

THE CONSTRUCTION INDUSTRY STAKEHOLDERS PRELIMINARY VIEWS ON THE PROPOSED SOUTH AFRICAN PROMPT PAYMENT AND STATUTORY ADJUDICATION REGULATIONS

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Payment default in form of delayed payment or non-payment is a key barrier to the survival of both contractors and sub-contractors in the construction industry. Delayed payments have not only negatively affected cash flow and progress of construction project but have, in some instances, resulted in protracted disputes thereby affecting the growth and performance of the construction industry. At present, payment default remains a chronic issue in the South African construction industry. This has become a source of concern to both the government and the construction industry. Following the successful adoption of the security of payment and statutory adjudication legislation in the United Kingdom (UK) and some other jurisdictions across the globe, the South African (SA) construction industry through the Construction Industry Development Board (CIDB) has prepared a prompt payment and statutory adjudication draft regulations. The regulation aims to address the peeved issues of late payment and provides a quick and cheaper means of resolving construction disputes through adjudication. At the moment, the draft regulation is awaiting approval. In anticipation of converting the draft regulations into law, this study investigates the industry stakeholders' first impressions of the proposed draft regulations, assesses their level of awareness and knowledge of the regulations and finally seeks their views on whether the regulations will be able to deliver its intended outcomes to secure timely payments in the industry. The study employs a quantitative research approach using a semi-structured questionnaire to gather information from various industry stakeholders within the KwaZulu-Natal Province of South Africa. The collected data was statistically analysed. The research revealed that the level of awareness is still very low. Moreover, opinion spilt as to the level of impressions that the respondents have regarding the regulations. Notwithstanding, majority of the respondents believed that the regulation should be able to deliver its intended outcome by providing remedy to the delayed payment problems in the industry.

Keywords: payment default, payment regulations, South Africa, statutory adjudication

INTRODUCTION

Late and disputed payment to contractors, sub-contractors or suppliers is an on-going problem in many construction industries across the globe (Nik Din and Ismail, 2014; Jin, Kumaraswamy and Gary, 2011). The South African construction industry is not spared in this unhealthy act (CIDB annual report, 2012; Maritz, 2014). In South

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Africa, delayed payments have traditionally been particularly common especially in public sector projects (Mewomo and Maritz, 2015; CIDB, 2015; Maritz and Mewomo, 2016). Often, the issue of delayed payments has not only resulted in protracted disputes and adversarial relationship between contracting parties but has significantly threatened the social and economic objectives of the country, thus affecting the national economic growth (CIDB, 2015; Rahman and Ye, 2010). Consequently, its disastrous effects have engendered serious concerns to both the government and various industry stakeholders as a good number of companies have been forced out of business due to late or non-payment. Small contractors and subcontractors' organisations are mostly affected as they require prompt payments for works executed in order to keep their businesses going. Unfortunately, these categories of organisations are faced with the dilemma of exercising their contractual and legal rights due to the cost and time involved as well as the fear of losing future job opportunities.

In the past, many regulative measures were introduced to address payment obligations, but most of them could not meet the demand of the industry. For instance, Act 1 of 1999, Section 38(1)(f) of the Public Finance Management Act (PFMA) requires accounting officers to settle all contractual obligations and pay all money owing, including intergovernmental claims, within the prescribed or agreed period. In addition, the National Treasury Regulation 8.23 states that: "Unless determined otherwise in a contract or other agreement, all payments due to creditors must be settled within 30 days from the receipt of invoice." Notwithstanding, despite the afore-mentioned regulations and many other similar ones, there has been a disappointing trend in the payment culture within the South African construction industry as timeous payment continues to deteriorate (CII, 2008, CIDB 2015). The CIDB Construction Indicators Report reveals the statistics of prevalent payment culture in the SA construction industry.

According to the 2014 edition, the report shows that a total of 58% of contractors suffered delayed payments. Fifty-three per cent of these contractors received payment for work done between 30-90 days, and 5% in 90 days or more (CIDB, 2014; CIDB, 2015). In 2015, 60% of payments to contractors were delayed for longer than 30 days after invoicing. This reflects a noticeable deterioration in prompt payment practices over the period 2012 to 2015. This practice is against the existing regulative measures and has put severe pressure on contractors and subcontractors, especially the emerging businesses who do not have sufficient capital (CIDB, 2015). Having realised the destructive effects of late payments on sustainability of entrepreneur and the survival of small and emerging contractors, both government and the industry have come to the realisation that delayed payment is a real threat, not only to small business, but to the very social and economic objectives of the country.

In line with this realisation, the CIDB believes that additional regulations and punitive measures are necessary to put an end to late payments (CIDB, 2015). This belief has propelled the CIDB to initiate the procedure stipulated in section 33 (Regulations) of the CIDB Act 38 of 2000 by drafting regulations in support of payment and adjudication practice in SA. The purpose of the regulation is to improve cash flow and provide quick access to justice through adjudication. Once enacted, the regulations are expected to ensure that there is actual cash flow in the construction industry (South African Construction News, 2015). According to Rabin and Schrag (1999), first impressions and initial responses of key stakeholders around new measures matter. Consequently, understanding stakeholders' views on new measures

may be one of the determinants of how effective the new regulation is likely to be and the level of benefits the industry can possibly derive from it. Thus, this study investigates the industry stakeholders' first impressions of the proposed draft regulations, assesses their level of awareness and knowledge of the regulations and finally seeks their views on whether the regulation is seen as a good move towards improving timely payment in the industry

LITERATURE REVIEW

The South African proposed prompt payment and adjudication regulations

In 2004, the CIDB introduced adjudication into construction contract in South Africa and advocated that: "adjudication should be applied to all categories of construction contracts, viz engineering and construction works, services and supplies, at both prime and sub-contractors' levels. Adjudication is meant to be a mandatory requirement for the settlement of disputes prior to the completion of contract" (CIDB, 2013). Through this initiation, construction adjudication found its way into two most famous locally-developed construction agreement in South Africa; the General Conditions of Contract (GCC) 2004 and Joint Building Contracts Committee, JBCC 4th edition, consequently adjudication becomes a common place in South Africa. However, in contrast to the practice in other jurisdictions where adjudication is a creation of legislation, in South Africa adjudication can only be adopted by agreement between the contracting parties. As a result, the use of adjudication remains largely ineffective in the South African construction industry. Having realised the fact that the existing regulations may not be effective in the absence of statutory force, the CIDB in terms of the procedure stipulated in section 33 (Regulations) of the CIDB Act 38 of 2000 prepared a draft regulation in support of payment and adjudication practice in South Africa. The draft regulations were published for comments by the Minister of Public Works in Government Gazette 38822 of 29 May 2015.

The regulations were targeted at resolving cash flow issues by ensuring progressive payment to contractors/ subcontractors for work done. The proposed regulations governing payments and dispute management under construction contracts are expected to bring a great change into the way the South African construction industry operates. These regulations primarily address a crippling constraint to effective infrastructure development by introducing processes to ensure effective cash flow system in the industry. The draft regulations are in two parts. The first part, which is Part IV B tagged "Prompt payment", provides a standard set of payment provisions which outlaw the practice of "pay when paid" or "pay if paid"; and support the entitlement to progress payment; date of liability for payment and provision of security and remedies for recovery of payment (CIDB, 2014). The second part, (Part IV C), introduces adjudication as a mandatory first step for resolution of disputes in both the public and private sectors. Several countries have already introduced Acts and Legislation to address payment default issues.

The scope of the Payment and Adjudication legislations in each jurisdiction (that has adopted it) is one of the main areas of divergence. While some jurisdictions include certain types of contracts in their Acts, some exclude them. Thus, the recognition of the types of contracts included in the Act to which the legislation refers is crucial in determining the beneficiaries that the legislation attempt to protect and thereby the legislation's scope of application (Mewomo, 2016; Munaaim, 2012). Unlike other jurisdictions where the security for payment and adjudication were legislated in a new Act, the South African proposal for security of payment and adjudication legislation is

somewhat different and unique in that it is effectively subject to existing legislation and not to a separate new Act, as practiced in other jurisdictions. The CIDB Regulations published under GN 692 in GG 26427 of 9 June 2004 were amended by the insertion of part IV B and Part IV C. While the adjudication regulations provide the aggrieved parties with an effective means of redress against perceived wrongs, the payment regulations attempt to alleviate the problems of late payments which are so common within the construction industry. As such, the CIDB's prompt payment regulations in Part IV B is set to achieve the following objectives:

- statutorily prohibit 'conditional payment' provisions e.g. 'pay-when-paid' clauses (Section 26B);
- improve payment process by insisting on regular payments within a defined time-frame - entitlement to progress payment (Section 26C);
- allow suspension of construction activities - right to suspend performance for non-payment (Section 26F);
- statutorily prohibit withholding of payment (Section 26E sub regulation 1, 6); and
- entitle a party to charge interest on late payments (Section 26D sub regulation 2);

In addition to the above-mentioned, the regulations provide for adequate mechanisms for determining the date of liability for payment under section 26D. The regulations require that every construction contract should provide a mechanism for determining when payment becomes due and payable under the contract. The date from which payment becomes due and payable is the date stipulated in the contract, provided that such date may not be more than 30 days after the date in which invoice was rendered (after which interest becomes payable). The purpose of the payment regulation is to address the payment issue which has been a serious problem within the industry. As such, the new proposed Payment and Adjudication regulations are expected to change the way the South African construction industry operates (South African Construction News, 2015). The introduction of the adjudication provisions in part IV C of the regulations would make it mandatory that construction contracts provide for the resolution of disputes by means of adjudication. In this way, each party to a construction contract would possess a statutory right to refer a dispute to an adjudicator, who would decide the dispute within twenty eight calendar days. The adjudicator's decision will be binding on both parties until finally settled by arbitration, litigation or by agreement.

RESEARCH METHODOLOGY

This study adopted a quantitative research approach. However, in order to get more insight into the subject, the respondents were given opportunity to provide further information in form of comments. The quantitative research approach started with a review of relevant literature on security of payment, South African payment culture, the existing payment problems and the possible measures provided in the proposed regulations to combat the payment problems. This was followed by descriptive survey research. The survey research process involved the design and administration of a structured questionnaire. The designed questionnaires were sent to a total of 107 construction participants comprising contractors, sub-contractors, consultants in the KwaZulu-Natal (KZN) province of South Africa. About sixty five per cent of the questionnaires were electronically mailed to industry stakeholders of which some are registered members of the Master Builder Association. Due to low response, some of

the questionnaires were distributed through face to face contact adopting convenience sampling. At the time of this preliminary survey, only 41 responses have been received on which this analysis is based. Therefore, the results are indicative of the condition in KZN and cannot be generalised to the rest of South Africa.

The questionnaire was sub-divided into three sections testing respondents' experience in payment default, the level of awareness and stakeholders' first impression of the proposed regulations, and general views on whether the proposed regulations will be able to deliver its intended outcomes to provide remedy to the delayed payment problems in the industry. A portion of the questionnaire provided an explanatory note to survey respondents. The explanatory note presented a brief summary of the provisions of the proposed regulations in order to enhance the respondents' knowledge on the intended purpose of the proposed regulations. In addition, efforts were made to further clarify issues regarding the regulations' provisions with those respondents that were met face to face. In order to determine the stakeholders' impressions on the proposed legislation, questions were asked as to the extent to which the respondents favour the provisions regarding regular payments within a defined time frame, provisions entitling a party to charge interest on late payments as well as banning of "pay if paid"; "pay when paid" provisions and mandatory statutory form of adjudication provisions in the proposed regulations.

The level of stakeholders' awareness and knowledge of the regulations could determine the rate of usage and adoption. Thus, a section of the questionnaire focused on determining the stakeholders' knowledge of the regulations and their level of awareness. The last section of the questionnaire was directed at examining the changes needed in the construction economics in order to support the effective implementation of the proposed prompt payment and adjudication regulations. The questionnaire used a five-point Likert type scale to measure a range of opinion from "very low" to "very high", "strongly disagree" to "strongly agree" very uncommon to "very common", as the case may be. The respondents were requested to rate the level of their agreements on issues pertaining to the proposed draft regulations on the scale provided.

The analysis shows that respondents are involved at both private and public construction sectors of the industry. According to the statistics, 18 of the respondents operate in private sector, while 23 are involved in the public sector of the industry. Further, the analysis shows that 15 of the respondents were contractors, 19 were public clients while only 2 were sub-contractors. The years of experience of the participants vary, 27 had experience that ranges from 1-5 years, 10 had experience in the range of 6-10 years and 2 had experience that ranges between 11-15 years and 2 had more than 16 years of experience in the construction industry. The analysis further reveals that 10 of the respondents' organisations had involved in 1-5 projects, 8 had worked in 6-15 projects, while the largest number of the respondents (22) had involved in more than 16 projects and are familiar with payment culture in the industry. This demographic information implies that the respondents have involved in a number of projects within the province and are suitable for this type of project which makes the data reliable. Moreover, considering the low responses from the survey research coupled with the facts that the study adopted convenience sampling approach, only the general views of the survey respondents were presented in this study. The differences in the views of different stakeholders were not considered in this study, as each strata /subgroup within the population were not equally represented.

Findings and Discussions

Trends Shown by the Data Collected

Stakeholders' experience in payment disputes

The first question under section 1 of the questionnaire was designed to gather information on the respondent's experience in payment default. The majority of the respondents (33) noted that their organisation had experienced delayed payments or non-payment in one or more of its projects. The minority of the respondents' (4) claimed that they had not experienced any delayed payments, while the remaining 4 of the respondents were neutral to the question. This result alludes to the fact that there exists a chronic problem of payment default in the South African construction industry (Maritz, 2007). A follow up question was asked to know the cases of disputes as well as types of disputes experienced by each of the respondents. Table 1 reveals that 29 of the respondents had experienced between 1 and 10 disputes over the period of 10 years, while only 3 had experienced more than 30 disputes in 10 years. The analysis further shows that the highest types of disputes experienced (43%) were caused by delayed payment by contractors to sub-contractors, followed by general payment/financial issues, and contractual claims which are 39% and 32%, respectively. Other types of disputes experienced include poor workmanship, delayed payment by client to contractors which are 29% and 10% respectively. It is not surprising that delayed payment by contractors is the most common type of disputes. This is in line with the report of CIDB which indicated that no less than 65% of subcontractors experienced delayed payment (CIDB, 2013). Most contractors delayed payments in order to increase their cash flow at the detriment of subcontractors (Lynch, 2011). Unfortunately, this unhealthy act continues to place small contractor in the construction industry at risk.

Table 1: Stakeholders experience in payment disputes

Cases of disputes	Frequency	Percentage (%)	Cumulative %
None	5	12	12
1-10	29	72	84
11-20	1	2	86
21-30	0	0	86
Above 30	3	7	97
Others	3	7	100

Table 2: Types of disputes experienced

Types of disputes	Frequency	Percentage (%)
Poor workmanship	12	29
Contractual claims	13	32
Breach of contract	4	10
Delayed payment by client	4	10
Delayed payment by contractors	18	43
General payment and financial issues	16	39
Consultants design deficiency	6	15

Stakeholders' responses on level of awareness, knowledge and impression on the proposed draft regulations

As noted earlier, the section 2 of the questionnaire focused on determining the level of awareness, knowledge and impression that the industry stakeholders have on the proposed regulations. Very few respondents' (only 3) rated their level of awareness of the proposed regulations as very high, 8 respondents noted that they have high level of awareness and 12 indicated they had average. The question regarding the level of knowledge of adjudication process and procedures indicates that only 1 respondent rated his level of knowledge and understanding as very high, 8 rated their level of knowledge high and the remaining 16 were neutral. The first impression on the regulations reveals that 3 of the respondents have very high impression, 13 respondents have high, while almost half of the respondents (20) rated their impression as average. It should be noted that as at the time of this survey, the regulations have not yet been implemented. However, the high number of respondents' who rated their impression from average to high and very high is a good indication that the industry stakeholders perceive the regulations provisions to be a positive and good move towards achieving improving cash flow in the industry.

Table 3: Summarised results on the level of awareness, knowledge and impression on the proposed regulations

Question	Low (No)	Very low (No)	Average (No)	High (No)	Very High (No)
Level of awareness	6	12	12	8	3
Level of knowledge	5	11	16	8	1
Impression on the payment regulations	1	4	20	13	3
Impression on the adjudication provision	2	3	15	19	2

The question on the impression on the proposed regulations was targeted at discovering how well the industry is ready and prepared to receive the regulations. Gary *et al.*, (2012) has noted the necessity of new legislation to be well received by the citizens, as it provides very good indication of its acceptability and future performance. The result from the survey data is a good indication that the industry is happy with the friendly provision of the proposed regulations. Nineteen (19) respondents rated their impression on the adjudication as high and, 2 very high while 15 rated their impression as average. Likewise, 13 respondents rated their impression as high for the proposed adjudication provision, 3 rated as very high and 20 rated it to be average. The fact that almost half of the respondents' rated their impression on payment provision as average shows that they are undecided, and their knowledge of its operation might have affected their decision. Notwithstanding, majority of the respondents opined that the regulations should be able to provide remedy to the delayed payment problems in the industry. More importantly, greater number of the respondents registered their agreement with the benefits that statutory adjudication under the proposed regulation has to offer (see Table 4)

Table 4: Summarised results on the benefits of adjudication as ADR

Question	Disagree (No)	Strongly disagree (No)	Neutral (No)	Agree (No)	Strongly agree (No)
Cost	1	5	11	17	7
Time	3	4	10	15	9
Privacy	-	6	12	17	6
Enforceability	3	4	11	21	1
Interim relieve	-	5	13	16	7
Fairness	-	5	8	19	9
Temporary binding decision	-	6	7	17	11

Stakeholders' responses on whether the regulations will be able to deliver its intended outcomes to secure timely payment and provide remedy to the delayed payment problems in the industry

Responses to the statement in section 3 of the questionnaire were intended to find out whether the respondents foresee any obstacles to the effective adoption of the proposed regulations and their suggestions on what possible means to avoid them. The first question under this category deals with the issue of business models that could impair the realisation of the intended outcomes of the proposed regulations. As earlier stated, this study did not consider the differences in the views of various industry stakeholders, notwithstanding, a cursory observation of the responses from sub-contractors group revealed that they supported the regulation provisions banning destructive payment terms. They however raised concerns on the issue of imbalance of power between main contractors and subcontractors. More concerns were raised on the possibility of main contractors using their superior power to hinder access to adjudication. Additional concerns were raised on the lack of knowledge of adjudication process and on whether the adjudication procedures will be simple or complex.

More apprehension was on whether an unpaid party can easily initiate the process irrespective of its status. Previously, within the industry, many subcontractors and small contractors had been confronted with the dilemma of exercising their legal and contractual rights and the fear of losing future job opportunities (CIDB, 2015), many of them chose to ignore their rights with the mind that 'Half bread is better than none' as they cannot afford protracted legal battles to force their clients/main contractors to pay. Presently, there is more concern that the big parties may utilise the skills of legal professionals such as claim consultants or lawyer and the small parties may thereby be at disadvantage if the procedure and process of adjudication is complex. The implication of these findings is that for the proposed regulations to be effective, the ease at which the smallest legally informed party can initiate the procedure should be put into consideration. Otherwise, some main contractors might possibly develop clever ways around legislation to delay payments. Issue regarding corruption and fear of losing opportunity to tender for future jobs were other major concerns raised by the contractor's group. The contractor's group suggested that for the proposed regulations to be effective, corruption must be preventable. Otherwise, there will be way around the "well-intended" provisions of the proposed regulations. The respondents finally believed that the regulations should be able to deliver its intended outcome by providing remedy to the delayed payment problems in the industry especially when there is improvement on construction economics within the industry.

CONCLUSIONS

This paper has presented the preliminary views of the industry stakeholders on the proposed draft regulations in the South African construction industry. Based on the survey feedback, the study provided confirmation that payment default remains a chronic problem affecting the delivery chain in the South African construction industry. As evident from the study, payment and financial issues are critical and have been found to be the root cause of disputes; most especially, delayed payment by main contractors/ clients. The proposed payment and adjudication regulation appear to be a very good and welcome idea by the industry. Notwithstanding, it appears that the payment provisions in the proposed regulations are of greater interest to the industry stakeholders as it received positive and high feedbacks.

Concerns were raised on some practices that can impair the effective adoption of the proposed regulations. These concerns ranged from lack of knowledge of adjudication process, the ease of access to adjudication, the complexity/simplicity of adjudication procedures, imbalance of power between contractors and subcontractors, the main contractors' business models / tactics through which contractors can develop clever ways around the regulations to delay payment, corruption and fear of losing future job opportunities. Certain suggestions were put forward if the purpose of the proposed regulations will be achieved. According to the sub-contractor's group, the ease at which the smallest legally informed party can initiate the adjudication procedure should be put into consideration. The contractors group suggested that for the proposed regulations to be effective, corruption must be prevented. More importantly, there is a suggestion that the current need of the industry is not only regulations, but the adoption of best practices, which will allow for a drastic change in the payment culture in such a way that the paymasters act justly, fairly and equitably by making the right payment due and in accordance with the applicable contractual obligations. These must be done within the confines of the universal notions of good conscience and justice.

This paper has been able to add to the existing body of knowledge by establishing that the proposed regulation is a good move towards promoting best practices between contracting parties, notwithstanding, corruption and other ill-practices must be prevented in order to realise the good and well-conceived provisions of the new regulations.

REFERENCES

- CIDB (2003) *Procurement Practice Guide #C3 Adjudication*, The Construction Industry Development Board, Pretoria, South Africa.
- CIDB (2012) *Annual Report of 2011/ 2012*, The Construction Industry Development Board, Pretoria, South Africa.
- CIDB (2015) *Concrete, Issue 3, June 2015*, The Construction Industry Development Board, Pretoria, South Africa.
- CIDB (2013) *Subcontracting in the South African Construction Industry, Opportunities for Development*, The Construction Industry Development Board, Pretoria, South Africa.
- CII (2008) *The Construction Industry Indicators, Summary Results*, Pretoria, South Africa.
- Gary, F S James, R M, David, G P and Collin, A B (2012) The new construction Act: Views and perceptions of construction industry stakeholders, *Structural Survey*, 30(4), 333-343.

- Jin, W, Kumaraswamy M M and Gary S (2011) Regulative measures addressing payment problems in the construction industry: A calculative understanding of their potential outcomes based on gametric models, *Journal of Construction Engineering and Management*, 137, 566-573.
- Lynch, P (2011) HGCRA: Re-addressing balance of power between main contractors and subcontractors? MSc, National Academy for Dispute Resolution, UK Available from <http://www.nadr.co.uk/articles> [Accessed: 8 October 2015].
- Mewomo, M C and Maritz, M J (2015) An examination into the current status of adjudication practice on public sector construction contracts in South Africa, *Journal of Construction*, 8(3), 8-13.
- Maritz, M J (2007) An investigation into the adjudication of disputes in the South African construction industry, In: *Proceedings of RICS COBRA Congress*, September, Atlanta USA, 419-426.
- Maritz, M J (2014) Late payments continue to threaten the beleaguered construction industry, *Official Journal of South African Builder*, 10.
- Maritz, M J and Mewomo, M C (2016) Towards effective implementation of adjudication as dispute resolution process on public sector projects in South Africa, Proceedings: The 40th Australasian Universities Building Education Association (AUBEA) 2016 Conference, 6 - 8 July 2016, Published by Central Queensland University, Bruce Highway, North Rockhampton QLD4702, Australia.
- Mewomo, M C (2016) *Requirements for the Effective Statutory Adjudication Practice in the South African Construction Industry*. PhD Thesis, University of Pretoria, South Africa.
- Munaaaim, M E (2012) *Developing a Framework for the Effective Operation of Security of Payment Regime in Common Law Jurisdictions*. PhD Thesis, Kings College, London.
- Nik DIN, N M D and Ismail, Z (2014) Construction Industry Payment and Adjudication Act (CIPAA) Remediating payment issues, *CIDB G7 Contractor's Perspective Journal of Technology Management and Business*, 1(1).
- Rahman, H A and Ye, K M (2010) Risk of late payment in Malaysian construction industry, *International Journal of Mechanical and Industrial Engineering*, 4(5), 503-511.
- South Africa Construction News (2015) *Regulation to Legislate Prompt Payments to Be a Game Changer for the Construction Industry*. Available from <https://propertywheel.co.za/2015/06/regulations-to-legislate-prompt-payments-are-a-game-changer-for-the-construction-industry/> [Accessed: 21/07/2019].