

87 *Robinson v Harmon* 1843–1860 All ER 383; *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 22; *Trotman v Edwick* 1951 1 SA 443 (A) 449 where Van den Heever JA stated: “A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind”; *Novick v Benjamin* 1972 2 SA 842 (A) 860; *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A) 687. See also the Australian case *The Owners of Strata Plan 76888 v Walker Group Constructions Pty Ltd* 2016 NSWSC 541.

88 *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A) 8; *Culwerwell v Brown* 1990 1 SA 7 (A) 25. This theory is known as the difference theory and is of German origin: Erasmus “Aspects of the history of the South African law of damages” 1975 *THRHR* 104 113–114. In *ISEP*, the court distinguished between a claim for costs of performance and a claim for damages and confirmed that our law does not recognise a claim for the costs of performance.

89 Eg, consultation fees, lost rent and relocation costs. In *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000 1 SA 639 (SCA) the defendant supplied an incorrect product which did not conform to specific standards. The plaintiff rejected the product, tendered redelivery and claimed damages. The court awarded damages together with incidental costs. The incidental cost was awarded for loss of managerial time because there was proof that the managers would have been working on other ventures and they were not managing the consequences of the defects within the ordinary course of their duties. See also *Georgiou v Freyssenet Posten (Pty) Ltd* 2016 JDR 0230 (FB) para 5.

90 *BK Tooling v Scope Precision Engineering* 1979 1 SA 391 (A) 423; *Schmidt Plant Hire (Pty) Ltd v Pedrelli* 1990 1 SA 639 (SCA). See also *Ruxley Electronics and Construction Ltd v Forsyth* 1995 3 All ER 268 and *Furmston Powell-Smith and Furmston's Building contracts casebook* (2012) 246.

91 See, eg, *Ruxley Electronics and Construction Ltd v Forsyth* 1995 3 All ER 268.

92 1954 90 CLR 613. The court re-affirmed the principles laid down in *Robinson v Harmon* 1843–1860 All ER 383.

substantial departures from the plans and specifications which formed part of the agreement between the parties. The court stated that:⁹³

“This loss can, *prima facie*, be measured only by ascertaining the amount required to rectify the defects complained of and so give to her the equivalent of a building on her land which is substantially in accordance with the contract.”⁹⁴

However, the general rule was subject to two qualifications: “The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt.”⁹⁵

As to what is both “necessary” and “reasonable” in any particular case is a question of fact.⁹⁶ In *Tabcorp Holdings Limited v Bowen Investments Pty Ltd*⁹⁷ the court expanded on the *Bellgrove v Eldridge*⁹⁸ test. The plaintiff instituted action for the cost of renovations to a foyer of a building which was made without obtaining the consent of the landlord as stipulated in the lease agreement. On appeal the court held that an order for rectification of defects will only be unreasonable in exceptional circumstance and that damages are determined by considering the loss suffered due to the failure of the tenant to comply with the lease agreement.⁹⁹ The lessor was awarded the cost for restoring the foyer to its original condition.

A situation normally qualifies as being unreasonable and unnecessary where the costs of rebuilding are out of proportion with the benefit it will obtain. In *Ruxley Electronics and Construction Ltd v Forsyth*¹⁰⁰ the contractor delivered a defective swimming pool.¹⁰¹ The court held that if the cost of rebuilding is out of proportion with the benefit that will be obtained,¹⁰² the cost of rebuilding will not be awarded as damages. Furthermore, the court held that the difference in the value between the work as it is and as it would have been if the contract was properly performed, is the primary measure of damages, even if the difference is nil. Due to the fact that there was no difference in value and an order for rectification would have been unreasonable, the court awarded a nominal amount of damages for disturbance and general inconvenience.¹⁰³

93 1954 90 CLR 613 617.

94 *Ibid*, confirmed in *Tabcorp Holdings Limited v Bowen Investments Pty Ltd* 2009 236 CLR 272; *Tzaneros Investments Pty Limited v Walker Group Constructions Pty Limited* 2016 NSWSC 50; *Metricon Homes v Sofiley* 2016 VSCA 60.

95 1954 90 CLR 613 619.

96 *Idem* 620.

97 2009 236 CLR 272; 2009 HCA 8. For a discussion of this case, see Bell “After *Tabcorp*, for whom does the *Bellgrove* toll? Cementing the expectation measure as the ‘ruling principle’ for calculation of contract damages” 2009 *Melbourne Univ LR passim*.

98 1954 90 CLR 613.

99 Confirmed in *Willshee v Westcourt Ltd* 2009 WASCA 87; *Wheeler v Ecroplot Pty Ltd* 2010 NSWCA 61; *Tranquility Pools & Sons Pty Ltd v Huntsman Chemical Co Pty Ltd* 2011 NSWSC 75.

100 1995 3 All ER 268.

101 See Eisenberg “Conflicting formulas for measuring expectation damages” 2013 *Arizona State LJ* 369 382 for a brief discussion of this case.

102 See also *Scott Carver Pty Ltd v SAS Trustee Corporation* 2005 NSWCA 462 para 120.

103 In Hassell “Nominal damages awarded to plaintiff for failure to meet commercial contract specifications – *Diotte v Consolidated Dev Co* 2014 CarswellNB 410 (Can NBCA) (WL)” 2015 *Suffolk Transnat LR* 207 217, it was argued that although “punitive damages are generally not awarded for breach of contract, perhaps a carefully crafted, modified

continued on next page

In *Rapiprop 31 (Pty) Ltd v Ironside*¹⁰⁴ the appellant requested rectification of the defective work whereafter Rapiprop failed to rectify the defective work. The appellant employed independent contractors to carry out and complete the work. It was argued that Ironside failed to prove that the costs for rectifications were reasonable and necessary. The court rejected the arguments by Rapiprop and the appellant was ordered to pay damages for rectifications of defective and incomplete works plus interest and costs to the respondents.

5.2 Claim for damages based on delict

In *Georgiou v Freyssenet Posten (Pty) Ltd*¹⁰⁵ Ebrahim J upheld an exception in respect of a claim for special consequential damages as a result of the loss of rental income and the particulars of claim was set aside. The plaintiff's claim was based on breach of contract. The decision was based on the fact that only parties to a contract can be liable for breach of that contract and without a breach of contract "there can be no claim for damages, and no talk of causation and the issue of the contemplation of damages does not therefore arise".¹⁰⁶ In such instances, some plaintiffs argue that because no contractual relationship exists, the cause of action is delictual and entitlement to damages is based on the *Aquilian* remedies.¹⁰⁷

Our law embraces a conservative approach to the extension of *Aquilian* remedies.¹⁰⁸ In order to establish a cause of action for damages based on delict, the most important question is whether the facts alleged by the plaintiff are efficient in establishing such a cause of action.¹⁰⁹ In *Lillicrap, Wassenaar & Partners v Pilkington Brothers*¹¹⁰ it was stated that policy considerations do not require a court to impose delictual liability for negligent breach of contract. It was furthermore stated that it is undesirable to extend the *Aquilian* remedies to the duties already determined and agreed on between the parties to a contract of a professional service. This state of affairs was confirmed in *Country Cloud Trading v MFC, Department of Infrastructure Development*¹¹¹ where it was held that our courts are hesitant to allow claims for pure economic loss, and even more so where it would constitute an extension of the *Aquilian* remedies and the law of delict.¹¹² In both these cases the court emphasised the fact that the relationship

form of punitive damages would provide an aggrieved party with an award more adequate than nominal damages, while simultaneously serving as a deterrent for breach of contract".

104 2012 ZAWCHC 297 (28 August 2012).

105 2016 JDR 0230 (FB).

106 Para 31.

107 See, eg, *Lillicrap, Wassenaar & Partners v Pilkington Brothers* 1985 1 SA 475 (A); *Cloud Trading v MFC, Departments of Infrastructure Development* 2015 1 SA 1 (CC); and *Van Rooyen v Trinamic Consulting Engineers (Pty) Ltd* (84775/2014) 2016 ZAGPPHC 19 (unreported 25 January 2016).

108 *Lillicrap, Wassenaar & Partners v Pilkington Brothers* 1985 1 SA 475 (A).

109 *Ibid.*

110 1985 1 SA 475 (A).

111 2015 1 SA 1 (CC).

112 For a discussion of the case, see Neethling and Potgieter "Breach of contract and delictual liability to third parties – *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 1 SA 1 (CC)" 2015 *THRHR* 711. See also Ramsden 216.

between the parties are determined by the contract and that their wishes must be respected.¹¹³

In *Van Rooyen v Trinamic Consulting Engineers (Pty) Ltd*¹¹⁴ the court was required to determine whether the *Aquilian* remedy should be extended to the specific set of facts. Van Rooyen was the second defendant and the excipient in an application where he stated that the plaintiff's claim did not disclose the cause of action. In short, the facts were that a construction contract was concluded between the plaintiff and Riverspray (which was liquidated). The plaintiff instituted an action for pure economic loss against the subcontractors of Riverspray for alleged defective work on his house. His claim was based on delict. The court held that the contract between the plaintiff and Riverspray defined the nature of their relationship and the required performance from each party. The court upheld the exception and delictual liability was not extended to the set of facts.

6 CONTRACTOR'S RESPONSE TO A DEFECTIVE WORK CLAIM

Prudent contractors protect themselves from liability arising out of their work on a construction project by maintaining "construction all risk"¹¹⁵ insurance cover. However, such a CAR policy generally does not provide coverage for claims by discontented owners for the cost to repair or replace allegedly defective work. Such claims, which can present a significant exposure to a contractor, instead are governed by the contract between the contractor and client. As a result, the terms of the warranty and indemnification language in construction contracts are very important and frequently misunderstood. The purpose of a warranty is to limit the contractor's responsibilities in the event the work does not meet the owner's expectations. Similarly, indemnification clauses can be used to shift the risk of defective work to others and to allocate the risk among multiple parties who may be responsible for the final product. It is therefore essential for contractors to understand the limitations of their liability insurance coverage, and to pay particular attention to the drafting of their contracts, seeking professional legal assistance where needed. Proper drafting on the front end can save substantial expense on the back end.

From a contractor's perspective, defending a defective work claim can be expensive and often the nature and extent of the damage is hotly disputed, leading to an expensive and time-consuming process in defending the claim. This is regardless of the timing of the making of the defective work claim by the building owner and/or the principal agent/engineer. For the sake of practicality and in preparation for a possible defective work claim, Doyle¹¹⁶ suggests the following:

- (a) establish the ambit of its contractual responsibility in relation to the design;
- (b) be clear as to any express and/or implied representation made in the documentation relating to any part of the contract as to the quality of workmanship;

113 Confirmed in *Van Rooyen v Trinamic Consulting Engineers (Pty) Ltd* (84775/2014) 2016 ZAGPPHC 19 (unreported 25 January 2016).

114 Unreported (84775/2014) 2016 ZAGPPHC 19 (25 January 2016).

115 Hereafter "CAR".

116 "Defective work claim" (2005), available at <http://bit.ly/1WY3AK9> (accessed on 12 December 2014).

- (c) be aware of any express and/or implied statements in the contract as to the purpose of the works;
- (d) be clear as to any express, implied and/or actual reliance on the part of the owner as to any of the contractor's obligations, skill or expertise; and
- (e) establish a contemporaneous documentation procedure to ensure that all directions, instructions, notifications, possible waivers, *et cetera*, are recorded in a timely and relevant manner.

7 CONCLUSION

Uncertainty often prevails regarding the assessment of damages in respect of claims that employers have against contractors for defective work. The employer is entitled to have the defective work rectified and/or claim damages in terms of contract and/or common law. Standard-form contracts generally provide for specific procedures related to defective work claims made during the pre-determined contractual completion stages and after the issuing of the final completion certificate. The success of a defective work claim after the issuing of the final completion certificate is complicated by various factors, *inter alia*, that the contractor may no longer be in business; there is no financial hold on the contractor because of the expiration of the performance guarantee; and the difficulty often to establish whether the defective work is as a result of a design or specification shortcoming/oversight, normal wear and tear or caused by the contractor or his sub-contractors.

The systems, tools and techniques are available for an industry willing to embrace good practice in order to improve industry performance and project outcomes. Vigilance on the part of the principal agent/engineer appointed to represent the employer is required to avoid later arguments as built environment professionals often fail to enforce the contractual requirements. In so doing, they leave the building owner/employer with no other option but to institute a claim for damages for breach of contract due to delivery of defective work by the contractor.

Continuous professional development for professionals practising in the construction industry is vital to understand and correctly apply the provisions contained in the particular contract. This will not only assist in the ability to correctly execute procurement requirements, but also the ability to effectively manage contracts from a supply chain management and built environment perspective.

The construction industry's contracts differ significantly from those generally used in the commercial environment as these contracts are negotiated at industry level through an inclusive consultative process with various industry stakeholders involved and are designed to reflect current industry norms and practices. Employers and contractors must be aware of the express and/or implied provisions in the contract on how to deal with defective work claims in order to prevent disputes that translate into a costly and time-consuming process when instituting/defending a defective work claim.