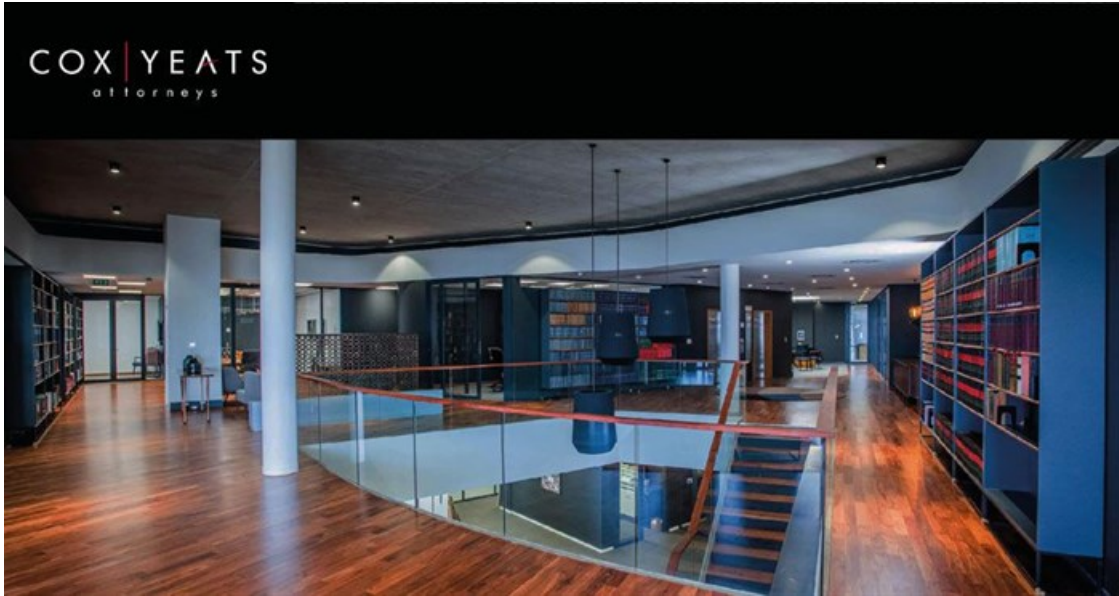


Adjudication enforcement: Is it effective?

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Considering liquidation and re-issued negative certificates in state construction contracts



In a recent decision, the Supreme Court of Appeal (SCA) considered the complexities surrounding liquidation, adjudication and payment certificate issues in government construction contracts.

Is an adjudicator's decision enforceable if a party disputes the ruling and wishes to proceed to arbitration?

And what is the situation where the other party is in liquidation – do you still have to pay on the adjudicator's award pending the outcome of the arbitration?

Is a subsequent negative payment certificate a sufficient reason to refuse to pay a certified amount due?

Background

The eThekweni Municipality contracted with Cooperativa Muratori & Cementisti - CMC di Ravenna Societa Cooperativa ("CMC"), an Italian construction company, for the construction of road works.

The municipality refused to pay the certified payment amounts and the disputes proceeded to adjudication. As a result of the adjudicator's findings, the municipality was required to make certain payments to CMC.

However, the municipality disputed the findings and then refused to meet its payment obligations, citing CMC's liquidation status. They argued to the court that since CMC was in liquidation, it would not be able to repay any funds that may be found in a later arbitration not to be due.

The municipality also contended that a subsequent payment certificate had been issued, cancelling the earlier unpaid certificates.

The High Court ruled in favour of CMC and ordered the municipality to make the payment. Dissatisfied with the decision, the municipality appealed to the SCA.

The effect of liquidation

The municipality attempted to use CMC's liquidation status as a basis for avoiding its payment obligations and argued it was against public policy to require it to pay when there was a risk from the liquidation that the funds could not be repaid if they were successful in the arbitration.

However, the SCA held that liquidation does not exempt a party from fulfilling its contractual obligations. While concerns about repayment in the event of liquidation are legitimate, they cannot be used as a blanket justification for withholding payment.

The power of adjudication

Adjudication is an essential mechanism for the speedy and efficient resolution of construction contract disputes.

The SCA's decision reaffirmed the importance of adjudication and its binding nature. The municipality's refusal to accept the adjudicator's findings undermined the purpose of the process, which is to provide interim solutions and ensure prompt payment to contractors. The court emphasised that adjudication decisions should be respected and enforced unless they are genuinely contrary to public policy considerations.

Unravelling the payment certificate issue

The case also dealt with the now increasingly prevalent practice of issuing subsequent negative payment certificates to avoid payment obligations.

The municipality claimed that a subsequent payment certificate had been issued, effectively nullifying the earlier unpaid certificates. However, the court found the municipality's explanation for the revised certificates to be insufficient and rejected it.

This decision emphasises that negative payment certificates cannot be casually used as a means of avoiding contractual responsibilities. A proper explanation for their re-issue will need to be provided.

The case underlines the crucial role of adjudication in resolving disputes promptly and ensuring interim payments to contractors.

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