IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~YES~~/NO (2) OF INTEREST OF OTHER JUDGES: ~~YES~~/NO (3) REVISED _____ _____ DATE SIGNATURE

Case no: 45610/2018

In the matter between:

T & L CIVIL ELECTRICAL CONTRACTORS CC **Applicant**

and

BAPHALABORWA 72 CONSTRUCTION & CIVIL ENGINEERING CC **Respondent**

JUDGMENT

FRIEDMAN AJ:

1 In this matter, the applicant seeks the following relief (I quote verbatim from the notice of motion):

> *"1. That the Honourable Court render the Adjudicator's Determination dated the 15th of October 2018 enforceable.*
>
> *2. That the Respondent be compelled to comply with the Adjudicator's Determination dated the 15th of October 2018, to pay the amount of R2,616,285.93, to the Applicant.*
>
> *3. That the Respondent be compelled to effect payment in the amount of R2,616,285.93, to the Applicant within 5 days from the day the Honourable Court make [sic] the Adjudicator's Determination enforceable.*
>
> *4. That the Respondent be ordered to pay the costs of this Application; and*
>
> *5. Further and or alternative relief."*

2 At the outset, I should note that, on both the notice of motion and the founding affidavit, the applicant is described as "T & L Civil Engineering Contractors CC" (my emphasis). However, in the Caselines folder the applicant is described as "T & C Civil Engineering Contractors CC" (my emphasis). It is clear from the papers as a whole that the correct name of the applicant is "T & L Civil Engineering Contractors CC" and that the reference to "T & C" is an error. I shall nevertheless describe the parties as "the applicant" and "the respondent" below.

THE APPLICANT'S CASE

3 The applicant's case is straightforward. It seeks to enforce an adjudicator's determination which was made in a referral of a dispute by the applicant in terms of "Clause 40.0 – Dispute Settlement" of the Master Builders South Africa Domestic Subcontract Agreement, read together with JBCC Series 2000 Principal Building Agreement Edition 5 (Domestic Subcontract Agreement January 2008 Edition).

4 The main findings of the adjudicator were the following:

4.1 The parties concluded several agreements which took the form of:

4.1.1 letters of appointment issued by the respondent and counter-signed by the applicant, which incorporated the terms and conditions of the Master Builders South Africa Domestic Subcontract Agreement ("the MBSA Agreement") for use with JBCC Series 2000 Principal Building Agreement Edition 5 (Domestic Subcontract Agreement January 2008 Edition); and

4.1.2 a signed copy of the MBSA Agreement.

(Like the adjudicator, I shall describe these documents collectively as "the Agreement" below.)

4.2 Clause 40.1 of the Agreement entitled either party to refer a matter to adjudication on notice. The applicant exercised this entitlement in respect of various claims for payment for work performed in terms of the Agreement.

4.3 However, before doing so, the applicant made an application, in terms of clause 40.6 of the Agreement, to the President of the Master Builders Association, North on 3 July 2018 for the appointment of an arbitrator. Unsurprisingly, the parties were informed that an arbitrator would lack jurisdiction at that stage because clause 40.2 of the Agreement provided that adjudication was required as a first step in resolving disputes.

4.4 The adjudicator, Mr Wiehan Palmer, was therefore appointed on 13 August 2018 following a revised request, this time for adjudication, sent by the applicant to the President of the Master Builders Association, North.

4.5 On 14 August 2018, the adjudicator confirmed his appointment in terms of clause 2.3 of the JBCC Adjudication Rules.

4.6 The applicant had made out a case for payment of the sums claimed (the precise quantum of which, I discuss below) in terms of the Agreement. None of the respondent's defences had any merit. The respondent had brought a counterclaim, which also lacked merit.

4.7 The adjudicator therefore determined the dispute (made up of several claims) in favour of the applicant by ordering the respondent to pay to the applicant the sum of R2 250 379.07 exclusive of VAT. This sum was reached by combining the principal amount claimed by the applicant of R1 898 471.90, plus a sum of R670 020.56 exclusive of VAT reflecting default interest as contemplated by the Agreement. The adjudicator also ordered that the applicant and respondent should share the cost of the adjudicator (being R56 700 exclusive of VAT) equally.

5 The applicant says that, in terms of the Agreement, the parties bound themselves to submit to adjudication. It refers, in particular, to the following rules arising from the Agreement:

5.1 First, in terms of clause 40.3 of the Agreement, the "adjudicator's decision shall be binding on the parties who shall give effect to it without delay and unless it is subsequently revised by an arbitrator in terms of [clause] 40.5".

5.2 Secondly, "if no notice of dissatisfaction is given within the period in terms of [clause] 40.4, the adjudicator's decision shall become final and binding on the parties".

5.3 Thirdly, in terms of clause 40.4, should "either party be dissatisfied with the decision given by the adjudicator, or should no decision be given within the period set out in the Rules, then either party may give notice of dissatisfaction to the other party and to the adjudicator within ten (10) working days of the date by which the decision was required to be given".

5.4 Lastly, in terms of clause 40.5, a "dispute which has been a subject of a notice of dissatisfaction shall be finally resolved by a single arbitrator" appointed jointly by the parties. A notice of dissatisfaction is, of course, the notice to which I referred in paragraph above.

6 The applicant says that both the parties received the adjudicator's determination (which is dated 15 October 2018) on 29 October 2018 and that the respondent was given seven working days in which to make payment. The applicant thereafter sent its banking details to the respondent, but the respondent did not pay the applicant the sum envisaged by the adjudicator's award.

7 The applicant therefore says that it seeks specific performance of the Agreement by the enforcement of the adjudicator's award.

THE RESPONDENT'S DEFENCES AND THE APPLICANT'S RESPONSES

8 The respondent filed a short answering affidavit. In the answering affidavit, the respondent denied that the adjudication "is final and consequently enforceable". It said that the "adjudication is only advisory subject to confirmation by arbitration" and denied, without explanation, that "the action is for specific performance". In addition to raising certain issues relevant to the underlying merits of the dispute between the parties (both as to the substance and prescription), the respondent says that "no award was brought to our attention" and that "the adjudicator never set down the matter for hearing and accordingly, we are prejudiced". It says that the "adjudicator breached the audi principle" and that it first learned of the adjudicator's decision when this application was brought.

9 In the answering affidavit, the respondent purports to bring a counter-application, unsupported by a notice of motion, to review and set aside the adjudicator's determination. Several supposed review grounds are mentioned such as that the adjudicator "depicted bias" and "admitted incompetent evidence". The adjudicator is also said to have "[d]escended into the arena by adjudicating interests [sic] with [sic] the affording [sic] the respondent opportunity to heard on the issue of interests [sic]." It is also alleged, without further explanation, that the adjudicator "[f]ailed to take cognizance that the applicants [sic] replying affidavit was not served on the respondent when a reasonable adjudicator would have not proceeded with the adjudication unless satisfied that there was proper service on the respondent".

10 The applicant filed a replying affidavit in which the following was noted:

10.1 Paragraph 6.7 of the Construction Industry Development Board Adjudication Procedure provides that, wherever possible, “the Adjudicator shall reach his decision without the process of a formal hearing”. I pause to emphasise that this is congruent with the overarching aim of adjudications, which is to create a speedy and convenient mechanism to facilitate the resolution of disputes which arise during the course of the working relationship in building contracts such as the Agreement.

10.2 The respondent is not being honest when it says that it only found out about the adjudicator’s determination when this application was launched. Reference is made by the applicant to the email addresses used by the respondent throughout the process (with evidence, in the form of certain emails sent on behalf of the respondent by its lawyers, that the relevant email addressed were in use). Proof is then provided that the respondent was notified that the applicant had filed a replication (which the respondent describes as a “replying affidavit” in its answering affidavit (see paragraph above)). The applicant also refers to an annexure to its founding affidavit in which it is shown that the adjudicator sent his determination to both parties, at the email addresses which, according to the evidence, they both used. Reference is also made to the proof furnished in the founding affidavit that the applicant called for payment, in terms of the determination, from the respondent.

10.3 As to the review, the applicant says that, if the respondent was not satisfied with the adjudicator’s determination, it should have referred the matter to arbitration. It failed to do so, which rendered the decision final.

THE MERITS

11 The respondent's defences are entirely lacking in merit. I say this for the following reasons:

11.1 First, as to the process, I accept the applicant's evidence that the respondent was at all material times aware of the proceedings before the adjudicator and the determination which he made. There is no meaningful dispute that the relevant correspondence (being correspondence exchanged before the adjudicator's determination was made, including the transmission of the applicant's replication; the communication of the adjudicator's determination; and the demand by the applicant for payment) was sent to the correct email addresses and received by the respondent. It is notable that, in the founding affidavit, the applicant explained clearly that all of the relevant documentation was sent by email. The denial of receipt of the determination (and replication) in the answering affidavit is bald and no serious attempt is made to deny that the correct email addresses were used (and no further evidence is given which could explain how, despite the use of the correct email addresses, the respondent did not receive the relevant communications). There is also no basis on which to criticise the process followed by the adjudicator – which was envisaged by the Agreement – even if it were open to the respondent to do so in these proceedings (a doubtful proposition, to which I return below).

11.2 On the substance of the application, the simple position is that the applicant is quite correct in its description of the dispute-resolution process envisaged by the Agreement. The applicant accepts that an adjudication is not necessarily final. But it points out, again correctly, that there is a simple procedure available to a party aggrieved by a decision of the adjudicator: a reference to

arbitration. The clear intention of the Agreement is to provide, through the mechanism of adjudication, for a quick and simple mechanism to resolve disputes. However, in providing this mechanism, the Agreement does not foreclose the more elaborate procedure of arbitration. It simply places an onus on an aggrieved party to take the matter further; and provides that, should neither of the parties elect to refer the matter to arbitration, the adjudication is binding (and final). In this context, the notion that the adjudicator's determination is "advisory", as contended by the respondent, is self-evidently wrong.

11.3 The evidence clearly establishes that the adjudication was drawn to the respondent's attention and that the respondent did not attempt to refer the determination to arbitration within the requisite time period (being 10 days – see paragraph above). In fact, there is no evidence before me that the respondent ever attempted to refer the matter to arbitration, even after the expiry of 10 days. As I explain in more detail below, the respondent attempted to file a supplementary affidavit at some point before this matter was ready for argument – it appears to have been signed on 30 May 2019. If I understand that affidavit correctly, some sort of counter-application (not supported by notice of motion) was envisaged in which the matter would be referred to arbitration. In other words, read generously, an order was sought from this Court referring the matter to arbitration. But no independent attempt – before or since – was made by the respondent to refer the matter to arbitration; at least, as appears from the papers before me.

11.4 The respondent has attempted, in various affidavits, to introduce evidence dealing with the merits of the underlying claim determined by the adjudicator. This is in addition to the allegations, which I have described above, that the adjudicator adopted an unfair procedure. That evidence is irrelevant. So too is the allegation in the answering affidavit that the applicant's claims (or at least some of them) have prescribed – an argument which was advanced before, and rejected by, the adjudicator. It is not for this Court to wade into the merits of the dispute between the parties. The Agreement provides for a dispute-resolution process which must be followed. That process envisages adjudication at first instance, followed by the possibility of arbitration at the instance of a party aggrieved by a decision of an adjudicator. If neither party elects to pursue arbitration within the requisite time period, the adjudicator's determination becomes final (see paragraph above). Since that is what happened in this case, effect must be given to the adjudicator's determination.

11.5 Lastly, it is not clear from the respondent's answering affidavit on what basis it suggests it may review the adjudicator's determination. Certain attacks are made, as shown above, against the adjudicator's conduct and findings. But the respondent's review cause of action is never identified. This is unsurprising because there is simply no basis, on the facts before me, on which the respondent may review the adjudicator's award. The Agreement provides for a remedy to be followed in the case of dissatisfaction with the adjudicator's determination. This cannot be cast aside in favour of judicial review based on some or other indeterminate cause of action. The Supreme Court of Appeal ("the SCA") has held, as I show below, that in rare cases it will be possible for an adjudicator's determination to be reviewed, to prevent injustice, even before

arbitration proceedings have been concluded. I record, for completeness, that the respondent's papers do not come remotely close to making out a case for review.

12 I should note, by way of conclusion on the merits, that I have not referred to case law in my discussion of the merits above. In my view, two decisions of the SCA amply cover all of the legal principles which I have mentioned above:

12.1 In *Framatome v Eskom Holdings Soc Ltd* 2022 (2) SA 395 (SCA), the SCA had to consider a different contract (an engineering contract) to the Agreement. But, as in the present case, it contained (a) a clause providing for the referral of disputes to adjudication (b) a clause entitling a party aggrieved by an adjudication determination to refer the dispute to arbitration and (c) a clause providing that, in the absence of a referral to arbitration, the adjudicator's decision was final and binding. The SCA held that, in a case where a party is dissatisfied by an adjudicator's decision – even where the complaint is framed as jurisdictional because it is alleged that the adjudicator did not decide the dispute actually referred to him – it cannot ask a court to consider the merits of the dispute. Its remedy, rather, is to refer the matter to arbitration (see, in particular, paragraphs 22-23).

12.2 In *Ekurhuleni West College v Segal* 2020 JDR 0556 (SCA), the appellant sought to review a decision of an adjudicator (in terms of the same agreement applicable to the present matter) before the conclusion of the arbitration envisaged by rule 40.5 (see paragraph above). So, unlike the case here, the appellant in *Ekurhuleni West College* in fact referred the matter to arbitration as a result of being dissatisfied with the adjudication decision. The SCA pointed

out that, in rare cases and to avoid grave injustice or irreparable harm, decisions such as the decision of the adjudicator could be taken on review. However, the appellant failed to make out such a case:

> "Central to the answer to this question is the nature and purpose of the adjudication in terms of the building contract and the rules. It 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. See, in respect of similar provisions, *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd and Another* [2013] ZASCA 83; 2013 (6) SA 345 (SCA) paras 7-9.
>
> [22] 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."

13 It follows from what I have said above that the application must succeed.

THE QUANTUM

14 As I noted above (see paragraph above), the applicant claims R2 616 285.93 from the respondent. A precise breakdown of this sum is not given in the founding affidavit. However, attached to the founding affidavit is the applicant's letter of demand in which it sought payment in terms of the adjudicator's determination. In that letter, a breakdown is provided. It is to the following effect:

14.1 The quantum awarded by the adjudicator was R2 250 397.07, exclusive of VAT.

14.2 VAT at 15% is calculated as R337 556.86.

14.3 The adjudicator then ordered the parties to split the costs of the adjudicator and the respondent's share is R28 350.00.

15 The amounts described in paragraphs , and add up to R2 616 303.93, which is slightly more than the R2 616 285.93 claimed in the notice of motion. To make matters worse, on my calculation the correct amount of VAT on the sum of R2 250 397.07 is R337 559.56, and not R337 556.86 as suggested by the applicant. It is entirely possible that I am missing something – numbers are not my strong suit – and this is something which I only frankly picked up when preparing this judgment. Since the applicant appears to have (very slightly) short-changed itself, fairness to the respondent dictates that I should simply stick to the sum in the notice of motion (ie by awarding the lower of (a) the amount to which the applicant is entitled and (b) the amount which it claimed). This has the salutary additional benefit that, if I have somehow made a mistake in my own calculations, the only harm caused will be to my ego.

16 Despite the fact that the respondent has failed to pay the applicant for a period now approaching five years, there is no claim for mora interest in the notice of motion. It is not clear to me why this is so. But, since there is no request for mora interest, it is not necessary for me to consider that issue further.

THE APPLICATION TO FILE A SUPPLEMENTARY AFFIDAVIT

17 Before I conclude, I should note that the respondent brought an interlocutory application seeking leave to file a supplementary affidavit. The supplementary affidavit, which is frankly quite difficult to follow, seeks to raise various matters relevant to the respondent's defences to the applicant's claim. I have made brief reference to it in the discussion above (see paragraph above) to demonstrate that the respondent made a

belated, and ill-conceived, attempt to ask this Court to refer the matter to arbitration. It follows from what I have said above about the proper determination of this matter, that the supplementary affidavit is otherwise entirely irrelevant to the proceedings before me. It impermissibly goes into the underlying merits of the dispute when they are not for this Court to determine (see paragraph above).

18 In seeking the affidavit's admission in the interlocutory application, the respondent sought no order as to costs. *Mr Rakgoale*, who prepared written argument for the applicant but did not appear on its behalf at the hearing, filed supplementary heads of argument in which he addressed the question of the admission of the supplementary affidavit. He made the point – and I paraphrase here – that the merits of the underlying dispute are irrelevant to the order sought by the applicant. On that basis, he argued that there was no need for me to consider whether to admit the supplementary affidavit. Taking into account that neither party sought any costs order arising from the respondent's attempt to introduce that affidavit, I agree. I therefore propose to make no ruling in respect of the interlocutory application.

CONCLUSION AND ORDER

19 The applicant has, for the reasons given above, made out a case for the relief sought in the notice of motion (subject, only, to some tweaking of the language which I intend to do in my order below). I accordingly make the following order:

1. **It is declared that the respondent is bound by the determination of the adjudicator, Mr Wiehan Palmer, dated 15 October 2018, in the dispute between the applicant and the respondent.**

2. **To give effect to paragraph 1 of this order, the respondent is ordered to pay the sum of R2 616 285.93 to the applicant within 10 days of this Court's order.**

3. **The respondent is to pay the costs of this application.**

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ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 30 June 2023.

APPEARANCES:

Attorney for the applicant:	Myburgh Ralenala Attorneys
Counsel for the applicant:	I Rakhadani
Attorney for respondent:	Nkabinde Attorneys
Counsel for the respondent:	J Nkosi

Date of hearing: 14 March 2023

Date of judgment: 30 June 2023