REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

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SIGNATURE **DATE**

Case No: 2021/3529

In the matter between:

QUALELECT INVESTMENT HOLDINGS (PTY) LTD **Applicant**

And

BELO AND KIES CONSTRUCTION (PTY) LTD **Respondent**

JUDGMENT

WINDELL, J:

INTRODUCTION

[1] This is an application for an order for the enforcement of a determination given by an adjudicator in respect of a dispute that arose between the parties under a Nominated/Selected Subcontractors Agreement ("the agreement").

[2] In terms of the adjudicator's determination ("the determination") dated 3 August 2020, the respondent was ordered to effect payment to the applicant in the amount of R1,844,240.30, in respect of invalid deductions made by the respondent, and in the amount of R 23,080.30, in respect of extra work done by the applicant.[1]

[3] The respondent opposes the relief sought by the applicant, *inter alia*, on the basis that the determination is unenforceable, as the adjudicator did not comply with his mandate in certain respects and exceeded his jurisdiction in respect of others.

BACKGROUND

[4] On or about 28 November 2017, the applicant and the respondent entered into the agreement for the electrical supply and installation works required at the Acornhoek Mall located in Mpumalanga (the "Project"). In terms of the agreement the applicant was engaged as a "Selected Subcontractor" for the electrical supply and installation works required ("the Works") at the Project. The initial contract value was for the amount of R48 815 335.80. On or about 28 November 2017, the applicant commenced with the Works. The applicant would invoice for services rendered which the respondent was responsible for paying. Once the Works were completed, the Principal Agent would issue a certificate of practical completion.

[5] On 30 October 2018, certain disputes arose between the applicant and the respondent. Firstly, the respondent deducted the amount of R2 214 240.30 as penalties for late completion in payment certificate number 11. This amount was reduced by the respondent to R1 844 240.30 in payment certificate number 12.

[1] The amounts are VAT-Exclusive and contractual default interest is calculated at a rate of 160% of the bank rate which is applicable from time to time to registered banks, calculated from 3 August 2020 to date of payment.

Secondly, the respondent instructed the applicant to effect remedial work that was identified in the architect's "snag list". The applicant contended that it was not liable for the costs of rectification of related works damaged by other contractors.

[6] The applicant referred these disputes for resolution in terms of the adjudication process provided for in the agreement. In the adjudication, the applicant was the claimant and the respondent, the defendant. The adjudicator had to determine the two disputes referred to above as well as the respondent's counterclaims. On 3 August 2020, the adjudicator gave his determination.

[7] On 18 August 2020, the respondent delivered a "Notice of Dissatisfaction" in respect of the determination.[2] The disputes between the parties will now, in accordance with the agreement, be determined on arbitration.

THE RIGHT TO ENFORCE AN ARBITRATOR'S DECISION

[8] In terms of the dispute resolution mechanism, (clause 40.3.3 of the agreement), the parties agreed that "*The adjudicator's decision shall be binding on the parties which shall give effect to it without delay unless and until it is subsequently revised by an arbitrator.*"

[9] The respondent argues that clause 40.3.3, also includes tacit, alternatively implied terms, namely that: (1) The adjudicator must not have determined issues that were not referred to him and accordingly, must not have exceeded his jurisdiction; (2) The adjudicator must have determined all the issues that were referred to him, in accordance with his mandate. This includes that the adjudicator should, in principle at

[2] The issues raised in the Notice of Satisfaction are identical to the issues raised in opposition of this application.

least, deal with and determine (and be seen to have considered) the parties' contentions, as they pertain to the issues in dispute; (3) The adjudicator must have given reasons for his determinations (findings) and this includes reasons why, as the case may be, certain contentions are upheld and others, not; (4) The adjudicator must not have materially misdirected himself as to points of law and/or fact and/or the nature of the dispute; (5) The adjudicator must have upheld and complied with the rules and principles of natural justice.

[10] The respondent contends that the aforesaid tacit, alternatively implied terms are basic prerequisites (or pre-conditions) that must be complied with and fulfilled, before any adjudication determination can (and ought to) be given effect to, as provided for in clause 40.3.3. Further, the enforcement of a determination which does not, at a minimum, comply with these prerequisites will — as a matter of law — be against considerations of public policy. It is submitted that the tacit, alternatively implied terms, were not complied with in this case and the determination is thus unenforceable. In the result, so it is argued, the application must fail.

[11] Prior to considering the various defences as raised by the respondent, it is necessary to consider the legal position pertaining to the enforceability of adjudication awards.

The purpose of adjudication

[12] Adjudication is an accelerated form of dispute resolution in which a neutral person determines the dispute as an expert and not as an arbitrator. The adjudicator's determination is binding unless and until varied or overturned by an arbitration award.[3]

[3] The JBCC Adjudication Rules published in October 2014.

Van der Merwe JA in *Ekurhuleni,*[4] held that adjudication was designed for the summary and interim resolution of disputes and that the adjudicator was given wide inquisitorial powers to resolve the disputes as expeditiously and inexpensively as possible. The adjudicator's determination is, however, not exhaustive of the disputes, as it may be overturned during the final stage of the dispute resolution process.

[13] In *Stefanutti Stocks (Pty) Ltd v S8 Property (Pty) Ltd*,[5] Wepener J, referred with approval to Eyvind Finsen, *The Building Contract - A commentary on the JBCC Agreements*, 2 ed, p 229, in which the purpose of adjudication is described as 'a quick, if possible temporary, resolution of a dispute and the granting of interim relief to the successful party', and that the 'whole purpose of adjudication would be frustrated if the successful party was unable to enforce the determination against the other party.'

[14] In *Bouygues,*[6] (a matter of the Queen's Bench Division, Technology and Construction Court), referred to with approval in *Freeman NO and Another v Eskom Holdings Limited,*[7] the court dealt with an dispute arising from a sub-contract, which provided for dispute resolution by adjudication pursuant to the Rules of the CIC Model Adjudication Procedure (2nd edition). The Rules, *inter alia*, provide that 'the object of adjudication is to reach a fair, rapid and inexpensive decision upon a dispute arising under the contract'. At paragraph 35, Justice Dyson explained the purpose of the Rules as follows:

> *"the purpose of the scheme is to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of*

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[4] *Ekurhuleni West College v Segal and Another* (1287/20180 [2002] ZASCA 32.
[5] (20088/2013) [2013] ZAGPJHC 249 (23 October 2013).
[6] *Bouygues (UK) Limited v Dahl-Jensen (UK) Limited* [2002] BLR 49 [TCC] at page 55.
[7] (43346/09) [2010] ZAGPJHC 29 (23 April 2010).

adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement, whether those decisions are wrong in point of law and fact. It is inherent in the scheme that injustices will occur, because from time to time, adjudicators will make mistakes. Sometimes these mistakes will be glaringly obvious and disastrous in their consequences for the losing party. The victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation, and possibly even by a subsequent arbitration." [8]

[15] It is clear from the above, that adjudication is meant to be a speedy remedy to assist cash flow and not to hold up the contract.[9] The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish) and can be revised during the arbitration proceedings.

The effect of an arbitrator's determination

[16] In *Stocks & Stocks (Cape) (Pty) Ltd v Gordon and Others NNO*,[10] there was a provision in a construction contract that the opinion of the mediator shall be binding on the parties and shall be given effect to by them until the said opinion is overruled in any subsequent arbitration or litigation. Van Dijkhorst J held:

"The scheme of clause 26 of the contract is conducive to finality and dispute resolution. The last provision of clause 26.3 is included to ensure continuation of the work pending arbitration which occurs, generally speaking, after the completion of the work and to obviate tactical creation of disputes with a view to postponement of liability. This cuts both ways. The contractor may be dissatisfied with the opinion of the mediator about the quality of his workmanship, which may lead to that work having to be redone, or

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[8] See also *C&B Scene Concept Design v Isobars Limited* [2002] BLR (CA) 93 at 98, para. 23.
[9] See *Sasol Chemical Industries Ltd v Odell and Another* (401/2014) [2014] ZAFSHC 11 (20 February 2014).
[10] 1993 (1) SA 156 (T).

the rejection of his claim for interim compensation, which may cause a cash-flow problem. The employer may be dissatisfied with a mediator's award of compensation to the contractor. Yet to ensure that the work does not become bogged down by a dispute about this, the contract provides that effect is to be given to the opinion. Should arbitration or litigation determine that the mediator's opinion was wrong, the matter is rectified and the necessary credits and debits will have to be passed in the final accounts."

[17] In *Stefanutti Stocks*[11], the court held that the parties must give prompt effect to a decision of an adjudicator and if a party is dissatisfied, he must 'nonetheless live with it'. He can have the decision reviewed in arbitration, and if successful, the decision will be set aside. But, until that has happened, the decision stands and he has to comply with it. The court, amongst others cases, referred to the unreported decision of *Esor Africa (Pty) Ltd/ Franki Africa (Pty) Ltd v Bombela Civils JV (Pty) Ltd,* [12] which is supported by a number of judgments, both here and abroad, dealing with similar provisions in different standard forms of construction contracts. All these cases point plainly to a practice relating to the immediate enforcement of an adjudicator's decision, leaving it to the dissatisfied party to refer the decision to arbitration in order to set it aside. Until so set aside, it remains binding.[13]

Review of adjudicator's decision

[18] The applicant contends that the appropriate remedy available to the respondent is for the determination to be reviewed and that, absent the determination being set aside on review, the enforcement of the determination cannot validly be resisted. The

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[11] Supra at para 14.
[12] 12/7442) [2013] ZAGPJHC 407 (12 February 2013).
[13] See in this regard *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd* 2014 (1) SA 244 (GSJ).

respondent submits that this proposition is wrong. It is contended, *inter alia*, that whilst the attempt at enforcing the determination does not stay or pend the arbitration, the issue is not whether the determination is reviewable. Instead, it is whether the determination ought to be enforced, or not, and in this context, where, *inter alia*, an adjudicator exceeds the mandate (or otherwise, does not carry out the mandate), the determination for purposes of enforcement, is a nullity. The "sanction" is accordingly to refuse the enforcement of the determination, as opposed to it being reviewed and/or set aside. In support of its argument the respondent relies on the matter of *Framatome v Eskom Holdings SOC Ltd.*[14] It is submitted that although the decision in *Framatome* has been overturned by the Supreme Court of Appeal ("SCA"), that the principle – concerning the review or non-enforcement of determinations – remains unaltered.

[19] The court in *Framatome* was concerned with the enforceability of a decision of an adjudicator in circumstances where it was alleged that the adjudicator exceeded his jurisdiction. Coppin J held that the court had to determine whether it had been shown that the adjudicator had answered *"the wrong question"*. Because, if it was merely shown that the answer itself was 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 would be bound by that answer. He found that it had been clearly shown that the adjudicator's finding did not decide the dispute that the applicant referred to him. The decision was therefore not binding upon the parties and, accordingly, it was not appropriate to enforce such decision in the interim. At paragraphs 44 to 46 Coppin J remarked as follows:

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[14] 2021 (2) SA 494 (GJ).

"[44] There is no reason for the position in the South African law to be any different. It makes perfect sense that the same consequences should follow in the event of it being clear that an adjudicator's decision is not covered by the relevant notice of adjudication, ie 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' 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 types of case but must be exercised judicially in light of all circumstances. 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." (Footnotes omitted. Emphasis added)

[20] The SCA upheld the appeal and granted an order enforcing the adjudicator's decision. In doing so, it held that it could not interrogate the merits of the adjudicator's decision, as only a tribunal may revise an adjudicator's decision. Mathopo JA, (as he then was) reiterated that adjudication was merely an intervening, provisional stage in

the dispute resolution process, and that parties still had a right of recourse to litigation and arbitration. As the adjudicator's decision had not been revised, it remained binding and enforceable. At paragraph 25, the court held as follows:

> *"[25] The submission that the adjudicator exceeded his jurisdiction and that the proper procedure was not followed does not entitle Eskom not to comply with the adjudicator's award. The adjudicator formulated the dispute with the understanding and appreciation of what the parties contemplated. It is trite that, if upon an application for enforcement of an adjudication decision,* ***it is found that the adjudicator did not have the requisite jurisdiction, his decision will not be binding or enforceable****. At no stage did Eskom contend that the dispute referred to the adjudicator was outside his jurisdiction. It cannot avail Eskom to raise issues relating to Framatome's quotation. The adjudicator dealt with this aspect in its finding in decision 11. It is an aspect that I now turn to because it formed the cornerstone of Eskom's submission."* (Emphasis added.)

[21] The SCA, in coming to this conclusion, did not entertain the merits of the dispute, but in the final analysis, had to examine the papers before the adjudicator and the issues raised by the respondent, to determine the factual question, namely, whether the adjudicator confined himself to a determination of the issues that were put before him by the parties. Because if the adjudicator did so, then the parties are bound by his determination, notwithstanding that he may have fallen into error. After examining the notified dispute, the court found that the finding of the High Court that the adjudicator answered the wrong question is not borne out by the facts and that the adjudicator at no stage departed from the real dispute between the parties and formulated the dispute as it was referred to him.

[22] The same approach was followed by the SCA in the matter of *Sasol South Africa (Pty) Ltd v Murray & Roberts Limited.*[15] In this matter, Sasol opposed the application for the enforcement of the adjudicator's decision and justified its refusal to comply with the adjudicator's decision by contending that it was of no force or effect because the adjudicator had acted outside of his powers. Sasol, *inter alia*, contended that the adjudicator had failed to consider the dispute before him, in particular the timesheets which formed the basis of Murray & Roberts' claims and the effect of such failure, prevented it from making submissions on those timesheets. Zondi JA, referred and relied on the judgment in *Carillion Construction v Devonport Royal Dockyard Ltd* [220] EWCA Civ 1358, in which the court endorsed the correctness of the principle that *'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",* and proceeded to analyse the proceedings before the adjudicator to establish whether the adjudicator had in fact acted outside the ambit of his jurisdiction. It is however important to note, that the court, in doing so, did not entertain the merits of the dispute or made any pronouncement on whether the adjudicator's decision was right or wrong.

[23] In my view, these two cases dispose of the argument that a litigant cannot oppose an application for enforcement without first instituting review proceedings. If it is found in an enforcement application that 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.[16]

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[15] (Case no 425/2020) [2021] ZASCA 94 (28 June 2021).
[16] See *Carillion Construction v Devonport Royal Dockyard Ltd* supra.

RESPONDENT'S DEFENCES

[24] The respondent has in essence raised two defences in relation to the enforcement application. The first defence is the "Flawed Adjudication Determination Defence". In this regard, the respondent identified ten errors allegedly committed by the adjudicator. It is alleged that the adjudicator: did not take all the submissions placed before him into account; did not consider relevant facts and submissions; considered irrelevant facts and submission; did not determine all the issues before him; determined that the respondent is liable to pay the applicant the amount of R23 080.00, whilst this was not an issue before him; made a determination "downstream" (i.e., between the applicant and the respondent) which is at odds with the factual situation "upstream" (i.e., between the respondent and the employer); did not take into account that the respondent is bound to the decisions, instructions and certification of and by the employer and its agents and that he cannot determine otherwise; did not determine the date for practical completion; determined that the respondent is indebted to the applicant, whilst the applicant is in fact indebted to the respondent; and determined contrary to the terms of the agreement and the applicable legal principles, that the applicant is not obliged to execute the valid contract instructions issued on 10 May 2019 and 11 June 2019.

[25] The respondent, however, contends that four of the aforesaid errors are fatal to the enforcement of the determination, these four being: The adjudicator did not take all the submissions into account; The adjudicator did not determine all the issues; The adjudicator determined irrelevant issues (and issues that he was not asked to determine); and lastly, the respondent did not give any reasons for his determination.

The adjudicator did not take all the submissions into account.

[26] The respondent alleges that at paragraph 35.5 of the determination, the adjudicator did not make reference to the amendments as set out in paragraphs 1.1,1.2 and 2 of the replication. It therefore appears that the adjudicator did not consider the replication.

[27] The fact that the adjudicator did not record the amendments in paragraph 35 of his determination, does not *per se* mean that he did not consider the replication. Adjudication proceedings are meant to be a speedy mechanism for settling disputes, such that an adjudicator does not have an inordinate amount of time to consider all the submissions. The adjudicator has a right to be wrong. The respondent's remedy in so far as it may have been dissatisfied with the adjudicator's determination, is to proceed to arbitration, whilst simultaneously giving effect to the determination. The failure to reflect the amendments can be raised during the arbitration proceedings. This is not the forum to appeal the determination.

[28] In any event, the significance of the adjudicator's failure to reference the amendments was not fully explained by the respondent, and I doubt whether it was of any relevance. The respondent's remedy in so far as it may have been dissatisfied in respect of any alleged 'patent clerical or arithmetical error or clarification of any ambiguity' in the adjudicator's determination, is included under Rule 6.2.1 of the Adjudication Rules, which reads as follows:

> *"6,2 Either party may:*
>
> *6.2.1 In writing request the adjudicator to correct any patent clerical or arithmetical error or clarify any ambiguity in the determination. Such party shall furnish the other party with a copy of such request within five (5) working days*

of receipt of the determination. The adjudicator shall comply with such request within a further five (5) working days."

[29] The respondent did not pursue this remedy.

The adjudicator did not determine all the issues.

[30] It is submitted that the adjudicator did not determine the issues identified in paragraphs 35.6, 35.7 and 35.10 to 35.13 of the adjudicator's determination. In fact, so it is argued, these issues are not addressed at all, other than for it being recorded that they are required to be determined. Paragraph 35.6, 35.7 and paragraph 35.10 of the determination deals with issues regarding *'the completion of snags in order to achieve final completion'* and the request for a *'declarator that the works to be performed in order to remedy snags could not be considered as additional works."*

[31] The applicant denies these allegations. The applicant submits that the adjudicator, in fact, dealt with these issues and that the respondent ignored the findings as set out under paragraphs 73 to 79 and paragraph 82 to 84, respectively, of the adjudicator's determination.

[32] I have perused the findings of the adjudicator. In my view, he sufficiently dealt with these issues. The adjudicator's decision should be enforced as binding on the parties, unless a 'respectable case' 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.[17] The respondent failed to make out such a case.

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[17] *Framatome supra* at para 45.

The adjudicator determined irrelevant issues (and issues that he was not asked to determine).

[33] In this regard the respondent contends that the adjudicator's determination, to the effect that the respondent must pay the applicant the sum of R23 080.00 (ex-VAT) in respect of remedial works effected by the claimant, was not an issue before the adjudicator. It is contended that the applicant expressly stated in paragraph 3.39 of its Statement of Claim that it does not claim any of the costs allegedly incurred by it, in respect of alleged remedial works, and that this element is not a dispute forming part of these present adjudication proceedings. The unsustainability of the applicant's claim was highlighted in the replication, which contention was not considered by the adjudicator.

[34] The respondent, unfortunately, disregards paragraph 6.7.8 (including its sub-paragraphs) and paragraph 6.7.9 of the applicant's Statement of Case.

> *"6.7.8 The Claimant has computed the costs, excluding for its own labour costs in respect of which the Claimant will not seek reimbursement, the remedial costs being as follows:*
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> *6.7.8.1 The costs for the testing of the transformers, post the Claimant having had its staff effect repairs to such equipment, said cost being the VAT-exclusive amount of R 20,580.00 (Twenty Thousand, Five Hundred and Eighty Rand Only);*
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> *6.7.8.2 The cost for the mini-sub door, being the VAT exclusive amount of R 2,500.00 (Two Thousand, Five Hundred Rand Only);*
>
> *6.7,9 The remedial works cost breakdown, and associated supplier invoices, are attached at Annexure "42" to the Statement of Case, the Clamant claiming*

said cost from the Respondent, in terms of these adjudication proceedings, the Claimant contending that the referred disputes are wide enough to include for such claim."

[35] It is clear that the applicant placed the issue regarding the remedial works in the sum of R23,080.00 (ex-Vat) in front of the adjudicator. The adjudicator in fact dealt with the issue of remedial works in paragraphs 80.3, 80.4 and paragraph 81, respectively, of the adjudicator's determination.

The respondent did not give any reasons for his determination.

[36] Throughout the course of argument, counsel on behalf of the respondent submitted that the determination is invalid as the adjudicator did not give reasons for his determination.

[37] The adjudication was regulated by amongst others the JBCC Adjudication Rules (Rules) published in October 2014. Clause 6 of the Rules pertinently states that the adjudicator must provide reasons for his decisions.

[38] The applicant sought payment of monies based on deemed practical completion, with the respondent precluded from levying penalties or damages. In addition, the applicant sought a declarator that it was not obliged to effect certain works based on the deemed practical completion, as well as the fact that the defects were not those of the applicant, with the respondent in all likelihood not going to pay the applicant for such work. The respondent's counter-claims are set out at paragraphs 35.1 to 35.5, paragraphs 35.8 to 35.10, and paragraph 35.12 of the adjudicator's determination.

[39] The claims and counter-claims are clearly interlinked, such that in so far as one party is successful with any claim, the other party would be unsuccessful in relation to

its corresponding claim. From a reading of the adjudicator's reasons, it is apparent that the adjudicator, in considering the applicant's claim, also considered and disposed of the respondent's counter-claim. The adjudicator's reasons are clearly set out from paragraphs 65 to 81 of the determination, the actual reasons underlined below, with paragraph 72 and paragraph 73 to be read as one paragraph:

"65. *On considering the provisions of the N/S Subcontract agreement entered into between the Parties, that the action of the Employer taking possession of the works on or about 24 October 2018 does constitute that deemed Practical Completion has occurred. This in terms of the provisions of Clause 24.8.*

66. *While the Respondent has stated that it was not in agreement that the Employer has taken such possession at the time. No argument or evidence is put forward regarding any actions the Respondent took to deny or bar the Employer such possession.*

67. *Accordingly, on a balance of probabilities I believe that sufficient agreement was present on the part of the Respondent to warrant the correct operation of the intended provisions of Clause 24.8.*

68. *Then regarding the claimed agreement/s reached between the Parties on 21 January 2019, this as supported by the Respondent's confirmatory communication dated 23 January 2019.*

69. *While it is clear that the Parties together with other subcontractors did meet to discuss the situation, and to consider the way forward. Which consideration might include a united front approach, etc. However, it is not confirmed or clear that the Parties had agreed to any amount of delay penalties to be capped or paid. Or that the parties had agreed to amend various conditions of the Contract pertaining specifically to Practical Completion.*

70. *Seemingly the Respondent had progressed down this path, which eventually resulted in the attendance and outcome of a mediation where certain*

agreements were reached regarding amendments to the Principal Building Agreement in place between the Respondent and the Employer. However, no such amendments had been agreed within the N/S Subcontractor's Agreement in place between the Parties.

71. On a balance of probabilities, I believe that while the Claimant agreed to attend the initial meeting, as well as furnish certain details to the Respondent as related. I do not believe that the Claimant at any time agreed to the payment of any capped damages, or to any amendments to the Contract.

72. Considering that Practical Completion is deemed to have occurred on or about 24 October 2018.

73. Accordingly, and as set out at Clause 24.6, the Claimant was not obligated to carry out any contractor's instructions for additional work issued after the date of Practical Completion.

74. The Electrical engineer has issued an instruction to install additional lights which were over and above the original scope of works. This on or about 10 May 2019. This additional work is confirmed as being linked to Phase 2, while the Claimants initial works are associated with Phase 1.

75. As such the Claimant was within its right to issue new terms as related to the works for the Respondents consideration. The alternative would be that the Claimant could simply refuse to complete these works, which would leave the Respondent with having to engage with other subcontractor's to do this work, which option they in any event would have if they refused to accept the Claimants terms.

76. Regarding the repair of claimed defective works related to various LED lights.'

77. On 11 June 2019, the Architects issue a final snag list which included for various LED lighting defects or short comings.

78. It is common practice for a Principal Agent to be supported by various agents who are discipline leads, such as HVAC, plumbing, electrical, etc. In this

instance Watson Mattheus are recognised as the professional team responsible for electrical engineering works.

79. *Evidence has been presented to indicate that the Electrical engineer was comfortable and happy that firstly the works as completed by the Claimant was done so to the correct standard as expected by the Contract, and further that the claimed defects in the lighting system were not attributable to the Claimant, but rather to other of the Respondents subcontractors.*

80. *When this is considered, together with the following:*

80.1 *The fact that the Respondent had received payment by the Employer of the initially withheld R 650,000.00 but had at the time failed to pay across this amount to the Claimant.*

80.2 *The provisions of Clause 2.2, which places an obligation of reciprocity on the Parties.*

80.3 *The provisions of Clause 8.5, which confirms that the Claimant shall not be liable for the cost of making good loss or repairing damages to the works which have been caused by inter alia the Respondent or its other subcontractors.*

80.4 *The provisions of Clause 9.2, which provides that the Respondent shall indemnify the Claimant against loss in respect of inter alia costs and expenses arising from physical loss or damage to the works where Practical Completion has been achieved.*

81. *Accordingly, I believe that through the Respondents actions, that the Claimant had just cause to believe that it would not be paid for these works, even though it together with the Electrical engineer were of the opinion that the defects were caused by others."*

[40] The adjudicator considered the submissions on behalf of the parties and gave his reasons in terms of clause 6 of the Rules. There was no failure of natural justice. What

the applicant is asking this court to do is interrogate the merits.[18] It is not for this court to determine whether the adjudicator was wrong, either in the law, the facts or the procedure he followed. In any event, as stated above, if the respondent required clarification, it was afforded the opportunity to write to the adjudicator within 5 days of receiving the determination. The respondent elected not to do so. Having not elected to do so, the respondent cannot now complain that it does not understand the reasons for dismissing the respondent's counter-claims, and upholding the applicant's claims.

[41] The respondent's second defence is the "Delayed Arbitration Defence". The respondent, with reference to *Benson v SA Mutual Life Assurance Society*[19] and *Tamarillo (Pty) Ltd v. BN Aitken (Pty) Ltd,*[20] submits that the applicant is seeking specific performance, which the court has a discretion to refuse. It is submitted that the applicant wishes to enforce the determination, flawed as it is, speedily and without providing any security to the respondent, whilst delaying the arbitration, for as long as it can. It is submitted that the adjudication (and the determination issued, pursuant thereto) is but one step in the process of resolving the disputes between the parties that will ultimately conclude on arbitration. As such, whilst the respondent is eager to bring the matter to finality, on arbitration, the applicant appears intent on securing a judgment in this application, in circumstances where it seeks to make it impossible for the respondent to proceed to arbitration and intent on delaying the arbitration process. In these circumstances, so it is argued, this application has been launched for an improper purpose and whilst the court retains a discretion, such discretion ought not to favour the applicant.

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[18] See *Framatome v Eskom Holdings SOC Limited supra* at para 23.
[19] 1986 (1) SA 776 (A).
[20] 1982 (1) SA 776 (A).

[42] There is no merit in this defence. The adjudication award had already been issued on 3 August 2020. The applicant, acting in accordance with its contractual rights, is entitled to apply for the enforcement of the determination. The decision of the adjudicator is binding and enforceable as a matter of contractual entitlement until and if it is revised in the final determination by an arbitrator.

[43] In light of the principle of *pacta sunt servanda,* the respondent is bound to the agreement concluded between itself and the applicant. The respondent is seeking to avoid the consequences of the contractual bargain it freely and voluntarily concluded, which bargain includes for the honouring of adjudication awards, even where any underlying dispute has been referred to arbitration.

[44] The court's discretion to enforce specific performance of a contractual obligation, must be exercised judicially in light of all circumstances. The arbitration proceedings are independent, separate and distinct from these present proceedings. The whole purpose of adjudication was for a quick, temporary resolution of the disputes. In striking an appropriate balance, the applicant would be frustrated and prejudiced if it is unable to enforce the determination against the respondent.

COSTS

[45] The successful party should, as a general rule, be awarded its costs.[21] In this matter, the applicant seeks a punitive cost award. It is submitted that it is trite that adjudication awards are enforceable as a matter of contractual entitlement and that the respondent, a large contractor, is simply being a "bully-boy" and ignoring its obligations. It is submitted that the respondent, since October 2020, has intentionally

[21] *Fripp v Gibbon & Co* 1913 AD 354 at 357; *Merber v Merber* 1948 (1) SA 446 (A) at 452.

and wilfully used every possible delay tactic in an attempt to escape giving effect to a binding and valid adjudication in this matter.

[46] The legal principles, pertaining to a punitive cost award, were considered by the Constitutional Court in *Public Protector v South African Reserve Bank.*[22] Costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant, which includes fraudulent dishonest or *mala fides* (bad faith) conduct; vexatious conduct and conduct that amounts to an abuse of the process of court. The applicant submits that the delaying tactics and abusive conduct of the respondent are clear from the applicant's initial enforcement application (the first application).

[47] The first application was launched by the applicant on 1 September 2020. The application was for the same relief as sought in the present enforcement application. On 22 September 2020, the respondent served a Rule 30(2)(b) notice on the applicant. As a result, the applicant re-served the application on the respondent on 1 October 2020. On 14 October 2020, and on 10 November 2020 respectively, the respondent served another two Rule 30(2)(b) notices. On 14 December 2020, the respondent served its interlocutory application, being in respect of the 10 November 2020 notice.

[48] On 4 February 2021 the applicant, in an attempt to expedite this matter, withdrew the first application. On the same day, the applicant served the current enforcement application on the respondent. On 18 February 2021, the respondent served a Rule 30(2)(b) notice on the applicant ("the February notice"). On 17 March 2021, the applicant received two applications. An application in relation to the February notice

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[22] [2019] ZACC 29.

and a costs application for the withdrawal of the first application. The applicant provided an answering affidavit in relation to the February notice. The respondent refused to accept service of the aforesaid answering affidavit and alleged that CaseLines numbering did not suffice as pagination. The respondent also failed to serve its replying affidavit within the stipulated *dies*. As a result, the applicant addressed a letter to the Deputy Judge President, requesting that the respondent be prohibited from continuing to abuse the court process. It is alleged that the applicant's letter achieved its purpose as the respondent promptly withdrew both applications and served its Answering Affidavit.

[49] The applicant submits that the above clearly shows that the respondent engages in Stalingrad delay tactics, and that the respondent has no valid defences in relation to this enforcement application. On this basis, it is submitted that fairness demands that the applicant be awarded costs on a punitive scale.

[50] The respondent contends that the first application did not, in various respects, comply with the Uniform Rules of Court and applicable Practice Directives. The applicant withdrew the first application, pursuant to the respondent's notices in terms of Rule 30(2)(b) and an application in terms of Rule 30(1). The notice of withdrawal was silent on the issue of costs and the respondent was compelled to launch an application for such costs in terms of Rule 41(c) (*the costs application*).

[51] Subsequent to the withdrawal of the first application, the applicant launched the current application, which was also plagued by irregularities. The applicant failed to remove the causes of complaint subsequent to the respondent's notice in terms of Rule 30(2)(b), as a consequence of which the respondent was compelled to proceed with an application as contemplated in Rule 30(1) (*the irregular step application*). The

applicant removed the primary causes of complaint, and the irregular step application became academic, but for costs.

[52] In all the circumstances, as far as the first application is concerned, the applicant elected to withdraw the application. The applicant ought to have tendered costs in its notice of withdrawal. It did not do so.

[53] As far as the second application is concerned, the circumstances under which the first application was withdrawn has no bearing on the costs of the current application. In the absence of any fraudulent, dishonest, vexatious or *mala fide* conduct, and in the exercise of my discretion, I can find no reason to grant costs on a punitive scale.

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

1. Effect must be given to the Adjudicator's determination ("the Determination") dated 3 August 2020 as a matter of contractual entitlement which the Determination is attached to the Founding Affidavit at Annexure "MK01";
2. In giving effect to the Determination, the Respondent is hereby ordered to:

    2.1 effect payment to the Applicant in the VAT-Exclusive amount of R1,844,240.30 (One Million, Eight Hundred and Forty-Four Thousand, Two Hundred and Forty Rand and Thirty Cents), which amount is the result of the Adjudicator's Determination regarding invalid deduction made by the Respondent;

    2.2 effect payment to the Applicant in the VAT-Exclusive amount of R23,080.30 (Twenty-Three Thousand and Eighty Rand and Thirty Cents), which amount is the result of the Adjudicator's Determination regarding extra work done on the contract by the Applicant,

2.3 effect payment to the Applicant of contractual default interest calculated at a rate of 160'io (One Hundred and Sixty Per Cent) of the bank rate which is applicable from time to time to registered banks, calculated form 3 August 2020 to date of payment, in terms of clause 31.11of the JBCC N/S Contract entered into by the parties.

3. Costs of the application to be paid by the respondent on a party and party scale.

L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

(Electronically submitted therefore unsigned)

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 22 June 2022.

APPEARANCES

Attorney for the applicant:	CDV Attorneys
Counsel for the applicant:	Advocate A. Glendinning
Attorney for the respondent:	Helen Ellis Attorneys
Counsel for the respondent:	Advocate J. Daniels SC
	Advocate C. de Villiers-Goulding
Date of hearing:	17 March 2022
Date of judgment:	22 June 2022