REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2019/20801

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

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SIGNATURE **DATE: 16 April 2020**

In the matter between:

MURRAY & ROBERTS LIMITED Applicant

and

SASOL SOUTH AFRICA (PTY) LTD Respondent

JUDGMENT

Weiner J

Introduction

[1] The applicant, Murray and Roberts Ltd ('M&R') and the respondent, Sasol South Africa (Pty) Ltd ('Sasol'), were parties to an NEC3 Engineering and Construction Contract related to a project at Sasol in Secunda (the 'contract'). The contract was concluded on 15 March 2015. Sasol is the employer and M&R is the contractor. The contract provided for the nomination of a project manager ('PM') who had certain prescribed functions and duties.

[2] The contract provided for a dispute resolution process and they opted for Option W1[1] contained in the contract. For this option, a three-step process was applicable:

2.1. Notification of the dispute;[2]

2.2. Referral of the dispute to adjudication;[3]

2.3. Referral to the tribunal (the agreed arbitrator).[4]

[3] M&R applied to enforce a decision on a dispute (Dispute 16) ('D16') made by the adjudicator, appointed in terms of the contract and the Adjudicator's contract. Sasol counter-applied for relief that the adjudicator's decision on Disputes 1-3, 5-6, 8-12 (the earlier decisions) be enforced.

Background

[4] On 1 March 2017, the PM issued an instruction or request to M&R to demobilise certain resources utilised at the construction site in Secunda (the construction site). This request was referred to as 'PMC200'. During the course of the contract, the adjudicator, appointed by the parties, made several decisions dealing with PMC200.

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[1] The relevant provisions are set out in para [13].
[2] Clause W1.3(1) of the contract.
[3] Clause W1.1 read with Clause W1.3(1) of the contract.
[4] Clause W1.4(1) of the contract.

[5] All the earlier decisions related to PMC200. The disputes in these decisions arose in relation to the status of the signed off timesheets. M&R contended that these timesheets contractually bound Sasol to payment in respect of the hours indicated. Sasol argued that they only served as a record of the hours indicated. The adjudicator had, in the earlier decisions, decided the PMC200 and timesheets dispute in favour of Sasol. M&R thereafter referred disputes 1 and 2, amongst others, to the arbitrator appointed by the parties.

[6] On 9 October 2018, the arbitrator returned an award in favour of M&R in respect of disputes 1 and 2. The arbitrator found that PMC200 was not valid or enforceable and that the timesheets proffered by M&R were contractually binding.

Dispute 16

[7] By the time the arbitration award was handed down, the adjudicator had already issued the earlier decisions. In view of the arbitration award, M&R notified Sasol and the adjudicator of D16. M&R sought a decision that the arbitration award had to be complied with, on the basis that the PM and, subsequently, the adjudicator [in terms of clause W1.3(5)] are bound by the arbitration award. The adjudicator, in his decision, sought to adjust the assessments in the earlier decisions in line with the arbitrator's review of Disputes 1 and 2, as both the earlier decisions and the arbitrator's review related to PMC200 and the timesheets.

[8] Sasol submitted that all the decisions related to payment disputes. It contended that, although certain factual and legal issues were common to all the disputes, they remained separate disputes based on distinct causes of action. The adjudicator decided each dispute individually, based on its particular characteristics. The arbitrator only considered Disputes 1 and 2. The other earlier decisions of the adjudicator had not been revised by the arbitrator and still stand. In their counter-application, Sasol sought enforcement of those decisions.

[9] M&R launched an application to have the arbitration award made an order of court. Sasol counter-applied to partially review the arbitrator's decision, in particular, the findings

related to PMC200 and the timesheets. In light of the review application, Sasol refused to comply with the affected portions of the arbitration award and/or with the adjudicator's decision on D16.

[10] The two applications came before Windell J, who, on 14 January 2020, dismissed the review and made the arbitrator's award an order of Court. (I am informed that the application for leave to appeal her decision was refused by Windell J on 12 March 2020.)

[11] Thus, at present, the arbitrator's award stands. M&R contended that as PMC200 has been declared invalid, all assessments which were calculated on PMC200 are incorrect. It does not matter that the timesheets related to different assessments. The arbitrator found that the timesheets were contractually binding, unless and until set aside on review.

The adjudicator's powers

[12] M&R contended that Sasol's conduct is in breach of clause W1.3(10) and clause 10.1 of the contract. The relevant clauses applicable to the adjudicator's powers are set out in the contract and the Adjudicator's Contract.

[13] The relevant clauses in the contract are the following:

13.1. Clause W1.1: 'A dispute arising under or in connection with this contract is referred to and decided by the Adjudicator.'

13.2. Clause W1.2(2): 'The *Adjudicator* acts impartially and decides the dispute as an independent adjudicator and not as an arbitrator.'

13.3. Clause W1.3(1): 'Disputes are notified and referred to the *Adjudicator* in accordance with the Adjudication Table.'

AJUDICATION TABLE

Dispute about	**Which Party may refer it to the *Adjudicator?***	**When may it be referred to the *Adjudicator?***

An action of the *Project Manager* or the *Supervisor*	The *Contractor*	Between two and four weeks after the *Contractor's* notification of the dispute to the *Employer* and the *Project Manager*, the notification itself being made out not more than four weeks after the *Contractor* becomes aware of the action
The *Project Manager* or *Supervisor* not having taken an action	The *Contractor*	Between two and four weeks after the *Contractor's* notification of the dispute to the *Employer* and the *Project Manager,* the notification itself being made not more than four weeks after the *Contractor* becomes aware that the action was not taken
A quotation for a compensation event which is treated as having been accepted	The *Employer*	Between two and four weeks after the *Project Manager's* notification of the dispute to the *Employer* and the *Contractor*, the notification itself being made not more than four weeks after the quotation was treated as accepted
Any other matter	Either Party	Between two and four weeks after the notification of the dispute to the other Party and the *Project Manager*

13.4. Clause W1.3(2): 'The times for notifying and referring a dispute may be extended by the *Project Manager* if the *Contractor* and the *Project Manager* agree to the extension before the notice or referral is due. The *Project Manager* notifies the extension that has been agreed to the *Contractor*. If a disputed matter is not notified and referred within the times set out in this contract, neither Party may subsequently refer it to the *Adjudicator* or the *tribunal*.'

13.5. Clause W1.3(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.'

13.6. Clause W1.3(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.'

13.7. Clause W1.3(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 times required by this contract that he is dissatisfied with a decision of the *Adjudicator* and intends to refer the matter to the *tribunal*.'

13.8. Clause W1.3(11): 'The *Adjudicator* may, within two weeks of giving his decision to the Parties, correct any clerical mistake or ambiguity.'

13.9. Clause W1.3(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 times required by this contract that he is dissatisfied with a decision of the *Adjudicator* and intends to refer the matter to the *tribunal*.'

13.10. Clause W1.4(1): 'A Party does not refer any dispute under or in connection with this contract to the *tribunal* unless it has first been referred to the *Adjudicator* in accordance with this contract.'

13.11. Clause 10.1: 'the employer, the Contractor and the Project Manager and the Supervisor shall act as stated in this contract and in the spirit of mutual trust and co-operation.'

[14] The relevant clauses in the Adjudicator's Contract are:

14.1. Clause 1.1: ‘The Parties and the Adjudicator shall act as stated in this contract and in the contract between the parties. The Adjudicator shall act impartially.’

14.2. Clause 1.7: ‘If a conflict arises between this contract and the contract between the Parties then this contract prevails.’

14.3. Clause 2.1: ‘The Adjudicator does not decide any dispute that is the same or substantially the same as one that he or his predecessor has previously decided.’

14.4. Clause 2.2: ‘The Adjudicator decides a dispute referred to him under the contract between the Parties. He makes his decision and notifies the Parties of it in accordance with the contract between the Parties.’

14.5. Clause 2.4: ‘The parties co-operate with the Adjudicator and comply with any request or direction he makes in relation to the dispute.’

14.6. Additional condition 2.5: ‘The adjudicator may ask for any additional information from the Parties to enable him to carry out his work. The parties provide the additional information within two weeks of the adjudicator’s request.’[5]

[15] It is common cause that, in terms of the contract, the adjudicator's decision is binding on the parties unless and until revised by the tribunal; it is enforceable as a matter of contractual obligation between the parties.[6] Sasol opposed the relief sought on the basis that the decision is of no force or effect. It reasons that, in conducting the adjudication and in issuing his decision, the adjudicator acted outside of his powers because he:

15.1. assumed the power to enforce the arbitration award;

15.2. sought to decide the same dispute which he had previously decided; and

[5] The Adjudicator’s Contract contained ‘An additional condition’ adding clause 2.5.
[6] Clause W1.3(10).

15.3. allowed for the submission of information and gave his decision after and outside of the time period permitted.

[16] In challenging the merits of the decision, Sasol contended that the adjudicator failed to consider the dispute before him, in particular the timesheets; alternatively, that Sasol was not given the opportunity to deal with the timesheets.

[17] Sasol contended that M&R wanted the adjudicator to short-circuit the agreed processes by persuading the adjudicator to revise his previous decisions, in direct breach of clause 2.1 of the Adjudicator's Contract. It submitted that the decision was beyond the adjudicator's jurisdiction. The adjudicator's powers are limited to disputes that are not substantially the same as the ones he previously decided. The power to reconsider or revise the adjudicator's decision is limited to the arbitrator. Sasol thus contended that the adjudicator exceeded his powers by assuming the power to enforce the arbitration award relating to Disputes 1 and 2, when the contracts do not afford him those powers.

[18] According to Sasol, the powers of the adjudicator do not entitle him to act as a substitute for the PM. He acts as an adjudicator of the actions of the PM.[7] It contended further that the adjudicator's decision only acquires the status of a 'contractual obligation', in terms of clause W1.3(10), only if it is a decision in terms of the contract i.e.:

18.1. The decision is one which the adjudicator is empowered to make;

18.2. The procedures prescribed by the contract were followed in reaching the decision;

18.3. The decision was issued within the time period allowed.

[19] Sasol relied on *Vidavsky v Body Corporate of Sunhill Villas*[8] for the submission that if the adjudicator acted outside of his powers, his decision is a nullity and Sasol is not obligated to comply with it. *Vidavsky* related to the powers of an arbitrator, which were expressly limited by s 15(2) of the Arbitration Act 42 of 1965. That section is peremptory:

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[7] Clause W1.2(2).
[8] *Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA).

the arbitrator may only proceed if the opposing party has received reasonable notice of the time and place of the hearing. There was no notice, thus the arbitrator had no jurisdiction and his decision was invalid.

[20] Arbitration proceedings are distinct from adjudication. The former is a quasi-judicial proceeding; the latter is not. It is a dispute resolution mechanism, which is preliminary in nature, as described by Dyson J in *Macob Civil Engineering Ltd v Morrison Construction Ltd*,[9] a Queens Bench Decision in the Technology and Construction Court.

[21] In *Macob*, it was argued that when the validity of the decision was challenged, that decision was not binding and enforceable until the validity of the decision had been determined. Dyson J rejected that argument and held:

'It will be seen at once that, if this argument is correct, it substantially undermines the effectiveness of the scheme for adjudication. The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in 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: .... The timetable for adjudication's is very tight.... Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this. So far as procedure is concerned, the adjudicator is given a fairly free hand. It is true (but hardly surprising) that he is required to act impartially.... He is, however, permitted to take the initiative in ascertaining the facts and the law…. He may, therefore, conduct an entirely inquisitorial process, or he may, as in the present case, invite representations from the parties. It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made

[9] *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] EWHC Technology 254; (1999) BLR 93; Case No:1999/TCC/30.

it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.'[10]

[22] The purpose of adjudication is to have speedy resolution of the dispute.[11] In *Esor Africa (Pty) Ltd/ Franki Africa (Pty) Ltd Joint Venture v Bombela Civils Joint Venture (Pty) Ltd*,[12] this Court, in dealing with the adjudication process, stated:

'the DAB [Dispute Adjudication Board] *process ensures the interim solution of an issue which requires performance and requires that the decision is implemented. The parties' position may be altered by the outcome of the eventual arbitration which is a lengthier process and there may be a refund ordered of monies paid or an interest readjustment if too little was decided by the DAB.'*[13]

[23] In *Freeman NO and Another v Eskom Holdings Limited*,[14] the High Court rejected the argument that because an adjudicator's decision had been referred to arbitration, the decisions of the adjudicator did not have to be complied with pending the outcome of the arbitration. The parties had expressly agreed, in terms of the contract between them, that an adjudicator's *"decision is final and binding unless and until revised by the tribunal".* Thus, the court found that the argument did *'not constitute a bona fide defence that is good in law.'*[15]

[24] In another decision by the Queen's Bench Division in the Technology and Construction Court, the court stated that, *'[I]n the short time since the Act came into force, there have been many adjudications and a number of decisions of this Court considering*

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[10] Ibid para 14.
[11] See *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd* 2014 (1) SA 244 (GSJ) para 27 and *Freeman NO and Another v Eskom Holdings Limited* (43346/09) [2010] ZAGPJHC 29 (23 April 2010). As stated in para 40 of *Ekurhuleni West College v Segal and Another* (26624/2017) [2018] ZAGPPHC 662 (29 August 2018), 'Both decisions make it clear that the purpose of adjudication is to arrive at a speedy resolution of a dispute.'
[12] *Esor Africa (Pty) Ltd/ Franki Africa (Pty) Ltd Joint Venture v Bombela Civils Joint Venture (Pty) Ltd* (12/7442) [2013] ZAGPJHC 407 (12 February 2013).
[13] Ibid para 11.
[14] *Freeman* (note 11 above).
[15] Ibid para 16.

challenges to Adjudicators' decisions and applications to enforce those decisions.'[16] The court endorsed a number of guiding principles on this issue, which included the following:

i. *'A decision of an adjudicator whose validity is challenged as to its factual or legal conclusions or as to procedural error remains a decision that is both enforceable and should be enforced;*

ii. *A decision that is erroneous, even if the error is disclosed by the reasons, will still not ordinarily be capable of being challenged and should, ordinarily, still be enforced;*

iii. *A decision may be challenged on the ground that the adjudicator was not empowered by the Act to make the decision, because there was no underlying construction contract between the parties or because he had gone outside his terms of reference;*

iv. *The adjudication is intended to be a speedy process in which mistakes will inevitably occur. Thus, the Court should guard against characterising a mistaken answer to an issue, which is within an adjudicator's jurisdiction, as being an excess of jurisdiction. Furthermore, the Court should give a fair, natural and sensible interpretation to the decision in the light of the disputes that are the subject of the reference; ….'*[17]

[25] It is thus legally irrelevant whether the adjudicator correctly or incorrectly came to the decision in D16. The decision of the adjudicator remains one that is enforceable and should be enforced – even where it is erroneous.

[26] A jurisdictional challenge to an adjudicator's decision on the grounds stated above in paragraph [15] above were identified by Lord Justice Chadwick in his judgment in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*, a decision in the Supreme Court of Judicature: Court of Appeal (Civil Division).[18] The Court of Appeal endorsed the principles as set out by Justice Jackson in the court a quo, which are as follows:

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[16] *Northern Developments (Cumbria) Limited v J & J Nichol* [2000] EWHC Technology 176 para 23.
[17] Ibid para 24.
[18] *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358.

1. The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish).

2. The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law….

3. Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision.

4. Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice…."[19]

[27] The suggestion by Sasol that the adjudicator exceeded his jurisdiction and that the proper process was not followed, does not entitle Sasol to not comply with the decision. There was no failure of natural justice. Compliance is a contractual obligation, and it is for the arbitrator to review the process followed by the adjudicator, and to decide whether the adjudicator did, in fact, exceed his jurisdiction and whether the process followed was proper.

[28] In *Ekurhuleni West College v Segal and Another*,[20] it was held that the parties are bound by the decision of the adjudicator and '…*the tribunal has the power to reopen the dispute. Mistakes will be made by adjudicators, but that is inherent in the scheme of adjudication. Such mistakes can be rectified in subsequent arbitration or litigation.*'

[29] If a party is unhappy with the way in which an adjudicator conducted an adjudication or arrived at the decision, but chooses to simply ignore the decision, because it believes that the process and/or decision was wrong, it would render the entire adjudication process futile.

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[19] Ibid para 52.
[20] *Segal* (note 11 above) para 40.

[30] The decision is binding unless and until varied, or overturned, by an arbitration award. A court has no appellate jurisdiction over adjudicators even in circumstances where an adjudicator is demonstrably mistaken.[21] In *Carillion Construction*[22] it was decided that—

'The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator.'

[31] The court also warned in such case that, *'[I]t is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels "excess of jurisdiction" or "breach of natural justice".'*[23]

[32] As stated by the court in *Ekurhuleni West College v Segal and Another*:[24]

'[Adjudication's] *true nature is to be found in the law of contract, whereby parties to a contract agree as an interim solution to resolve interim disputes through a process of adjudication. The rules of natural justice do not find application. The adjudicator acts according to the terms of his reference. The terms of reference as in the present matter is contractual in nature and leaves very little room for having it being set aside on review. When the main contract was concluded the parties foresaw the possibility that an adjudicator may come to an incorrect conclusion and for that very reason agreed that in such an event the parties shall proceed to arbitrate. The contract does not contain any provision that the adjudicator's decision may be taken on review. The absence of such a provision clearly indicates that the parties expressed in the clearest of terms that they will*

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[21] See *Northern Developments (Cumbria) Ltd v J & J Nichol* (note 16 above) para 25, where the court endorsed this principle.
[22] *Carillion Construction* (note 18 above) para 85.
[23] Ibid para 86.
[24] *Segal* (note 11 above) para 41.

comply with the adjudicator's decision made in terms of his mandate and make immediate payment in terms of the agreement.'

[33] In *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd*,[25] it was stated:

'*The adjudication rules issued by the JBCC for use with the contract describe adjudication as "an accelerated form of dispute resolution in which a neutral third party determines the dispute as an expert and not as an arbitrator and whose determination is binding unless and until varied or overturned by an arbitration award.*"'

Is it the same dispute?

[34] M&R contended that D16 required the adjudicator to decide whether contractually, the arbitration award had to be complied with, on the basis that the PM and the adjudicator [in terms of W1.3(5)] are bound to comply with the arbitration award. It stated that the dispute '*squarely related to whether the PM acted correctly by disregarding portions of the arbitrator's award on the instructions of Sasol. Sasol confuses the consequences of the arbitration award on prior disputes with the nature of the current dispute.*' The adjudicator also found that new information, in the form of the arbitrator's award, had become available and this permitted his decision.

[35] Sasol admitted that in D16, the adjudicator had to decide whether the PM was correct when he *'refused to comply with certain portions of the arbitration award'* and *'declined to apply the part of the arbitration award that is the subject of the review application'*. M&R contended that the adjudicator did not decide the same disputes. He decided that the PM is bound to the principles decided in the arbitration award and should have adhered to such award, when he considered M&R's claims for payment and assessed M&R's claims. It was not in dispute that the PM was obliged, in terms of clauses 50.5 and 51.3 of the contract, to consider and take into account M&R's entitlements as determined in an arbitration award.

[25] *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd & Another* 2013 (6) SA 345 (SCA).

[36] Clause 50.5 provides that the PM is to correct any wrongly assessed amount due in a later payment certificate.

[37] Clause 51.3 provides:

'*If an amount is corrected in a later certificate either*

- *by the Project Manager in relation to a mistake or a compensation event or*
- *following a decision of the adjudicator or the tribunal;*

interest on the correcting amount is paid….'

[38] A principle was established in the award that PMC200 was invalid and the timesheets were contractually binding between the parties. This principle extended to all the earlier decisions. Clauses 50.5 and 51.3 of the contract compel the PM to reassess earlier assessments and amend them in accordance with the arbitrator's award. In the present case, Sasol admitted that the PM refused to comply with certain portions of the arbitration award in making his assessments (in relation to the disputes, other than Disputes 1 and 2). M&R submitted that such refusal constituted a dispute about *'[a]n action of the PM… or… not having taken an action'*. Once that dispute is referred to the adjudicator, he is empowered to '*review and revise any action or inaction of the PM…related to the dispute*' in relation to the effect of the arbitration award on any prior determination made by the adjudicator relating to the same or similar rights and obligations.[26]

[39] The adjudicator has thus not reconsidered his earlier decisions but has reviewed and revised the inaction of the PM in not following the arbitrator's award. The PM was obliged to give effect to the arbitration award to the extent that it corrected the earlier decisions. This the PM failed to do. Thus, the adjudicator reviewed and revised that inaction by assessing M&R's claim correctly in line with the principles established in the arbitration award. He decided in D16 that the PM was wrong to contend that '*certain*

[26] As provided for in the first bullet point of clause W1.3(5) of the contract.

portions of the arbitration award…were…of no force and effect'. The adjudicator stated as follows:

'*67. Although the Employer is correct that an adjudicator may not decide a dispute that he has previously decided, it ignores the fundamental difference that an adjudicator may consider the dispute if new facts are presented. I refer to what I have said above. It makes no sense that an award by the Tribunal dealing with a dispute and establishing principles cannot be considered as a new fact While I fully appreciate that particular facts in a dispute referred to, unless relevant to a later dispute. are irrelevant, principles established in an award must be applied until set aside.*

I do not agree with the submission that the validity or enforceability of the arbitrator's award cannot be considered because no dispute about that has been referred to me. This fundamentally ignores the hierarchy of decisions. The Tribunal, unless its award is challenged in Court, is the final decision-maker. Whatever the Tribunal decides must be enforced.'

[40] Sasol disputed this. It contended that the proposition that an arbitration award directly impacts on the earlier decisions is flawed. They contended that M&R was placing form above substance and referred in this regard to authorities dealing with res judicata. This argument is ill-founded.

Applicable time periods

[41] Sasol contended that the four-week period stipulated in clause W1.3(3) of the contract can only be extended by agreement between the parties.[27] In regard to the adjudicator being entitled to request further information, Sasol argued that it was not the adjudicator who suggested the required new information; it was M&R who requested to respond to Sasol's submission, thus compelling the adjudicator to make his decision after

[27] Clause W1.3(3) provides:
'The party referring the dispute to the *Adjudicator* includes in 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.'

the time period had elapsed. It submitted that the adjudicator was bound to the strict time limits agreed upon. If he required further same information, same had to be provided within two weeks of his request, in terms of the adjudicator's contract. The adjudicator is bound to exercise his powers in such a manner that he renders his decision within the agreed four-week period.

[42] M&R submitted that the parties agreed to the adjudicator's extended powers by concluding the adjudicator's contract wherein these powers governed the position. These are contained in clauses 1.7, 2.4 and additional condition 2.5 of the Adjudicator's Contract.

[43] M&R submitted, correctly in my view, that the period provided in clause 2.5 would commence after the period stipulated in clause W1.3(3), that is, after Sasol had filed its opposing information in relation to D16. M&R contended that that is the period being regulated in clause W1.3(3), as opposed to the period of four weeks after which the adjudicator has the right afforded to him in terms of clause 2.5 read with clause W1.3(5).[28] These clauses deal with the four-week period. Clause 2.5 provided the adjudicator with the power thereafter, to request information from the parties, which would have to be delivered within two weeks.

[44] Clause 1.7 of the Adjudicator's Contract gives precedence to the amended powers of the adjudicator in clause 2.5 to ask for additional information. This would allow for him to make a decision within four weeks after obtaining the final information from both parties i.e. '*the end of the period for receiving information'*.[29] This period was extended by agreement in clause 2.5 of the Adjudicator's Contract. This is as opposed to the date by which the other party has to respond with information in response to the contractor's referral as stipulated in clause W1.3(3) of the contract. The logic of this approach is demonstrated by the fact that the responding party may wait until the initial four-week period is about to expire before filing its response, as happened in this case. This would oust the right of the contractor to reply to such information. This process also permitted

[28] See para 13.5.
[29] See para 13.6.

the adjudicator to give both parties time to submit documents and information, which demonstrated his application of the *audi alteram partem* rule.

[45] Sasol relied on the judgment of Twala J in *Group Five Construction (Pty) Ltd v Transnet SOC Limited*,[30] in which it was held that, without consent, the adjudicator cannot extend the time period beyond the four week prescribed period. In doing so, without such consent, it was held that the adjudicator's decision was invalid. M&R sought to distinguish this decision on the basis that the contract in *Group Five* did not contain a clause akin to clause 2.5, which extended the adjudicator's powers to require further information, outside of the four-week period. A further distinguishing feature is that the adjudicator in *Group Five* was already in possession of the documentation he required in the extended period.

[46] The events set out below, M&R stated, demonstrated that the adjudicator acted within his powers in extending the time periods.

46.1. On 16 January 2019, M&R submitted its referral of D16 to the adjudicator.

46.2. On 11 February 2019, Sasol responded thereto.

46.3. On 19 February, M&R, having received Sasol's response, informed the adjudicator that Sasol had made 'serious new and unsubstantiated allegations' which required a response. M&R thus sought the adjudicator's consent to submit a reply by 25 February 2019. Sasol refused to agree to this, stating that the period for submissions could only be extended by consent in terms of clause W1.3(5) of the contract.

46.4. On 19 February M&R responded to such refusal, stating that the adjudicator had the discretion to allow further submissions; consent of Sasol was not required. It

[30] *Group Five Construction (Pty) Ltd v Transnet SOC Limited* (45879/2018) [2019] ZAGPJHC 328 (28 June 2019) paras 17-25.

referred in detail to the allegations it wished to deal with. The adjudicator required Sasol's response to M&R's email.

46.5. On 21 February, Sasol responded, without prejudice to its rights in relation to the time period. M&R responded to that email on the same day.

46.6. On 27 February, the adjudicator informed the parties that he would permit M&R to submit further information. An opportunity would be given to Sasol to respond. Further additional information was required from both parties.

46.7. On 5 March 2019, M&R submitted further information requested by the adjudicator and suggested that Sasol file its response by 8 March 2019. Sasol objected to the time period and requested a lengthier period to respond in the interest of 'natural justice'.

46.8. On the same day, the adjudicator indicated that 12 March 2019 seemed suitable, but required Sasol to indicate when it could respond. Sasol undertook to revert on this as soon as possible. On 8 March 2019, Sasol stated it would respond by 14 March 2019, which it did.

46.9. On 20 March 2019, in response to the adjudicator's invitation, M&R motivated its need for oral argument. Sasol rejected this on the same day again, citing the adjudicator's lack of jurisdiction as the time period had expired.

46.10. On 22 March 2019, the adjudicator stated that he would allow oral submissions.

46.11. On 26 March 2019, Sasol, again citing the time period requisites, notified M&R that, as the adjudicator's jurisdiction had terminated by the effluxion of time, it was referring D16 to the tribunal (the notice of dissatisfaction).

46.12. M&R rejected this contention on the same day. It referred to clause W1.3(3), (5) and (8) as justifying the adjudicator's decisions and the time periods permitted.

[47] The adjudicator responded on the same day stating that Sasol has submitted its response on 11 February 2019. According to his calculation, four weeks from 11 February

is 11 March. On 27 February 2019, he requested further information in terms of the third listed bullet of clause. W1.3(5), which according to Keating,[31] gave the adjudicator the power to extend the time period, if it was in the interests of justice. The intention of clause W1.3(5) is to allow a four-week period within which the adjudicator may give directions as to the submissions by both parties.

[48] Neither party objected to the adjudicator's request, nor did either of the parties indicate that they believed the adjudicator's decision was due four weeks after Sasol's submission, despite his extended powers. The adjudicator thus accepted (as he was entitled to) that he had to hand down his decision within four weeks of the receipt of the last information. The adjudicator also referred the parties to Clause 10 of the contract which required the parties to act in a spirit of mutual trust and co-operation. The adjudicator thus refuted Sasol's suggestion that the time period had lapsed.

[49] M&R contended that Sasol should have filed the notice of dissatisfaction on 12 March 2019 if it believed that the time period lapsed on that day. Instead, it requested additional time, without at that stage, reserving its rights. It proceeded to file lengthy submissions. Thus, M&R submitted that Sasol had waived the right to rely on this point. The adjudicator had the power to accept M&R's contention that it was essential that it be permitted to respond to Sasol's submissions.

[50] Sasol, despite its earlier objections, then agreed, without prejudice to its rights to attend the oral hearing on 16 April 2019. Both Sasol and M&R were present and filed heads of argument. Sasol was given the opportunity to respond in full to M&R's submissions.

[51] From the aforegoing events, it is also evident that the alleged irregularities relating to the lack of *audi alteram partem,* cannot be accepted. Sasol was given every opportunity to deal with M&R's claims, which were detailed in the referral. It fully participated in the proceedings (despite the objections it had raised). In its response, Sasol elected not to deal with the quantification of M&R's claims. It attempted to have such claims dismissed

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31 Keating on Construction Contracts (10th ed) Third Supplement.

on a legal basis only. It only raised the quantification issues during the oral hearing. Sasol cannot now rely on this as a failure by the adjudicator to allow *audi alteram partem*. In any event, an irregularity in the proceedings does not mean that the decision was incorrect. Such irregularity must relate to the procedure adopted, which prevented the party from having its case fully ventilated.[32] The above rendition of events demonstrates that this is not the position here. The adjudicator considered every issue raised by Sasol and gave valid reasons for each finding.

[52] In *Segal*,[33] De Vos J summarised the position as follows:

'*Having regard to the nature of the adjudication process, I accept that it is sui generis. I further take notice of the fact that the very nature of the adjudication process carries with it a risk of unfairness, either in the way the adjudication is conducted, or in the result, or both. The need to speedily resolve the dispute and the parties' entitlement to an answer, increases the risk compared to a hearing, arbitration proceedings, and/or court proceedings. … I also accept that our courts are of the opinion that as long as the adjudicator acted generally in accordance with the usual rules of natural justice and without bias and within his terms of reference, his decision is likely to be enforced.*

… Enforcement of the adjudicator's decision is critical to the success of adjudication as a form of alternative dispute resolution, and therefore our courts have adopted a robust approach in this regard; see Transnet Soc Ltd v Group Five Construction (Pty) Ltd and Others (7484/2015) [2016] ZAKZDHC 3 (9 February 2016). An adjudicator is a third-party intermediary appointed to resolve a dispute between parties. The decision of the adjudicator is binding and final, unless it is later reviewed by either arbitration or court proceedings, <u>whichever the parties selected at the time of formalising the contract</u>. Adjudication is intended to be a condition precedent to either

[32] *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 581 '…an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.' See also *Telcordia Technologies Inc v Telkom SA Ltd* (26/05) [2006] ZASCA 112 (22 November 2006); 2007 (3) SA 266 (SCA); paras 52-78, 85-88; *Herholdt v Nedbank* Ltd (701/2012) [2013] ZASCA 97 (5 September 2013); 2013 (6) SA 224 (SCA) para 19.

[33] *Segal* (note 11 above) paras 44-45 (original emphasis).

arbitration or litigation. Where the contract explicitly requires this, the parties cannot directly approach a court of law for any relief.'

[53] Sasol did not seek the review and setting aside of the adjudicator's decision in its counter-application. Although Sasol has delivered a notice of dissatisfaction, this does not release Sasol from complying with the adjudicator's decision. The notice to preserve the party's right to require arbitration does not affect the binding nature of the adjudicator's determination.

[54] In *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd*,[34] du Plessis AJ stated:

'… This court has declared that a notice of dissatisfaction does not excuse performance by the party giving such notice from giving effect to the decision in the interim.

The wording of the provisions in question is entirely consistent with other forms of contract and are indicative of a practice currently existent in the construction industry, to the effect that dissatisfied parties are required to give prompt effect to the decisions of adjudicators in question despite their notices of dissatisfaction; those notices merely allow a possible revision of these decisions without affecting their interim binding nature.'

The dissatisfied party (Sasol) is obliged to comply promptly with the adjudicator's determination (the decision), notwithstanding its delivery of a notice of dissatisfaction. The notice preserves the party's right to require arbitration, but does not affect the binding nature of the adjudicator's determination.

[55] From the papers, it appears that Sasol has not referred the decision to the arbitrator. Until and unless the adjudicator's decision has been revised by the arbitrator, Sasol is bound to comply with such decision in terms of clause W1.3(10) of the contract.

[56] For the reasons stated above, Sasol's counter-application must fail.

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[34] *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd* 2014 (1) SA 244 (GSJ) paras 26-27. See also *Basil Read (Pty) Ltd v Regent Devco (Pty) Ltd* (41108/09) [2010] ZAGPJHC 75 (9 March 2010) para 51.

In the result the following order is granted:

1. The respondent shall upon service of this order give immediate effect to the decision delivered by the adjudicator on 12 May 2019 ('the decision').

2. In respect of the decision the respondent shall make immediate payment to the applicant as follows:

    2.1. R130 959,39 plus VAT;

    2.2. R2 340 290,55 plus VAT;

    2.3. R10 888 833,76 plus VAT;

    2.4. R2 420 242,59 plus VAT;

    2.5. R173 938,58 plus VAT;

    2.6. R1 469 609,12 plus VAT;

    2.7. R335 400,27 plus VAT;

    2.8. R991 562,24 Plus VAT;

    2.9. R934 931,85 plus VAT;

    2.10. R102 842,50 plus VAT;

    2.11. R23 587 548,00 plus VAT (being the unpaid awarded amount referred to in paragraph 3 below);

    2.12. R1751 851,91 plus VAT (also being the unpaid awarded amount referred to in paragraph 3 below); and

    2.13. R3 868 744,99 plus VAT (being interest up to 10 November 2018).

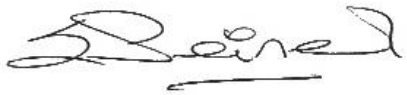
3. The respondent is ordered to pay interest on the unpaid awarded amounts plus VAT set out in paragraphs 2.11 and 2.12 above on the amount of R25 339 399.91 from 11 November 2018 to date of payment to be calculated on a daily basis at the interest rate equal to the prime lending rate of ABSA Bank, and compounded annually from the date when the incorrect amount was certified until the date when

the corrected amount is certified, as included in the assessment which includes the corrected amount.

4. The respondent is ordered to pay interest on the amounts set out in paragraphs 2.1 to 2.12 above plus VAT from 10 June 2019 (being the date from which the respondent is *in mora* of having failed to make payment to the applicant in accordance with the decision) to date of payment to be calculated on a daily basis at the interest rate equal to the prime lending rate of ABSA Bank and compounded annually.

5. The costs of this application are to be paid by the respondent; and

6. The respondent's counter-application is dismissed with costs.



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S E WEINER

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	20 February 2020
Date of judgment:	16 April 2020

Appearances:

Counsel for the Applicants:	Adv. LJ van Tonder SC
Instructing Attorneys:	Tiefenthaler Attorneys Inc
Counsel for the Respondents:	Adv. PHJ van Vuuren SC; Adv. HM Viljoen
Instructing Attorneys:	Cliffe Dekker Hofmeyr Inc