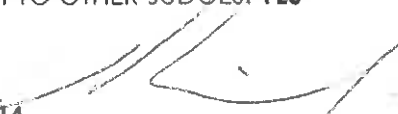


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2014/15608

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.
<div style="display: flex; justify-content: space-between; align-items: center;"> <div style="text-align: left;"> <p>30 September 2014</p> <p>DATE</p> </div> <div style="text-align: right;">  <p>.....</p> <p>SIGNATURE</p> </div> </div>	

In the matter between:

ESKOM HOLDINGS LTD

Applicant

and

CMC-MAVUNDLA-IMPREGGIO JOINT VENTURE

First Respondent

CHAPMAN, PETER HJ

Second Respondent

JUDGMENT

SPILG, J:

BACKGROUND

1. The applicant, Eskom Holdings Ltd (*Eskom*), and the first respondent, which is CMC- Mavundla--Impreglio Joint Venture (*the Joint Venture*) concluded a main agreement on 16 April 2009 in terms of which the former, as employer, engaged the latter as contractor, in respect of the main underground civil works for the Ingula Pumped Storage Scheme. The agreement was in the form of the standard NEC3 Engineering and Construction Contract.

2. The main agreement provided for a dispute resolution mechanism through the appointment of a person termed an '*adjudicator*'.
3. A separate agreement, being an NEC3 Adjudicator's Contract, was concluded on 28 September 2010 between the parties to the main contract and Mr Chapman who is the second respondent.
4. The second respondent's initial contract terminated on 31 December 2011 and three successive contracts of up to a year's duration were concluded after that between Eskom, the Joint Venture and Chapman, terminating respectively on 31 March 2012, 31 December 2012 and 31 December 2013.

No further written contract was signed between the three parties to extend the period of Chapman's engagement as adjudicator beyond the last mentioned date.

5. The Joint Venture however has continued to refer disputes to Chapman pursuant to which Chapman has made determinations. In the meanwhile Eskom has sought the appointment of a new adjudicator but complains that the Joint Venture has frustrated its efforts to do so.
6. This impasse between the parties resulted in the current application brought by Eskom which seeks declaratory orders that;
 - a. Chapman's appointment terminated on 31 December 2013 by effluxion of time;
 - b. Chapman had no jurisdiction after that date to entertain, or to make any determination on, any disputes referred to him by either Eskom or the Joint Venture or to have received any such referrals;

- c. Any decision handed down by Chapman after 31 December 2013 is null and void, whether in relation to the main contract or otherwise;
 - d. The applicant is not obliged to renew Chapman's appointment as adjudicator;
 - e. In the absence of agreement as to the identity of the new adjudicator the nomination shall be made by the Adjudicator Nominating Body referred to in the main agreement.
7. The first respondent opposed the application. Chapman did not, although it is evident from the papers that in continuing to perform the functions of adjudicator, despite the applicant's objections, he considers that he is still the appointed adjudicator under the main contract.

THE ISSUES

8. The first respondent opposed urgency on the basis that the applicant ought to have brought the application when the last contract expired and when the first respondent continued to approach Chapman to adjudicate. I am of the view that irrespective of earlier possible delays the matter certainly became semi-urgent once the Joint Venture refused to budge from its position. The first respondent is also not prejudiced as it was afforded sufficient time to present its case.
9. On an analysis of the papers the determinative issue is whether the terms of the main agreement between the parties contains an umbrella provision governing the appointment of an adjudicator as between Eskom and the Joint Venture or whether the NEC Adjudicator's Contract superseded or otherwise qualified their relationship under the main agreement.
10. The issue is to be resolved by interpreting the terms of the two agreements by reference to their purpose.

INTERPRETING CONTRACTS

11. When interpreting agreements the meaning of words is determined by the nature and purpose of the contract having regard to the context of the words used in relation to the contract as a whole. Where two or more contracts are linked or otherwise form part of a suite of interrelated agreements then they are all to be taken into account when determining their respective purpose and limitations.

12. In *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979(1) SA 195 (A) at 202 C the court said : “ *Dit is vir my vanselfsprekend dat 'n mens na die betrokke woorde moet kyk met inagneming van die aard en opset van die kontrak, en ook na die samehang van die woorde in die kontrak as geheel.*” This passage was cited with approval in *List v Jungers* 1979 (3) SA 106 (A) at 118G-H. Any confusion that might have arisen in *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A), which approved this passage from *Swart* at p 767I , has been settled by *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) which adopted *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

In *Bothma-Batho* Wallis JA said at para 12;

“Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'

13. There is therefore no longer any scope for arguing that a court will have regard to the context as a whole only if the words actually used are unclear, ambiguous or lead to absurdity or some repugnancy.

INTERPRETING THE AGREEMENTS

14. It is common cause that the contract governing the relationship between Eskom and the Joint Venture *inter se* is the one which both parties readily identify as the main contract between them, namely the NEC Engineering and Construction Contract.

15. Under the heading '*Form of Agreement*' the main contract provides that;

'Parties 2

2.1 *The Parties to this Agreement are the Employer and the Contractor as stated in the Contract Data.*

This Contract 4

4.1 *This contract between the Parties comprises the documents entitled:*

- *Form of agreement*
- *Contract Data*
- *Conditions of Contract (NEC 3)*
- *Bill of Quantities*
- *Works Information including Drawing*
- *Site Information including Geotechnical Information*
- *Annexure C6.1 to C6.8'*

16. There is the following provision also under the '*Form of Agreement*' heading which reads;

'Recordal 3

3.1 *It is recorded that the Parties have entered into an agreement as evidenced by the Notification of Acceptance dated 07 July 2008.*

3.2 *It is recorded that the Parties have agreed that the Adjudicator will be appointed in terms of the NEC Adjudicator's Contract in the event of a dispute.'*

17. The last mentioned passages are identified as recordal provisions and must be interpreted as such. Accordingly a proper construction of cl 3.2 is that the parties agree to adopt the standard form NEC Adjudicator's Contract when contracting with the appointed adjudicator. It does not seek to lay down a condition precedent to the appointment of the adjudicator. If that were the case then one would find such a provision as one of the conditions and not a mere recordal of form.

18. This interpretation is consistent with the two contracts read as a whole, since the standard form NEC Adjudicator's Contract does not itself provide the mechanism for selecting the adjudicator and there is not a pre-printed prescribed termination date.

Such provisions are however expressly contained in the main contract under the heading '*Contract Data*' the salient provision reading;

The Adjudicator is

<i>Name</i>	<i>Will be appointed by the Parties if and when a dispute arises and will be either James J Brady or Peter</i>
-------------	--

Chapman, failing which the Adjudicator will be nominated by the Adjudicator Nominating Body.

19. The word '*Name*' was part of the standard form. The balance was inserted by the parties.

An ordinary interpretation of this provision when read with the main contract as a whole is that either Brady or Chapman will be appointed when a dispute arises. If neither of them can take up the appointment then and only then will the Adjudicator Nominating Body nominate the adjudicator.

It is therefore beyond cavil that provided either Brady or Chapman is available then one or the other must adjudicate.

20. It is common cause that Brady could not take up the appointment as he was ill and in the context of the factual situation Chapman was appointed the adjudicator under the main agreement. That being so, the proviso regarding the nomination by the Adjudicators Nominating Body fell away.

21. The question then arises as to whether the stipulated termination date contained in the Adjudicator's Contract superseded or otherwise was intended to alter the clear provisions identifying who would adjudicate when a dispute arises under the main contract, which in its terms is identified as including the documents mentioned earlier under clause 4.1 under the heading '*Form of Agreement*'.

22. In my view the answer lies in recognising that whereas the main contract stipulates the terms of the agreement binding between Eskom and the Joint Venture *inter partes* including the standard form that will be used to regulate the relationship with the adjudicator who they selected under the main agreement, the Adjudicator's Contract is a tri-partite agreement regulating their pre-determined (under the main contract) joint relationship

with the adjudicator. In this contract the adjudicator has an input into the contents of the variable provisions of the agreement.

One of the key features of the Adjudicator's Contract is found in the '*Contract Data*' provisions. It comprises three columns. The first two, headed '*Clause*' and '*Statement*' are pre-printed while the last, titled '*Data*' was inserted by the parties. These provisions read:

Clause	Statement	Data
1.1	The Contract between the Parties is	The construction of the Main Underground Civil Works (Contract Number 4650010053) for the Ingula Pumped Storage Scheme
1.6	The law of contract is the law of	The Republic of South Africa
1.9	The language of this contract is	English
2.6	The period of retention is	4 weeks
3.1	The amount of the advanced payment is	Nil
3.4	The Adjudicator fee is	<ol style="list-style-type: none"> 1. Euros € 385 per hour excluding: <ul style="list-style-type: none"> • Value added tax • Expenses and outgoings reasonably incurred • Cost of professional advice/assistance 2. Euros €3.025 per day or part thereof for attendance at hearings 3. 75% of the standard rate for travelling expenses when

attending hearings

The amounts given are fixed for the duration of the Contract.

3.5	The period for payment of invoices is	30 days from invoice date
3.6	The currency of this contract is	The Euro
3.7	The interest rate is	0% above Libor being the one month London Interbank Offered Rate of Interest
4.3	The Adjudicator's appointment terminates	On 31st December 2013

The clause numbers are cross-references to the body of the Adjudicator's Contract.

23. It is evident that certain of the insertions to the '*Contract Data*' section were already contained in the main contract while others such as the fee were matters for negotiation between the three of them. The fee was evidently based on a reasonable fee for a person with Chapman's experience and qualifications. There is no suggestion that Chapman has sought to charge anything other than a reasonable fee and which, based on the fee provisions agreed upon under the several earlier renewed contracts with him, is readily determinable by reference to that ordinarily charged by those of Chapman's level of competence.

24. The applicant however argues that the provisions of clause 1.7 in the body of the Adjudicators Contract govern the contract between Eskom and the Joint Venture. It reads:

'1.7 If a conflict arises between this contract and the contract between the Parties then this contract prevails'

25. In my view this clause means no more than that the relationship between the adjudicator on the one hand and the contractor and employer on

the other is governed by the Adjudicator's Contract. That it is not intended to qualify the provisions of the main contract to which only Eskom and the Joint Venture are privy regarding who they selected to adjudicate on their disputes under the main contract is further reinforced by the standard provisions of cl 4.1 which allow Eskom and the Joint venture to terminate the adjudicator's appointment '*by agreement ... for any reason*'. Moreover difficulties are created if a dispute is not determined or only arises on the day when the adjudicator's appointment is terminated.

26. Clause 4.3 provides that unless the adjudicator has terminated his appointment or it has been terminated by the employer and contractor, then his appointment shall terminate on the date stated in the *Contract Data* provisions.

While potentially supportive of the interpretation advanced by *Mr Leech* on behalf of the applicant reliance on this clause does not address the fundamental issue, which is the hierarchic nature of the contracts. The main contract is intended to and governs the relationship between the Eskom and the Joint Venture. This is the contract where one finds the overall terms concluded between them. The Adjudicator's Contract is a collateral contract finding its existence by reason of the provisions of the main contract and is in effect an agreement they mutually enter into with the adjudicator as the other party precisely because their relationship and the provisions relating to dispute resolution as well as who is to adjudicate remains governed by the super-imposing obligations agreed upon under the main contract.

It is therefore evident that the parties to the main contract envisaged that termination could only ordinarily occur by agreement between them.

27. The governing provisions as between Eskom and the Joint Venture under the main contract continue to be the overriding provisions of the main contract in terms of the provisions I have already read and also under the heading '*Dispute Resolution*'. The salient provisions are;

Dispute Resolution

Option W1

.....

Dispute resolution W1

W1.1

A dispute arising under or in connection with this contract is referred to and decided by the Adjudicator.

The Adjudicator W1.2

- (1) The Parties appoint the Adjudicator under the NEC Adjudicator's Contract current at the starting date.*
- (2) The Adjudicator acts impartially and decides the dispute as an independent adjudicator and not as an arbitrator.*
- (3) If the Adjudicator is not identified in the Contract Data or if the Adjudicator resigns or is unable to act, the Parties choose a new adjudicator jointly. If the Parties have not chosen an adjudicator, either Party may ask the Adjudicator nominating body to choose one. The Adjudicator nominating body chooses an adjudicator within four days of the request. The chosen adjudicator becomes the Adjudicator.*
- (4) A replacement Adjudicator has the power to decide a dispute referred to his predecessor but not decided at the time when the predecessor resigned or became unable to act. He deals with an undecided dispute as if it had been referred to him in the date he was appointed.*

28. These provisions presuppose that at all times during the duration of the construction of the works that;

- a. There is an adjudicator;
- b. He or she is identified in the main contract under the '*Contract Data*' provisions and the appointment endures until the works are completed unless the person appointed resigns or is unable to act;
- c. The only occasion that the parties will have an adjudicator determined for them, is if the person they appointed and identified in the main contract resigns or is unable to act. In such event, and if the parties cannot agree on a replacement, a new adjudicator will be chosen by the Adjudicator nominating body.

29. The effect is that the main contract does not contemplate that anyone other than the originally appointed adjudicator or adjudicators will determine all disputes for the duration of the works unless such person (or persons) resigns or is unable to act, but not because there is a finite period contained in a subordinate agreement they have mutually concluded in conformity with the standard NEC Adjudicator's Contract which they have bound themselves to adopt under the main contract.

30. Why then did the contractor and employer simply provide in the Adjudicator's Contract that it would terminate only once all the disputes between them were adjudicated upon?

In part the answer is provided by the appreciation that the adjudicator's fees will not remain constant over the entire period of construction, yet the standard contract clause required a fee to be stipulated (see under '*Contract Data*' against the reference to cl 3.4.)

31. A comprehensive explanation is provided in the first respondent's answering affidavit. As pointed out by *Mr Wasserman* on behalf of the first respondent the following is alleged;

"As appears from this correspondence the first applicant, represented by the Project Manager, confirmed the second respondent's understanding that his 'appointment would be an ongoing one for the duration of the project'

... It was discussed and stated by the applicant's representatives to the first respondent's representatives that, because of these internal procurement policies (ie; that the second respondent was regarded as a single or sole supplier and the applicant was therefore not permitted to sign a contract with such a supplier for more than one year at a time), the agreement concluded with the second respondent would be renewed automatically every year."

32. The applicant denied that there was any policy to this effect at the time and claimed that the applicant's project manager did not have the necessary authority to conclude the agreement as alleged. Whether or not the project manager had the authority to conclude any agreement is not necessary to the present enquiry. Of relevance is the explanation given by the first respondent as to why the appointment was of limited duration. It is sufficiently backed up with the correspondence mentioned in the cited extract to pass scrutiny for the purposes of constituting the evidence that this court is obliged to accept, and the applicant is effectively bound by the reply, in terms of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)* since final relief is sought on motion.

33. Although the main contract contains a sole memorial clause and the Adjudicator's Contract may be construed as having the same effect, the parole evidence rule is not disturbed as the circumstances under which the Adjudicator's Contract came into being is *per se* admissible as confirmed in

Bothma-Batho at para 12. In any event at face value there is ambiguity between the two contracts regarding the same issue and extrinsic evidence is admissible to resolve the conflict without offending that rule.

34. There is a further argument raised by the applicant. It claims that such an interpretation leads to an absurdity and could never have been contemplated by the parties because it would have the effect that the neither party may seek to terminate the adjudicator's appointment without the concurrence of the other even if he demonstrated bias or was conflicted.
35. I disagree. On ordinary principles a domestic tribunal or other adjudicating body or person appointed under a contract is obliged to apply the precepts of natural justice and must act impartiality, without bias and cannot be conflicted if such requirements expressly or impliedly arise from the terms of the enabling agreement and regard is had to the nature of the adjudicating body. See *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 646G to 647B. At 646G-H the court said;

"In addition to what may be described as the procedural requirements, the fundamental principles of justice require a domestic tribunal to discharge its duties honestly and impartially (Dabner v SA Railways and Harbours, 1920 AD 583 at p. 589). They require also that the tribunal's finding of the facts on which its decision is to be based shall be "fair and bona fide" (Jockey Club of S.A. v Transvaal Racing Club, supra at p. 450). It is, in other words, "under an obligation to act honestly and in good faith (Maclean v Workers' Union, supra at p. 623)."

36. In the present case clauses 1.1 and 1.2 of the Adjudicator's Contract under the heading 'General' provides that the adjudicator shall act impartially and must notify the parties as soon as he becomes aware of any matter which may present him with a conflict of interest. There are other provisions both in that contract and, as appears earlier, in the main contract to similar effect,

37. The remedy to challenge a decision by reason of a failure of natural justice under the court's common law powers of review are unaffected by the Promotion of Administrative Justice Act (PAJA) which applies to organs of state or a person exercising a public power or exercising a public function.

The common law remedy remains available while the agreements are in existence and is reinforced by section 34 of the Constitution which extends the right to have any dispute that can be resolved by the application of law decided aside from a court and where appropriate, by another independent and impartial tribunal or forum.

38. Chapman has shown a willingness to be bound by a renewed contract and the applicant has not indicating that it would not be uncomfortable with any of the variables that can be legitimately inserted in the standard agreement.

39. The applicant has therefore frustrated the continued application of the terms of the Main Contract and cannot take advantage of its own non-performance. Chapman remains the selected adjudicator in terms of the main agreement between Eskom and the Joint Venture and the essential terms are those contained in the prevailing standard NEC Adjudicator's Contract, with the fee based on a reasonable remuneration which, as indicated earlier, is readily determinable by reference to the historic rate negotiated with Chapman.

COUNTER-CLAIM

40. The first respondent brought a conditional counter-application seeking an order declaring that Chapman continues to remain the adjudicator under the main contract. It also seeks orders entitling it to payment in terms of decisions taken by Chapman since December 2013. The counter-application was not argued and accordingly it is unnecessary to give a decision in respect

of any of the relief sought. Indeed the difficulty that might have faced the first respondent if it persisted with enforcement of Chapman's decisions was the allegations of bias or that he was conflicted. Albeit strenuously denied the *Plascon-Evans* principles may rebound where the first respondent assumes the position of an applicant.

ORDER

41. The applicant has remedies regarding the alleged bias on the part of Chapman or that he is conflicted. However none are contained in the relief sought.

42. The relief sought is dependent on a finding that the main agreement is not the final word on who the adjudicator will be for the duration of the construction, barring any lawful basis for his removal. I have found that the main agreement is determinative of that provision as between the employer and contractor.

Accordingly the application is dismissed with costs including the costs of two counsel.

DATE OF HEARING: 3 June 2014

DATE OF JUDGMENT: 30 September 2014

LEGAL REPRESENTATION:

FOR APPLICANT: Adv BE Leech SC and Adv S Ebrahim

Hogen-Lovells Attorneys

FOR 1st RESPONDENT: Adv JG Wasserman, SC and Adv MD Cochrane

Terry Mahon Attorneys