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CONSTRUCTION LAW BULLETIN

DUTY TO SUPERVISE

INTRODUCTION

What is the ambit of the Employer's Agent's ("EA") duty to supervise the execution of construction works and what are the consequences of a failure to do so properly?

The extent of the duty will be set out in the relevant contract which must be one's first port of call in addressing the question.

Absent a contractual disclaimer, a professional is obliged to render his professional services with due skill and care.

If an EA falls short of this standard and fails to pick up defective workmanship or materials, he can be held liable by the Employer for the loss and expense suffered by the Employer as a result of that failure.

There is a common misconception that in these circumstances the EA can deflect any claim by an Employer on the basis that the true culprit is the Contractor who has failed to execute the works in a proper and workmanlike manner.

Unfortunately for EA's that is not the case as, in law, an Employer has separate claims against the Contractor and the EA. An Employer can elect to sue either or both the Contractor and the EA.

We can draw guidance on the subject from some of the court cases where these questions have been addressed.

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CASE STUDIES

Joffe v Hoskins[1]

In 1941 a concrete cantilever hood on a building collapsed.

A firm of Engineers had designed the hood and undertaken to supply, deliver and fix into position the steel reinforcement ("rebar") for the construction of the hood.

In contradistinction to reinforcing in a floor slab where the tensile stresses are greatest at the base of the slab necessitating the fixing of the rebar in the lower part of the slab, it was critical for the cantilever hood rebar to be fixed close to the upper part of the concrete slab which is where the greatest tensile stresses in a cantilever structure occur.

The Engineers designed and fixed the rebar correctly. However, it was critical to ensure that, when the Contractor poured the concrete slab, the position of the rebar was maintained.

Unfortunately, this proved not to be the case, which led to the collapse of the hood and a plumber working below the hood being mortally injured.

The Engineers' contractual obligations were described as:

> *"… to design, supply and deliver on site, cut, bend and fix in position, all the steel reinforcement in the concrete construction of the above job."*

The Engineers applied the correct rebar and correctly placed it in the shuttering erected by the Contractor for purposes of the concrete pour. However, in the course of the Contractor's concrete pour, the rebar was dislodged and much of it ended up incorrectly in the lower part of the slab which resulted in the collapse a few days after the shuttering and supports had been removed.

The Engineers admitted that they had not supervised the concrete pour but pointed the finger at the Contractor who was clearly at fault for not having ensured that the rebar remained in place during the pour.

Despite the Engineers' contract not specifically including an obligation to supervise the concrete pour, the court held that the Engineers should either have supervised the pour or alternatively so fixed the rebar that it could not have become displaced during the pour.

The court accordingly held the Engineers liable for the widow's claim.

The lesson to be learnt is that, even where there may not be an express duty to supervise, if in order to avoid problems arising out of a construction operation, a reasonable professional ought to supervise an activity, a failure to do so can give rise to liability for the loss and damage which arises.

Hoffman v Meyer[2]

In this case, as a consequence of negligent supervision on the part of the Architect, the Architect issued a final completion certificate despite the fact that the works were defective in a number of respects.

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[1] Joffe & Co Ltd v Hoskins and Another 1941 AD 431

[2] Hoffman v Meyer 1956(2) SA 752 (C)

It was common cause in the case that:

- the Architect's contract encompassed supervising the building works;
- in doing so, the Architect was obliged to exercise due care and skill; and
- upon a failure to do so, the Architect would incur liability to the building owner.

The incorrect certification of final completion by the Architect meant that the building owner was unable to make any claim against the Contractor to remedy its defective work.

In the result, the court found that the building owner was fully entitled to pursue a damages claim against the Architect.

Stellenbosch University v JA Louw[3]

In this case the Architects designed a building for the University of Stellenbosch. The floor of the main hall of the building was lower than the surrounding ground level. The Architects appreciated that it was important to ensure that the design was appropriate to avoid damage to the floor of the hall by seepage or surface water.

A firm of Consulting Engineers was employed to design a subsurface drainage system.

After the construction had been completed and the Architects had issued a final completion certificate, the floor and floor coverings in the hall were damaged by water. It emerged that, contrary to the design, drains had been placed half a metre to three-quarters of a metre nearer the ground surface than they should have been.

The university sued *inter alia* the Architects for payment of the damages suffered by it on the grounds that the Architects had failed to properly supervise the construction of the drainage system.

The Architects admitted that they had not supervised the construction of the drainage system but contended that it was not their duty to do so and they were entitled to rely on the assurance given to them by the Engineer that the system had been properly installed.

The court quoted with approval the decision in Hoffmann's case relating to an Architect's liability to a building owner in cases where the Architect fails to supervise building works with due skill and expertise.

The case had largely to do with the question as to whether the university's claim ought to have been pursued via arbitration proceedings as opposed to court proceedings, the court ultimately finding that, because of the multiplicity of parties involved, court proceedings were appropriate.

As such the court did not per se pronounce on the Architects' liability for inadequate supervision apart from confirming that an Architect could be held liable in such circumstances.

The case is a warning to Architects and Principal Agents that their supervisory obligations may extend to ensuring that specialist works designed by other professionals are properly constructed by the Contractor.

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[3] Universiteit van Stellenbosch v JA Louw (Edms) Bpk 1983(4) SA 321 (A)

Van Immerzeel & Pohl v Samancor[4]

Samancor appointed Van Immerzeel & Pohl ("the Engineers") to design a water pipeline and pump installation and appointed Cocciante Construction CC ("the Contractor") to construct the works.

The contract with the Engineers was not elaborate being embodied in a purchase order which described the required professional services as follows:

> *"The provision of all professional services required for the supervision of the installation of the water reticulation pipe line and the construction of the pump station by Cocciante Construction for Steelpoort Village in accordance with Contract Nos ANX 2/53/31/152 and ANX 2/54/31/152."*

The ANX contract references were to the construction contract between Samancor and the Contractor and contained stipulations relating to the quality of the goods, materials and workmanship expected from the Contractor.

The contracts called for goods to be in accordance with their relevant specifications and materials and workmanship to be as specified and/or of first class quality and compliant with appropriate British standard specifications or SABS specifications.

Three months after the Engineers certified the pipeline as complete, it manifested leaks.

It was established that the leaks were due to corrosion caused by substandard coating and lining of the pipes and a failure of the cathodic corrosion protection system. The defects were so extensive that they necessitated the replacement of the pipeline.

The evidence established that it would have been readily apparent from a reasonable inspection of the pipeline that the coating system and the cathodic protection system were defective.

The Engineers, optimistically, contended that their supervisory function only extended to ensuring that the pipeline was properly placed. They also argued that, even if they were guilty of inadequate supervision, Samancor should first pursue its claim against the Contractor and, only if it was unsuccessful in recovering its claim, should it look to the Engineers to make up any shortfall.

The court found that the Engineers' supervisory duties included an obligation to:

- examine the pipes on site to confirm compliance with the specifications which they could easily have done;
- inspect the cathodic protection system which also could easily have been done and which would have demonstrated that it was patently defective; and
- monitor construction to guard against mechanical damage to the pipeline from stones and rocks during the backfilling process.

The court held that the Engineers had failed dismally in performing the supervisory functions required of them.

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[4] Van Immerzeel & Pohl and Another v Samancor Ltd 2001(2) SA 90 (SCA)

The court explained that the correct legal position was that the Engineers and the Contractor were independently liable for the same or similar damage and that Samancor was fully entitled to pursue separate claims against them arising out of their two separate albeit interconnected contracts.

Naturally Samancor was not entitled to compensation twice in that recovery from the Engineers would reduce the liability of the Contractor and vice versa.

The Engineers and the Contractor were accordingly held liable jointly and severally for Samancor's claim in respect of the costs incurred in replacing the pipeline, with due credit being given for the short period of usage of the pipeline compared to its design life.

Turn Around Investments v Marcus Smit Architects[5]

In this case the Employer appointed Marcus Smit Architects as its Principal Agent in connection with a building contract relating to the construction of a house, outbuildings, wine cellar, manager's house and a cottage on a farm near Somerset West.

The contract between the Employer and Principal Agent was an oral agreement in terms of which, for a monthly fee of R12 000,00, Marcus Smit Architects undertook to perform the functions of the Principal Agent under the main contract.

The Principal Agent accepted that, pursuant to this appointment, it was required to:

- regularly inspect the works to satisfy itself that the said work was being done in accordance with the plans and/or contract documents; and
- exercise reasonable professional skill and diligence in the performance of such mandate.

In the event, the construction works were not carried out in a proper and workmanlike manner and the buildings suffered from material defects.

The fundamental problem with the work related to the ingress of water into the building structures and the consequent damage caused by that.

After the Employer had instituted action against the Contractor and the Principal Agent for payment of the costs relating to the necessary rectification and remedial work, the Contractor was placed into liquidation. The liquidator did not persist in defending the action which then proceeded against the Principal Agent only.

As an interesting aside, one of the defences raised by the Principal Agent was that the Employer had not suffered any damages because it was not the owner of the buildings. The court sidestepped that defence by explaining that, whilst such a defence might be valid in relation to a claim in delict, in the case of a claim based on a contract, a plaintiff "sues to have its bargain or its equivalent in money or in money and kind" and in such a case the bargain is the proper construction of the works and therefore the Employer was fully entitled to claim damages.

It was established that the causes of the water ingress included:

- a failure to properly install the damp proof course ("DPC");

[5] Turn Around Investments 7 (Pty) Ltd and Others v Marcus Smit Architects CC and Another 2023(1) SA 300 (WCC)

- the fact that there was a layer of DPC extending across the cavity between the internal and external skins of brickwork ("cavity wall");
- the fact that both wet and dry rubble and other debris was allowed to accumulate in the cavity wall which had the effect of bridging the cavity and allowing the migration of water;
- there were open conduit pipes in the cavity wall allowing water penetration; and
- a failure to properly waterproof the full-bore inlets on the roof.

In relation to the nature and scope of a Principal Agent's obligations, the court said:

> *"… it has been accepted in this and other jurisdictions that the architect, as principal agent, has a duty to supervise the works, in particular, for the purpose of ensuring that they are carried out in accordance with the terms and specifications of the contract."*

The court added that an obligation to supervise did not entail that the Principal Agent had to supervise the works in the sense of monitoring and directing them on an ongoing or day-to-day basis. What is contemplated is that the Principal Agent should inspect the works with sufficient frequency and sufficient care and diligence to ascertain whether they are being carried out generally in accordance with the requirements of the contract. It is also incumbent on the Principal Agent to give the Contractor such instructions as are necessary to ensure that the works are being properly executed.

In discharge of these obligations, it might be necessary for the Principal Agent to inspect the works, not only at site meetings, but also at such other times as may be necessary to enable him to inspect important elements of the work which he may subsequently be unable to inspect due to them being closed up. He should require the Contractor to give him notice of important events so that he can timeously inspect those elements.

The nature of the defects and their prevalence throughout the buildings led the court to conclude that the Principal Agent, exercising reasonable skill, diligence and care, should have observed them and taken steps to have them rectified in the course of the execution of the works, and its failure to do so was a clear breach of its obligations as Principal Agent.

The Principal Agent invoked a clause in the Standard Client Architect Agreement to the effect that an Architect is not responsible for the defective work of the Contractor and that the Contractor, together with his subcontractors, is the party directly responsible to the Employer for due performance in terms of the building contract.

The court said that, properly interpreted, this clause went no further than to absolve the Architect from responsibility for the Contractor's breach in rendering defective work but it did not apply to absolve the Architect in respect of the Employer's separate cause of action against the Architect for its breach in failing to properly supervise the building work.

The court granted judgment for the costs of the work necessary to remedy the defects jointly and severally against the Principal Agent and the insolvent Contractor.

CONCLUSION

Where professionals take on an appointment as Principal Agent or Employer's Agent in connection with construction contracts, they can and will be held accountable for loss suffered by their clients due

to defective works which a reasonable person would have detected in the course of properly supervising execution of the construction works.

This liability can arise out of the explicit or implicit obligations undertaken by a Principal Agent in relation to supervision of the execution of construction works.

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