REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 45879/2018

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED

28/06/19 .....

Date **ML TWALA**

In the matter between:

GROUP FIVE CONSTRUCTION (PTY) LTD **APPLICANT**

AND

TRANSNET SOC LIMITED **RESPONDENT**

JUDGMENT

TWALA J

[1] Before this Court is an opposed application wherein the applicant seeks the following orders against the respondent:

1. The respondent shall immediately upon service of this order give effect to the Decision of the Adjudicator, as handed down on 18 September 2018, by:

   I. Making payment to the applicant in the sum of R74 940 872.82 (excluding VAT); and
   II. Interest on R74 940 872.82 (excluding VAT) at the prime lending rate of Standard Bank Ltd as determined from time to time from 18 September 2018 to date of payment.

2. Costs of this application to be paid by the respondent; and
3. Further and or alternative relief.

[2] On or about the 24th of January 2011 the applicant and respondent entered into a written engineering and construction contract numbered PYP/W1/6/21/624/02/43 ("the ECC") for the provision of Works for the NMPP Project comprising of the supply, fabrication and erection of civil, building, structural steel, piping, mechanical, electrical and instrumentation work for Terminal 1 – Coastal. The ECC incorporated the NEC Engineering and Construction Contract (third edition, June 2005) as published by the

Institution of Civil Engineers as the conditions of contract with option D ("the NEC"). Both the ECC and NEC are collectively referred to as "the agreement". The dispute resolution mechanism between the parties was to be as provided for in option W1 of the agreement. If and when a dispute arises, the parties would appoint the Adjudicator under the NEC3 Adjudicator's Contract (June 2005) and the adjudicator nominating body was be the Association of Arbitrators (Southern Africa).

[3] The genesis of this application is the dispute pertaining to the respondent's issuance of a final payment certificate number 92. On the 6th of April 2018 the applicant notified the respondent of the dispute. On the 21st of April 2018 the Association of Arbitrators appointed Mr G Parkin ("the Adjudicator") as the adjudicator who, in turn, confirmed his appointment on the 30th of April 2018. On the 4th of May 2018 the applicant submitted its referral to the adjudicator and the respondent filed its response on the 30th of May 2018.

[4] The parties continued to exchange documents and correspondence and on the 19th of June 2019 the adjudicator accepted the late response by the respondent and afforded the applicant an opportunity to file its response thereto by not later than the 29th of June 2018. On the 25th of June 2018 the applicant stated that due to the further response being required to be submitted by the 29th of June 2019, the adjudicator's decision was therefore due four weeks hence.

[5] On the 19th of July 2018 the adjudicator requested further information from the applicant in the form of an electronic copy of a previous settlement agreement between the parties and he was provided with same on the same day as it formed part of the documents submitted by the applicant when the

dispute was referred to the adjudicator. On the 30th of July 2018 the adjudicator requested that both parties allow him an additional seven calendar days to finalise his request for further information where after he should be in a position to finalise his award within four (4) weeks.

[6] On the 31st July 2018 the respondent refused to grant the adjudicator the extension as requested and on the same date it delivered a notice to the applicant to refer the dispute to the tribunal. On the 6th of August 2018, the respondent indicated that its notice to refer the dispute to the tribunal shall stand and that the adjudicator's intention to proceed with the adjudication was at his peril. However, during August 2018 the adjudicator continued to communicate and received certain information from the applicant without any further contribution and participation from the respondent and published his decision on the 18th of September 2018.

[7] In order to put context to the material issues in dispute, I consider it appropriate to quote the relevant provisions of the agreement between the parties which deal with the resolution of dispute between them which provide as follows:

"DISPUTE RESOLUTION

Option W1

Dispute resolution procedure (used unless the United Kingdom Housing Grants, Construction and Regeneration Act 1996 applies).

Dispute resolution W1

W1.1 a dispute arising under or in connection with this contract is referred to and decided by 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) .....

W1.3

1) .....

2) .....

3) *The party referring the dispute to the Adjudicator included with his referral information to be considered by the Adjudicator. Any more information from a party to be considered by the Adjudicator is provided within four weeks of the referral. This period may be extended if the Adjudicator and the parties agree.*

4) .....

5) *The Adjudicator may;*

- *Review and revise any action or inaction of the Project Manager or Supervisor related to the dispute and alter a quotation which has been treated as having been accepted,*
- *Take the initiative in ascertaining the facts and the law related to the dispute,*
- *Instruct a party to provide further information related to the dispute within a stated time, and*
- *Instruct a party to take any other action which he considers necessary to reach his decision and to do so within a stated time.*

6) .....

7) .....

8) *The Adjudicator decides the dispute and notifies the parties and the Project Manager of his decision and his reasons within four*

weeks of the end of the period for receiving information. This four week period may be extended if the parties agree.

9) .....

10) The Adjudicator's decision is binding on the parties unless and until revised by the tribunal and is enforceable as a matter of contractual obligation between the parties and not as an arbitral award. The Adjudicator's decision is final and binding if neither party has notified the other within the time required by this contract that he is dissatisfied with a decision of the Adjudicator and intends to refer the matter to the tribunal.

W1.4

1) A party does not refer any dispute under or in connection with the contract to the tribunal unless it has first been referred to the Adjudicator in accordance with this contract.

2) .....

3) If the Adjudicator does not notify his decision within the time provided by this contract, a party may notify the other party that he intends to refer the dispute to the tribunal. A party may not refer a dispute to the tribunal unless this notification is given within four weeks of the date by which the Adjudicator should have notified his decision.

4) The tribunal settles the dispute referred to it. The tribunal has the power to reconsider any decision of the adjudicator and review and revise any action or inaction of the project manager or the supervisor related to the dispute. A party is not limited in the tribunal proceedings to the information, evidence arguments put to the adjudicator.

[8] It is a trite principle of our law that the Courts should be slow in entertaining issues which fall squarely in the domain of the arbitrator or adjudicator in terms of an agreement concluded between the parties. This is so because the decision to refer a dispute to private arbitration is a choice which as long as it is voluntarily made should be respected by the Courts.

[9] In *Lufuno Mphaphuli & Associates (Pty) Ltd v Nigel Athol Andrews & Another [2009] (4) SA 529 CC* the Constitutional Court stated the following:

> *"[236] The final question that arises is what the approach of a court should be to the question of fairness. First, we must recognise that fairness in arbitration proceedings should not be equated with the process established in the Uniform Rules of Court for the conduct of proceedings before our courts. Secondly, there is no reason why an investigative procedure should not be pursued as long as it is pursued fairly. The international conventions make clear that the manner of proceeding in arbitration is to be determined by agreement between the parties and, in default of that, by the arbitrator. Thirdly, the process to be followed should be discerned in the first place from the terms of the arbitration agreement itself. Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which an arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of section 33(1), the goals of private arbitration may well be defeated."*

[10] In *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd & Another 2013 (6) SA 345 (SCA) at para 3-5* the Supreme Court of Appeal stated the following regarding the process of adjudication:

"[3] Construction contracts most often require disputes to be resolved by arbitration, but at the same time postpone arbitration until the works have been completed, so as to avoid interruption. Earlier contracts in common use made an exception in certain limited circumstances. That was the case in Britain under the JCT Standard Form of Building Agreement (1980 edition), and in this country under the General Conditions of Contract 1982 for the use in connection with Works of Civil Engineering Construction (Fifth Edition). In both cases an arbitration could not be opened until after completion of the works, except on limited issues that, by their nature, demanded earlier resolution, in particular disputes concerning payment certificates.

[4] It has become common internationally – in some countries by legislation – for disputes to be resolved provisionally by adjudication. In Macob Civil Engineering Limited v Morrison Construction Limited [adjudication was described, in the context of English legislation, as:

'.....a speedy mechanism for settling disputes [under] construction contracts on a provisional interim basis, and requiring the decision of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement. ..but Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process."

[11] Counsel for the applicant submitted that this Court is not competent to preside over matters which are in the domain of the arbitrator. The Court should not look at the process of the adjudication otherwise it will undermine the purpose of arbitration. The decision of the adjudicator, so it is contended, remains binding and enforceable even if published long after the four week period unless reviewed or revised by the tribunal. It is contended further by counsel for the applicant that, although the decision of the adjudicator was late, it is however not provided in the contract that it will be invalid if it is issued after the four week period.

[12] Because the adjudicator requested further information on the 19th of July 2018, so the argument goes, he was entitled to an extension of time for a further four week period from that date. It was not necessary for the adjudicator to approach the parties for consent for the extension of time as it did on the 30th of July 2108.

[13] *In Riversdale Mining Limited v Du Plessis (536/2016) [2017] ZASCA 007 (10 March 2017)* the Supreme Court of Appeal stated the following:

> *"[28] So, did the arbitrator exceed his jurisdiction in deciding the issue? The basic principle in the interpretation of arbitration clauses is that they must be construed liberally to give effect to their essential purpose, which is to resolve legal disputes arising from commercial relationships before privately agreed tribunals, instead of through the courts. When businesspeople choose to arbitrate their disputes they generally intend that all their disputes to be determined by the same tribunal, unless they express their wish to exclude any issues from the arbitrator's jurisdiction in clear language. There is thus a presumption in favour of 'one stop arbitration"'.*

[14] I do not understand the above authorities to mean that the Courts should not entertain the issues of interpretation of the clauses of the agreement where parties chose to arbitrate their dispute. The circumstances of the present case are in my view distinguishable in that the issue that arises is whether the decision of the adjudicator is binding and enforceable even though the respondent had refused consent to extend the time of publication of the adjudicator's decision which decision was ultimately published long after the respondent had served the applicant with the notice to refer the dispute to the tribunal in terms of clause W1.4.3 of the agreement.

[15] Counsel for the respondent submitted that time is of essence in building contracts – hence the agreement between the parties to resolve their disputes by way of adjudication before referring the matter to arbitration. It was contended further that, on the 19th July 2018 the adjudicator had no reason to request a copy of the previous settlement agreement between the parties in electronic format when same formed part of the documents submitted to him by the applicant when the referral of the dispute was lodged. The adjudicator, so the argument goes, did not consider his request of the settlement agreement as a request which extends the period for publishing his decision by a further four (4) weeks – hence he made a request of a seven day extension on the 30th of July 2018 which was refused by the respondent.

[16] It was submitted further by counsel for the respondent that the adjudicator failed to publish his decision within four weeks which period was from the 29th of June 2018 to the 29th of July 2018. The adjudicator should not, so it is contended, have proceeded with the adjudication of the matter without the consent of both parties since the respondent refused to give consent on the 31st of July 2018. The respondent has, by delivering a notice to refer the dispute to arbitration on the 31st July 2018 to the applicant, put the

adjudication process to a stop and disempowered the adjudicator from continuing with the adjudication.

[17] It is trite law that in interpreting any document, the Court must consider all the facts and the circumstances under which such document or contract was concluded. The starting point remains the words in the document, the background facts and the intention of the parties.

[18] In *Novartis v Maphil [2015] ZASCA 111*, the Supreme Court of Appeal per Lewis JA alluded to the following:

> "*[27] I do not understand these judgments to mean that interpretation is a process that takes into account only the objective meaning of the words (if that is ascertainable), and does not have regard to the contract as a whole or the circumstances in which it was entered into. This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. KPMG, in the passage cited, explains that parol evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances, and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties' intention.*

[28] The passage cited from the judgment of Wallis JA in Endumeni summarizes the state of the law as it was in 2012. This court did not change the law, and it certainly did not introduce an objective approach in the sense argued by Norvatis, which was to have regard only to the words on the paper. That much was made clear in a subsequent judgment of Wallis JA in Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk [2013] ZASCA 176; 2014 (2) SA 494 (SCA), paragraphs 10 to 12 and in North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd [2013] ZASCA 76; 2013 (5) SA 1 (SCA) paragraphs 24 and 25. A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.

[29] Referring to the earlier approach to interpretation adopted by this court in Coopers & Lybrand & others v Bryant [1995] ZASCA 64; 1995 (3) SA 761 (A) at 768A-E, where Joubert JA had drawn a distinction between background and surrounding circumstances, and held that only where there is an ambiguity in the language, should a court look at surrounding circumstances, Wallis JA said (para 12 of Bothma-Botha):

'That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. While 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" [a reference to a statement of Lord Clarke SCJ in Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2012] Lloyd's Rep 34 (SC) para 21].

[30] Lord Clarke in Rainy Sky in turn referred to a passage in Society of Lloyd's v Robinson [1999] 1 All ER (Comm) at 545, 551 which I consider useful.

'Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which the reasonable person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.'

[31] This was also the approach of this court in Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund [2009] ZASCA 154; 2010 (2) SA 498 (SCA) para 13. A further principle to be applied in a case such as this is that a commercial document executed by the parties with the intention that it should have commercial operation should not lightly be held unenforceable because the parties have not

expressed themselves as clearly as they might have done. In this regard see Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd [1991] ZASCA 130; 1991 (1) SA 508 (A) at 514B-F, where Hoexter JA repeated the dictum of Lord Wright in Hillas & Co Ltd v Arcos Ltd 147 LTR 503 at 514:

'Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects.'

[19] I am unable to disagree with counsel for the respondent that time is of essence in building contracts of this nature – hence the provision that disputes between the parties are referred to adjudication for speedy resolution. The terms of the contract are that the adjudicator shall publish his decision within 4 weeks from the date of the last submission unless he obtains consent from the parties to extend that period. I disagree with counsel for the applicant that if time was of essence, the contract would have provided that a decision of the adjudicator shall be invalid if published after the 4 week period. The adjudicator has to obtain consent from the parties if he is unable to finalise his decision within the stated period. Absent such consent from either party, his mandate is, in my respectful view, terminated and is incompetent to proceed with the adjudication of the matter.

[20] Further, counsel for the respondent referred me to various English Courts' decisions and the applicant's counsel urged me not to consider these decisions. However, I can find no reason why I should not refer to these decisions in this case as suggested by counsel for the applicant. The dispute

resolution procedure as agreed to by the parties herein is based on the laws of the United Kingdom and the document signed by the parties itself refers to the United Kingdom Housing Grants, Construction and Regeneration Act 1996.

[21] In *Cubitt Building & Interiors Ltd v Fleetglade Ltd [2006] EWHC 3413 (TCC)* wherein Judge Peter Coulson QC stated the following:

> *"The importance of adjudication is speed. What matter most is the production of temporarily binding decision within the timetable provided by the 1996 Act or the terms of the applicable construction contract. Accordingly the ultimate correctness or otherwise of the decision matters less, because the decision is not binding and it can be challenged in court r in arbitration."*

[22] In *Ritchie Brothers (PWC) Ltd v David Philp (Commercials) Ltd [2005] 1 BLR 384* Lord Nimmo Smith made the following comment:

> *"If a speedy outcome is an objective, it is best achieved by adherence to strict time limits. If the timetable is not kept to, there is a a clear risk that , instead of giving rise to a quick decision the adjudication will instead become a long drawn-out and necessarily expensive process, much more akin to arbitration. "*

[23] Judge Richard Havery Q.C stated the following in *Epping Electrical Company Limited v Briggs and Forrester (Plumbing Services) [2007] EWHC 4 (TCC):*

> *"If a speedy outcome is an objective, it is best achieved by adherence to strict time limits. Likewise, if certainty is an objective, it is not achieved by leaving the parties in doubt as to where they stand after the expiry of the 28-day period. These considerations reinforce the*

view that paragraph 19 means exactly what it says, so that it is not open to an adjudicator to purport to reach his decision after the expiry of the time limit."

[24] In terms of clauses W1.3.3 and W1.3.8 of the agreement between the parties the time period for the publication of the adjudicator's decision is 4 weeks from the date when he receives the last submissions from the parties, unless the parties agree to grant him an extension of time. These clauses do not state what should happen when a party does not grant the consent to extend the period. I am of the respectful view that the intention of the parties to make the requirement of consent from the parties to afford the adjudicator more time is meant to give the parties control over the process of the adjudication. It is meant to give the parties some power to deal, should they find themselves in that situation, with a recalcitrant adjudicator. The ineluctable conclusion is therefore that, absent such consent to the extension of time, the adjudicator should publish his report on due date failing which his mandate is terminated. I am therefore unable to disagree with counsel for the respondent that, from the plain wording of these clauses, the adjudicator is not competent to proceed and act beyond the time period set by the agreement if he is unable to secure the necessary consent from both parties. No other meaning can be ascribed to these provisions for they are not at all ambiguous.

[25] It is clear and plain from the wording of clause W1.4.3 of the agreement that it is an escape provision for the parties when dealing with a recalcitrant adjudicator. It provides for a party to refer the dispute to the tribunal if the adjudicator does not publish his decision within the prescribed period, provided that the party shall notify the other of its intention to refer the dispute to the tribunal within four weeks of the date when the adjudicator

was to publish its decision. Once notice has been delivered to the other party within the specified period, then there is compliance with the requirements of clause W1.4.3 and the adjudicator cannot, in my view, be competent to continue with the adjudication.

[26] I find myself in disagreement with counsel for the applicant that the adjudicator, by requesting further information on the 19th of July 2018, earned himself a further 4 weeks within which to publish his decision. I am in agreement with counsel for the respondent that, if that was the case, there was no reason for the adjudicator to request the parties' consent to extend his period by a further seven days on the 30th of July 2018. The adjudicator himself did not believe that his request of the 19th of July 2018 earned him the extension – hence his request of the 30th July 2018. I hold the view therefore that the adjudicator did not earn himself an extension by making the request for further information when in fact that information was already in his possession.

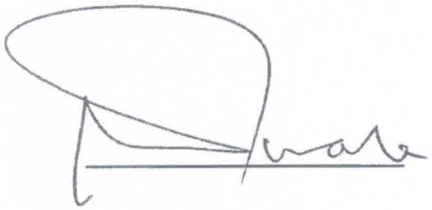
[27] It is on record that the adjudicator continued to communicate with and obtained further information from the applicant after the respondent refused consent to extend the time for the publication of the decision. It is also on record that the respondent did not participate any further in the adjudication process after it referred the dispute to the tribunal. However, the adjudicator decided to flagrantly disregard the fundamental principle of our law, the *audi alteram partem*, by proceeding to deal with the applicant in the absence of the respondent and this cannot be countenanced by the Court.

[28] It is my respectful view therefore that time was of essence in the adjudication of this case and that the adjudicator's mandate was terminated by the respondent on the 31st of July 2018 when it refused to consent to the

extension of time as requested by the adjudicator. Further, I hold the view that the adjudicator was not competent to proceed with the adjudication without the participation and contribution of the respondent. The irresistible conclusion is therefore that the decision of the adjudicator dated the 18th of September 2018 was published late and in breach of the terms of the agreement of the parties and is therefore not binding and enforceable as against the respondent. It is therefore my respectful view that the application falls to be dismissed.

[29] In the circumstances, I make the following order:

1. The application is dismissed with costs.



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JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: **10th of June 2019**

Date of Judgment: **28th June 2019**

For the Applicant: **Adv. S. Reynecke SC**
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