

Chapter 6

ENGINEERING CONTRACTS AND LAW

INTRODUCTION

- ▶ South Africa law of contract has adopted from Roman Law
- ▶ Law of contract firms part of law of obligations is based on the simple principle where one should honour their promises.
- ▶ A construction contract may be defined as a contract in terms of which one party, namely the contractor agrees to perform construction work for another the client.
- ▶ In any project the following party may be present
 - ❖ The client (or Employer)
 - ❖ The principal agent (Or Engineer)
 - ❖ The contractor
 - ❖ The clerk of works (or resident engineer)
 - ❖ Subcontractors and
 - ❖ Consultant

OBLIGATIONS, THE CONCEPTS OF CONTRACT AND REQUIREMENTS FOR VALIDITY

- ▶ Agreement that create Obligations are considered contracts
- ▶ A contract comes into force and binding on both parties when an offer was made in clear terms and was accepted without reservations.
- ▶ Requirements for a contract to come into existence:
 - ❖ Agreement (consensus)- parties must reach agreement
 - ❖ Contractual capacity
 - ❖ Performance to be certain
 - ❖ Performance must be possible
 - ❖ Lawful
 - ❖ Formalities to be complied with

PERFORMANCE, PERSONAL RIGHTS, CREDITORS AND DEBTORS

- ▶ Performance it means the fulfilment of legal obligations created under contract by the promisor and promisee.
- ▶ Performance gives a creditor the right to claim that the debtor shall perform.
- ▶ Creditor – a person who may claim performance from the other party.
- ▶ Debtor – a person who has a duty to perform
- ▶ Mora debitoris – means delay of the debtor
- ▶ Mora creditoris - delay of the creditor

AGRREMENT

- ▶ In determining whether or not a contract has come into existence, it is necessary to determine whether there is consensual agreement between two or more parties
- ▶ A contract may not be conducted alone.
- ▶ The most common way to determine whether there has been agreement is to identify an offer, and acceptance of that offer

AGREEMENT (Offer)

- ▶ An offer is a statement of intention in which one party (offeror) disclose to what performance and on what terms, he or she will consent to bind him/herself to the person whom the offer is addressed (offeree).
- ▶ Requirement of offer is as follow:
 - ❖ The offer must be definite and complete.
 - ❖ The offer must be a firm offer.
 - ❖ The offer must come to attention of offeree.
 - ❖ An offer must as a rule be directed at a definite person or persons
 - ❖ Any formalities prescribed by legislation must be complied with.

AGREEMENT (Expiry of the Offer)

- ▶ After an offer has expired the offeree can no longer accept it.
- ▶ The offer it expires if it is revoked or withdrawn by the offeror.
- ▶ The offer does not remain valid indefinitely, but it rather lapse after expiry of the time that he offeror has prescribed for acceptance.
- ▶ The offer lapses on the death of the offeror or the offeree.
- ▶ If offeree rejects an offer it lapses. When the offeree makes a counter offer the original offer lapses as a counter offer regarded as a rejection of original offer.
- ▶ Offer lapses when the offeror in case of a juristic person loses its contractual capacity.

AGREEMENT (Acceptance)

- ▶ Before acceptance can give rise to the formation of valid contract between offeror and offeree, certain requirements for a valid acceptance must be satisfied.
- ▶ Requirements for a valid acceptance:
 - ❖ The acceptance must be unconditional and unequivocal.
 - ❖ The acceptance must be made with the intention of it being legally bound.
 - ❖ Normally an acceptance may be made in writing, orally even tacitly.
 - ❖ The offer must be accepted by the person to whom the offer was addressed.
 - ❖ The acceptance must be in reaction to the offer, as the person cannot accept an offer of which he was not aware.
 - ❖ The acceptance of the offer must come to the attention of the offeror.

CIRCUMSTANCES AFFECTING CONSENSUS (Consensus){agreement}

- ▶ Consensus is the basis for the validity of every contract.
- ▶ If the consensus of one of the parties is legally invalid, there can be no contract.
- ▶ If the consensus is absent for any reason, the contract is void.
- ▶ If consensus is achieved in an improper manner, the contract is voidable.

CIRCUMSTANCES AFFECTING CONSENSUS (mistake/error)

- ▶ Mistake in contract means that one or both parties to a contract have the incorrect impression. Such incorrect impression affects the validity of the contract.
- ▶ Mistake is material due to fact that is lacking on consensus.
- ▶ Mistake is non-material due to facts that affects the decision to contract.

CIRCUMSTANCES AFFECTING CONSENSUS (Misrepresentation)

- ▶ Culpable misrepresentation (either fraudulent or negligent) is a wrongful statement of fact made by one party (or his or her agent) to the other party (or his/her agent) prior to finalising the contract, which misrepresentation persuades the latter party to conclude the contract.
- ▶ The misrepresentation may be express or tacit and in some cases silence may amount to misrepresentation.
- ▶ Tacit- not expressed in words but based on the parties' true intention.

CIRCUMSTANCES AFFECTING CONSENSUS (Duress)

- ▶ Duress arises when a prospective contractant is forced/compelled by means by of an unlawful threat/intimidation by the other party (or someone acting on his behalf), which causes fear in the prospective contractant, to conclude the contract.
- ▶ Duress usually results in a void contract due to the fact that the consent of one party is obtained in an improper manner.

CONTRACTUAL CAPACITY

- ▶ A party to a contract must have the necessary contractual capacity.
- ▶ Contractual capacity can be divided into three categories:
 - ❖ Full contractual capacity – person with full contractual capacity can conclude a contract
 - ❖ Limited contractual capacity – persons with limited contractual capacity need assistance/permission.
 - ❖ No contractual capacity – persons with no contractual cannot capacity conclude contracts

CONTRACTUAL CAPACITY (The state)

- ▶ For a contract with the state (where government is one of the parties) to be valid, such a contract must be authorised by the relevant minister.

CONTRACTUAL CAPACITY (Corporations)

- ▶ Company: A company is a juristic person and needs representatives (or organs) to act on its behalf. The contractual capacity of the representative is determined by the powers given to him/her by the company.

CONTRACTUAL CAPACITY (The age of a person)

- ▶ A person's contractual capacity is determined by age.
- ▶ The law distinguishes between minors and majors.
- ▶ A minor under the age of seven has no contractual capacity.
- ▶ Minors, who are between seven and 18 years and have limited contractual capacity.
- ▶ Whether female or male child- becomes major upon reaching the age of 18 years (the children Act 38 of 2005)

FORMALITIES

- ▶ Formalities that are prescribed by statute in south Africa cover the following types of contracts:
 - ❖ Contracts of the alienation of land must be in writing and signed by or on behalf of the parties.
 - ❖ Contracts of suretyship must be in writing.
 - ❖ Executory contracts of donation must be reduced to writing.
 - ❖ Any credit record must be recorded in writing.
 - ❖ For ante-nuptial contracts, long leases, mortgages, and assignment of patents they must be formally registered.

PERFORMANCE MUST BE OBJECTIVELY POSSIBLE

- ▶ Performance must be objectively possible during the conclusion of the contract. This is a requirement for a valid contract and a contract is void if performance is objectively impossible.
- ▶ A contract is unlawful when its conclusion, performance to be rendered, and the object for the conclusion of the contract is forbidden by law.

THE CONCLUSION OF THE CONTRACT, ITS PERFORMANCE AND ITS OBJECT MUST BE LAWFUL

- ▶ A contract is unlawful when the performance to be rendered is forbidden by law.
- ▶ A contract to commit a crime, e.g. fraud, would be void (not valid).

THE PARTIES TO A CONTRACT, PARTIES COMMONLY ASSOCIATED WITH ENGINEERING AND CONSTRUCTION CONTRACT

- ▶ Co-creditors and co-debtors
 - ❖ Contracts are usually concluded between one debtor and one creditor, though it is also permissible that several debtors bind themselves as against several creditors.
 - ❖ E.g. Richard and Joseph agree to construct a house for Peter and Jenny, in which case Richard and Joseph are co-debtors who need to construct the house, with Peter and Jenny co-creditors.
- ▶ Simple joint liability
 - ❖ In the case where the parties to the contract have made no stipulations, then each debtor to the contract is simply jointly liable for his or her own share only.

THE PARTIES TO A CONTRACT, PARTIES COMMONLY ASSOCIATED WITH ENGINEERING AND CONSTRUCTION CONTRACT (Cont.)

- ▶ Joint and several liability
 - ❖ Joint and several liability only apply if the parties have expressly contracted to be bound jointly and severally as debtors.
- ▶ Joint (common) liability
 - ❖ In such a case, the debtors are jointly liable only, and the co-creditors may only claim performance jointly against all debtors.

THE PARTIES TO A CONTRACT, PARTIES COMMONLY ASSOCIATED WITH ENGINEERING AND CONSTRUCTION CONTRACT (Cont.)

- ▶ Parties commonly associated with engineering and construction contracts:
 - ❖ The engineer - The registration of professional engineers, technologists and technicians are regulated by the ECSA (Engineering Council of South Africa).
 - ❖ The resident engineer- must watch and supervise the design and execution of works.
 - ❖ The architect/quantity surveyor – Architects are regulated by the South African Council for Architects. The function of an architect is to design and supervise the erection of the buildings.
 - ❖ The professional construction project manager/project manager

TERMS OF A CONTRACT

- ▶ Contract is an agreement that creates obligations and legal ties
- ▶ Term of contract in general:
 - ❖ The essentialia of a contract are the terms that the law deems essential for placing a contract into a certain category, The purchase price of an item is an example of the essentialia of a contract of purchase and sale.
 - ❖ naturalia of a contract are terms which naturally form part of s contract through which parties can expressly change.
 - ❖ The incidentalialia of contract are the additional terms which parties themselves make part of contract.

TERMS OF A CONTRACT (Cont.)

- ▶ Express, implied and tacit terms:
 - ❖ Express terms are terms in a contract that are incorporate into contracts by means of communicated (oral or written) declarations of intent.
 - ❖ Implied terms are terms not expressed by words, but which are incorporate into a contract by operation of law.
 - ❖ Tacit terms are incorporated into contracts without having to be expressed in words. It is based on the parties true intention.

TERMS OF A CONTRACT (Cont.)

- ▶ A condition - A contractual term that renders the operation and consequences of the contract dependent on the occurrence or non-occurrence of a specific uncertain future event.
- ▶ Time clauses - Determines a specific time or period within which the contract will either become operative or be dissolved.
- ▶ Supposition - A contractual term that renders the operation of a contract dependent on an event that has already taken place.
- ▶ Warranties - A warranty is a contractual term whereby a contracting party assumes absolute liability for proper performance.
- ▶ Exemption clauses – exemption clauses limit the liability of one of the parties to the contract, e.g. liability for latent defects in the item sold, for misrepresentation or for breach of contract.

TERMS OF A CONTRACT (Cont.)

- ▶ Non-variation clause –
- ▶ Cancellation clauses - A clause that entitle a contracting party to summarily cancel the contract due to the other's breach.
- ▶ Penalty clauses - A clause that states that the party who commits breach of contract must render a specified performance to the aggrieved party.

INTERPRETATION OF CONTRACTS

- ▶ In the interpretation of contracts:
 - ❖ Primary rules of interpretation are always applied firstly,
 - ❖ Secondary rules applied in the event of ambiguity remaining and
 - ❖ tertiary rules applied in the event where rules do not resolve the ambiguity. (last resort)

BREACH OF CONTRACT

- ▶ Breach of contract occurs when the one contracting party culpably interferes with the rights of the other contracting party or fails to discharge his obligations in terms of a contract.
- ▶ Mora debitoris means “default by the debtor”.
- ▶ Mora creditoris means “default by the creditor”.

BREACH OF CONTRACT (cont.)

- ▶ The law of contract recognises five distinct ways in which breach of contract may occur:
 - ❖ Default by the debtor (Mora debitoris) – Mora debitoris arises where the debtor neglects or fails to perform timeously whilst performance remains possible.
 - ❖ Default by the creditor (Mora creditoris)
 - ❖ Positive malperformance – occurs when a contracting party does not comply with the terms and condition of contract
 - ❖ Repudiation – occurs when one contracting party conducts himself in such a manner that the other party reasonably concludes that the former will no render performance
 - ❖ Prevention of performance – arise where performance is made impossible by either contracting party after the conclusion of the contract.

REMEDIES FOR BREACH OF CONTRACT

- ▶ With breach of contract there are three remedies that may be available to the innocent party.
- ▶ Availability of each remedy depend upon the form and severity (seriousness) of the breach
- ▶ three remedies for breach of contract:
 - ❖ Specific performance – is the performance of that which the parties agreed to when entering into the contract. An innocent party (to a contract) is always entitled to claim specific performance.
 - ❖ Cancellation/rescission of the contract – is a juristic act in terms of which obligation provided by a prior valid contract is terminated. Cancellation (rescission) of a contract is possible only in exceptional circumstances.
 - ❖ Damages – defined as the monetary equivalent of damage awarded to a plaintiff with the object of eliminating.

REMEDIES FOR BREACH OF CONTRACT (Cont.)

- ▶ Typical damages due to delay caused by employer with respect to construction contracts:
 - ❖ Additional site expenses
 - ❖ Escalation of material, labour, fuel, plant and sub-contract
 - ❖ Additional expenses due to loss of production
 - ❖ Additional costs of financing and insurance
 - ❖ Loss of profit and off-site overhead

THE TRANSFER AND TERMINATION OF OBLIGATIONS ARISING FROM A CONTRACT

- ▶ Cession - Rights arising from a contract can be transferred by the holder thereof to another person.
- ▶ Delegation - is when contractual duties are transferred from the original debtor to a third party.
- ▶ Discharge – a contract is terminated naturally by its discharged.(performance in accordance with what the parties envisaged they entered into the contract.
- ▶ Release – this is a further agreement between the creditor and the debtor in terms of which the creditor releases the debtor from his or her obligations in terms of the original contract.

THE TRANSFER AND TERMINATION OF OBLIGATIONS ARISING FROM A CONTRACT (Cont.)

- ▶ Novation – this is an agreement between a creditor and debtor on an existing obligation.
- ▶ Set-off – is the extension of debts owed reciprocally by the parties. Example If John owes Lucky R1000 whilst Lucky owes John R800 then John owes Lucky R200 after set-off.
- ▶ Compromise – if the parties are in dispute as to the performance that is due, they may agree to settle the dispute by way of compromise agreement.
- ▶ Prescription – the passage of time by way of prescription influence obligation. Prescription start to run as soon as the debts is due payable.

DIFFERENTIATING BETWEEN THE CONTRACT FOR THE LETTING AND HIRING OF WORK AND THE CONTRACT FOR THE LETTING AND HIRING OF SERVICES

- ▶ In Roman law, there were three species of letting and hiring contracts, Namely:
 - ❖ Contracts for the letting and hiring of a specific thing,
 - ❖ Contracts for the letting and hiring of work,
 - ❖ Contracts for the letting and hiring of personal services in return for remuneration.

DIFFERENTIATING BETWEEN THE CONTRACT FOR THE LETTING AND HIRING OF WORK AND THE CONTRACT FOR THE LETTING AND HIRING OF SERVICES (Cont.)

- ▶ Principles related to the contract for the letting and hiring of work.
 - ❖ This is a contract whereby a specialist is hired to perform a specific piece of work.
 - ❖ The hired party is not employed by the owner and is therefore not under his/her control or subject to his/her orders.
 - ❖ No formalities are required for this type of contract.
 - ❖ The main duty of the contractor is to complete the work in accordance with the contract and any plans and specifications incorporated into it by reference.
 - ❖ Where the details of the work are not specified contractually, the contractor has to do what is reasonably necessary to achieve the object of the contract.
 - ❖ The main duty of the owner is to pay the contractor for the work in accordance with their contract.
 - ❖ The contractor is entitled to be remunerated for "extras" and variations not provided for in the original contract if the owner consented to them.

References

- ▶ Ref: Management for Engineers, Technologists and Scientists, 3rd edition, by Wilhelm P. Nel