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# Memo

**To:** Ms Inba Thumbiran  
**From:** Adv. Janette Botha  
**CC:**  
**Date:** 10 February 2009  
**Re:** GCC 2009 Dispute Board Rules

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JB Consult was requested to review the proposed GCC Dispute Board Rules against the background of the current construction legislative environment in South Africa:

## 1 General:

The purpose of the Dispute Board is not clearly defined in the proposed rules. However, it has been deduced from other documentation that the Dispute Board is intended to be a "preventative body". The basic principle of preventing disputes is sound and as such form part of the obligations of almost all contracts. However, the manner of implementation through the proposed GCC 2009 Dispute Board Rules poses a serious concern.

### 1.1 Administrative Justice

**METRO INSPECTION SERVICES (WESTERN CAPE) CC AND OTHERS v CAPE METROPOLITAN COUNCIL 1999 (4) SA 1184 (C)**

**TOTAL SUPPORT MANAGEMENT (PTY) LTD AND ANOTHER v DIVERSIFIED HEALTH SYSTEMS (SA) (PTY) LTD AND ANOTHER 2002 (4) SA 661 (SCA) – Arbitration is not administrative action**

**SOUTH AFRICAN JEWISH BOARD OF DEPUTIES v SUTHERLAND NO AND OTHERS 2004 (4) SA 368 (W)-**

The constitution affords every person the right to administrative justice, a concept with which most administrators are familiar. Giving effect to this basic human right in a highly technical and modern environment is not easy. However, the principle cannot be diffused to the point where it becomes irrelevant.

Administrative justice consists of various components, but the basic tenets are those of fairness and reasonableness. Through the years these concepts have been developed into the following basic principles, which I paraphrase and oversimplify:

- a person be entitled to state his or her case prior to an administrative decision being taken that may affect that persons rights;
- that person exercising the administrative decision apply his/her mind through the relevant considerations and then exercise it in a fair and reasonable manner; and
- persons affected by such decisions be given reasons for the decision that may affect him/her.

The right to fairness and reasonableness includes inter alia the rules that justice must not only be done, it must be seen to be done, as well as the rule that one cannot be the judge in your own cause. These rules have in the past been taken very seriously by the South African Courts. (Get examples) -

The concept of a Dispute Board that is involved in the execution of the contract diffuses the principle of administrative justice. The

## **2 CLAUSE 10 – CLAIMS AND DISPUTES**

It is, in my view, necessary to briefly consider the framework of this clause as it is within the terms of this that the Dispute Board will operate.

2.1 Sub-clause 1 sets out a procedure whereby a timeframe is established for a Contractor to lodge a claim for an extension of time, for additional payment or compensation. The process is laid down for the recording of relevant details upon which the claim may be based, recording any points of agreement or disagreement and the Engineer is then required to make his ruling following the consultation process and in accordance with clause 3.1.2 of the agreement.<sup>1</sup>

2.2 Clause 10.2 makes provision for the Contractor to require the Engineer to make a ruling on any agreement which does not fall within the ambit of 10.1 or 10.12 (which relates to special disputes).

2.3 Clause 10.3 permits either the Employer or the Contractor to place in dispute a ruling of the Engineer by means of a "Dispute Notice" delivered to the Engineer and the other party disputing the validity or correctness of the whole or part of the ruling and similarly the Contractor may do so if the Engineer fails to rule on an issue.

2.4 It is at this stage, and in terms of clause 10.3.4 that the road parts and a dispute may be referred to a Dispute Board or be referred for Adjudication, as parties may have agreed in the Contract Data, unless settled directly between the parties. Where the parties to the contract have agreed on Adjudication in the Contract Data, it then proceeds in accordance with the rules set out in Appendix III of the GCC Draft Second Edition.

2.5 Clause 10.5 deals with the Dispute Board route and requires that this be constituted within 56 days of the Commencement Date of the contract, and in accordance with 10.10.1.2, which entitles the parties to jointly select one or three persons from a panel published by the South African Institution of Civil Engineering failing which he/she/the Dispute Board will be

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<sup>1</sup> 3.1.2 Whenever the Engineer intends, in terms of the Contract to exercise any discretion or make or issue any ruling, contract interpretation or price determination, he shall first consult with the Contractor and the Employer in an attempt to reach agreement. Failing agreement, the Engineer shall act impartially and make a decision in accordance with the Contract, taking into account all relevant facts and circumstances.

appointed by the President of the Institution on application of one or other party to the agreement.

2.6 If a dispute arises within the 56 day period and prior to the establishment of the Dispute Board the matter will proceed to Arbitration or Court, as agreed in the contract. Presumably this course will also follow if a dispute arises after the 56 day period in circumstances where a Dispute Board has not been established for whatever reason. Perhaps this clause should be expanded upon to say this.

The above is a summary of the provisions relating to claims and disputes.

### **3 GCC 2009 – DISPUTE BOARD RULES**

I have some initial comments of a more general nature.

Referring to the memorandum of Mr Willie Claassen, referred to above, the intention of the Dispute Board is to exercise a more proactive function that avoids disputes and provides solutions. If I am correct in this respect, it might be more appropriate to refer to this Board as a Dispute Resolution Board to avoid the negative connotation of a body being in place for disputes before there is anything in issue.

A further comment is that the complexity, length and detail of these rules seem to break with the usual practice of dispute resolution provisions in the construction field being relatively brief and robust.<sup>2</sup> This seems out of character with the practices in the construction industry.

Proceeding to the rules themselves:

Scope of Rules:

Rule 1.1 states that "these rules apply to dispute resolution by a Dispute Board..."

The further clauses therein, particularly 1.2.1 through to 1.2.3 (perhaps the first and second to a greater extent than the third), seem to address normal contract management. If there is no dispute, as contemplated by clause 10.3.1, would these clauses have any application? Put another way, if there is no problem, does it need to be fixed?

We should enquire whether these Clauses 1.2.1 to 1.2.3 confer contractual powers as against one or other of the contracting parties. I refer to a situation where the Dispute Board considers itself duty-bound to enquire into matters where one, or both, contracting parties do not welcome or invite this intervention.

#### **3.1 Establishment of Dispute Board:**

What provision is made for fees and disbursements of the members of the Dispute Board? Appendix V certainly makes provision that their fees and expenses shall be paid in full by one or other party and that one half should be recovered from the other so that they are borne equally. Is it the intention that these fees be prescribed or determined by a professional association, or perhaps agreed on an ad hoc basis? We would suggest that attention be given to this and included in this paragraph, alternatively in Appendix V.

While dealing with Appendix V, perhaps it should make provision for the contact details or addresses where each of the signatories will accept receipt of documentation, notices etc.

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<sup>2</sup> For example, compare Cl 4.6 which, in the event of this process failing to resolve a dispute one consequence flows therefrom while their embarking on the procedure laid down by Cl 4.7 has another.

If there is a lack of clarity as to the financial implications of adopting this process, there will be an understandable reluctance, on the part of contracting parties, to embark on this process.

### **3.2 Clause 2.4:**

The use of the word "proceedings" in the first line warrants reconsideration. Proceedings connote something happening, some sort of activity, whereas it is likely that proceedings in the sense contemplated here will only commence at some later stage. Perhaps the drafter should consider something on the following lines:

"2.4 The Dispute Board shall be constituted as such on the date when the..."

### **3.3 Clause 3: Commencement of Dispute Board Proceedings:**

Again, we would suggest that the word "proceedings" be substituted with the word "constitution".

I have difficulty with the way clause 3.1 is phrased. It reads "...on a continuous basis, informally assist the Contractor and Employer to resolve differences between them by discussion...". I would suggest that this be revisited. The likelihood is that this Board will not sit continuously but will, even if informally, interact on an "as needed" basis or by arrangement. Perhaps the following wording should be considered: "...from time to time, informally and as may be agreed by the Contractor, the Employer and the Board, to resolve differences..."

We would suggest that a clause 3.2(a) (or the following being renumbered) be inserted stating that the Board will be required to provide an address where it will receive documentation and notices. We suggest:

" 3.2(a) The Board will furnish the Engineer, the Contractor and the Employer with an address at which it will receive documentation and notices. In the case of a three person dispute, such documentation and notices may, at the request of the Dispute Board, be required to be furnished in triplicate. The Board will further provide e-mail addresses at which its members will agree to receive documents transmitted by electronic communication".

### **3.4 Clause 3.3; Board Dispute Procedures:**

I am of the view that Clause 3.3 needs consideration and needs to be firmed up<sup>3</sup>.

My understanding is that the dispute board is intended to be actively engaged in the process of interaction between Employer and Contractor. In terms of the preceding Clause 3.2, where there is a claim (10.1) or a disagreement (10.2) the Dispute Board is required to be placed on notice. Instead of now leaving it to the Employer and the Contractor to "... discuss the matter and seek to reach agreement on the procedure to be followed to resolve the dispute ..." the Dispute Board should be entitled to enquire into the matter and, in consultation with parties, determine the procedure for the most expeditious resolution of the dispute.

### **3.5 Clause 4.4 :**

In respect of the wording "... and shall not give advice on the execution of the contract.", is their authority or involvement ousted where matters relating to "the execution of the contract"

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<sup>3</sup> Clause 3.3 reads as follows; "Once a dispute has been referred to the Dispute Board in terms of GCC 2009, Clause 10.3.4, the Employer and the Contractor may discuss the matter and seek to reach agreement on the procedure to be followed to resolve the dispute. In the absence of reaching such an agreement within 28 days of the date of referral, the adjudication procedure shall be followed."

is at the core of the dispute? This may relate to quality issues or a host of other matters which may relate to the execution of the contract? Perhaps the drafter should make his/her intentions clearer in this respect. It seems inconceivable that the Dispute Board's role should be ousted in this respect when, clearly, there is a conciliation role in their function.

I have some difficulty in foreseeing how Clause 4.5.2 will work out in practice. Given circumstances where the parties may choose not to solicit the input of the Board but they intervene in circumstances where they are advised of a claim, are they then under duty to enquire into and provide an opinion? Given such circumstances, are they entitled to raise fees and disbursements for their intervention?

I am of the view that Clause 4.5.3 should be amended so as not only to set out, as a course of action, the processes under 4.5, but rather to set out the 3 possible courses, ie 4.5, 4.6 and 4.7. I would, accordingly, suggest that Clause 4.5.3 be framed along the following lines;

"4.5.3 Informally advising the Contractor and Employer whether, having regard to the nature of the claim or dispute, it would be in the interests of all parties to attempt to resolve the claim or dispute by way of the process laid down by Sub-clause 4.6, Sub-clause 4.7, or Sub-clause 4.8"

### **3.6 Clauses 4.6, 4.7 and 4.8; Wording**

The above three clauses make provision for a process where the parties can either settle on;

- the advisory procedure; or
- the recommendation procedure; or
- the adjudication procedure.

If I am correct that the parties must choose one of three laid down procedures, then the wording leading into 4.6, 4.7 and 4.8 should be uniform, on the following lines;

"4.6 If the parties agree to proceed in accordance with the advisory procedure, the process shall proceed as follows:" and

"4.7 If the parties agree to proceed in accordance with the recommendation procedure, the process shall proceed as follows:" and

"4.8 If the parties agree to proceed in accordance with the adjudication procedure, the process shall proceed as follows:"

### **3.7 Sub-clause 4.6: Advisory Procedure; Order and Layout**

I would suggest that the sequence of this sub-clause be revisited, setting out, in the first place, the basic procedure and, thereafter, any qualifications thereon.

I would suggest something along the following lines:

"4.6.1 The Dispute Board shall, as soon as feasible after it has been determined that the advisory procedure is to be applied;

- 4.6.1.1 invite one party to set out its claim or complaint by means of verbal and/or written representations and that the other be permitted to respond, by means of a procedure which is procedurally fair to both parties; and

- 4.6.1.2 release its the advisory opinion as soon as possible thereafter, but not later than 21 days after receiving the representations referred to in 4.6.1.1;
- 4.6.2 If the Employer and the Contractor ;
  - 4.6.2.1 agree to abide by the advice which is the product of the advisory procedure, this shall be recorded by way of a minute signed by both parties and the dispute or claim shall be deemed to be resolved accordingly;
  - 4.6.2.2 do not both agree to abide by the advice which is the product of the advisory procedure, or if it becomes apparent at any stage that one or other party will not abide by the advice, or if the Dispute Board determines that, by reason of complexity, or any other reason, the process provided for by this Sub-clause 4.6 will not bring about the resolution of the claim or dispute;

the Employer and Contractor shall be accordingly advised within seven days, whereafter either party may invoke the adjudication procedures open to them provided for in Sub-clause 4.8.

- 4.6.3 In any procedures referred to adjudication in accordance with 4.6.2.2, any submission, admission or concession may not be used against the party who made it."

In a nutshell then, if one or other party adopts this course, the Board will hear representations from each side, provide advice on the basis of having heard both sides and then it is up to the parties to accept the advice, thereby resolving the issue at hand, or not to accept the advice, in which event it will proceed to the adjudication process, if sought by either party.

As this Sub-clause 4.6 is presently drafted, it provides that in the event of the advice not being accepted "... the adjudication process shall be followed." (4.6.4)

I would advise against a mandatory reference to adjudication. In the first place, reference to a process where the issues are taken out of the hands of the parties and is decided by the Board should be at the election of one or other of the parties, if not both of them.

A greater problem is that the same Board that provided advice will now sit in adjudication of the issues. A party who is unhappy about the "advice" provided by the Board is hardly likely to invite that same Board to sit in judgement of the same issues, or to agree to such a process. This situation would be highly vulnerable from an administrative law point of view as the Board will justifiably stand accused of entering into the enquiry with preconceived views on the dispute.

### **3.8 Sub-clause 4.7; The Recommendation Procedure**

This clause seems to be silent on the procedural steps that one or other party is required to follow if they choose to invoke this procedure.

Before going there, it may, perhaps, be of assistance to establish the objective of this Sub-clause, compare it with 4.6 and, in the light of the difficulties faced by 4.6 ask whether there is, indeed, a basis for having these two clauses one after the other, in tandem.

In a nutshell, what seems to be intended is a procedure aimed at dealing with weightier differences than those contemplated in 4.6 where, in circumstances there is no resolution by this means, instead of the dispute being referred to adjudication in accordance with the

Dispute Board Rules, the parties have recourse to litigation or external arbitration, as they may have agreed.

By reason of the difficulties inherent in Sub-clause 4.6 and, save for the distinction of where unresolved matters may be referred to, perhaps the drafter should give consideration to collapsing 4.6 and 4.7 into one, where the intervention of the Dispute Board offers only two courses for the dispute proceed to follow;

- mediation, whether it is called the advisory procedure or the recommendation procedure; and
- adjudication.

The wording of the clause that will subsume 4.6 and 4.7 could be along the lines of those suggested under 4.6, above.

### **3.9 Subclause 4.8; The Adjudication Procedure**

If this is retained as one of the procedures of the Dispute Board (I will suggest that this may not, necessarily, be a good idea), again, the clauses dealing with the adjudication procedure should lay down actual steps that the Board will be required to follow.

For the reasons stated above, I suspect that steps taken by the Dispute Board to adjudicate, whether this has been preceded by an advice procedure, the recommendation procedure or whether informal steps have been taken to avoid disputes which later develop, may well come under attack for the reason that it entered into the enquiry with preconceived views.

### **3.10 Overview of Procedures**

From the above, I would suggest that, in practice, a Dispute Board might find that the space within which it can move is limited.

While it could, without much difficulty, move from an informal player, as contemplated by Sub-clause 1.2.2 for example, to a mediatory role, as soon as it tries to wear the hat of the adjudicator, it may find itself in difficulty.

These are, in my view, considerations which should lead the drafter of this format, where contracting parties must choose the adjudication route will be Dispute Board route, back to the drawing board.

### **3.11 Clause 5; Meetings and Site Visits**

I have no difficulty with this clause, save to suggest that if and when the Dispute Board and the parties agree on a schedule of visits, there should be agreement on the cost of these visits.

### **3.12 Clause 6; Duties of the Contractor and the Employer**

I have no difficulty with this clause, save to suggest that the word "reasonably" be inserted before the word request in 6.4.

### **3.13 Clause 7; Power of the Dispute Board**

The word "Power" in the heading should be stated in the plural.

7.1 The second line should be supplemented to read " ... principles of fairness, impartiality and taking into account the wishes of ..."

7.1.1 Particularly where the Dispute Board acts in its mediatory role, I would question whether their powers would extend to revising site instructions or certificates or valuations of the Engineer.

### **3.14 Clause 8; Decisions by the Dispute Board**

8.2 I would suggest that this be redrafted as follows;

"8.2 Advice, recommendations and decisions of the Dispute Board shall be delivered as soon as circumstances permit, but no longer than 28 days after hearing the parties, unless the Employer and Contractor agree to an extended period for this purpose."

### **3.15 Clause 9; Representation**

9.1 I would revise the proviso as follows;

" ... provided that formal legal representation shall be permitted with the consent of the parties, or with the leave of the Dispute Board, which shall be given where it, in its discretion, forms the view that this would materially assist in deciding the issues."

9.2 I would suggest that the words "are to" be deleted and the words "shall be" be inserted in their place.

### **3.16 Clause 12; Role of Members in subsequent proceedings**

12.1 I suggest that this be deleted. This follows as a matter of law and need not be included. Apart from that, this clause seems to have been taken from an agreement. Under consideration is a set of rules, not an agreement.

12.2 The same applies here. Provision has already been made that prior proceedings will be privileged and may not be used as evidence.

### **3.17 Conclusion**

Apart from numerous clauses that will require re-drafting, I am of the view that there are a number of serious structural difficulties that should be reconsidered.

The most concerning of these is the multifaceted role that is contemplated for the Dispute Board where, in the same dispute, they may, in the first instance, offer informal advice, then formal advice and finally adjudicate the same issues.

Kind regards,

Advocate Janette Botha