REPUBLIC OF SOUTH AFRICA

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

REPORTABLE

CASE NO: 43535/2019

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.✓

30/09/2020
DATE

SIGNATURE

In the matter between -

FRAMATOME Applicant

and

ESKOM HOLDINGS SOC LIMITED Respondent

J U D G M E N T

COPPIN J:

[1] This is an opposed application concerning the enforcement of a decision made by an adjudicator, appointed in terms of an engineering and construction contract, as a contractual obligation, where it is contended that the decision was invalid because the adjudicator had exceeded his jurisdiction.

[2] The applicant seeks declaratory orders and consequential relief, in the form of claims for the payment of monies, essentially enforcing a decision of the adjudicator ('decision 11, which refers to a previous decision, i.e. "decision 7") as a contractual obligation. The respondent argues that the application ought to be dismissed with costs, essentially, because the decisions are invalid, a nullity and unenforceable.

[3] The actual relief sought by the applicant is the following:

"1. Declaring and confirming that the Respondent is in breach of the New Engineering Contract 3: Engineering and Construction Contract (June 2005) was Option A ("NEC Contract") between the applicant and the respondent, dated 5 September 2014, for the replacement of the steam generators at Koeberg Nuclear Power Station, Unit 1 and 2, in South Africa ("the Contract");

2. Directing the respondent to adhere to and fully recognise and implement the decision delivered by the Adjudicator on 23 July 2019 (decision number 11), more particularly in the respects detailed in paragraphs 3 to 6 below;

3. Declaring and confirming that the contractual key dates 15, 16, 17, 18 and 19 relating to the replacement of the steam generators at the Koeberg Nuclear Power Station, Units 1 and 2, are:

3.1 In respect of Koeberg Power Station, Unit 1, 11 November 2018, 18 may 2019, 26 April 2020, 16 January 2020 and 14 February 2020 respectively

3.2 In respect of Koeberg Power Station, Unit 2, 19 May 2019, 23 November 2019, 1 November 2020, 23 July 2020 and 21 August 2020 respectively;

4. Declaring and confirming that the Contractual Sectional Completion Dates for each section of the Works (as defined in the contract) have been revised so that Sectional Completion Date 1 is 3 June 2020, Sectional Completion Date 2 is 9 December 2020 and Sectional Completion Date 3 is 22 June 2021;

5. Declaring and confirming that the Contractual Completion Date for the whole of the works is 22 June 2021;

6. Directing the respondent to pay the applicant the additional cost of:

6.1.1 EUR 2 706 146.00 which are subject to the price adjustment pursuant to the Secondary Option Clause X1 of the Contract and pursuant to

clause 51.4 of the Contract, interest thereon calculated at the LIBOR rate applicable at the time for amounts due in other currencies from 12 August 2018 to date of payment (inclusive of both dates), with the LIBOR rate being the 6 month London Interbank Offered Rate quoted under the caption "Money Rates" in the Wall Street Journal for the applicable currency or if no date is quoted for the currency in question than the rate for United States Dollars, and if no such rate appears in the Wall Street Journal then the rate as quoted by the Reuters Monitor Money Rates Service (or such service as may replace the Reuters Money Rates Service) on the due date for the payment in question, adjusted *mutatis mutandis* every 6 months thereafter and as certified, in the event of any dispute, by any manager employed in the foreign exchange department of The Standard Bank of South Africa Ltd, whose appointment it shall not be necessary to prove;

6.1.2 EUR 2 706146 which is subject to the price adjustment pursuant to the Secondary Option Clause X1 of the Contract and pursuant to clause 51.4 of the Contract, interest thereon calculated at the LIBOR rate (described in paragraph 6.1.1) applicable at the time for the amounts due in other currencies from 17 February 2019 to date of payment (inclusive of both dates);

6.1.3 EUR 1 353 073 which is subject to the price adjustment pursuant to Secondary Option Clause X1 of the Contract and pursuant to clause 51.4 of the Contract, interest thereon calculated at the LIBOR rate (described in paragraph 6.1.1) applicable at the time for amounts due in other currencies from 24 September 2019 to the date of payment (inclusive of both dates);

6.1.4 ZAR 36 595 611 which is subject to price adjustment pursuant to Secondary Option Clause X1 of the Contract and pursuant to clause 51.4 of the Contract, interest thereon calculated at the rate of 0% above the publicly quoted prime rate of interest (calculated on the 365 day year) charge from time to time by The Standard Bank of South Africa (as certified, in the event of any dispute, by any manager of such bank, whose appointment it shall not be necessary to prove) from 12 August 2019 to date of payment (inclusive of both dates);

6.1.5 ZAR 30 659 5611 which is subject to the price adjustment pursuant to the Secondary Option Clause X1 of the Contract and pursuant to clause 51.4 of the Contract, interest thereon calculated at a rate of 0% above

the publicly quoted prime rate of interest (as described in paragraph 6.1.5) from 17 February 2019 to date of payment (inclusive of both dates);

6.1.6 ZAR 18 297 805 which is subject to the price adjustment pursuant to Secondary Option Clause X1 of the Contract and pursuant to clause 51.4 of the Contract, interest thereon calculated at the rate of 0% above the publicly quoted prime rate of interest (as described in paragraph 6.1.5) from 24 September 2019 to date of payment (inclusive of both dates);

within 10 days from the date of this order;

7. Costs of suit;
8. Further and/or alternative relief"

Background Facts

[4] The contract was originally entered into between the respondent (i.e. the employer) and AREVA NP. The latter ceded its rights and obligations in terms of the contract as of 31 January 2018 to the applicant, which then became the contractor.

[5] In terms of the contract the applicant is to complete the design, manufacture, transportation, installation and commissioning of six replacement steam generators, together with specified engineering studies and safety analysis, at the Koeberg Nuclear Power Station, Units 1 and 2 in Cape Town ("the Works"), for the respondent.

[6] The contract is essentially based on the standard form NEC3 Engineering and Construction Contract (June 2005) clauses and other clauses as stated. The NEC3 contract is a standard form construction agreement and parties are able to select those clauses which they agree should govern their relationship.

[7] The Works consists of three lots – Lot 1 pertains to the design, manufacture and delivery of the generators; Lot 2 covers the removal of the old steam generators and the installation and commissioning of the new generators and Lot 3 covers the safety studies and

engineering analysis necessary for the generator replacement and increasing the thermal power uprate of Koeberg Power Station (Units 1 and 2) by ten percent.

[8] The completion date for the whole of the Works was initially set in the contract as 31 August 2019 and the Sectional Completion Dates (SCDs) were the following: SCD 1 pertains to the completion date for the Works in respect of Unit 1 of the power station and was initially set at 12 August 2018; SCD 2 relates to the completion date for the Works in respect of Unit 2 of the power station and it was initially set in the contract at 7 February 2019 and SCD 3 relates the completion date for the remainder of the Works (and coincides with the initially agreed final completion date for the entire Works) and it was initially set in the contract as at 31 August 2019.

[9] Decision 11 of the adjudicator was published on 23 July 2019 and the essence of it reads: "...the project manager failed to make a full assessment of the compensation event of changed key dates 2, 14 and 24 timeously as a consequence of which the contractor's quotation contained in the contractor's referral of 11 December 2018 (paragraphs 135 to 171 and Appendices 6 and 7) shall be deemed to be accepted by the employer".

[10] The referral of 11 December 2018 is referred to as "referral number 7" in terms of which the adjudicator rendered decision 7 in which he, essentially, ruled that the change by the project manager, representing the employer (i.e. the respondent) in the definition of the Key dates 2, 14 and 24, was a compensation event, and had instructed the project manager to complete the assessment of that event in accordance with the contract.

[11] For context, Key date 2 relates to Lot 1 and is the date by which the contractor was to submit of an acceptable design (it was initially agreed

to as 1 February 2017). Key date 14 relates to Lot 2 and is the date by which the contractor is to submit an acceptable detailed design for outages 123 and 223, i.e. for Unit 1 by 5 December 2016 and by 1 February 2017 for Unit 2. Key date 24 relates to Lot 3 and is the date by which the contractor is to submit an acceptable safety case in B status. It was initially set as 1 March 2017.

[12] The quotation referred to in decision 7 is the quotation which the applicant included in referral 7 and in terms of which it submitted revised prices for payment brought about, on its version, by the redefinition of key dates 2, 14 and 24 and in which it also stated, inter alia, that it proposes that the corresponding payments are made by, inter alia, certain dates and that the activity schedule be modified accordingly. The applicant claims that the acceptance of the quotation, as ruled by the adjudicator, made those payments, that are being claimed in theses proceedings, due; alternatively, that they became due because of the amendment of the activity schedule; further alternatively, that the payments constitute "other amounts to be paid to the Contractor" as envisaged in terms of the contract (clause 50.20) and which ought to have been assessed by the project manager and paid.

[13] In terms of clause W1.1 of the contract a dispute arising under or in connection with the contract is to be decided by the adjudicator. Clause W1.3(10) provides that the adjudicator's decision is binding on the parties unless and until it is revised by the arbitration tribunal and is to be enforced as a matter of contractual obligation between the parties and not as an arbitration award. The contract also provides that the adjudicator's decision is final and binding if neither party has notified the other, within the times required by the contract, that it is dissatisfied with the decision of the adjudicator and intends to refer the decision to the arbitration tribunal.

[14] Although the respondent has not given the applicant notice of its dissatisfaction with decision 7 it has given such notice in respect of decision 11 and of its intention to refer that decision to the arbitration tribunal, but no arbitration has taken place as yet. In any event, it is conceded that, notwithstanding its dissatisfaction with that decision, the respondent has (nevertheless), pending its reconsideration by the arbitration tribunal, complied with it, save for not having made payment to the applicant of the monies which are claimed in these proceedings,

[15] The respondent avers that the amounts claimed are not due and payable in terms of the adjudicator's decision 11, or at all and that the adjudicator's decision did not include a change in the payment terms provided for in the contract. In the alternative, it is contended by the respondent that if it is found that the adjudicator's decision 11 did provide for such a change in the terms of payment, that decision was beyond the powers and jurisdiction of the adjudicator and was consequently of no force and effect.

[16] The respondent further contends that the adjudicator's decision 7 was also of no force and effect for lack of jurisdiction, and as insofar as decision 11 was based on decision 7, it was, similarly, of no force and effect for lack of jurisdiction. In essence, the respondent contends, firstly, that decision 7 did not relate to a dispute that had been notified in terms of clause W1.3(1) of the contract. Secondly, that the applicant's quotation, contained in the 11 December 2018 referral notice (i.e. referral no. 7) does not constitute a quotation as envisaged in the contract and that the procedure provided for in clause 64.4 of the contract, in terms of which a quotation is deemed to be accepted, was not followed in respect of the said quotation. Thirdly, the respondent contends that a proposal to change the payment provisions could not and do not form part of the quotation under the contract and that (a) in deeming that the applicant's quotation was accepted, as per decision 11, the adjudicator changed the payment provisions of contract (which

he could not do) and thereby exceeded his jurisdiction; (b) the amounts claimed by the applicant pursuant to decision 11 are not due and payable; and (c) the relief sought by the applicant in these proceedings is inappropriate, because it is final relief which cannot be granted at this stage.

[17] The applicant's contentions in response, in brief, are the following: firstly, regarding the adjudicator's jurisdiction: (a) that this is not the correct forum to challenge the adjudicator's jurisdiction and that can only be done at the arbitration; (b) the respondent never took issue with decision 7 at the time it was made and cannot challenge it now; the respondent is out of time and since that decision stands in terms of the contract, the jurisdictional challenge has no merit; (c) that in challenging the jurisdiction of the adjudicator, this Court, in effect, is required to embark upon a consideration of the merits of the adjudicator's decision which it is not empowered to do, in particular, as this would include considering whether the adjudicator was correct regarding the quotation contained in the applicant's December 2018 referral notice.

[18] Secondly, the applicant contends that its claims for payment are completely consonant with decision 11 and the terms of the contract and that it is within its rights to seek the relief set out in the notice of motion in this application.

The issues

[19] Thus, the issues for decision may briefly be stated to be the following: Firstly, whether the court is empowered to consider whether the adjudicator had acted within his powers and jurisdiction, i.e. had not exceeded his powers, in respect of decision 11, and as a sub- issue, to decide whether the fact that the respondent did not challenge decision 7 (within the time allowed and in terms of the contract) disqualifies it

from impugning the adjudicator's decision 11, in which he essentially enforces decision 7.

[20] Secondly, whether this Court may, essentially, consider whether the applicant's quotation contained in its December 2018 referral notice constitutes a quotation as envisaged in the contract.

[21] Thirdly, whether the adjudicator, in deciding that the quotation is deemed to have been accepted (as per decision 11) had changed the payment provisions of the contract, and if so, whether he had acted within his powers in doing so; and lastly, whether the relief the applicant is claiming, including payment of the particular amounts, is appropriate in the circumstances, and to decide, as part of that issue whether (a) those amounts are due and payable; and (b) whether the claims are enforceable at this stage of the proceedings.

Definitions

[22] Before dealing with the issues as identified, it is necessary, in order to facilitate their discussion, to give an overview of some of the relevant contractual provisions and its terminology.

[23] Terms utilised in the decisions are defined in the contract and are common cause. In the contract "contractor" refers to the applicant, "employer" refers to the respondent; "project manager" refers to the respondent's representative, who is also the deponent of its answering affidavit in these proceedings. The "adjudicator" is the one whose decisions are the subject of the dispute in this application. He was appointed by the parties in terms of the contract. I will deal with his powers in due course. A "Key date" is a date by which work is to meet the condition(s) stated in the contract and the conditions themselves are stated in the contract data, unless later changed in accordance with the contract (clause 11.2. (a)). The "activity schedule" is a schedule

agreed upon in the contract and can only be changed in accordance with the contract (clause 11.2. (20)). The "price for work done to date" is defined as the "total of the prices for each group of completed activities; – and for a completed activity which is not in the group. A "completed activity" is one without defects which would either not delay or be covered by immediately following work" (clause 11.2 (22)).

[24] A "compensation event" in terms of the contract is one which, if it does occur, is not due to the contractor's fault – and entitles the contractor to be compensated for any effect the event has on the prices and the completion date(s) or key date(s). With a compensation event what is assessed is its effect on the prices, the completion date or any key date. As for the procedure, in terms of the contract if a compensation event occurs, either the project manager (acting on behalf of the employer), or the contractor, notifies a compensation event as contemplated in sub-clauses 61.1 – 61.3. The event is then assessed in the manner contemplated in clause 63 by, either the contractor (in this case the applicant) or the project manager. The contractor then submits a quotation (in respect of the compensation event) to the project manager because of the effect the event has on the prices and/or causes a delay in the completion date(s) or key date(s), as assessed by the contractor. The project manager may, either accept, or reject, the quotation and then do his own assessment (sub-clause 62.3). If the project manager fails to react to the contractor's quotation then, following notice, the contractor's quotation may be deemed to be accepted (sub-clause 62.6). The compensation event is then implemented. Clause 60.1 (4) of the contract provides that an instruction by the project manager to change a key date is a compensation event.

[25] As far as payment is concerned - core clause 5 is applicable. The contractor submits an application for payment to the project manager on or before the assessment date (sub-clause 50.4) and the project

manager is to assess the amount due at each assessment date. The contractor is entitled to be paid according to the following formula: (sub-clause 50.2) the price for work done to date (PWDD), plus other amounts to be paid to the contractor, less amounts to be paid by or retained from the contractor. The product project manager then certifies payment within one week of each assessment date and payment is to be made three weeks later (sub-clauses 51.150 1.2).

Referral 7

[26] It is common cause that on 29 May 2017 the project manager notified the contractor (i.e. the applicant) of an event as a consequence of the redefinition of key dates 2, 14 and 24. A dispute arose between the parties in respect of the project manager's decision regarding the consequences of the redefinition of those key dates. The project manager, essentially, expressed the view that it had no consequence and that it was not a compensation event. The applicant took issue with that conclusion and was of the view that it did have a consequence and was a compensation event. The applicant referred its view (notified through its channel C/C 3976) to the adjudicator and the question was whether it was a compensation event. This culminated in decision 7 – referred to above.

[27] The adjudicator reasoned that from an analysis there was only one compensation event in issue, namely, the instruction of 24 May 2017 to vary the key dates 2, 14 and 24 and that it was the manner the event had been implemented that required evaluation. The adjudicator concluded that the event notified was indeed a compensation event, but that its implementation had to be assessed. In that regard, the adjudicator held that the event had only been implemented in part, i.e. that the project manager had already notified what was a compensation event and that the contractor's notification of the same compensation event was unnecessary and superfluous and that,

similarly, the project manager's rejection of that notification (i.e. C/E3976) was of no force, because the compensation event had already arisen when the project manager instructed the changes to the dates.

[28] The adjudicator was also of the view that the compensation event arising from the change of those dates had to be fully implemented, in that an assessment of the impact the change of the dates had on other key dates, sectorial completion dates (SCD's) and the prices was still to be made by the project manager, as contemplated in sub-clause 64.1 of the contract. As part of his decision the adjudicator (accordingly) directed the project manager to make such further assessment.

[29] It is not disputed that the employer (i.e. the respondent) did not notify of any dissatisfaction with the adjudicator's decision 7 in accordance with the terms of the contract. Thus, unless that decision was of no force and effect, in terms of clause 64.6, it became final and binding in those circumstances.

[30] Of further significance concerning referral 7, is that, as part of its notification to the respondent (i.e. the project manager) and its referral to the adjudicator, as pointed out earlier, the applicant (i.e. the contractor) also included an assessment and quotation in respect of what it alleged was a compensation event and requested the adjudicator to direct the implementation of that event in accordance with its assessment.

[31] However, it is clear from decision 7 that the adjudicator did not comply with that request, since he was of the view that an assessment of the compensation the contractor was entitled to, was premature, and that sub clauses 64.1 and 65 of the contract had to be complied with first. Thus, the adjudicator directed the project manager to proceed in terms

of clause 64.1, failing which, according to the adjudicator, the contractor would be entitled to the remedies provided for in sub-clause 64.4. In terms of that sub-clause, if the project manager does not reply to the contractor's notification within a stipulated period, the project manager would be deemed to have accepted the contractor's quotation.

Referral 11

[32] It is not in issue that following decision 7 the applicant (i.e. the contractor) notified the project manager that he failed to assess the compensation event (i.e. as directed by the adjudicator in decision 7). The project manager responded on 26 March 2019. That gave rise to a dispute between the parties as to whether the project manager did indeed assess the compensation event as contemplated in sub-clause 64.4. The dispute was referred by the applicant to the adjudicator for adjudication culminating in decision 11, which is quoted earlier in this judgement.

[33] It is noteworthy that in decision 11 the adjudicator records that his jurisdiction to deal with the dispute was not in issue. Further, in brief, the adjudicator decided that the project manager did not make a full assessment of the compensation event, referred to in decision 7, timeously, as a result of which the contractor's quotation for the event, i.e. that was part of its submission in referral 7, was deemed to be accepted by the respondent (i.e. the employer).

The jurisdictional challenge of the adjudicator's decisions

[34] The respondent's argument under this head is that the adjudicator is a creation of the contract and derives power only from the contract and the agreement between himself and the parties. In the agreement with adjudicator he undertook to carry out his duties "as described in the

conditions" of the contract. One of his duties in terms of the contract was to decide disputes referred to him under the contract between the parties.

[35] Sub-clause W1.3 (1) provides that disputes are notified and referred to the adjudicator in accordance with the adjudication table. Sub-clause W1.3 (2) provides that, if a disputed matter is not notified and referred within the time period stipulated in the contract, neither party may refer the dispute or matter to the adjudicator or the arbitration tribunal.

[36] Accordingly, so contends the respondent, if the adjudicator gives a decision in respect of the dispute that was not referred to him the same consequence would be applicable to such decision as applies to the decision (award) of an arbitrator who has no jurisdiction. In terms of the judgment in *Vidavsky v Body Corporate of Sunhill Villas*[1] such a decision would be a nullity and does not even require setting aside, or, as expressed in *Fassler, Kamstra & Holmes v Stallion Group of Companies (Pty) Ltd*[2], would be void *ab initio* and does not give rise to legal obligations[3]. The applicant, of course, disputes that is the position in the case of a decision of an adjudicator, contending that such an approach would undermine the rationale of appointing an adjudicator.

The Legal position on the question of the adjudicator's jurisdiction

[37] It is indeed so that an adjudication ought to be distinguished from an arbitration. Adjudication is not arbitration[4]. In *Radon Projects v NV Properties and Another*[5], Nugent JA writing on behalf of the court, described the essential differences between the two concepts as follows:

---

[1] 2005 (5) SA 200 (SCA) para 14.
[2] 1992 (3) SA 825 (W) at 829.
[3] *Carillion Construction Ltd v Devonport Royal Dockyard* [2005] EWHC 778 (TCC) para 80.3 and *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd and Another* 2013 (6) SA 345 (SCA) ("*Radon Projects*") para 29.
[4] *Freeman NO v Eskom Holdings Limited* [2010] JOL 25357 (GSJ) para 23.
[5] See *Radon Projects* (above) paras3-5; and 2 LAWSA (3ed) para 89.

"[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 use in connection with the 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 now become internationally – in some countries by legislation – (acceptable) for disputes to be resolved provisionally by adjudication. In *Macob Civil Engineering Ltd v Morrison Construction Ltd* 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 decisions 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.'

[5] the authors of *Hudson's Building and Construction Contracts* observed that under New Zealand construction legislation adjudication 'is regarded as essentially a cash–flow measure implementing what has now been colloquially described as a "quick and dirty" exercise to avoid delays in payment pending definitive determination of litigation'." (Footnotes omitted)

[38] Even though the South African cases referred to by the respondent pertain to arbitrators, the respondent has also referred to English cases dealing with the position of adjudicators, where the courts in dealing with applications for the enforcement of decisions of adjudicators held that if a clear case is made that an adjudicator had no jurisdiction to decide a dispute, the court may refuse to enforce such a decision because it would have been invalid[6]. The courts in those cases do not

[6] See: *Edmund Nuttall Ltd v RG Carter Ltd* [2002] EWHC 400 (TCC) para25; *Thomas-Fredric's (Construction) Ltd v Keith Wilson* [2003] EWCA Civ. 1494 par 20; *Geoffrey Osborne Ltd v Atkins Rail Ltd* [2009] EWHC 2425 (TCC) para 22: *Carillion Construction Ltd v*

review and set aside such decisions, but refuse to enforce them in light of their judicial discretion to do so. The review and setting aside is left to the arbitration tribunal.

[39] In *Edmund Nuttal v RG Carter Ltd* Seymour J, sitting in the Technology and Construction Division of the High Court of England and Wales, expressed the position as follows: "... in particular it was accepted before me that the jurisdiction of an adjudicator derives, at least in a case like the present, from the Notice of Adjudication. Put simply, the adjudicator has jurisdiction to decide a "dispute" which is the subject of a Notice of Adjudication, but has no jurisdiction to decide something which is not covered by the relevant Notice of adjudication."[7]

[40] Having considered the facts in that case, Seymour J concluded that if the adjudicator had adjudicated a dispute which was not, upon a proper construction of the Notice of Adjudication, the subject of that Notice, the adjudicator would not have had jurisdiction to decide that dispute and his decision in respect of it would be invalid and the action for its enforcement should be dismissed[8].

[41] In *Thomas-Frederic's (Construction) Ltd v Keith Wilson* the Supreme Court of Judicature, sitting in an appeal from the Technology and Construction Division of the High Court of England and Wales, held that even if it had been agreed by the parties that the decision of the adjudicator would be binding on them and had to be complied with in the interim (i.e. until finally determined by other means, such as arbitration) and even if the purpose of referral to an adjudicator was to provide a quick, enforceable, interim decision under the rubric "pay now, argue later" – "by no means does it follow, however, that even in

---

Devonport Royal Dockyard [2005] EWHC 778 (TCC) generally and particularly paras 11 and 72.

[7] Para 25.

[8] Para 32.

the short term the decision binds the parties, if a respectable case has been made out for disputing the adjudicator's jurisdiction."[9]

[42] In response to arguments, that to allow such challenges to an adjudicator's decision would undermine the rationale of making use of an adjudicator, the court in *Thomas-Frederic's* held that that did not justify the disallowance of such a challenge. Lord Justice Simon Brown put it thus: "....I readily recognise the concern lest the salutary new statutory power to promote early payment in construction cases be emasculated by jurisdictional challenges. The solution, however, seems to me not in finding defendants too readily to have, in the full sense, submitted to the adjudicator's jurisdiction, which if properly advised they plainly would not do. Rather, as Dyson J observed in paragraph 8 of his judgement in the *Project Consultancy Group* case, it is for courts (and adjudicators) to be 'vigilant to examine the arguments critically'. It is only if the defendant had advanced a properly arguable jurisdictional objection with a realistic prospect of succeeding upon it that he could hope to resist the summary enforcement of an adjudicator's award against him."[10] (Emphasis added)

[43] In *Carillion* Lord Chadwick LJ observed, inter-alia, how the decisions of adjudicators were to be approached[11]. One such observation was that courts ought to respect and enforce the adjudicator's decision, unless it is plain that the question which the adjudicator has decided was not the question referred to him. Another was, that it was all too easy for a party in a complex matter to find points upon which to mount a challenge on the adjudicator's decision under the label that the adjudicator acted outside his, or her, jurisdiction, and that such challenges, if not well-founded, are likely to lead to a substantial waste of time and expense.

---

[9] Para 20 per Lord Justice Simon Brown. The decision in the matter was unanimous.
[10] Para 32.
[11] Para 80.

[44] There is no reason for the position in the South African law to be any different[12]. It makes perfect sense that the same consequences should follow in the event of it been clear that an adjudicator's decision is not covered by the relevant notice of adjudication, i.e. where he acts outside of his jurisdiction. However, one must also be mindful of the fact that treating the situation of an arbitrator and an adjudicator strictly the same might well undermine the rationale and objectives for appointing an adjudicator in the first place. Parties may needlessly become bogged down in litigation about whether a particular decision of an adjudicator was within (or outside) of his powers or jurisdiction. This would result in the antithesis of a summary and expeditious process and would negatively impact cash-flow.

[45] The answer to what appears to be a conundrum seems to be in striking an appropriate balance, which is, essentially what has been done in the English cases referred to above. The adjudicator's decision should be enforced as binding on the parties, unless a "respectable case"[13] or a clear case has been made out that the adjudicator exceeded his or her jurisdiction. If the case is not clear, the parties ought to be held bound by the adjudicator's decision in the interim and the court ought to enforce it.

[46] The position is also consistent with the court's discretion in our law to enforce specific performance of a contractual obligation. The discretion is not limited to certain type of case but must be exercised judicially in light of all circumstances[14]. Our courts will not in the exercise of that discretion subject a defendant to the dangers or futility of complying with a decision as a contractual obligation even though it is clearly shown to be invalid and not binding.

---

[12] See *Ekhuruleni West College v Segal and Another* (26624/2017) [2018] ZAGPPHC 662 (29 August 2018) paras 35-37, where the court referred to the English decisions with approval.
[13] See; *Thomas- Fredric's (Construction) Ltd v Keith Wilson* (above).
[14] See *Haynes v King Williams Town Municipality* 1951 (2) SA 371 (A) 378G: GB Bradfield *Christie's Law of Contract in South Africa* (7ed) p 619-620.

Application

[47] Turning to the facts of the present case, I am not convinced that a 'respectable case' or clear case has been made out that the adjudicator exceeded his jurisdiction in respect of adjudication 7, but am of the view that such a case has been made out in respect of adjudication 11. The reasons for my conclusion are stated in the discussion below.

[48] Where the adjudicator's jurisdiction is disputed in proceedings such as the present, i.e. for enforcement of the adjudicator's decision, it is, essentially, for the court to determine whether it has been shown that the adjudicator has answered the wrong question. If it is merely shown that the answer itself is wrong, but was in respect of the right question, it would not have been shown that the adjudicator had exceeded his jurisdiction and the parties are bound by that answer (even if wrong)[15].

[49] Establishing whether the right question has been answered involves the proper construction of the instruments in terms of which the dispute was conveyed to the adjudicator, such as the notice(s) of dispute, or referral letter(s) and accompanying submissions of the parties, but also, importantly, in light of the agreed powers of the adjudicator.

The adjudicator's powers

[50] For context in this matter, it is noteworthy that in terms of the agreement between the parties and the adjudicator, his powers are fairly wide. He undertook to carry out his duties as described in the conditions of contract. This would include a reference to option W1. In terms of sub-clause W1.3 (5) the adjudicator may: (a) 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

[15] See *Hudson's Building and Engineering Contracts* (13 ed) para 11-010.

having been accepted; (b) take the initiative in ascertaining the facts and the law related to the dispute; (c) instruct a party to provide further information related to the dispute within a stated time; and (d) instruct a party to take any other action which he considers necessary to reach his decision and to do so within a stated time. The agreement thus clearly allowed for the adjudicator to be pragmatic and to deal with disputes referred to him in a practical and sensible manner.

[51] In its papers (and argument) the respondent defined the referred issue in adjudication 7 rather (unreasonably) narrowly. The dispute referred was indeed about the project manager's decision (given in channel E/C7999), that the event notified by the contractor in CE 3976 concerning the change in the definitions of key dates 2, 14 and 24 – is not one of the compensation events stated in the contract, i.e. the core of the dispute was whether the event, which was the same event dealt with by the project manager and the contractor, was a compensation event.

[52] The history of the correspondence shows that the project manager changed the definitions but was of the view that it had no impact and was therefore not a compensation event in terms of the contract. The contractor took issue with that position and notified (possibly unnecessarily) the project manager of the same compensation event. The project manager decided (in channel E/C7999) – in effect, that the contractor was wrong and that he was right and that the event, i.e. of changing the definition of the key dates, was not a compensation event.

[53] The adjudicator pragmatically and logically reasoned that there was only one event that was being referred to, namely, the change in the definition of the key dates; that the question to be answered was whether that event was a compensation event; that it was indeed (effectively) a compensation event, but that it needed further

assessment as contemplated in clause 64, and he directed accordingly. That this is so is clear from adjudication 7. Having recorded what the dispute was about the adjudicator proceeded as follows: "from an analysis of the submissions it is clear that there is only one compensation event at issue namely the instruction on 29 May 2017 to vary key dates 2, 14 and 24."

[54] So, effectively, with regard to adjudication 7, the adjudicator's decision was covered by the referral to him. A possible criticism is that he went further to evaluate the manner in which the compensation event was implemented, but the criticism would not be valid in light of the adjudicator's powers. He states, for example, in adjudication 7, after having mentioned that there is only one compensation event at issue, namely, the variation of key dates 2, 14 and 24, that "the manner in which this compensation event was implemented needs to be evaluated". He then proceeds to evaluate its implementation and concludes that it was not fully implemented.

[55] Narrowly construed, this was not the dispute that was referred to him for resolution, but viewed in light of his power to review and revise any action or in action of the project manager related to the dispute, and to instruct a party to take any other action which he considers necessary, decision 7 cannot be said to have been beyond the adjudicator's jurisdiction and not have been covered by the notice of adjudication pertaining to adjudication 7. In addition, the respondent neither objected to the decision, nor gave notice of its intention to refer the decision to arbitration, which indicates that at the time it accepted that the decision was within the powers of the adjudicator.

[56] Regarding adjudication 11- the notice of dispute (or referral) relied on by the applicant is worded as follows: "In accordance with Core Clause W1 .3 (1), the Contractor notifies the Project Manager of a dispute regarding Project Manager's assessment of March 26th, 2019

(E/C884c6) of changed key dates 2, 14 and 24 which is incorrect and disregards the Adjudicator's decision of February 26th, 2019. The Contractor's position on this issue is given in channel C/E4379 of April 3rd, 2019."

[57] In his decision the adjudicator states the question, which he perceived he was required to answer, as follows: "the first issue on which I am required to give a decision is whether the Project Manager failed to make the assessment of the Compensation Event of changed Key dates 2, 14 and 24 in due time as directed by the Adjudicator's decision of 26 February 2019 and if not what the consequences of this are"[16]. The adjudicator then went on to answer that very question.

[58] His decision states: "In conclusion my decision is that the Project Manager failed to make a full assessment of the Compensation Event of changed key dates 2, 14 and 24 timeously as a consequence whereof the Contractor's quotation contained in the Contractor's referral of 11 December 2018 (paragraphs 135 to 171 and appendices 6 and 7) shall be deemed to have been accepted by the Employer."[17]

[59] However, it is clear from the written reference of the dispute that the question was not as the adjudicator chose to frame it. The adjudicator answered the wrong question. In fact the reference suggests that an assessment had been done, but that the contractor was of the view that it was incorrect. It was therefore for the adjudicator to determine whether the assessment was incorrect and if so whether that could be construed as a disregard for the adjudicator's decision of February 26, 2019. There is no mention at all in the referral about whether the project manager timeously issued the assessment.

[60] In my view it is clearly shown that the adjudicator did not decide the dispute referred to him under the contract by the parties and therefore

[16] Emphasis added.
[17] Emphasis added.

that the respondent has a very good prospect of successfully establishing at the arbitration that the adjudicator acted outside of his jurisdiction in respect of decision 11, and that the decision is not binding upon the parties and is unenforceable.

The quotation

[61] In light of my finding concerning the adjudicator's jurisdiction in respect of decision 11 it is not necessary to decide the issues related to the quotation, including whether the applicant could have by way of a quotation, even assuming it to have been accepted by the respondent, vary the terms of the contract in the absence of a written variation signed by, or on behalf of, the parties, save to make the following observations in that regard.

[62] In terms of its quotation the applicant proposed that the payments mentioned there be made, effectively, before the work in respect of such payments had been done, thus proposing a variation of the payment terms of the contract. In terms of the contract payment was due upon completion of the work. The unilateral variation of the terms by the applicant was ineffective and unenforceable. In terms of clause 12.3 of the contract no change to the contract (that would include the payment terms) was of any force or effect unless it had been agreed to and confirmed in writing and signed by the parties. Even if it assumed that the respondent had accepted the applicant's proposal as per its quotation, an effective variation of the payment terms could arguably only have been attained if that agreement was reduced to writing and signed by the parties. In the absence of such, the respondent could not enforce its proposed payment term as if it was already a term of the contract.

[63] I also do not deem it necessary to decide whether or not the quotation referred to by the adjudicator in decision 11 was indeed a quotation as contemplated in the contract (i.e. clause 61.1). The fact is that the

adjudicator concluded that it was a quotation and I am doubtful whether that conclusion of the adjudicator on its own is reviewable, let alone by this court, or reviewable on the basis that it is wrong.

Conclusion

[64] The essential aspects of the relief sought by the applicant depends on the enforceability of decision 11. In light of the finding that there are good prospects that he decision would be set aside at the arbitration it is not appropriate to effectively enforce it in the interim. I cannot find that the respondent is in breach of a decision which has been adequately shown to be a nullity. Further granting the declaratory orders sought by the applicant would be tantamount or consistent with enforcing decision 11, which, in the exercise of my discretion, for the reasons mentioned above, I shall not be ordering in these proceedings. The is no reason why the costs should not follow the outcome of the application and the employment of two counsel was justified.

[65] In the result the following order is made:

1. The application is dismissed;
2. The applicant is to pay the costs of the application, which shall include the costs of two counsel.

P COPPIN
Judge of the South Gauteng Local Division

APPEARANCES:

FOR THE APPLICANT	B Berridge SC and DR van Zyl
INSTRUCTED BY	Webber Wentzel Attorneys
FOR THE RESPONDENT	PHJ Van Vuuren SC and NL Dyirakumunda
INSTRUCTED BY	Edward Nathan Sonnenberg
DATE HEARD:	9 June 2020
JUDGMENT DATE:	Date judgment emailed to parties deemed to be 30 September 2020.