

SOUTH AFRICA / JUDGMENT

Amanz'Abantu Services Pty Ltd v Coega Development Corporation Pty Ltd (620/2022) [2022] ZAECQBHC 20 (10 August 2022) [2022] ZAECQBHC 20

COURT

Eastern Cape High Court, Gqeberha

BEFORE

Govindjee

CASE / FILE NUMBER

620/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GQEBERHA)

NOT

REPORTABLE

Case

no: 620/2022

In

the matter between:

AMANZ'ABANTU

SERVICES PTY LTD

Applicant

and

COEGA

DEVELOPMENT CORPORATION PTY LTD

Respondent

JUDGMENT

Govindjee J

Background

and issues

- [1] During 2016, the respondent awarded a tender to the applicant to upgrade the Nessie Knight Hospital. The parties subsequently concluded a written JBCC Agreement to govern the works ('the JBCC').
- [2] The JBCC contains a detailed 'settlement of disputes' clause. Any dispute arising between the parties may result in notice by one party to the other to resolve such disagreement.[1] Failure to resolve any disagreement within ten working days of receipt of such notice results in possible referral of the dispute to adjudication or arbitration. When a party chooses to refer the dispute to adjudication, this is to be conducted in terms of the edition of the JBCC Rules for Adjudication current at the time ('the Rules'). It is common cause that the parties referred various disputes that developed to adjudication before an agreed adjudicator.
- [3] The JBCC provides that an adjudicator's decision 'shall be binding on the parties who shall give effect to it without delay unless and until it is subsequently revised by an arbitrator'. Should either party be dissatisfied with the decision given by the adjudicator, or should no decision be given within the period set in the Rules, such party may give notice of dissatisfaction to the other party and to the adjudicator within ten working days. The termination of the agreement does not affect the validity of the 'settlement of disputes' clause of the JBCC.[2]
- [4] The adjudicator published a decision on 1 September 2021 ('the decision'). The conclusions reached were summarised by the adjudicator as follows:
- '19.1 The relief sought by the Claimant for Dispute No. 1 is partly granted. I determine that:
- 19.1.1 The revision of the date for practical completion based on EOT Claim 11 be adjusted to 12 May 2020 as determined by the PA.
- 19.1.2 The revision of the date for practical completion based on EOT Claim 12 be adjusted to 20 July 2020 and not 15 October 2020 as claimed.
- 19.1.3 The revision of the date for practical completion based on EOT Claim 13 is not granted (see also my determination for Dispute No. 6).
- 19.1.4 The calculation of the time related preliminaries must be based on the default provision as provided for in the CE Contract Data.
- 19.2 The relief sought by the Claimant for Dispute No. 2 is granted. I determine that:

19.2.1 The current penalties being deducted be reversed for the amount of R7 318 364,26.

19.2.2 Interest is due on the levied penalties for the period from when deducted from the certificates to the date the penalty funds are reversed and paid.

19.3 The relief sought by the Claimant for Dispute No. 3 is neither granted nor not granted as it is not possible for me to rule on the alleged under-measurement and certification by the PQS and incorrect CPAP calculation due to time constraints as mentioned. My ruling is therefore based on the contractual steps to be followed, as follows:

19.3.1 The final account to be submitted by the PA to the Claimant by not later than 90 working days after 21 July 2021, i.e., 26 November 2021.

19.3.2 The Claimant to accept or object to the final account within 45 working days of receipt thereof, i.e., not later than by the end of February 2022.

19.4 The relief sought by the Claimant for Dispute No. 4 is neither granted nor not granted as it is not possible for me to rule on the alleged non-certification of additional work by the PQS due to time constraints as mentioned. My ruling is therefore based on the contractual steps to be followed, as follows:

19.4.1 The final account to be submitted by the PA to the Claimant by not later than 90 working days after 21 July 2021, i.e., 26 November 2021.

19.4.2 The Claimant to accept or object to the final account within 45 working days of receipt thereof, i.e., not later than by the end of February 2022.

The time periods are very liberal taking into consideration the amount of information already available and the fact that the 'draft Final Account' has almost been completed by the PQS. I foresee therefore that the parties would have more than enough time to reach agreement on whether the Claimant is entitled to be paid for the additional work in contention. Should the parties still not be able to reach agreement arbitration would be the option for the parties to consider in order to reach a final and binding resolution.

19.5 The relief sought by the Claimant for Dispute No. 5 is not granted.

19.6 The relief sought by the Claimant for Dispute No. 6 is not granted. I determine that:

19.6.1 The Claimant was not entitled to suspend the execution of the works.

19.6.2 The contract between the parties was validly terminated by the Respondent on 21 July 2021.

19.6.3 The Claimant has no right to continuous possession of the works.

19.6.4 The Claimant is directed to vacate the site forthwith.

19.6.5 The cost of others to remedy the Claimant's defective work, if any, be deducted from the final value of the works.'

[5] The applicant seeks compliance with parts of the decision favourable to it, partly based on its own calculations. The application is opposed on the basis that it is not possible for the respondent to

perform according to the decision and because an order directing performance will result in disproportionate hardship to the respondent.

[6] The Rules provide as follows:

'Adjudication is an accelerated form of dispute resolution in which a neutral person determines the dispute as an expert (and not as an arbitrator) and whose determination is binding on the parties for immediate compliance and which shall remain in force until varied or overturned by an arbitration award.'

[7] Importantly, the adjudicator's written determination of the dispute constitutes a liquid document in terms of the Rules. Where a written determination orders the payment of an amount of money, that

amount 'shall be a liquidated amount'. Either party may request the arbitrator to correct any patent clerical, typographical

or arithmetical error or clarify any ambiguity in the determination. Any party may also apply to the High Court for the enforcement of the

determination.

Applicable legal principles

[8] Construction contracts often require disputes to be resolved by arbitration, simultaneously postponing that process until the works have been completed, in order to avoid interruption. [3] In *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd and Another*, [4] the SCA noted that it has become prevalent, also internationally, for disputes to be provisionally resolved by adjudication. The SCA added as follows:

'The authors of Hudson's Building and Construction Contracts observe that under New Zealand construction legislation adjudication 'is regarded as essentially a cash flow measure implementing what has been colloquially described as a "quick and dirty"

exercise to avoid delays in payment pending definitive determination of litigation'.

[9] An identically worded settlement of disputes clause was considered, and read with the Rules, by the SCA in *Ekurhuleni West College v Segal and Another* [5] ('Segal'). In that matter, five of the second respondent's claims referred to adjudication were adjudicated in its favour, requiring payment of the amount of more than R3 million by the appellant. A patent error of calculation was subsequently identified by the second respondent ('Trencon'), and

corrected by the adjudicator.[6] The appellant gave notice of dissatisfaction and referred the disputes to arbitration. The SCA held as follows:[7]

‘This did not, of course, relieve the College of the obligation in terms of clause 40.3.3 to make payment to Trencon without delay. However, the College neglected to do so. Instead ... it issued an application to review and set aside the determination ... The adjudicator operated as a tribunal created by contract ... [Adjudication] was designed for the summary and interim resolution of disputes. The adjudicator was given wide inquisitorial powers to resolve the disputes as expeditiously and inexpensively as possible. But the adjudicator’s determination was not exhaustive of the disputes, as it may be overturned during the final stage of the dispute resolution process ... The College agreed to be bound by the adjudicator’s determination. Its remedy was to refer the matter to arbitration. It invoked that remedy and could have pursued it expeditiously. In these circumstances holding the College to its contract would not cause grave injustice nor irreparable harm.’

[10] Enforcement of an adjudicator’s determination in terms of a construction contract was also in issue in the recent decision of the SCA in *Framatome v Eskom Holdings SOC Ltd* (‘Framatome’).[8] That contract made provision for ‘compensation events’ which allowed Framatome to claim additional payment and extra time to do the work from the employer.[9] Eskom argued that the adjudicator’s main decision was predicated on an invalid earlier decision, so that it was unenforceable. The SCA confirmed that Eskom could have referred the disputed decision to arbitration. There was also no authority supporting the proposition that a lack of jurisdiction in relation to an earlier adjudication was a recognised ground for challenging an adjudicator’s jurisdiction in a subsequent adjudication that relied on the findings of the challenged jurisdiction, prior to any challenge being made good.[10] In rejecting Eskom’s contentions, the SCA confirmed that the adjudicator’s decision was final and binding and to be enforced as a matter of contractual obligation between parties in the absence of an arbitration decision to the contrary.[11] Accepting Eskom’s contention was untenable:[12]

‘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 decisions 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 adjudicator’s decision. As that decision has not been revised, it remains binding and enforceable. Eskom cannot 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 arbitration.’

[11] There was no justifiable reason for not giving full effect to the adjudication decision and refusing to comply with the payment award of the adjudicator in Framatome was disingenuous.[13] The SCA added the following:

‘The provision that payment must be made even before arbitration is a strong indication of the ousting of a court’s jurisdiction to review the award. The parties knew when they contracted with each other that the disputes may arise and a temporary solution in the form of interim payments is provided to ensure the completion of the Contract within the agreed specified period ... As stated in Hudson’s Building and Engineering Contracts: “It should only be in rare circumstances that the courts will interfere with the decision of an Adjudicator, and the courts should give no encouragement to an approach which might aptly be described as ‘simply scrabbling around to find some argument, however tenuous, to resist payment.’”

Postponement or set-off as defences

[12] The respondent’s defence, as expressed in its answering affidavit, is centred on the adjudicator’s finding in respect of dispute six. Once termination of the contract was declared lawful, an assessment and evaluation of the work performed by the applicant is required in order to determine any amounts due to either party. The respondent avers that the costs to remedy defects in the applicant’s work and to complete the work can only be properly determined once practical completion has been achieved on the entire project. Its case on the papers is based squarely on the process to be followed to prepare the final account and its belief that it is premature for the applicant to demand payment of any monies that may be due to it before that process is concluded. The respondent also places reliance on the adjudicator’s conclusion that it is

entitled to deduct from the final value of the works the costs of remedying the applicant’s defective work, if any. It offers its own preliminary calculations, based on information presently at its disposal, to suggest that the applicant is liable for damages in excess of R7 million, so that the applicant may be entitled only to payment of a sum less than R275 000.

[13] Insofar as the respondent relies upon some form of postponement as a defence to the application, it must be noted that it, in effect, refuses to comply with the outcome of a process to which it consented. Although aggrieved, it has not given notice of dissatisfaction and has not referred any aspect of the adjudication to arbitration or raised a substantive question of clarification with the adjudicator on the formulation of the decisions in favour of the applicant. The determination remains binding and the parties were obliged to give prompt effect to it.[14] The applicant was, in principle, entitled to receive quick cash flow in accordance with the outcome of a favourable adjudication decision on a monetary claim. As Spilg J held in *Esor Africa (Pty) Ltd / Franki Africa (Pty) Ltd Joint Venture v Bombela Civils Joint Venture (Pty) Ltd*: [15]

‘The [adjudication] decision is not final but the obligation to make payment or otherwise perform under it is. In the most elementary way the [adjudication] 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 [adjudicator] ...

neither payment nor performance can be withhold when the parties are in dispute ... the respondent cannot withhold payment of the amount determined by the adjudicator ... it was precisely to avoid this situation that the clauses were worded in this fashion.’

- [14] There is nothing on the papers to suggest that the respondent’s interpretation premised on set-off was contemplated by the adjudicator. By contrast, the adjudicator notes that six ‘separate’ disputes were referred, to be adjudicated. This is consistent with the notion that adjudication is intended to provide interim resolution of construction disputes, with an adjudicator’s expression of payment and performance obligations to be effected expeditiously. Read in its entirety, the adjudicator’s determination of dispute six centred on the applicant having erroneously suspended the works. The respondent placed the applicant on terms and was found to have been entitled to terminate the agreement when the applicant refused to uplift the suspension. This, according to the adjudicator, ‘... clearly demonstrates an intention no longer to be bound by the terms of the agreement, and more specifically clause 15.3.’ That clause refers to the applicant’s obligation to ‘...continuously, industriously and with due skill and appropriate physical resources to bring the works to ... final completion’. As a result, the adjudicator determined that the applicant was not entitled to suspend the execution of the works and the contract between the parties was validly terminated by the respondent on 21 July 2021. The applicant was not entitled to continuous possession of the works and was directed to vacate the site forthwith.
- [15] The adjudicator added that ‘the cost of others to remedy the claimant’s defective work, if any, be deducted from the final value of the works’. No additional indication of the practical impact of this conclusion appears in the adjudicator’s explanation of the decision in respect of dispute six. It certainly cannot be said, based on the text of the determination, that the intention was for the adjudication decisions in respect of the other disputes to be superseded because of the dispute six outcome. I am also unable to accept the reading that the text included after paragraphs 19.3.2 and 19.4.2 in the adjudication determination, and their reference to the ‘draft Final Account’, supports the respondent’s interpretation. Those paragraphs, in my view, clearly relate only to the determinations of dispute three and four, and cannot be read to support the argument premised on the outcome of dispute six. In any event, the adjudicator made no finding as to the allegedly defective work in resolving the final dispute, deliberately adding the words ‘if any’ to that portion of the outcome.
- [16] It is trite that where two persons are mutually indebted to one another their obligations may be extinguished by set-off. Set-off can only take place if both debts are liquidated in the sense that they are capable of speedy and easy proof.[16] The question whether a debt may

be capable of speedy ascertainment is ‘a matter left for determination to the individual discretion of the Judge’.[17] The facts of this matter are such that I am unable to conclude that the applicant owes the respondent a liquidated debt. Bearing in mind the period of time that has already elapsed, any process of establishing and quantifying an amount based on allegedly defective work is, in my view, not capable of speedy and easy proof. It follows that the adjudicator’s determination in respect of dispute six cannot be set-off against determinations in favour of the applicant that are capable of immediate enforcement. On the issue of enforceability, both parties relied on the decision of Unterhalter J in *Murray & Roberts Ltd v Alstom S&E Africa (Pty) Ltd* (‘*Murray & Roberts*’).[18]

Adjudication and specific performance

[17] *Murray & Roberts* also considered an application for the enforcement of a decision of an adjudicator. The respondent in that matter also resisted enforcement based on impossibility of performance. *Murray & Roberts* focused on the argument that a court will not order the specific performance of obligations arising from an adjudicator’s

decision that are impossible of performance:[19]

‘That the decision of the adjudicator is binding and must be given effect to may be said to amount to little more than a stipulation that performance is due, whether or not notice of dissatisfaction has been given. But, it may be argued, the fact that performance is due under the contract, of which the adjudication and its outcome form part, does not alter the remedial discretion of the courts to decide whether to order specific performance in the face of the claim that the performance due is impossible of performance.’

[18] The court highlighted the difficulties with this line of argument, with reference to the contractually agreed scheme of adjudication.[20] Adjudication was intended to resolve disputes practically and, to do so, decision-making would often result in remedies requiring a party to take certain actions.[21] Because *Alston*, in that matter, was required to promptly give effect to the adjudicator’s decision, the adjudicator’s decision was, in substance, an order of specific performance. The relevance of this conclusion was that the remaining question was whether the court should consider the possibility of compliance in determining whether the decision should be made an order of court.[22]

[19] As in the present instance, the adjudicator in *Murray & Roberts* had determined the remedy in their discretion. This was a consequence of the contractual arrangement, which included appreciation that the adjudicator’s decision would be final and binding and must be enforced. The consequence was as follows:[23]

‘Put simply, this court is not being asked to decide whether to order specific performance of a primary obligation owed by a party to a contract, where the court is at large to determine the correct remedy. Rather, the court is being asked to decide whether to make an order enforcing an adjudicator’s decision where the adjudicator has already decided upon the remedy, in circumstances where the parties gave him the competence to do so and had undertaken to treat his decision as final and binding.’

[20] It is apparent that courts retain the inherent power to regulate their own process and to develop the common law. According to Unterhalter J, one incidence of that power is the competence to decide whether to make an adjudicator’s decision, arising from an agreement,

enforceable by order of court. This power is to be exercised upon just and equitable considerations, bearing in mind the contractual

agreement between the parties to afford the original remedial decision-making power to an adjudicator.[24]

[21] The court proceeded to identify the following relevant questions, noting that this was not a closed list of enquiries:[25]

- a. Did the adjudicator decide the dispute now raised before the court?
 - i.If not, could the party contending for impossibility have raised the issue before the adjudicator, and if so, did the party do so, and if not, why not?
- b. Why should the party contending for impossibility escape its obligations to be bound by the outcome of the adjudication, to treat it as final and give effect to it?
- c. What are the consequences of permitting a party to escape the enforcement of the decision, bearing in mind that the adjudicator has determined the merits of the case and decided upon a remedy and considering the equities of a decision by the court to leave the applicant without the benefit of that decision.
- d. What are the systemic risks if agreed procedures for dispute resolution that are intended to be quick and avoid disruption to large construction projects, nevertheless give rise to lengthy litigation before the courts?
- e. Is there a risk that the impossibility relied upon will indeed, if an order is made, require what cannot be done and expose the defaulting party to the risk of contempt proceedings?

[22] It may be accepted for present purposes that this issue was not raised before the adjudicator and arose based on the formulation of the determination itself. The respondent endeavours to avoid being bound by the adjudication determination based on its reliance on dispute six. As discussed, there is no merit to that argument. There is no serious dispute on the papers as to the applicant’s

calculations in respect of those determinations in its favour. It amounts to a bare denial, not based on any factual or legal grounds

and, as Mr Mullins SC for the applicant argued, without any different calculation being advanced in respect of those aspects of the determination.[26] Those aspects of the determination were not queried with the adjudicator as ambiguous or referred to arbitration. The respondent

merely falls back on its argument that there should be a comprehensive calculation, to be undertaken by the Quantity Surveyor,

and possibly subject to its own dispute process, before that calculation may be finalised. This is a repeat of the arguments for

postponement of finalisation or set-off already considered, coupled with submission of a preliminary calculation that has not been

endorsed by an adjudication determination. The other questions identified in Murray & Roberts may similarly be answered in favour of the applicant. There is no good reason advanced by the respondent for non-enforcement and it would be inequitable to deprive the applicant of adjudication determinations that stand in its favour. Finding for the respondent would result in the applicant being left without a remedy to enforce the adjudication determinations in its favour until the respondent, in its own time, finally established and quantified a basis for deducting from the amounts it owes the applicant. Indeed, to proceed on that basis would be to forsake the accepted contractual arrangement, which is frequently adopted in the construction sector, and allow a more litigious approach to trump expeditiousness. On my interpretation the relief sought is capable of enforcement and does not unnecessarily expose the respondent to contempt proceedings by compelling compliance with an order that is unenforceable.[27]

[23] Finally, Ms Ntsepe, for the respondent, urged me to dismiss the application because of the undue hardship that would be inflicted upon the respondent.[28] This is not a case that is established on the papers and, in any event, it cannot be said that ordering specific performance will

result in undue hardship to the respondent that is completely disproportionate to the benefit that the applicant will enjoy. There

is also no basis for accepting that there is an alternative remedy that will secure sufficient benefit to the applicant.[29] In these circumstances, it is appropriate to exercise the court's discretion in favour of implementation of the relevant adjudication determinations, and in a manner that avoids depriving the successful party of the benefit of decisions taken in its favour. There are no compelling reasons not to do so in my view. The parties were in agreement that costs must follow the result.

Order

[24] The following order will issue:

1. The respondent is directed to comply with the adjudicator's decision dated 30 August 2021.
2. The respondent must:
 - 2.1 in respect of paragraph 19.1.2 of the Adjudication Determination read with paragraph 19.1.4:
 - 2.1.1 certify and pay the costs for completion of the works having regard to the extension of time for practical completion that was granted to 20 July 2020, amounting to the sum or R1 906 277,06 inclusive of VAT;
 - 2.1.2 pay default interest on the aforesaid amount at the rate of 7% per annum compounded monthly calculated from 1 September 2020 to date of payment.
 - 2.2 in respect of paragraph 19.2 of the Adjudication Determination:
 - 2.2.1 pay the sum of R7 318 364,26 to the applicant in respect of the reversal of penalties;
 - 2.2.2 pay interest in the amount of R695 430,00, being the interest calculated on the aforesaid amount until 1 July 2020;
 - 2.2.3 pay further interest on the sum of R7 318 364,26 at the rate of 7% per annum compounded monthly calculated from 2 July 2020 to date of payment; and
 - 2.3 in respect of paragraphs 19.3 and 19.4 of the Adjudication Determination, submit its final account to the applicant in respect of contract number CDC/591/15.
3. The respondent is directed to pay the applicant's costs.

A. GOVINDJEE

JUDGE OF THE HIGH COURT

Heard: 28 July 2022

Delivered: 10 August 2022

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[1] In terms of clause 40.7 of the JBCC, recording of a dispute does not relieve the parties from liability for the due and timeous

performance of their obligations.

[2] Clause 40.9 of the JBCC.

[3] Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd & Another [2013] ZASCA 83 ('Radon Projects') para 3.

[4] Radon Projects *ibid* para 4.

[5] Ekurhuleni West College v Segal and Another

[2020] ZASCA 32 ('Segal').

[6] Segal *ibid* para 8.

[7] Segal *ibid* paras 9, 15, 21, 22. The reference to 'grave injustice' and 'irreparable harm' was made in the context of the referral to arbitration and the power of the arbitrator to revise the adjudicator's determination as if it had not been issued. The College was effectively requiring the court *a quo* to review unterminated proceedings, which would only be permissible if 'grave injustice' or 'irreparable harm' could be demonstrated: see Segal para 18.

[8] Framatome v Eskom Holdings SOC Ltd [2021] ZASCA 132 ('Framatome').

[9] For further details of 'compensation events' and their assessment, see Framatome *ibid* para 6.

[10] Framatome *ibid* para 21.

[11] Framatome *ibid* para 22.

[12] Framatome *ibid* para 23.

[13] Framatome *ibid* para 24. In Framatome, the SCA held that the parties would be bound by an adjudicator's decision if the adjudicator had confined himself to a

determination

of the issues put before him, even if he had erred in determining those issues: Framatome *ibid* para 29.

[14] See Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd 2014

(1) SA 244 (GSJ) para 8. Also see Esor Africa (Pty) Ltd / Franki Africa (Pty) Ltd Joint Venture v Bombela Civils Joint Venture (Pty) Ltd (Unreported South Gauteng High Court, Johannesburg decision) (case no. 12/7442) ('Esor Africa') para 9.

[15] Esor Africa *ibid* paras 11, 12, 13.

[16] See Blakes Maphanga v Outsurance Insurance 2010 (4) SA 232 (SCA) ('Blakes Maphanga') para 15.

[17] Blakes Maphanga *ibid* para 18.

[18] Murray & Roberts v Alstom 2020

(1) SA 204 (GJ) ('Murray & Roberts').

[19] Murray & Roberts *ibid* para 21. Alstom argued that the enforcement of the adjudicator's decision was no different from any other claim of specific performance and that if the decision was impossible of performance, no order should issue to compel what could not be done. Murray & Roberts contended that the adjudicator's decision was the outcome of an agreed, binding mechanism of dispute adjudication and that the decision was enforceable: paras 10, 13.

[20] Murray & Roberts *ibid* para 22 et seq.

[21] Murray & Roberts *ibid* para 24.

[22] Murray & Roberts *ibid* paras 30-35.

[23] Murray & Roberts *ibid* paras 36, 38.

[24] Murray & Roberts *ibid* para 39.

[25] Murray & Roberts *ibid* para 41.

[26] See the SCA decision in Framatome *supra* fn 8 para 31 for an illustration of an order to comply with an adjudicator's determinations that involve price adjustment and interest calculations.

[27] See Murray & Roberts *supra* fn 18 para 69.

[28] See Murray & Roberts *ibid* para 73. In that matter, the respondent attempted to provide a basis for its averment in a rejoining affidavit. Also see *Haynes v King Williams Town Municipality* 1951 (2) SA 371 (A) 380B-C.

[29] Murray & Roberts *ibid* para 75.

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