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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASENO: 32783/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

25/11/2022

In the matter between:

**BABCOCK NTUTHUKO ENGINEERING (PTY) LTD
t/a BABCOCK NTUTHUKO POWERLINC**

Applicant

And

ESKOM HOLDINGS SOC LIMITED

Respondent

JUDGMENT

MAKUME, J:

[1] The Applicant issued a notice of motion on the 9th July 2021 in which it seeks the following relief against the Respondent:

1.1 Rectification of the written NEC3 contract between the parties by substituting Babcock Ntuthuko Engineering t/a Babcock Ntuthuko Power lines for Babcock Ntuthuko Power lines (Pty) Ltd.

1.2 Declaring the Adjudicators decision dated the 16th November 2020 as an order of Court.

1.3 Ordering the Respondent to make payment to the Applicant of:

a) The VAT inclusive sum of R26 354 863.29 as payment of the capital sum awarded by the Adjudicator as set out in the Applicant's tax invoice number [...] dated the 2 December 2020.

b) The VAT inclusive sum o R2 705 935.29 as payment of the contract price adjustment for inflation awarded by the adjudicator on the capital sum as set out in the Applicant's tax invoice number [...] dated the 2nd December 2020.

c) VAT inclusive sum of R5 310 741,46 as payment of interest awarded by the Adjudicator on the capital sum and contract price adjustments for inflation from their due dates to 7 January 2021 as set out in the Applicant's tax invoice number [...]

d) Vat inclusive sum of R1 596 803.16 as payment of interest awarded by the Adjudicator on the capital sum and contract price adjustment for inflation from their due dates to 7 January 2021 as set out in Applicant's tax invoice number [...] dated 7 June 2021

1.4 Interest on the amounts in (a) (b) calculated from 3 December 2020 to date of payment.

1.5 Costs including costs of two counsel.

[2] The Applicant's Founding Affidavit is deposed to by Neil Clive Penson who is employed by the Applicant as a Company Secretary and is duly authorised to depose to the affidavit.

[3] The award of the Adjudicator was delivered on the 16th November 2020 and on the 11th December 2020 the Respondent delivered a notice of dissatisfaction in respect of the Adjudicator's decision.

[4] During or about April 2021 the Respondent proposed 3 names of persons to be possible arbitrators. The terms of the W1.3(10) NEC contract provide that a dissatisfied party has the right to refer the matter to a tribunal.

[5] The Respondent is not opposing the rectification of the contract to indicate the correct party.

[6] Eskom now says at paragraph 11.1 that the Adjudicator exceeded his powers and therefore the award is not enforceable.

[7] Eskom also says that the Applicant owes it R12 735 666,50 in delay damages for late completion of the works which amount has been certified as owing and due.

[8] Also that Applicant owes Eskom an amount of R288 392.96 being an amount Eskom paid to a third party on behalf of the Applicant for demolition of a pump house.

BACKGROUND

[9] On or about the 20th September 2016 the Applicant duly represented by Mr IG Whaley and the Respondent duly represented by Mr C Fisher concluded a written NEC 3 Engineering Construction Contract (April 2013) main option B priced contract with bill of quantities under contract number 4600053758 (the contract). The terms of the contract are largely common cause.

[10] In the contract the Applicant is the contractor whilst the Respondent is the employer. It is common cause that the contract envisaged the appointment of a project manager whose powers and duties are defined therein. The project manager in this instance was a certain Mr Francoise Naidoo.

[11] The contractor bound itself to commence with the agreed work and to complete same by the 31st December 2017. The contract was for construction of 3 transmission lines by the Applicant for Eskom namely:

11.1 Sol Camden 400kv lines 1 and 2

11.2 Kendal-Zeus 400kv lines Section B

11.3 Kusile-Zeus 400kv lines Section B

[12] The contract makes provision for dispute resolution by firstly referring the dispute to an Adjudicator and thereafter to Arbitration if the dispute remains unresolved as follows:

12.1 Option W1 the parties agreed that A dispute arising under or in connection with this contract is referred to and decided by the Adjudicator.

12.2 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 (option W1.3(10)).

[13] Option W1.4 (2) provides that "if after the Adjudicator notifies his decision a party is dissatisfied; he may notify the other party that he intends to refer it to the tribunal. A party may not refer a dispute to the tribunal unless this notification is given within four weeks of notification of the Adjudicator's decision."

EVENTS LEADING UP TO ADJUDICATION

[14] During or about May 2019 various disagreements arose between the parties and the project manager regarding amounts not paid to the contractor. Finally on the 25th May 2019 the Project Manager informed the Applicant that he was rejecting the Applicant's entitlement to payment. As a result and in accordance with the terms of

the contract the Applicant on the 28th May 2019 notified both the Respondent as well as the Project Manager about the dispute arising out of the rejection to pay.

[15] On the 3rd March 2020 the parties agreed to appoint Mr Peter Odell as the Adjudicator and on the 21 August 2020 a formal contract appointing Mr Odell as Adjudicator was concluded.

[16] On the 16th November 2020 Mr Odell made his findings and award in favour of the Applicant.

EVENTS POST THE AWARD

[17] In paragraph 156 of his award the Adjudicator concludes with the following remarks:

“The Adjudicator draws the attention of the parties to the following:

14.1 In terms of clause W1.3 (10) the above decision are binding unless and until revised by the tribunal.

14.2 In terms of clause W1.4 (2) if either party is dissatisfied with the decision then that party has four (4) weeks from date of notification of the Adjudicator’s decision to refer the matter to the tribunal.”

[18] On the 11th December 2020 Mr Francois Naidoo filed the Respondent’s notice of dissatisfaction with the Adjudicator’s decision pertaining to the seven (7) disputes that had been referred to Adjudication. In particular, in the last paragraph of that letter the Respondent says the following:

“In accordance with ECC Disputes Resolution Clause W1.3(10) and W1.4(2) the Employer hereby notifies the contractor of its dissatisfaction with the Adjudicator’s decision in respect of the above matter and expresses the intention to refer the Adjudicator’s decision to the tribunal.”

[19] On the 7th April 2021 the Respondent's attorneys of record addressed a letter to the Applicant in which they proposed three names from which an Arbitrator was to be nominated. The names were those of Senior Counsel's William La Grange; Bruce Leech and Mohammed Chohan. Of particular significance in that letter the following:

“kindly let us have your preferred arbitrator on or before 16h00 on 14 April 2021 failing which our client will initiate the process of appointment of an arbitrator by the appointing authority.”

[20] The notification of dissatisfaction of the Adjudicator's decision did not set out the basis for the dissatisfaction. The Respondent did not proceed with the appointment of an Arbitrator as indicated in their attorney's letter of the 7th April 2021.

[21] On the 9th July 2021 which is three months after that letter the Applicant filed this application seeking an order to enforce the decision of the Adjudicator.

THE APPLICANT'S CASE

[22] The Applicant's case is for an order compelling the Respondent to make payment of four amounts totalling R35 968 343.10 invoiced by the Applicant to the Respondent in accordance with the Adjudicator's decision dated the 16th November 2020.

[23] It is the Applicant's case that the parties voluntarily agreed that disputes between them be subject to private alternative dispute resolution procedures detailed in Option W1. Such procedures commenced with the appointment of Mr Peter Odell as Adjudicator to be followed if need be by an Arbitration Tribunal at the instance of a dissatisfied party.

[24] The Applicant maintains that unless and until the Arbitration Tribunal has revised the decision of the Adjudicator that decision remains binding and enforceable as a contractual obligation.

THE RESPONDENT'S CASE

[25] The Respondent has raised the following defences against the application:

- i) That clause W1.3(2) of the agreement precluded any referral of disputes to adjudication if certain jurisdiction requirements have not been met.
- ii) That the Adjudicator had no jurisdiction to entertain the Applicant's claim or grant relief. That in fact the Adjudicator unilaterally conferred jurisdiction on himself thus rendering his decision null and void and unenforceable.
- iii) That the Adjudicator breached the rules of natural justice in that he did not Adjudicate Eskom's defence.
- iv) That this Court has a discretion not to order compliance of the Adjudicator's decision.
- v) That Babcock invoices are inconsistent with the Adjudicators decision.
- vi) That Eskom has a claim for delay damages which claim exceeds the amount awarded to the Applicant by the Adjudicator.

THE ADJUDICATION AGREEMENT AND ITS EFFECT

[26] It is not in dispute that by concluding the contract of adjudication both Babcock and Eskom voluntarily agreed to the private resolution of their dispute. Option W1.4(2) provides that if after the Adjudicator notifies his decision a party is dissatisfied he may notify the other party that he intends to refer it to the tribunal. It is common cause that the agreement further provides that a party may not refer a dispute to the tribunal unless the notification of dissatisfaction is given within four (4) weeks of the Adjudicator's decision.

[27] The Respondent complied with this requirement in that it filed its notice of dissatisfaction within the prescribed period and also proceeded to propose names of possible Arbitrators and stopped there. The question to be answered is whether this failure to proceed with arbitration renders the Respondent's defences a nullity.

[28] A similar situation arose in the matter of **Framatome vs Eskom Holdings Soc Ltd 2022 (2) SA 395 (SCA) at paragraph 23** of that judgment Mathopo JA makes a strong and compelling policy statement which reads as follows:

"If the interpretation contended for by Eskom is correct, it will substantially undermine the effectiveness of the scheme of Adjudication. It is plain that the purpose of Adjudication was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis and requiring the decision of Adjudicators to be enforced pending the final determination of disputes by arbitration. As far as the procedure is concerned, Adjudicators are given a fairly free hand. They are required to act impartially and permitted to take the initiative in ascertaining the facts and the law. Sight should not be lost of the fact that Adjudication is merely an intervening, provisional stage in the dispute resolution process. Parties still have a right of recourse to litigation and arbitration. Only a tribunal may revise an Adjudication. As that decision has not been revised it remains binding and enforceable. Eskom can't partially comply with the award and decline to give full effect to the payment portion of the award. What Eskom is asking the Court to do is to interrogate the merits, an aspect which falls within the purview of the arbitrator."

[29] For Eskom to succeed with its defence in this matter it has to deal convincingly with this aspect. The question is why did Eskom not proceed to arbitration? Why is Eskom asking this Court to deal with the merits of the Adjudicator's award an issue which in accordance with the contract resorts within the Arbitration Tribunal.

[30] The SCA in **Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd 2013 (6) SA 345** sets out succinctly the powers and purpose of Adjudication. It said quoting

the Canadian decision in the matter of **Macob Civil Engineering Ltd vs Morrison Construction Ltd [1999] BLR 93 (A) at 97** which described Adjudication as:

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

[31] In **Freeman v Eskom Holdings Ltd [2010] JOL 25357 (GSJ) paragraph 25** the Court said:

“Unlike an arbitration award which is usually final and binding the Adjudicators determination is binding on the parties and enforceable in Court proceedings as a contractual obligation unless and until the determination has been overturned or varied in arbitration proceedings. A dissatisfied party must still comply promptly with the Adjudicators determination notwithstanding the party’s delivery of a notice of dissatisfaction.”

THE ADJUDICATORS AWARD

[32] It is common cause that the Adjudicator delivered his award on the 16th November 2020 that decision remains binding until set aside or revised by an Arbitrator. The Case Law referred to above is sufficient authority and is the current law.

[33] Initially when the Applicant invoiced the Respondent demanding payment based on the Adjudicator’s award the respondent refused to pay and cited as the only reason for not paying at that time that the Adjudicator Mr Odell delivered a decision in favour of an entity named “Babcock Ntuthuko Engineering (Pty) Ltd.

[34] The Respondent Attorneys in their letter dated the 1st June 2021 to say the following:

“1.2 You would further agree that the underlying contract was concluded between Eskom Holdings Soc Ltd (the Employer) and Babcock Ntuthuko Power lines (Pty) Ltd Registration Number 1948/032084/07 (the Contractor).

1.3 From the above it is clear that the entity under which the Contractor purported to invoke the dispute resolution provisions under the contract is neither a legal entity nor the entity under the Contract.”

[35] It was only after being served with this application that Eskom raised the defence set out in paragraph 25 above. It is also in its Answering Affidavit that the Respondent abandoned its defence as raised in its attorneys’ letter dated the 1st June 2021. The Applicant when it proceeded with this application was still under the impression correctly so that the defence of a wrong party was still an issue hence the application for rectification. It was very clear that Eskom knew all along that this must have been a typing error to indicate the name “Power lines” instead of “Engineering.” I say so because the company registration number was correct. This defence or objection was raised as a technical point and did not attack the merits of the Applicant’s claim. Rectification is accordingly granted as prayed for and Eskom is liable to pay the costs of that application.

[36] The Applicant’s tax invoices for the items assessed by the Adjudicator dated the 2nd December 2020 were sent to the Respondent on the 3rd December 2020 and in accordance with the Adjudicator’s ruling and the agreement payment became due on or before the 8th January 2021. The Respondent failed to make payment.

[37] I now deal with the Respondent’s defences as raised in its Answering Affidavit and further amplified in the Heads of Argument. The first defence raised is to the effect that clause W1.3 (2) precludes any referral of disputes to Adjudication if certain jurisdictional requirements have not been met. The Respondent says that it is this issue that renders the award not only unenforceable but also that the Adjudicator exceeded his jurisdiction in assuming that the jurisdictional requirements had been complied with thus assuming that Mr Odell had the authority to entertain the claim.

[38] The crux of the Respondent's defence is that the Applicant did not timeously or within the time specified in clause W1.3(2) lodge or refer the dispute for Adjudication within the time periods set out in the Adjudicator's table.

[39] It is common cause that the dispute referred to as Dispute one in this matter arose in or during May 2017 and was only referred to Adjudication during May 2019. The question is does that disentitle the Applicant to seek relief.

[40] A close reading of clause W1.3(2) demonstrates that the clause is not prescriptive for it provides for extension of the times for notifying and referring a dispute if the contractor and Project Manager agree. Further it is so that the clause envisages that if there is a referral and there is a dispute to whether the referral was done timeously the Adjudicator must first determine that dispute.

[41] In this matter Mr Odell was required to first determine if the dispute had been timeously referred for Adjudication this he did and found in favour of the Applicant. The writer in LAWSA 143 correctly states that:

“it is important to distinguish between a situation where the arbitral tribunal purports to exercise a power which it does not have and where it erroneously exercise a power that it does have. The situation is not a basis for setting aside the award on the ground under discussion.”

[42] Mr Odell having heard the parties on the time barring facts concluded that the Applicant complied with the stipulated periods. If he was wrong it is only the Arbitration Tribunal that is empowered to make a final decision on that aspect.

[43] The SCA in the matter of **Makhanya vs University of Zululand 2010 (1) SA 62 (SCA)** expressed a view consistent with what was referred to in LAWSA (supra) to the effect that:

“[29] Jurisdictional challenges will be raised either by an exception or by a special plea depending on the grounds upon which the challenges arise. There will be some cases in which the jurisdiction of Court is dependent

upon the existence of a particular fact (often called jurisdictional fact) Where the existence of that fact is challenged it will usually be in a special plea, and the matter will proceed to a factual enquiry confined to that issue. In other cases, the existence or otherwise of jurisdiction to consider the case will appear from the particulars of claim and in those cases challenge will be raised by an exception. In such cases a Court that considers the challenges might not even be aware of whether or not the Plaintiff intends raising any defence at all to the claim. But in both cases the issue must necessarily be disposed of first because upon it depends the power of the Court to make any further orders.”

[44] I am satisfied that the Adjudicator dealt with disputes referred to him including the jurisdictional defences being a time related matter and rejected same. As appears from paragraphs 61,67,86, 105,111,117 and 137 of the Adjudicator’s decision, the Adjudicator decided that the closing out meeting of 28 May 2019 was the commencement of the period for the Applicant to notify the dispute which they the Applicant did three days later.

[45] It is further to be noticed as appears from paragraphs 58-60 and 36-41 of the Adjudicators decision, the Adjudicator found that it was not possible for the Applicant to refer a dispute until the Adjudicators contract comes into being this the Applicant did within four weeks of such event being the 21 August 2020.

[46] The Respondent bound itself to the agreement that if it is not satisfied with the findings of the Adjudicator then such decision must be referred to a tribunal. The Respondent has not explained why it has not referred its dissatisfaction to a tribunal. By failing to refer its dissatisfaction to the tribunal the Respondent has committed a material breach of contract which fact entitles the Applicant to an order for specific performance.

[47] It is indeed disingenuous of the Respondent to now allege that the Adjudicator had no jurisdiction to deal with the complaints because of such complaints not having been raised or referred to Adjudication in accordance with the Adjudicator’s table under option clause W1.3. It is the Respondent itself in paragraph 16.6 of its

referral for Adjudication which requested, the Adjudicator to rule on this aspect. It is in my view unacceptable that the Respondent now turns around that the Adjudicator had no authority to deal with that.

IS THE ADJUDICATORS DECISION ENFORCEABLE?

[48] The Respondent contends that the decision by the Adjudicator is unenforceable. The Respondent argues that for the Applicant to succeed in these proceedings for specific performance the Applicant must prove that it has complied with its obligations under the agreement. It is common cause that in terms of Option 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.”

[49] The only obligations that rest on the Applicant in order to enforce specific performance is firstly that the Applicant must prove the existence of an Adjudicator’s decision and compliance with the Adjudicators’ directive by delivering invoices that entitled the Applicant to payment.

[50] Goldstone JA in the matter of **Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd 1994 (1) SA 162 (A)** concluded that where parties agree to refer a dispute to arbitration they accept that they will be finally bound by the award of the arbitral tribunal.

[51] It is trite law that where there is on the face of it a valid award, the award is enforceable and the party wishing to resist enforcement will have to bring an application timeously for setting it aside. Ponnau JA in **Bantry Construction Services (Pty) Ltd v Raydin Investments (Pty) Ltd 2009 (3) SA 533 (SCA)** at **paragraph 21** writes as follows:

“It ill-behoved Bantry to adopt the passive attitude that it did. It ought instead to have taken the initiative and applied to Court to have the award set aside

within six weeks of the publication of the award alternatively to have launched a proper counter application for such an order.”

[52] In this matter the Adjudicator published the award during December 2020. In the Answering Affidavit all that the Respondent says is that the application be dismissed with costs. There is no application to set the award aside which means that the award stands until set aside either by the arbitral tribunal or by a Court. This award is enforceable.

[53] The Respondent in support of its contention that the Adjudicator’s award is not enforceable has referred this Court to a decision of the SCA namely **Kates Hope Game Farm (Pty) Ltd vs Terblance Hoek Game Farm Pty Ltd 1998 (1) SA 235 (SCA) at 241 B-C** a judgment by Olivier JA. That matter involved enforcement of an agreement concluded by members of an Association it had nothing to do with the enforceability of an arbitration award granted in terms of an agreement governed by the Arbitration Act.

[54] The parties agreed that the Adjudicator’s decision would be enforceable as a term of the contract it goes without saying that the Applicant’s claim for enforcement is correctly classified as a claim for specific performance of a contractual obligation. A dissatisfied party must still comply promptly with the Adjudicator’s determination notwithstanding the party’s delivery of a notice of dissatisfaction.

[55] Du Plessis AJ in **Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd 2014 (1) SA 244 GSJ at paragraph 8** writes as follows after having made references to the clauses on Adjudication in the agreement between the parties:

“The effect of these provisions is that the decision is binding unless and until it has been revised as provided. There can be no doubt that the binding effect of the decision endures at least until it has been so revised. It is clear from the wording of clause 20.4 that the intention was that a decision is binding on the parties and only loses its binding effect if and when it is revised. The moment the decision is made the parties are required to “promptly” give effect to it.”

[56] I accordingly have no hesitation in concluding that the award and decision by the Adjudicator in this matter is enforceable and must be “promptly” enforced.

DID THE ADJUDICATOR EXCEED HIS POWERS?

[57] In paragraph 11.2 of its Answering Affidavit the Respondent contends that the Adjudicator in arriving at his decision exceeded his powers accordingly that this Court should refuse to grant the orders prayed for. The Respondent does not elaborate to what extent or in what respect did the Adjudicator exceed his powers. The only argument raised is that the Adjudicator wrongly decided on the time barring defences. The SCA at paragraph 29 of the unreported judgment of **Framatome v Eskom Holdings SCA case under 357/2021 decided on 1st October 2021** concluded as follows:

“In the final analysis the question to be asked is whether the Adjudicator’s decision is binding on the parties. The answer to that question depends on whether the Adjudicator confined himself to a determination of the issues that were put to him by the parties. If he did so then the parties are bound by his determination, notwithstanding that he may have fallen into an error. “

[58] Eskom’s complaint is that the Adjudicator decided the time barring defence wrongly. The Applicant disputes this. It is important to distinguish between a situation where an Adjudicator purporting to exercise a power which it does not have and where it erroneously exercises a power it does have.

[59] In the matter of **Royal Bafokeng Economic Board v Basson 2009 JDR 1057 (GNP)**, an error of law by the tribunal on the merits was held not be capable of attack on the basis that the tribunal has exceeded its powers (See also **Dickenson and Brown vs Fishers Executors 1915 AD 166, 175, 180-181**).

[60] Once again the SCA decision of Framatome at paragraph 25 puts the issue beyond doubt in the following words:

“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 upon an application for enforcement of an Adjudicator’s 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 findings in decision 11.”

DOES THIS COURT HAVE A DISCRETION TO REFUSE ENFORCEMENT OF THE ADJUDICATOR’S DECISION?

[61] It is trite law that any Court that has to exercise a discretion must do so judicially having taken into consideration all the facts in a matter.

[62] Eskom contends that this Court does have such a discretion which it should exercise in its favour and thus deprive the Applicant of a contractual payment due. The Respondent’s reasoning for this argument is to say the least surprising one of its reason is that Eskom being a State owned company subject to the Public Finance Management Act will cause immense prejudice to the Public if it is ordered to make a payment. I have no hesitation in dismissing it as a ploy to avoid its contractual liability.

[63] In Framatome v Eskom Holding Soc the SCA ordered Eskom to pay an amount in excess of R150 million in compliance with an Adjudicator’s decision. No such concern of immense public prejudice was ever raised and has so far not been raised. Eskom should not be allowed to hide behind its statutory and public status to avoid liability based on its own contractual undertakings.

ESKOM’S DEFENCE THAT THE APPLICANT’S INVOICES ARE INCONSISTENT WITH THE ADJUDICATOR’S DECISION

[64] In paragraph 258-263 as well as paragraph 248-249 Eskom denies that the Applicant's calculations are correct but fails to point out in what respect that is so. The Adjudicator's decision is in connection with seven different disputes Eskom cannot dispute the correctness of the invoiced capital amounts which are expressly stated in the Adjudicator's decision. It has been unable to raise any valid dispute regarding the method of calculating inflation increases as well as interest on the Capital amount.

[65] The amounts invoiced by the Applicant are not undetermined because the Adjudicator has not stated precise amounts for price adjustments for inflation and interest. These amounts are determined by applying the contractual terms of the Capital amount decided by the Adjudicator.

[66] The Respondent 's bald denials do not in any manner rebut the detailed evidence set out in Applicant's invoices that are correct and consistent with both the Adjudicator's decision as well as the contract.

THE RESPONDENT'S DEFENCE THAT APPLICANT OWES IT AMOUNTS EXCEEDING THOSE AWARDED BY THE ADJUDICATOR

[67] This defence is based on assessment and certificate raised by the Project Manager on the 10th September 2021 which is five days before Eskom signed its Answering Affidavit. The contention is that the Project Manager did so acting in terms of clause 51.3 of NEC 3.

[68] Clause 51.3 reads as follows:

"If an amount due 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 interest is assessed from the date when the incorrect amount was certified until the date when the correcting amount is certified and is included in the assessment which includes the correcting amount."

[69] Clause 51.3 cannot be read in isolation it must be read in conjunction with clause 51.1 which provides that “the Project Manager Certifies payments within one week for each assessment date. There is in this matter no explanation why the Project Manager did not certify the Adjudicators assessment during December 2020 and waited 10 months to adjust the certificate of payment. He clearly did not act with impartiality. The Project Manager’s certificate were not issued “following a decision of the Adjudicator.” This is not what clause 51.3 requires. His certificates are accordingly invalid.

[70] It is so that shortly after the Project Manager issued his impugned certificate the Applicant Babcock issued a dispute notice on the 14th October 2021 and has asked that the certificates be referred to Adjudication in accordance with option W. The certificate issues by the Project Manager are still subject to a dispute and cannot be used to offset what is due to the Applicant.

[71] In the result I am persuaded that the Applicant has made out a case on the papers and is entitled to an order as prayed for in prayer 1 to 5 of the notice of motion.

ORDER

1.1 The written NEC3 contract between the parties is hereby ractified by substituting “Babcock Ntuthuko Engineering trading as Babcok Ntuthuko Powerlines” for Babcock Ntuthuko Power lines (Pty) Ltd on the title page.

1.2 The Adjudicators decision awarded on the 16th November 2020 is hereby made an order of Court.

1.3 The Respondent is ordered to pay to the Applicant forthwith the following:

a) The VAT inclusive sum of R26 354 863.29.

b) The VAT inclusive sum of R2 705 935.29.

c) The VAT exclusive sum of R5 310 741,46.

d) The VAT exclusive sum of R1 596 803.16.

1.4 Interest on the amounts stated in (a) and (b) above calculated from 3 December 2020 to date of payment calculated on a daily basis at the publicly quoted prime rate of interest (calculated on a 365 day years). Charged from time to time by the Standard Bank of South Africa and compounded annually.

1.5 Taxed Costs which shall include costs of two counsel.

Dated at Johannesburg on this 25th day of November 2022

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances

DATE OF HEARING : 10 AUGUST 2022

DATE OF JUDGMENT : 25 NOVEMBER 2022

FOR APPLICANT : Adv Kemack Sc

With : Niewoudt

INSTRUCTED BY : Messrs MDA Attorneys

FOR RESPONDENT : Adv Tshikila

INSTRUCTED BY : Dlamini Attorneys