

SOUTH AFRICA / JUDGMENT

Ekurhuleni West College v Segal and Another (26624/2017) [2018] ZAGPPHC 662 (29 August 2018)

[2018] ZAGPPHC 662

COURT

North Gauteng High Court, Pretoria

BEFORE

De Vos

CASE / FILE NUMBER

26624/2017

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 26624/2017

In the matter between:

EKURHULENI WEST COLLEGE Applicant

and

STANLEY HAROLD SEGAL First Respondent

TRENCON CONSTRUCTION (PTY) LTD Second Respondent

J U D G E M E N T

DE VOS J:

- [1] This is an application by the applicant for the review and setting aside of the first respondent's decision, acting as the adjudicator between the applicant and the second respondent in terms of a building contract. It is common cause that the applicant and the second respondent entered into a written agreement in terms of which the second respondent would render services to the applicant. The applicant is the employer in terms of the building contract. The second respondent is the main

contractor. Various disputes had arisen between them, which in terms of the contract were to be referred first to adjudication and, in the event that a party is dissatisfied with the outcome thereof, to arbitration.

[2] The agreement provides that when a dispute is referred to adjudication, the adjudicator's determination would be binding

on the parties who are contractually obliged to give effect to the determination. A dissatisfied party could thereafter refer the dispute to arbitration, but the determination had to be implemented immediately, notwithstanding the referral to arbitration.

[3] The first respondent is the duly appointed adjudicator. The adjudication process is regulated by the JBCC Adjudication Rules: October 2014 ('the adjudication rules'). The second respondent was the claimant in the adjudication proceedings. The process unfolded as follows:

[3.1] The first respondent was appointed as adjudicator and on 11 November 2016 the parties held a first preliminary meeting;

[3.2] On 29 November 2016 the second respondent filed its statement of claim;

[3.3] On 6 January 2017 the applicant filed its statement of defence. That statement of defence contained various counterclaims;

[3.4] On 19 January 2017 the second respondent filed a replication;

[3.5] On 23 January 2017 the applicant filed a rejoinder;

[3.6] On 24 January 2017 the second respondent filed an objection to the rejoinder;

[3.7] On the same day, the applicant responded with a letter of appeal in which it sought the first respondent's consent to consider the rejoinder;

[3.8] On 2 February 2017 the second respondent responded to the rejoinder by filing a rebutter;

[3.9] On 5 February 2017 the first respondent rejected the applicant's rejoinder;

[3.10] No hearing was held by the first respondent;

[3.11] On 14 March 2017 the first respondent published his award;

[3.12] On 19 March 2017 the first respondent, at the behest of the second respondent, corrected certain errors in the award;

[3.13] On 28 March 2017 the applicant filed a notice of dissatisfaction, referring disputes 7, 8, 9, 10, and 13 to arbitration.

- [4] The contract regarding the dispute resolution process identifies the parties thereto as the claimant, the defendant and the arbitrator. The express terms of the contract between them are contained in the dispute resolution clause of the principle building agreement and the adjudication rules.
- [5] On 28 March 2017, after the final adjudication determination was made, the applicant filed a notice of dissatisfaction, referring the matter to arbitration. Although arbitration proceedings are pending to reverse the adjudication award, the reward is enforceable in the interim in terms of the principle building agreement. Despite thereof, the applicant refuses to give effect to the determination. The applicant now seeks an order for the review and setting aside of the adjudicator's award. The second respondent opposes this application and filed a counter-application to make the award an order of court.
- [6] It is not in dispute between the parties that the process of dispute resolution by adjudication is a contractual one. It is not arbitration and therefore the provisions of the Arbitration Act do not apply; neither is it administrative action and therefore

the Promotion of Administrative Justice Act ('PAJA') does also not apply.

- [7] The applicant contends that it is entitled to review the adjudicator's determination.

The Joint Building Contracts Committee Principle Building Agreement

- [8] The first issue to be determined is whether the terms of the contract exclude a review. It is common cause that in terms of the Joint Building Contracts Committee Principal Building Agreement (the 'PBA') the applicant (as employer) appointed the second respondent (as the principal contractor) to construct a conference centre/auditorium at the premises of the applicant ('the works').
- [9] In clause 40.3.3 of the PBA the parties, i.e. the applicant and second respondent, agreed in writing that where disputes that have arisen between them are referred to adjudication '[t]he 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'. In clause 40.3.4 of the PBA it was agreed that '[s]hould either party be dissatisfied with the decision given by the adjudicator . . . the dissatisfied party shall refer the dispute to arbitration'.

- [10] It is common cause that the disputes which arose between the parties concerned the second respondent's related claims for extensions of time and for payment of the related additional amounts.
- [11] The adjudication rules are applicable to the agreed adjudication procedure. These rules provide inter alia that:

[11.1] Clause 5.4.6: '[t]he adjudicator shall. . .[a]dopt the most cost and time effective procedure consistent with fairness to determine the dispute';

[11.2] Clause 5.5.1: '[t]he adjudicator may. . .[c]onduct a hearing but is not obliged to do so';

[11.3] Clause 5.5.2: '[t]he adjudicator may. . .[d]etermine the dispute on the basis of the submitted documents only and/or an inspection of work related to the dispute as may be appropriate'; and

[11.4] Clause 6.1.4: '[t]he adjudicator's written determination of the dispute shall. . .[b]e binding on the parties unless and until such determination of the dispute is overturned or varied in whole or in part by an arbitration

in terms of the Dispute Resolution clause of the agreement' between the parties.

[12] The minutes of a pre-adjudication or preliminary meeting held between the parties and the first respondent recorded that the parties agreed inter alia that there was a possibility of holding a hearing to determine the dispute in the event that the adjudicator considered himself unable to determine the dispute on the parties' written submissions alone. The relevant clause reads:

'Should the adjudicator not be able to determine the dispute after receiving and studying the documents submitted by the parties, he may conduct a hearing in which case the parties will be notified of the date, time and venue of such a hearing in terms of rule 5.5.4'.

[13] In summary, the adjudication rules and the minutes clearly stipulate and record the particular written submissions each party agreed to submit in terms of the adjudication provisions, and the sequence in which these would be submitted.

[14] It is the applicant's contention that it is not obliged to make payment in terms of the determination made by first respondent, as the contract regarding the dispute resolution process has various implied terms, one thereof which originates from the provisions of section 34 of the Constitution, which provides:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.

The applicant contends that the first respondent exceeded his jurisdiction and did not act independently or impartially, in that

the audi alteram partem rule was not complied with when (a) he rejected the applicant's rejoinder on 05 February 2017; and (b) he failed to conduct a hearing.

[15] The second respondent contends that the applicant is in flagrant breach of its undisputed contractual obligation to make payment as set out in the award to the second respondent, and is unjustly seeking to use this application to avoid or delay its performance of that obligation. It is contended that this is an abuse of process of law as it concerns a contractual obligation, and that the applicant is debarred from bringing this application as the applicant already filed a notice of dissatisfaction on 28 March 2017, whereby it elected to proceed with the arbitration process in terms of the contract.

[16] The applicant contends that independence and impartiality are qualities which manifest themselves in the manner in which the

proceedings set up by agreement are conducted, and more particularly, by the *audi alteram partem* rule. The applicant relies on the decision in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & Another* 2009 (4) SA 529 (CC) where it was held that section 34 of the Constitution requires that a hearing (i.e. on arbitration) must be 'fair'. It is contended that section 34 must be interpreted on its own language and with integrity. It is submitted that the Constitutional

Court correctly held that it cannot be concluded, given the general lack of fit between private arbitration and the language of the section, that section 34 of the Constitution has direct application to private arbitration. However, the Constitutional Court laid down certain rules when the question of fairness in the conduct of arbitration is considered. Firstly, it must be recognised that fairness in arbitration proceedings should not be equated with the process established in the Uniform Rules of Court for the conduct of proceedings before our courts. Secondly, there is no reason why an investigative procedure should not be pursued as long as it is pursued fairly. The international

conventions make it clear that the manner of proceeding in arbitration is to be determined by agreement between the parties and

in default of that, by the arbitrator. Thirdly, the process to be followed should be discerned in the first place by the terms of the arbitration agreement itself. Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which an arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of section 33(1) of the Arbitration Act, the goals of private arbitration may well be defeated; see para 236 at 599B. The court concluded that in the case before it, the arbitration having been an informal and investigative one, the grounds relied upon (i.e. that the *audi alteram partem* rule was not complied with) were not sufficiently serious to warrant the award being set aside. However, the court held that throughout

the arbitration process, the arbitrator had given both sides the opportunity to comment upon and challenge his preliminary findings,

and that the parties had indeed taken the opportunity to do so. This confirms that the principle of a fair trial must be applied.

[17] The grounds for review are based on the allegation that the adjudication process was irregular and unfair in that:

[17.1] the first respondent had no jurisdiction to determine disputes 7 and 8;

[17.2] the first respondent refused to consider the written submission made by the applicant as set out in the rejoinder application dated 23 January 2017, and did not conduct a hearing;

[17.3] the first respondent erred in extending the date for practical completion in regard to disputes 7, 8, 9, 10, and 13.

[18] The applicant concedes that the first respondent ruled against the second respondent on the first six disputes and consequently those disputes are irrelevant for present purposes.

[19] The applicant contends that the crucial question is whether these irregularities prevented a fair trial of the issues. The applicant relies on several decisions for this contention:

[19.1] In *Ellis v Morgan*; *Ellis v Dessai* 1909 TS 576 at 581 Mason J said:

‘But an irregularity in proceedings does not mean an incorrect judgement; it refers not to the result but to the methods of the trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined’.

[19.2] The applicant also referred to *Goldfields Investment Ltd v City Council of Johannesburg & Another* 1938 TPD 551 at 560-561, citing *Ellis supra*, where it was held:

‘If it did prevent a fair trial of the issues, then it will amount to a gross irregularity. Many patent irregularities have this effect and if from the Magistrate’s reasons it appears that his mind was not in a state to enable him to try the case fairly, this will amount to a latent gross irregularity. If on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to a gross irregularity . . . Where the point relates only to the merits of the case it would be straining the language to describe it as a gross irregularity or a denial of a fair trial’.

[19.3] Reference was also made to *Lufuno Mphaphuli & Associates supra* at para 153 where Kroon AJ held:

‘Courts should not lightly assume that the right to be heard has no application. As Goldstone J put it in *Traube and Others v Administrator, Transvaal and Others* [1989 (1) SA 397 (W)] (a matter involving an administrative decision):

“As I understand the law, if a person is wrongly denied a hearing in a case where he should have been given one, no matter how strong the case against him, the denial of the hearing is a fatal irregularity. In General Medical Council v Spackman 1943 AC 627 at 664-5 Lord Wright said:

‘If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision’”

[19.4] In *Klaase & Another v Van der Merwe N.O. & Others* 2016 (6) SA 131 (CC) at para 148 Zondo J held:

‘What is the effect in law of the fact that the eviction order against Mr Klaase Jr and Mrs Klaase was granted in the absence of Mrs Klaase even though she had a direct and substantial interest in the outcome of the proceedings? Since the order was made without Mrs Klaase being heard, it was in breach of the audi alteram partem rule – a fundamental principle of our law which both courts and administrative tribunals and functionaries are generally required to observe before they may make a decision adverse to anybody’.

[20] The applicant relies on clauses 3.1; 5.4.2; and 5.4.3 of the adjudication rules where it is specifically recorded:

‘3.1 The adjudicator shall at all times act impartially and independently of the parties and shall inform the parties immediately of anything which could affect his impartiality or independence’; and

‘5.4 The adjudicator shall:

5.4.1 . . .

5.4.2 Act independently with fairness and impartiality to both parties

5.4.3 Ensure that each party is furnished with a copy of any written communication sent to or received from either party’.

[21] The applicant contends that the rules of natural justice are expressly included in the adjudication rules. The question to what extent they may be excluded or limited is contained in rule 5.5.1 where it is provided that ‘[t]he adjudicator may. . . [c]onduct a hearing but is not obliged to do so’. It is contended that the word ‘may’ confers the discretion upon the adjudicator – a discretion which he is duty-bound to exercise arbitrio boni viri (with the judgement of a reasonable man); see *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A); *Blake and Another v Cassim & Another* NNO [2008] ZASCA 67; 2008

(5) SA 393 (SCA); and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) at para 61.

[22] It is contended that the first respondent acted irrationally by refusing to hold a hearing. In his determination the first respondent also failed to articulate his reasons for not holding a hearing. When called upon to do so in this application, he similarly declined the invitation to furnish reasons. It is submitted that the absence of reasons amounts to no reasons at all, and that amounts to irrationality. It is further contended that a careful analysis of the first respondent’s

determination

illustrates the absence of proper reasoning.

The Nature of the Adjudication Process

[23] Before dealing with the applicant's review application, the nature of adjudication proceedings must be determined. In *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd & Another* 2013 (6) SA 345 (SCA) at para 3-5, Nugent JA described the process of adjudication as follows:

'[3] Construction contracts most often require disputes to be resolved by arbitration, but at the same time postpone arbitration until the works have been completed, so as to avoid interruption. Earlier contracts in common use made an exception in certain limited circumstances. That was the case in Britain under the JCT Standard Form of Building Agreement (1980 edition), and in this country under the General Conditions of Contract 1982 for the use in connection with Works of Civil Engineering Construction (Fifth Edition). In both cases an arbitration could not be opened until after completion of the works, except on limited issues that, by their nature, demanded earlier resolution, in particular disputes concerning payment certificates.

[4] It has now become common internationally – in some countries by legislation – for disputes to be resolved provisionally by adjudication. In *Macob Civil Engineering Limited v Morrison Construction Limited* [adjudication was described, in the context of English legislation, as

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

[5] The authors of *Hudson's Building and Construction Contracts* 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 of payment pending definitive determination of litigation".

[24] The adjudication rules describe adjudication as an accelerated form of dispute resolution in which a neutral third party determines the dispute as an expert and not as an arbitrator, and whose determination is binding unless and until varied or overturned by an arbitration award. This definition has been accepted by the Supreme Court of Appeal; see *Radon Projects* supra at para 7. The adjudicator is typically given wide inquisitorial powers to resolve the dispute summarily and expeditiously.

[25] The process of dispute resolution by adjudication is a contractual one. The terms of the contract are contained in the PBA, which contains a dispute resolution clause and the adjudication rules. Adjudication differs from arbitration in that it has been described as a 'quick and dirty process' to ensure cash flow; see *Radon Projects* supra at para 5, where the adjudicator must typically make a decision on the dispute within stringent time limits. The adjudicator may in principle adopt the most cost- and time-effective procedure consistent with fairness to determine the dispute. The adjudicator is therefore subject to less strict standards of due process than an arbitrator. Unlike an arbitrator's award which is usually

final and binding, the adjudicator's 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; see Radon Projects supra Ltd at para 7.

[26] It has been commonly accepted that adjudication is not arbitration and therefore the provisions of the Arbitration Act do not apply. Neither is it administrative action and therefore PAJA does not apply. The principles of adjudication proceedings are fundamentally different to and distinguishable from both arbitration and court proceedings. The nature of adjudication creates a procedure for the speedy resolution of disagreements and the enforceability of the award pending arbitration and/or litigation.

[27] A dissatisfied party must still comply promptly with the adjudicator's determination, notwithstanding the party's

delivery of a notice of dissatisfaction. The notice preserves the party's right to require arbitration, but does not affect the binding nature of the adjudicator's determination; see Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd 2014 (1) SA 244 (GSJ) at para 27; Basil Read (Pty) Ltd v Regent Devco (Pty) Ltd (41108/09) [2010] ZAGPJHC 75 (9 March 2010) at para 41.

[28] In the unreported decision of Esor Africa (Pty) Ltd / Franki Africa (Pty) Ltd JV v Bombela Civils JV (Pty) Ltd (12/7442) [2013] ZAGPJHC 407 (12 February 2013) at para 11 Spilg J held:

'... [t]he DAB decision is not final but the obligation to make payment or otherwise perform under it is. In the most elementary way the DAB process ensures the interim solution of an issue which requires performance and requires that the decision is implemented. The parties' position may be altered by the outcome of the eventual arbitration which is a lengthier process and there may be a refund ordered of monies paid or an interest readjustment if too little was decided by the DAB'.

[29] In Freeman NO and Another v Eskom Holdings Limited (43346/09)

[2010] ZAGPJHC 29 (23 April 2010) at para 16, Kathree-Setiloane AJ (as she then was) held that the defendant's assertion that it need not comply with the adjudicator's determination pending the arbitration was not a bona fide defence that is good in law because the parties had agreed that the adjudicator's decision is final and binding unless and until revised by arbitration; it is therefore of an interim nature.

The Issues to be Decided

[30] The issues to be decided by this court are:

[30.1] whether the institution of arbitration proceedings by the applicant precludes a review application;

[30.2] whether the first respondent is in breach of the principles of natural justice (and particularly the audi alteram partem rule) and whether his findings against the applicant were both irrational and unfair by:

[30.2.1] refusing to take the applicant's letter of appeal and rejoinder into account, resulting in not affording the applicant an opportunity to respond to the further information submitted by the second respondent; and

[30.2.2] his decision not to hold a hearing.

[30.3] whether the applicant is bound by the first respondent's determination and is obliged to give effect thereto without delay unless and until it is overturned or varied on arbitration.

[31] The process of adjudication applicable in construction disputes in South Africa originates to a great extent from the English Law. In England, the Housing Grants Construction and Regeneration Act 1996 were enacted with effect from 1 May 1998. Adjudication principles are included in Part II thereof. In early cases the principles 'driving' Part II were considered by the courts. In *Macob Civil Engineering Ltd v Morrison Construction Ltd* (1999) BLR 93 it was contended that where the validity of a decision was challenged, that decision could not be binding or enforceable until

the validity of the decision had been determined or agreed. Dyson J (as he then was) rejected that argument. He concluded in para 14:

'It will be seen at once that, if this argument is correct, it substantially undermines the effectiveness of the scheme for adjudication. The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction

contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement: see s 108(3) of the Act and paragraph 23(2) of Part I of the Scheme [own emphasis]. The timetable for adjudication is very tight (see section 108 of the Act). Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this. So far as procedure is concerned, the adjudicator is given a fairly free hand. It is true (but hardly surprising) that he is required to act impartially (section 108(2)(e) of the Act and paragraph 12(a) of Part I of the Scheme). He is, however, permitted to take the initiative in ascertaining the facts and the law (section 108(2)(f) of the Act and paragraph 13 of Part I of the Scheme). He may, therefore, conduct an entirely inquisitorial process, or he may, as in the present case, invite representations from the parties. It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved'.

[32] The vast majority of cases which have, since Macob supra, elucidated the purpose of Part II of the Housing Grants Construction and Regeneration Act as well as the adjudication process, confirm that ‘the purpose of adjudication is not to be thwarted by an overly sensitive concern for procedural niceties’; see *Balfour Beatty Construction Ltd v The Mayor & Burgesses of the London Borough of Lambeth*

[2002] EWHC 597 (TCC); (2002) BLR 288 at para 27.

It is held that in order to determine whether a decision has been made outside the adjudicator’s terms of reference ‘the court should give a fair, natural and sensible interpretation to the decision in the light of the disputes that are the subject of the reference. . . the court should bear in mind that the speedy nature of the adjudication process means that mistakes will inevitably occur, and. . . it should guard against characterising a mistaken answer to an issue that lies within the scope of the reference as an excess of jurisdiction’; see *Nikko Hotels (UK) Ltd v MEPC Plc*

[1991] 2 EGLR 103 (21 March 1991).

[33] In *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*

[2005] EWCA Civ 1358; [2006] BLR 15 it was decided that ‘. . . unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair’ the courts are to respect and enforce the adjudicator’s decision. The court also warned that ‘[i]t is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator’s

reasons and identify points upon which to present a challenge under the labels ‘excess of jurisdiction’ or ‘breach of natural justice’. Courts were cautioned to remain aware of the fact that ‘the majority of adjudicators are not chosen for their expertise as lawyers’ and that their skills are likely to lie in another discipline; and that the task of the adjudicator is not to act as arbitrator or a judge, but to find an interim solution which meets the needs of the case.

[34] In *Alstom Signalling Ltd v Jarvis Facilities Ltd* [2004] EWHC 1285 (TCC) para 19–20 it was held that the enforcement policy only applies to decisions which are valid, namely, decisions which the adjudicator was authorised to reach, in circumstances where that decision was not vitiated by some material failure to comply with basic concepts of fairness. The right to enforce is therefore always qualified or contingent on the validity of the decision itself.

Apart from complying with the rules of natural justice the adjudicator must also comply with the time limits set in the agreement and his ability to make corrections to errors in the decision.

[35] It therefore appears that the enforcement of an adjudicator’s decision cannot be prevented whether it was caused by errors of procedure, fact, or law, unless the adjudicator has purported to decide matters which were not referred to him; see in this regard *C & B Scene Concept Design Ltd v Isobars Ltd*

[2002] EWCA Civ 46; [2002] BLR 93 TCC, i.e. where there is an absence of jurisdiction.

The importance of a jurisdictional challenge to an adjudicator's decision (as opposed to complaints about errors of law or fact) can be seen in the four general principles identified by Jackson J at para 80 of his judgment in *Carillion Construction* supra. Four general principles were based on five decisions of the Court of Appeal and two decisions of the TCC. The cases were: *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*

[2000] EWCA Civ 507; [2000] BLR 522; *C&B Scene Concept* supra; *Levolux AT Ltd v Ferson Contractors Ltd* [2003] EWCA Civ 11, 86 Con LR 98; *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd* [2003] EWCA Civ 1750, [[2003] EWCA Civ 1750; 2004] 1 All ER 818; *Discain Project Services Ltd v Opec Prime Development Ltd* [2000] BLR 402 and *Balfour Beatty Construction* supra. They were formulated as follows:

- '1 The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish);
2. The Court of Appeal has repeatedly emphasised that adjudicator's decisions must be enforced, even if they result from errors of procedure, fact or law;
3. Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision;
4. Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the court accepts that such errors constitute excessive

jurisdiction or serious breaches of the rules of natural justice'.

[36] In *Anisminic Ltd v Foreign Compensation Commission* [1968] UKHL 6; [1969] 2 AC 147 (HL) Lord Reid explained that there may be a want of jurisdiction, not at the outset but subsequently, because, for example, the tribunal made a decision that it had no power to make, or it failed in the course of the inquiry to comply with the requirements of natural justice, or it misconstrued the provisions giving it power to act with the result that it failed to deal with the question remitted to it and decided some question that was not remitted to it. Likewise, the tribunal may have refused to take into account something that it was required to take into account, or it may have based its decision on some matter that, under the statutory provisions setting up the tribunal, it had no right to take into account.

[37] It appears from the foregoing that a lack of jurisdiction, as well a failure of natural justice, constitutes grounds for a court to interfere with an adjudicator's decision. The English Law provides that if a party wishes to claim that he has not had a fair hearing for some particular reason, he must be able to demonstrate that he has suffered real prejudice as a result. The test for bias in the English Law is a test of the fair-minded observer, as adopted by the House of Lords in *Lawal v Northern Spirit Ltd* [2003] UKHL 35 where the test for bias was expressed in the following terms: 'whether the fair-minded and informed observer, having

considered the facts, would conclude that there was a real possibility that the tribunal was biased’.

In *Amec Capital Projects Ltd v Whitefriars City Estates Ltd* [2004] EWCA Civ 1418;

[2005] BLR Dyson LJ expressed the view that it will only be in the rarest cases that a court will refuse to enforce an adjudicator’s decision because there was a real risk that the adjudicator was either biased or failed to act impartially.

South African Law

[38] In *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* [1993] ZASCA 158; 1994 (1) SA 162 (A) the Appeal Court held that where the parties refer a matter to arbitration, unless submission provides otherwise, they implicitly,

if not explicitly, abandon the right to litigate in courts of law, and accept that they will be finally bound by the arbitrator’s

decision. .

[49] In *Zhongji Development Construction Engineering Co Ltd v Kamoto Copper Company SARL* 2015 (1) SA 435 (SCA) it was held that South African courts will uphold the sanctity of the arbitration process. Where the parties have expressly agreed to an arbitration process, our courts are generally hesitant to determine issues that fall within the sphere of an arbitrator.

If an agreement provides for arbitration as the method to determine any dispute arising out of the parties’ contractual relationship, the appointed tribunal will have jurisdiction to decide any issue that may be raised before it and the courts will not interfere unless it is clear that certain questions were intended to be excluded from the tribunal’s jurisdiction. The courts have consistently respected the provisions of arbitration agreements and will give effect thereto. The court reaffirmed the judgement of the Constitutional Court judgement delivered by O’Regan ADCJ in *Lufuno Mphaphuli & Associates supra* that our law of arbitration is not only consistent but also in full harmony with prevailing international practice in the field. Since 1976 our country has been a party to the New York convention on the Recognition of Foreign Arbitral Awards 10 June 1958, widely known simply as the New York Convention. The very purpose of the New York Convention provides for the recognition and enforcement of arbitratin awards, and provides only narrow grounds for a court to refuse to give effect to an award. Consequently, if a party refuses to obey an award, the law provides for the enforcement of the award by the ordinary courts.

This principle, although in *Amalgamated Clothing and Lufuno Mphaphuli & Associates supra* confined to an arbitration process, in my view applies equally to the dispute resolution process agreed upon between the parties in this matter.

[40] In an unreported case, *Sasol Chemical Industries Ltd v Odell and Another* (401/2014) [2014] ZAFSHC 11 (20 February 2014) Kruger J concluded that an adjudication decision made by the first respondent (who was also the adjudicator in that matter) cannot be set aside because the first respondent refused to entertain a request by the applicant for an extension of time.

Kruger J held in para 18 that adjudication is not subject to the common law. The second respondent referred the court to where the court points out that adjudication is not arbitration. Freeman and Another supra is also cited in Tubular Holdings supra. Both decisions make it clear that the purpose of adjudication is to arrive at a speedy resolution of a dispute. The proceedings before the adjudicator are not subject to the rules of natural justice, save in the plainest cases, as it is put in the dictum of the United Kingdom Court of Appeal quoted with approval in para 24.4.2 of Freeman and Another supra. The parties are bound by the decision of the adjudicator and the tribunal has the power to reopen the dispute. Mistakes will be made by adjudicators, but that is inherent in the scheme of adjudication. Such mistakes can be rectified in subsequent arbitration or litigation. Regarding the issue that the applicant's request for an extension of time was not considered by the adjudicator, Kruger J concluded in para 21 that the applicant does not have a clear right to demand such indulgence from the adjudicator, and in para 20 referring to a subsequent arbitration process, that the applicant can again exercise its rights.

- [41] I agree with the finding of Kruger J that adjudication is not subject to the common law. It is also clear that it is not subject to PAJA. Its true nature is to be found in the law of contract, whereby parties to a contract agree as an interim solution to resolve interim disputes through a process of adjudication. The rules of natural justice do not find application. The adjudicator acts according to the terms of his reference. The terms of reference as in the present matter is contractual in nature and leaves very little room for having it being set aside on review. When the main contract was concluded the parties foresaw the possibility that an adjudicator may come to an incorrect conclusion and for that very reason agreed that in such an event the parties shall proceed to arbitrate. The contract does not contain any provision that the adjudicator's decision may be taken on review. The absence of such a provision clearly indicates that the parties expressed in the clearest of terms that they will comply with the adjudicator's decision made in terms of his mandate and make immediate payment in terms of the agreement.
- [42] The determination of disputes in terms of a contractual obligation effectively prevents the courts from exercising its normal review jurisdiction. It is important to note that the contractual terms applicable to the present agreement has nothing to do with the provisions of section 34 of the Constitution as no party to a contract can as of right claim to have a dispute adjudicated upon. The provision that payment must be made even before finalisation of arbitration is a further clear indication of the ousting of a court's jurisdiction to review the award, the reason being that the parties knew when they contracted with each other that disputes may arise, but that in such an event, a temporary acceptable solution is provided for in order to ensure the completion of the contract within the agreed specified time table. Once it is accepted, the adjudication is not an administrative action or resulted in an administrative decision in terms of the common law, and has no effect on the stability of an orderly society. There exists no reason for a court to exercise judicial control over interim adjudication decisions, especially where the parties already agreed that if anyone is dissatisfied such a party can institute arbitration proceedings.

[43] In my view an adjudicator's decision, made in terms of his mandate, does not constitute a decision that is reviewable for the following reasons:

[43.1] it does not constitute an official act but only a preliminary or intermediate step agreed by two independent contracting parties;

[43.2] the interim nature of the decision does not amount to "have an adverse and direct effect on any of the contractual parties' rights" as the two contracting parties explicitly declared to be bound and to give effect thereto, until finalisation of the arbitration proceedings; see *Bhugwan v JSE Ltd* 2010 (3) SA 335 (GSJ) para 10.

[43.3] the constitutionality principle of legality has also not been breached if effect is given to an agreement voluntarily entered into by the contracting parties, who explicitly agreed to be bound and to give effect to the adjudicator's determination.

[44] Having regard to the nature of the adjudication process, I accept that it is *sue generis*. I further take notice of the fact that the very nature of the adjudication process carries with it a risk of unfairness, either in the way the adjudication is conducted, or in the result, or both. The need to speedily resolve the dispute and the parties' entitlement to an answer, increases the risk compared to a hearing, arbitration proceedings, and/or court proceedings. I further take into account that the adjudicator is entitled to take the initiative in ascertaining the facts and the law necessary to determine the dispute. Having regard to the fact that adjudicators are experts in their own field and probably not qualified lawyers increases the risk that they may adopt a procedure that is or might be seen to be unfair. I also accept that our courts are of the opinion that as long as the adjudicator acted generally in accordance with the usual rules of natural justice and without bias and within his terms of reference, his decision is likely to be enforced.

[45] For example, when a party raises a challenge to the jurisdiction of a court, the issue must necessarily be resolved before any other issues in the proceedings. The reason is simple. If the court has no jurisdiction it is precluded from dealing with the merits of the matter brought to it. The same principle is applicable to the adjudication process. The adjudicators clause embodies an agreement that is distinct from the terms of the agreement itself. Rule 2.5 of the adjudication rules provides that the adjudicator's appointment shall be limited to the current dispute. Rule 5.1 provides that '[t]he referring party shall submit full details of a dispute . . . together with copies of the relevant documents . . . together with its notice of adjudication'. The obligation to adjudicate arises consequent to a specific agreement to adjudicate. Enforcement of the adjudicator's decision is critical to the success of adjudication as a form of alternative dispute resolution, and therefore our courts have adopted a robust approach in this regard; see *Transnet Soc Ltd v Group Five Construction (Pty) Ltd and Others* (7484/2015)

[2016] ZAKZDHC 3 (9 February 2016). An adjudicator is a third-party intermediary appointed to resolve a dispute between parties. The decision of the adjudicator is binding and final, unless it is later reviewed by either arbitration or court proceedings, whichever the parties selected at the time of formalising the contract. Adjudication is intended to be a condition precedent to either arbitration or litigation. Where the contract explicitly requires this, the parties cannot directly approach a court of law for any relief.

This is a fundamental rule in construction disputes where the parties have expressly subjected their disputes to adjudication and

arbitration. See also in this regard Tubular Holdings *supra*; Esor Africa / Franki Africa *supra*.

[46] The applicant now seeks a review of disputes 7, 8, 9, 10, and 13.

Dispute 7: Jurisdiction/Extension of Time

[47] This dispute concerns the fact that the principal agent, appointed by the applicant, allowed a revision of the date for practical completion of 22 days under circumstances where the delay was caused by a subcontractor who had installed flawed carpets in the auditorium,

which had to be removed and refitted, but failed to approve additional remuneration for the second respondent. It is contended by the applicant that this issue was raised for the first time before the adjudicator. Clause 40.1 of the agreement required, as a jurisdictional prerequisite, that the contractor should have given notice of the dispute to the principal agent. Only if the matter is not resolved within ten days, may the contractor proceed to adjudication. This requirement was not complied with in the following ways:

[47.1] this defence was pertinently raised by the principal agent in her defence to the second respondent's claims; and

[47.2] the first respondent ignored this defence and did not even mention it in his award.

In para 59 of its statement of claim, the claimant (second respondent) stated:

'The Claimant confirms acceptance of the extension period of 22 working days awarded by the Principle Agent extending the completion date to 13 November 2015 and there is therefore no dispute regarding the extension period awarded'.

In para 8 of the statement of claim it is stated:

'The Principle Agent granted an extension to the date of practical completion of 127 working days and the revised date for practical

completion was extended to 11 November 2015 – the date for practical completion was revised as follows:

[a. – h. relates to claims 1 – 09 and is excluded from this quote]

i. Claim 10 relates to carpet tiles = 22 working days'.

The second respondent further states in para 9 of its statement of claim:

“The claimant submitted several further claims for a revision to the date of practical completion to the Principle Agent, which were rejected, reduced or deemed rejected by the Principle Agent”.

In paragraph 10 of the statement of claim the second respondent alleges ‘[t]he parties were unable to resolve such disagreements. . .’ and therefore referred to adjudication.

In paragraph 11g of the statement of claim the second respondent explained that claim 10 refers to dispute 7, i.e. instruction to change the carpet installed.

Dispute 8: Jurisdiction/Extension of Time

[48] The applicant alleges that the second respondent claimed an extension of time and additional remuneration relating to the ‘change of colour’ of special wall coatings applied to the works. The principal agent had rejected the claim for a revision of the date of practical completion, and consequently any claim for further payment.

The applicant contended that the dispute arose and had been resolved prior to the adjudication as follows:

[48.1] The product specified for external wall application is ‘Marmoran’. Upon inspection the principal agent discovered that an inferior product called ‘Comet’ was used.

[48.2] The second respondent implored the applicant to accept the alternative product nevertheless.

[48.3] A meeting took place on 27 November 2015. The issue was resolved between the parties by agreement at that meeting and the agreement was recorded by the principal agent in a letter dated 13 January 2016:

[48.3.1] The rates that were agreed upon were discounted by 20%;

[48.3.2] A red colour sample of both ‘Marmoran’ and ‘Comet’ would be applied to plaster for approval;

[48.3.3] The ‘yellow colour’ was not as per the requirement which should have been gold and not bright yellow;

[48.3.4] The corrections of all defective applications on all new walls where comet was applied to be carried out at no additional cost to EWC;

[48.3.5] All guarantees by ‘Comet’ must be submitted to EWC prior to any payment of the product.

It is alleged that the first respondent referred to the aforesaid letter, the contents of which were common cause but he simply ignored the agreement that was recorded therein, criticising the principal agent as follows:

‘5 A prudent principal agent would have insisted on the colour sample of the wall coating being applied to the area which is to receive the wall coating prior to the work being undertaken, which sample would need to be approved by the defendant and the defendant’s agent, the principal agent / architect. I find it inconceivable that only after the wall coating was in the process of being applied, was a meeting held between the defendant and the claimant on 27 November 2015 (SCA18) to resolve the disagreement regarding the colour and type of wall coating being applied’.

It is contended that the adjudicator had no jurisdiction to override an agreement concluded between the parties, which expressly contained a stipulation that no further payment would be made as a result of the second respondent’s admitted mistake. The fact that the first respondent had recorded the terms of the agreement recorded in the letter and then simply ignored it, without giving reasons, is indicative of the fact that he failed to apply his mind to the defence raised by the applicant, and consequently acted irrationally.

Dispute 9: Extension of Time/Audi Alteram Partem

[49] In this claim it was common cause that the principal agent had, on 10 February 2016, issued a construction instruction to the second respondent to remove various ‘Ecophon’ ceiling panels in order to have holes laser-cut into them in order to allow maintenance to light fittings. The second respondent claimed a revision of the date for practical completion with an adjustment to the contract value for a period of 43 working days. The principal agent rejected the claim on the basis that the reinstallation of the ceiling panels did not affect the critical path and did not cause a time overrun. The principal agent justified the rejection of the claim in that the reinstallation of the panels in no way hindered any other building activity which was going on elsewhere on the site. The second respondent, by that stage, had been far delayed in its own program. Electrical installation was only approximately 85% complete at the time and the electrical sub-contractor was still working in the auditorium at the time. Practical completion was not delayed by this instruction. The second respondent replied thereto by filing a substantial response. It explained in detail the construction methods

allegedly used in order to further substantiate its claim. The first respondent did not afford the applicant an opportunity of commenting on the second respondent’s reply either in writing or at the hearing. The first respondent relied upon the second respondent’s reply and did not consider the applicant’s defence of causation at all. He found in paragraph 23.9 of his award simply the following:

‘23.9 in weighing up the arguments put forward by the claimant and the defendant, I find that the claimant has a legitimate argument

favouring a revision of the date for practical completion [own underlining] by twenty five working days with an adjustment to the contract value for preliminary costs only. My decision for the awarding of this additional time and cost is that the initial installation of the ceiling panels was complete and only at a later stage was it discovered that larger openings were required around the light fittings for maintenance purposes – this matter should have been coordinated

between the principal agent and the electrical consultant before the ceiling panels were ordered and installed’.

It is submitted that by the applicant that the absence of any comment relating to the question whether on the facts any delay to practical completion was caused by the instruction, is evidence of the fact that the first respondent did not consider the applicant’s submissions in this regard. Had the first respondent conducted the hearing the issue would have been properly ventilated thereat.

Dispute 10: Extension of Time/Audi Alteram Partem

[50] In this claim the second respondent claimed an additional 54 days extension of time plus additional remuneration because of the fact that it, allegedly, only received joinery details for the construction of a lectern and VIP table on 31 March 2016. Whilst it was common cause that those details were submitted on that date, it was again pleaded by the applicant that such extension should not be allowed because the item was not on the critical path, therefore caused no delay to practical completion, since practical completion was only achieved on 15 August

2016. In addition, it was stated that the second respondent only initially claimed 36 days and that it never submitted a claim for 54 days to the principal agent. The first respondent again failed to consider at all the question of causation raised by the applicant. Had a hearing been held the applicant’s defences would have been highlighted thereat.

[51] Dispute 13: Extension of Time/Audi Alteram Partem

The second respondent was instructed on 6 June 2016 to appoint Ergo Systems to install certain decorative wall panels. It claimed to be entitled to a revision for the date of practical completion of 41 working days. The claim was rejected by the principal agent. In the statement of defence it is stated:

‘This claim is not a valid claim. The decorative panels are like artwork, which means that the Claimant is trying to claim extension of time for getting someone in to hang a painting in the Foyer. The artwork is in no way required for a fully functional Auditorium and has no bearing on Practical Completion. It is in no way on a critical path and does affect the completion of any of the other trades in order for the Works to reach Practical Completion. It would have been possible for the installers to only hang these panels two years after Practical Completion and no-one would have noticed.’

The second respondent filed a five-page response to the aforesaid plea. The first respondent refused to consider the applicant’s response thereto. No hearing was conducted and the applicant submits that this issue should have been properly ventilated during an oral hearing. It is submitted the applicant that by dispensing with an oral hearing, the first respondent deprived himself of the benefit of a proper debate between the parties on the issues set out above.

Evaluation of Dispute 7

[52] The applicant contends that an extension of 22 days was agreed upon by the parties. The claim for extension of time was therefore already settled and confirmed by the second respondent. The applicant also contends that this issue was first raised before the adjudicator without prior notice given to the Principle Agent as required. As this requirement was not complied with, the adjudicator had no jurisdiction to adjudicate the issue. The adjudicator, in its determination of the disputes, merely confirms that the claimant's (second defendant's) acceptance of the extension of 22 working days as agreed upon and explicitly says "there is no dispute regarding the extension granted". As no decision was given in this aspect it follows automatically that no jurisdiction was exceeded. What is in dispute is that claimant (second respondent) disagreed with the Principle Agent's determination that the claim falls under clause 29.1 of the contract. The second respondent claimed that this claim falls under the ambit of clauses 29.2 and 29.3 and rely on the latter clauses for compensation. Clause 29.1.3 provides for a revision to the date for practical completion to be granted without an adjustment to the contract value where 'making good physical loss and repairing damage to the works [8.0] where the contractor is at risk'. The adjudicator found in favour of the second respondent, holding that it 'had no right of substitution of a material (the carpets – own insertion) specified by name and therefore determine that the claimant (second respondent – own insertion) is entitled to an adjustment of the contract value for preliminary and general costs as per clause 29.2.2 and 29.3'. There is simply no merit in the applicant's contention that the first respondent acted unfairly when its argument that clause 29.1 applies was rejected. The first respondent considered this argument and stated that he does not agree with the applicant's viewpoint and that he is more inclined to favour the second respondent's viewpoint. The applicant is correct that in its plea it was pleaded that the second respondent's claim for further expense and loss is a new claim and has never formed part of any disagreement or dispute and therefore fell outside the scope of the adjudicator's mandate. A perusal of the adjudicator's determination where he stated that he is in favour of claimant's viewpoint and that he is entitled to an adjustment of the contract value for preliminary and general costs as per clause 29.2.2 and 29.3, is a remark and has no binding effect as no amount was awarded by the adjudicator for the extended period. The reference by the adjudicator as to whose viewpoint he supports must be regarded as obiter dictum and has no binding effect. It is quite clear that the issue about the carpets had been made out in statement of claim, and was therefore properly before the first respondent. It was also dealt with in the statement of defence and the replication. The rejoinder merely served to reiterate the applicant's denial and did not add any new information for consideration by the first respondent. The determination makes it further clear that the first respondent considered the issue and that he decided that the dispute was properly before him. As to which party was at risk, the first respondent found that the applicant was at risk because the second respondent had no right of substitution. It therefore appears from the reading of the papers that the applicant's remedy is to pursue the arbitration which has already been set in motion but not actively pursued.

Evaluation of Dispute 8:

- [53] It is contended by the applicant that this dispute has been settled at a meeting between the claimant (second respondent) and the Principle Agent of the applicant on 27 November 2015 to resolve the disagreement regarding the colour and type of wall coating being applied and that the first respondent had no jurisdiction to determine the dispute. This argument cannot succeed. In para 22.4 of the adjudicator's determination the adjudicator referred to a letter dated 13 January 2016, written by the applicant referring to the resolutions taken at the meeting on 27 November 2015 as well as correspondence received dated 10 December 2015.
2015. The letter ends with the defendant's (applicant) request that it awaits acceptance of the above letter to be in order. The second respondent was not satisfied with the rejection of its claim for an extension of 24 working days as claimed with an adjustment to the contract value for preliminary and general costs only, and referred this claim for adjudication. The first respondent rejected applicant's allegation that the matter had been settled and reviewed the deemed rejection of the claimant's (second respondent's) claim and granted the extension sought. In my view the first respondent was fully entitled to reject the applicant's version that all the disputes were settled. He was fully entitled to accept that this claim was rejected by the Principle Agent and could be reviewed. This conclusion is corroborated by the fact that there is no reference in the letter dated 13 January 2016 that a settlement was reached on 27 November 2015 regarding the claim for an extension of time. Notice of this claim was duly given on 22 April 2016 by the second respondent to the applicant. Subsequent to the last mentioned date the applicant failed to prove in writing that this dispute has been settled.

Extension of Time Disputes

- [54] The disputes relating to an extension of time are treated together for purposes of evaluation.
- [55] In the second respondent's notice of dissatisfaction, the second respondent stated that it gave notice in terms of clause 40.1 of a disagreement pertaining to the extension of time claims which it then listed by claim number and description. It is clear, on a proper interpretation of the "machinery" provided for by the JBCC agreement, that claims for adjustment to the Contract Value for additional preliminaries are a corollary to claims for extensions of time and such entitlements are therefore decided together. It was common cause that the second respondent's claims for extensions of time, as submitted to the Principal Agent made provision for the consequential adjustment to the Contract Value for the preliminary costs incurred by the second respondent. As such, the second respondent could reasonably have expected its claims for extension of time to be decided together with any consequent adjustment to the Contract Value in consequence of the second respondent incurring such costs. It is important to note that in paragraphs 9 to 12 of the first respondent's decision, the first respondent concluded that in his opinion the second respondent had sufficient time between the certified date of practical completion and the reference of the dispute within which to submit details of the claim to the applicant's

Principal Agent. In not one instance was the second respondent awarded amounts for expense and loss. The second respondent was only granted certain extensions of time and the concomitant preliminaries it was entitled to in consequence thereof. In the result, the first respondent decided those disagreements are properly before him. No jurisdictional facts precluded him from considering the extension of time claims together with the claims for additional remuneration for preliminaries and he did not exceed his jurisdiction by doing so.

Audi Alteram Partem

[56] The applicant is also seeking a review of the adjudicator's decision on the basis that he has not complied with the audi alteram partem rule. Apart from the award-making decision, the first respondent (the adjudicator) failed to provide any further reasons for the decisions under review. The applicant contends that the failure to explain how and why a decision was reached after a review application was served on the first respondent offends against a general sense of justice and fair play. In assessing the merits of this contention, it is useful to have regard to the fundamental principles pertaining to adjudication. A review can only lie on this ground, if the fundamental principles of justice, considered in the light of both the nature of the

adjudicating body and the agreement between the persons effected, have been violated.

[57] Although this court has not been favoured with the reasons for the adjudication award as requested in the review proceedings, it appears ex facie the record that the applicant is under a misapprehension regarding the facts of the matter. The applicant's case is that the first respondent, in refusing to take the applicant's letter of appeal into account and not affording the applicant an opportunity to respond to the further information submitted by the second respondent, breached the principles of audi alteram partem. In paragraph 13.1 of the Founding Affidavit the applicant alleges 'that the first respondent, in refusing to take the applicant's letter of appeal [own emphasis] into account and not affording the applicant an opportunity to respond to the further information submitted by the second respondent, breached the principles of audi alteram partem'.

[58] The departure point for the applicant's review application is that the agreement made no provision for the delivery by the second respondent of a replication. This allegation is premised on the flawed allegation that the adjudication rules of the Association of Arbitrators of Southern Africa applied to the agreement. The adjudication rules provide specifically in clause 5.3, read with 5.3.1, that a claimant may, within five (5) working days of receipt of the response from the other party (rule 5.2) submit a replication to the adjudicator and the other party. This fact was also recorded at a pre-adjudication meeting. Conversely, the rules did not provide for the delivery of a rejoinder nor for the letter of appeal. The rules also authorised the first respondent to request further information from any one of the parties. Conversely, the rules do not contemplate that the other party would respond to the further information provided pursuant to a request by the first respondent, as such a

process would lead to an on-going exchange of submissions and counter submissions.

Accordingly, there is no merit in the applicant's contentions as set out above. The first respondent's approach was entirely consistent with the rules and the agreed procedure. No leave was sought by the applicant from the first respondent to respond to the further information provided by the second respondent. The first time that this complaint was raised, was when the applicant delivered this application. Accordingly it must be held that the principles of justice were not violated considering the agreement between the parties.

The Failure to Conduct a Hearing

[59] The adjudicator was obliged, in terms of the agreement, to adopt the most cost effective procedure consistent with fairness to determine the dispute and to act as an expert and not as an arbitrator, as expressly set out in the rules.

The applicant's complaint that the first respondent failed to conduct a hearing is also without merit. The first respondent had a discretion in terms of the rules as to whether or not to conduct a hearing. There is nothing indicating that the first respondent acted with male fides or with an ulterior motive when he decided to determine the disputes on the papers as they stand. In his expert opinion he was able to reach a determination within the confines of the agreement and the rules and in accordance with the nature and purpose of adjudication, i.e. to obtain an interim determination from an expert quickly and inexpensively. On 14 February 2017, before the adjudicator decided the issues, he expressed the view that a hearing would not be necessary. No complaint was raised by the applicant. It is only after the adjudicator found against the applicant in regard of some disputes, that a complaint was raised. In my view, the principles of justice have not been violated and the adjudication was

conducted in terms of the agreement between the parties, read with the applicable rules of an adjudication process. It is

unnecessary to deal with the applicant's letter of appeal. As I have said before, it is based on the misconception that the second respondent was not entitled to file a reply. In the absence of any reasons filed by the first respondent, it would amount to pure speculation as to whether he considered the letter of appeal at all. Similarly, no inference can be drawn against the first respondent for failing to give reasons for his decision, having regard to the fact that no provision is made for review procedures in the adjudication agreement. The reasons given for making the award should therefore be regarded as sufficient reasons in terms of the first respondent's mandate.

The Agreement to Arbitrate

[60] The applicant's decision to arbitrate is a question of fact. The applicant is bound by the terms of the contract. The applicant cannot approbate and reprobate or 'blow hot and cold'. Once a litigant elected to treat a decision as one of being capable of being referred to arbitration, he is bound to treat it as a decision which is binding and enforceable until revised by an arbitrator. A party cannot seek to approbate those parts of which they like, and

reprobate those parts of it which they do not. This amounts to an abuse of the powers of the court. Accordingly, the review application should be dismissed on this basis alone. Taking the first respondent's decision on review is exclusive of referring the self-same decision to arbitration. The applicant was put to the election and it decided, on 28 March 2017 (prior to launching the review in April of that year), to refer the first respondent's decision for reconsideration by way of arbitration. It did so without reserving its right to take the first respondent's decision on

review. Having made its choice, it is not now open to the applicant to change its mind and to seek to enforce two mutually exclusive

remedies simultaneously; see Christie *The Law of Contract in South Africa* 7th edition p638 with reference to the decision in *Segal v Mazzur* 1920 CPD 644-5; *Peters v Schoeman* 2001 (1) SA 827 (SCA) 882. Accordingly, the applicant's application should be dismissed with costs.

[61] In the interim, the determination is binding and the applicant is contractually obliged to give effect thereto. The second respondent is accordingly entitled to an order to give effect thereto. The applicant concedes that the second respondent is entitled to an order in terms of the counter-application if the main application is dismissed. The agreement reached between the parties is clear: both parties intended for the determination to be binding unless and until set aside or varied in arbitration. The first respondent's determination is therefore binding on the parties and enforceable in court proceedings as a contractual obligation. There is accordingly no real dispute that the second respondent is entitled to the relief that it seeks, including costs of opposition and costs occasioned by the counter-application.

ACCORDINGLY, I MAKE THE FOLLOWING ORDER:

1. The applicant's application for the review of the first respondent's adjudication award is dismissed with costs, including the costs of two counsels.
2. The first respondent's determination dated 19 March 2017, a copy of which is attached to the founding affidavit in this matter marked 'A', is hereby enforced and is declared binding on the parties who shall give effect to it without delay unless and until it is subsequently revised by an arbitrator;
3. The applicant is directed to pay the second respondent the amount of R3 253 484,41 being the amount determined as payable to the second respondent by the applicant in the first respondent's determination;
4. The applicant is to pay the second respondent interest on the aforesaid amount at the rate specified in the written agreement concluded between the parties, being 160% of the current Repo Rate of 7% (i.e. 160% of 7% = 11.2%), from 19 March 2017 until date of payment.

5. The applicant is to pay the costs of the Second Respondent's counter-application on an attorney and client scale which costs are to include the costs consequent upon the employment of two counsel.

DE VOS J

JUDGE OF THE GAUTENG DIVISION

OF THE HIGH COURT OF SOUTH AFRICA

Date of Hearing: 26 April 2018

Date of Judgement: 29 August 2018

Appearances:

For the Applicant: Advv. P. Ellis SC & P. Ellis

Instructed by: Roelf Nel Incorporated

For the Second Respondent: Advv. K. Trisk SC & C. de Witt

Instructed by: Cameron Staude Attorneys

c/o Klagsbrun Edelstein Bosman De Vries

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