IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 599/2023P

In the matter between:

RODPAUL CONSTRUCTION (PTY) LTD
T/A RODS CONSTRUCTION **APPLICANT**

and

MEC: KWAZULU-NATAL PROVINCIAL
DEPARTMENT OF PUBLIC WORKS **RESPONDENT**

JUDGMENT

Nicholson AJ:

Introduction

[1] The applicant seeks to make an adjudicator's determination dated 30 August 2022 an order of court, together with ancillary relief, directing the respondent to make payment of various amounts in terms of the adjudicator's determination (for convenience, the adjudicator's determination will be referred to as 'the adjudicator's determination' or 'the Award').

[2] It is common cause that:

(a) the parties bound themselves to the terms and conditions in the NEC3 Engineering and Construction Contract, Option E: Costs Reimbursable Contract of April 2013 ('the NEC3');

(b) the parties referred disputes to the adjudicator for determination in terms of the NEC3;

(c) the various monies to be paid in terms of the adjudicator's determination are sought to be made an order of court;

(d) the adjudicator's determination has not been set aside by a tribunal; and

(e) the adjudicator's determination has not been paid.

[3] While the respondent advanced other grounds in its answering affidavit,[1] such as the adjudicator's lack of jurisdiction to entertain the contra charges and penalties; in its oral argument before me, it abandoned these grounds, and in its heads of argument, it abandoned the issue of the contra charges, and instead relies on two arguments for resisting making payment in terms of the Award, which can be summarised as follows:

(a) In considering the wording of clauses W1.3 and W1.4 of the NEC3, the award is only enforceable, final, and binding, as a contractual obligation, if neither party notified the other of a dissatisfaction of an award. Considering that the respondent has notified the applicant of its dissatisfaction of the award, and has referred the award to a tribunal, the award is not enforceable at this point;[2] and

(b) Considering that the award has been referred to the tribunal in an attempt to have it overturned, it fears that the applicant will not be in a position to repay the monies already paid by the respondent, should the tribunal overturn the adjudicator's determination. This is so because the applicant is indebted to the respondent in an amount of R690 346.46 and if the applicant is unable to pay that debt, it would unlikely be able to repay the adjudicator's determination, should the tribunal overturn it.[3]

[4] It is instructive that the relevant portions of the NEC3 read as follows:

'W1.3(10) The adjudicator's decision is binding on the Parties unless and until revised by the tribunal and is enforceable as a matter of contractual obligation between the Parties and not as an arbitral award. The Adjudicator's decision is final and binding if neither Party has notified the other within the times required by this contract that he is dissatisfied with a decision of the Adjudicator and intends to refer the matter to the tribunal.

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[1] Titled 'opposing affidavit', Vol 4, at pages 317-333.
[2] Respondent's heads of argument paras 5–8.
[3] Respondent's heads of argument paras 9–16.

. . .

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

[5] Regarding the second ground, which is argued in the alternative, the respondent asserts that should this court be of the view that when payments are directed in terms of an adjudicator's determination, payment must be made, having regard to the circumstances in this matter, the respondent may nonetheless resist payment pending the outcome of the tribunal's findings.

[6] These circumstances include: the use of public funds, particularly funds from the Department of Health that services the most indigent among us, together with its fear that the applicant may not be able to repay the monies in terms of the determination, if the tribunal overturns the Award. So, argues the respondent, on the grounds of public policy, which I am asked to develop the common law to include 'just and equitable' considerations, the respondent may resist payment.

[7] It is apposite to mention at this point that the adjudicator's determination directs that the various monies be paid by the applicant to the respondent, with the highest amount therein being R7 747 736.57 excluding VAT, which is less than one tenth of the amount owing by the respondent to the applicant. Further, in its replying affidavit, the applicant directs that the amount may be set off against the amounts directed in the determination. It is noted that while this is a new legal issue brought up in reply, the respondent has not rejoined to provide facts why the amount should not be set off. In the circumstances, should I find in favour of applicant, I see no reason why the amount of R690 346.46, should not be set-off against the award.

[8] The respondent does not provide any authority for its first contention, but in support of its argument on the second ground, the respondent relies on *Murray & Roberts v Alstom,*[5] where the court held the following:

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[4] Volume 2, NEC3 at page 104.
[5] *Murray & Roberts Ltd v Alstom S&E Africa (Pty) Ltd* 2020 (1) SA 204 (GJ).

'[39] This distinction does not mean that this court is placed in the position it would be if impossibility of performance was raised to resist an award in an arbitration being made an order of court. There the courts are constrained by the Arbitration Act. I allow that, in circumstances where the parties to a contract have agreed to have their disputes decided by an adjudication that is not an arbitration, the courts are not required to make the decision an order of court, absent some challenge akin to s 33 of the Arbitration Act. The courts have an inherent power to regulate their own process and develop the common law by virtue of s 173 of the Constitution. One incident of that power is the competence to decide whether to make an adjudicator's decision, arising from an agreement, enforceable by order of court. The courts' remedial competence is not constrained by the strictures of the Arbitration Act. It is exercised upon just and equitable considerations which take account of the fact that parties agreed to repose in an adjudicator remedial decision-making power.

[40] The considerations relevant to the exercise of this discretion will be different to the exercise of discretion when the court is deciding de novo whether to refuse the specific performance of a party's obligations.

[41] Where, as in this case, an adjudicator has decided upon the remedy, by reason of a competence the parties to the contract have given him, the following will be relevant. First, did the adjudicator decide the dispute now raised before the court? If not, could the party contending for impossibility have raised the issue before the adjudicator, and if so, did the party do so, and if not, why not? Second, why should the party contending for impossibility escape its obligations to be bound by the outcome of the adjudication, to treat it as final and give effect to it? Third, what are the consequences of permitting a party to escape the enforcement of the decision? In the standard case, a refusal of specific performance simply requires the wronged party to seek damages or some other appropriate remedy. But in the case where the enforcement of the decision of an adjudicator is in issue, it is the adjudicator that has determined the merits of the case and decided upon a remedy. Here the decision of the court is binary: enforce the decision or leave the applicant without the benefit of the decision. The equities of such an outcome require careful consideration. Fourth, what are the systemic risks if agreed procedures for dispute resolution that are intended to be quick and avoid disruption to large construction projects, nevertheless give rise to lengthy litigation before the courts. Fifth, is there a risk that the impossibility relied upon will indeed, if an order is made, require what cannot be done and expose the defaulting party to the risk of contempt proceedings? This is by no means a closed list.

. . .

[69] Turning to other considerations relevant to the discretion I have to exercise, there are systemic matters of some moment. The scheme of adjudication agreed by the parties is intended to yield an expeditious resolution of disputes. This means that a court, while enjoying

a supervisory jurisdiction over the orders it will issue, as I have recognised, will be careful not to subvert the very point of expedited adjudication by the adjudicator. This court should not act as a court of appeal to determine the correctness of the decision. Yet in a number of passages in the answering affidavit, that is precisely what Alstom invites me to do. The deponent says that the adjudicator wrongly found in the decision that Alstom had obligations to perform that it now contests. But that is an invitation to consider the correctness of the decision and not its enforceability, and it is an invitation I decline because it would prise open the merits of the decision which the parties agreed the adjudicator should determine.
[70] Furthermore, I am alive to the danger that enforcement proceedings should not become a means to use the courts to delay the implementation of a decision, given the scheme of adjudication to which the parties agreed. Consequently, my discretion should be exercised so as to avoid depriving a successful party of any benefit of the decision taken in its favour, unless there are compelling reasons to do so.'

[9] In *Alstom*, the court observed that while there may be occasion to decline making an award an order of court, or staying compliance therewith; it nonetheless directed the offending party to give effect to the adjudicator's determination. The dictum in *Alstom* suggests that the court appears to favour the view that, while the high court has inherent jurisdiction to develop the common law to make an adjudicator's determination an order of court on 'just and equitable grounds', the courts are not constrained by the Arbitration Act 42 of 1965 and retain their common law right to exercise a discretion on whether or not to make the adjudicator's decision an order of court.

[10] On the other hand, in opposing the argument of the respondent, the applicant relies on *Ethekwini Municipality v Cooperativa Muratori & Cementisti-CMC Di Ravenna Societa Cooperativa*,[6] where the SCA held that when parties enter into a contract, there is always a possibility that a party may not recover its debt, or part thereof, in terms of a contract. In the circumstances, considering public policy, the fear of non-payment of a debt cannot be used as a ground not to comply with a contract.

[11] The applicant avers that *Alston* was overturned by *Cooperativa Muratori*. I do not agree. While the facts in *Cooperativa Muratori* appear to be consistent with the

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[6] *Ethekwini Municipality v Cooperativa Muratori and Cementisti - CMC Di Ravenna Societa Cooperativa* [2023] ZASCA 95 para 16, read with para 21(e).

facts in the present matter, different questions were asked and consequently answered. I hasten to add, however, that *Cooperativa Muratori* is authority for the proposition that a fear that a party will not be in a position to repay an award if such award is overturned at arbitration, is not a ground to resist paying the award. In this matter, the respondent contends that public policy be developed to make allowance for the proposition. This question was not decided in *Cooperativa Muratori.*

Discussion

Enforceability of adjudication awards pending arbitration

[12] In commenting on adjudications within the NEC3 framework, the court in *Framatome v Eskom Holdings SOC Ltd*[7] stated that:

'It is plain that the purpose of adjudication was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration.'

[13] In dealing with the considerations applicable to adjudication, the court in *Freeman NO and Another v Eskom Holdings Limited*[8] commented as follows:

'The adjudicator's decision, therefore, remains binding and enforceable until revised in the final determination by an arbitrator. Mr Kemack referred me to the United Kingdom case of Bouygues *(UK) Limited v Dahl-Jensen (UK) Limited* [2000] BLR 49 [TCC] at 55, para. 35, which bears out this conclusion. This matter, of the Queen's Bench Division, Technology and Construction Court ("TCC"), concerned a dispute arising from a sub-contract, which provided for dispute resolution by adjudication pursuant to the Rules of the CIC Model Adjudication Procedure (2nd edition) which provided that:

> "1.*The object of adjudication is to reach a fair, rapid and inexpensive decision upon a dispute arising under the contract and this procedure shall be interpreted accordingly.*
>
> ...
>
> *4. The Adjudicator's decision shall be binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.*
>
> *5. The parties shall implement the Adjudicator's decision without delay whether or not the dispute is to be referred to legal proceedings or arbitration.*
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> ..."

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[7] *Framatome v Eskom Holdings SOC Ltd* [2021] ZASCA 132; 2022 (2) SA 395 (SCA) para 23.
[8] *Freeman NO and Another v Eskom Holdings Limited* [2010] ZAGPJHC 137para 17.

Having regard to these Rules, Justice Dyson held as follows:

> *"the purpose of the scheme is to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement, whether those decisions are wrong in point of law and fact. It is inherent in the scheme that injustices will occur, because from time to time, adjudicators will make mistakes. Sometimes these mistakes will be glaringly obvious and disastrous in their consequences for the losing party. The victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation, and possibly even by a subsequent arbitration." (See also: C&B Scene Concept Design v Isobars Limited* [2002] BLR (CA) 93 at 98, para. 23)' (Formatting as in the original judgment, underlining is my emphasis.)

[14] In *Ekurhuleni West College v Segal and another*,[9] the SCA observed that:

'[19] In *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A) at 119H-120B, this court held that by virtue of its inherent power to restrain illegalities in inferior courts, the high court may, in a proper case, grant relief by way of review, interdict or *mandamus* against the decision of a magistrates' court given before conviction. This power, said Ogilvie Thompson JA for the court, must be sparingly exercised. The court said that it was impractical to attempt any precise definition of the ambit of this power, for each case must depend on its own circumstances. The court, however, laid down the general rule that the power should be exercised only "in rare cases where grave injustice might otherwise result or where justice might not by other means be attained".

[20] These principles have been approved and followed on countless occasions. Their purpose is to limit piecemeal litigation in the interests of justice. They are not limited to criminal proceedings. See *Anglo American Corporation of SA Ltd v Sierzputowski* 1973 (3) SA 709 (T) at 714C-H and *Magistrate, Stutterheim v Mashiya* 2004 (5) SA 209 (SCA) paras 13-14. They have been applied to the proceedings of statutory and non-statutory tribunals. See, for instance, *Brock v SA Medical and Dental Council* 1961 (1) SA 319 (C) at 324B-E and *Laggar v Shell Auto Care (Pty) Ltd and Another* 2001 (2) SA 136 para 14. *In my view, the principles laid down in Wahlhaus are equally applicable to the present matter.*

[21] Did the College place its case for the review of the adjudicator's determination within the ambit of these principles? I think not. 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*

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[9] *Ekurhuleni West College v Segal and another* [2020] ZASCA 32.

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.*

[23] It follows that the review application had to fail and the counter-application for enforcement of the determination was correctly allowed. . .' (My emphasis.)

[15] Having regard to the authorities referred to as far as the NEC3 is concerned, the following principles may be extrapolated:

(a) Adjudication and arbitration is part of the same dispute resolution process.

(b) The general rule of discouraging 'piecemeal litigation', save in 'rare cases where grave injustice might otherwise result or where justice might not by other means be attained',[10] is applicable to the dispute resolution process under the NEC3.

(c) The dispute resolution process provides for a speedy mechanism for settling disputes in construction contracts on a provisional and interim basis, and requires the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration.

(d) An adjudication determination is binding and enforceable pending arbitration.

(e) A high court may be approached to declare an adjudication determination an order of court and/or to enforce the award.

(f) In enforcing the determination, a court should not act as a court of appeal to determine the correctness of the determination.

(g) Good prospects of success at arbitration is not a defence against payment of an adjudication determination, as the relief of a dissatisfied party lies in expeditiously prosecuting an arbitration.

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[10] *Wahlhaus and others v Additional Magistrate, Johannesburg and another* 1959 (3) SA 113 (A) at 120A-B.

[16] The NEC3 is a contract widely used within engineering projects. These projects are usually characterised by very tight deadlines and progression payments in order to ensure cashflow to contractors for operating costs, which are regulated by the NEC3. Due to the tight deadlines, it is not feasible to stall the project while attempting to resolve disputes regarding, inter alia, progression payments. Accordingly, dispute resolution mechanisms with rigid timeframes are incorporated in the contract. Adjudication is one such mechanism.

[17] Having regard to the authorities in the preceding paragraphs, it is apparent that it is settled law, notwithstanding the wording of clause W1.3 and W1.4 of the NEC3, and a referral to a tribunal by any party, that an adjudicator's determination must be actioned. Accordingly, the respondent's contention that, on the interpretation of those clauses, the adjudication determination is not enforceable because of the referral to a tribunal, is not sustainable.

Public policy and sanctity of contracts

[18] I now turn to consider the issue of public policy, where on the one hand, the respondent contends that public policy must be developed to incorporate just and equitable considerations, and on the other hand, the applicant contends that public policy favours the implementation of the award. A convenient starting point in considering public policy, is the understanding of the principle of sanctity of contract.[11]

[19] In *Beadica 231 CC and others v Trustees, Oregon Trust and others,*[12] the Constitutional Court observed:

'[83] The first is the principle that '(p)ublic policy demands that contracts freely and consciously entered into must be honoured'. This court has emphasised that the principle of *pacta sunt servanda* gives effect to the "central constitutional values of freedom and dignity". It has further recognised that *in general* public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken. *Pacta sunt servanda* is thus not a relic of our pre-constitutional common law. It continues to play a crucial role in the judicial control of

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[11] This principle is also known as *pacta sunt servanda,* which loosely translates to 'agreements must be kept'.

[12] *Beadica 231 CC and others v Trustees, Oregon Trust and others* [2020] ZACC 13; 2020 (5) SA 247 (CC).

contracts through the instrument of public policy, as it gives expression to central constitutional values.

[84] Moreover, contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.

[85] The fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if courts denude the principle of *pacta sunt servanda*.

[86] However, the pre-constitutional privileging of *pacta sunt servanda* is not appropriate under a constitutional approach to judicial control of enforcement of contracts. Prior to our constitutional era, in *Wells*, the Appellate Division cited an English authority to the effect that —

> "(i)f there is one thing, which more than another, public policy requires, it is that [individuals] of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by courts".

[87] In our new constitutional era, *pacta sunt servanda* is not the only, nor the most important principle informing the judicial control of contracts. The requirements of public policy are informed by a wide range of constitutional values. There is no basis for privileging *pacta sunt servanda* over other constitutional rights and values. Where a number of constitutional rights and values are implicated, a careful balancing exercise is required to determine whether enforcement of the contractual terms would be contrary to public policy in the circumstances.' (Footnotes omitted.)

[20] The principle of sanctity of contract thus incorporates the following principles:

(a) Public policy demands that contracts must be entered into freely and voluntarily, and must be honoured.

(b) Certainty in contractual relations creates a fertile environment for the advancement of constitutional rights because it is important to economic development

that parties trust that the person with whom they are contracting, will voluntarily honour the contract.

(c) Sanctity of contract and freedom to contract go hand in hand because freedom of contract means the parties are free to both enter into a contract, and to decide on the terms of the contract.

(d) In light of the Constitution, sanctity of contract is neither the only, nor the most important principle in the judicial control of contracts, and need not be ranked above other constitutional rights and values.

(e) *Pacta Sunt Servanda* continues to play a role in the judicial control of contracts and is essential for a constitutional democracy.

[21] In *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*,[13] the SCA summarised the authorities relevant to the balancing of sanctity of contract with public policy as follows:

'[21] What must be decided in this case is whether the implementation of clause 20 is manifestly unreasonable or unfair to the extent that it is contrary to public policy. To answer that question the enquiry must be directed at the objective terms of the agreement, in the light of the relative situation of the parties. This, without doubt, calls for a balancing and weighing-up of two considerations, namely the principle of *pacta sunt servanda* and the considerations of public policy, including of course constitutional imperatives.

[22] Before these arguments are considered, it is necessary to place the issue in its proper perspective with regard to the legal principles governing contractual obligations. This court in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) ([1988] ZASCA 94) said at 9B:

> "The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness."

[23] The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract. Taking into considerations the requirements of a valid contract, freedom to contract denotes

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[13] *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* [2017] ZASCA 176; 2018 (2) SA 314 (SCA).

that parties are free to enter into contracts and decide on the terms of the contract. This court in *Wells v South African Alumenite Company* 1927 AD 69 at 73 held as follows:

> "If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice."

[24] Parties enter into contractual agreements in order for a certain result to materialise. The fact that parties enter into an agreement gives effect to their constitutional right of freedom to contract, however, the carrying out of the obligations in terms of that contractual agreement relates to the principle of *pacta sunt servanda*. In *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (2002 (12) BCLR 1229; [2002] 3 All SA 363; [2002] ZASCA 35) Cameron JA held that judges must exercise "perceptive restraint" (para 94) lest contract law becomes unacceptably uncertain. Cameron JA noted that the judicial enforcement of terms, as agreed to, is underpinned by "weighty considerations of commercial reliance and social certainty" (para 90). In the majority judgment in *Barkhuizen,* Ngcobo J endorsed Cameron JA's broader conception of the law of contract as reflected in *Brisley* and affirmed that the Constitution requires parties to honour contractual obligations that were freely and voluntarily undertaken. The court further went on to say:

> "[70] While it is necessary to recognise the doctrine of *pacta sunt servanda*, courts should be able to decline the enforcement of . . . a clause if it would result in unfairness or would be unreasonable. . . ."

[25] In *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) Harms DP interpreted Ngcobo J's reference to public policy importing notions of "fairness, justice and reasonableness" as not extending these notions beyond instances in which public policy considerations found in the Constitution or elsewhere would be implicated:

> "[47] This all means that, as I understand the judgment, if a contract is prima facie contrary to constitutional values questions of enforcement would not arise. However, enforcement of a prima facie innocent contract may implicate an identified constitutional value. If the value is unjustifiably affected, the term will not be enforced. An example would be where a lease provides for the right to sublease with the consent of the landlord. Such a term is prima facie innocent. Should the landlord attempt to use it to prevent the property being sublet in circumstances amounting to discrimination under the equality clause, the term will not be enforced."

Harms DP went on to say:

> "[50] With all due respect, I do not believe that the judgment held or purported to hold that the enforcement of a valid contractual term must be fair and reasonable even if no

public policy consideration found in the Constitution or elsewhere is implicated. Had it been otherwise I do not believe that Ngcobo J would have said this (para 57):

> "Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress."

[26] Davis J made a similar point in *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C) at 85A, when he held that "(m)anifestly, without this principle, the law of contract would be subject to gross uncertainty, judicial whim and an absence of integrity between the contracting parties". And in the same vein Brand JA remarked in *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) ([2009] 1 All SA 525; [2008] ZASCA 134) at 158E – F that "*(a)* legal system in which the outcome of litigation cannot be predicted with some measure of certainty would fail in its purpose".

[27] In *Barkhuizen*, Ngcobo J said:

> "If it is found that the objective terms [of the contract] are not inconsistent with public policy on their face, the further question will then arise which is whether the terms are contrary to public policy in the light of the relative situation of the contracting parties."

He goes on to say that where the enforcement of a time-limitation clause on the basis that non-compliance with it was caused by factors beyond his or her control, it is inconceivable that a court would hold the claimant to such a clause. Ngcobo J considered the principle of *lex non cogit ad impossibilia* to be relevant in this regard.

[28] The following facts are critically relevant in the present case in applying the judgment of the Constitutional Court in *Barkhuizen*: *(a)* the terms of the contract are not, on their face, inconsistent with public policy; *(b)* the relative position of the parties was one of bargaining equality; the parties could have negotiated a clause in terms of which the respondent was given notice to remedy a breach before the contract was cancelled; and *(c)* the performance on time was not impossible because the respondent could have diarised well ahead of time to monitor this important monthly payment and it could have effected other means of payment such as an electronic funds transfer. Against this background, it cannot be against public policy to apply the principle of *pacta sunt servanda* in this case.

[29] . . .

[30] The fact that a term in a contract is unfair or may operate harshly does not by itself lead to the conclusion that it offends the values of the Constitution or is against public policy. In some instances the constitutional values of equality and dignity may prove to be decisive where the issue of the party's relative power is an issue. There is no evidence that the respondent's constitutional rights to dignity and equality were infringed. It was impermissible

for the high court to develop the common law of contract by infusing the spirit of ubuntu and good faith so as to invalidate the term or clause in question.

[31] . . .

[32] The result may well be unpalatable to the respondent. It must therefore bear the consequences of its agent's (bank) failure in paying the October rental on due date. Its defence was clearly to restrict the lawful reach of the contract and to limit what can be regulated by way of a contractual agreement between parties, in circumstances where the terms of the contract were clear and unambiguous. In this case the parties freely and with the requisite animus contrahendi agreed to negotiate in good faith and to conclude further substantive agreements which were renewed over a period of time. It would be untenable to relax the maxim *pacta sunt servanda* in this case because that would be tantamount to the court then making the agreement for the parties.' (Footnotes omitted.)

[22] In considering *Mohamed's Leisure Holdings*, with regard to public policy, the following principles emerge:

(a) The power to declare a contract or term of a contract contrary to public policy must be exercised sparingly to avoid uncertainty in the validity of contracts.

(b) If a term is manifestly unreasonable or unfair, it may be contrary to public policy.

(c) It is not for the court to infuse fairness and good faith into contracts that are clear and unambiguous and entered into freely and voluntarily.

(d) A clause to the detriment of one of the parties or which is unduly harsh or unfair, is not per se contrary to public policy because persons are free to regulate their own affairs.

(e) To determine if a clause or term is manifestly unreasonable or unfair to the extent that it vitiates public policy, an objective assessment or enquiry into the objective term of the agreement must be conducted. This is to be done in light of the relevant situation of the parties, and public policy, which includes constitutional principles, and the principle of sanctity of contract are weighed against each other.

(f) If a term of a contract is found to be consistent with public policy, a further question is whether the term is contrary to public policy in light of the relevant situation of the contracting party, because in some instances, the constitutional values of equality and dignity may prove to be decisive where the issue of the parties' relative power is an issue.

[23] On the facts before me, the NEC3 is not contrary to public policy because it is either common cause or not disputed that: (a) the contract was entered into freely and voluntarily; (b) the contract was entered into at the behest of the respondent who, although was free to negotiate and amend the terms of the contract at the onset, did not do so; and (c) it does not impugn a constitutional principle. Accordingly, public policy demands that the terms of the contract must be honoured.

[24] The next question is whether the principle of public policy should be developed to incorporate just and equitable considerations, which will allow the respondent, who is a government department, to resist paying over public funds as directed in terms of the Award.

[25] As already mentioned, *Alston* is authority for the view that in very limited deserving cases, an adjudication determination may be stayed, pending the outcome of the arbitration. *Cooperativa Muratori* is authority for the proposition that the possible inability to repay all or part of an award if such award is overturned at arbitration, is not a ground to resist paying the award.

[26] In agreeing to the terms in the NEC3, the applicant and the respondent freely and voluntarily agreed to a clause, which provided that in the event of any disputes, they would be resolved by way of an expeditious dispute resolution process, which includes both adjudication and arbitration. After concluding the contract, when the clause operated to its disadvantage, the respondent asserts that on a 'developed' public policy ground, the court should allow the respondent to withhold payment in terms of the Award.

[27] The respondent has not made out a case that there was a change in the manner in which the respondent intended to service the contract prior to contracting up until adjudication. Put differently, prior to contracting, the respondent would have serviced the contract with public funds and that position has not changed. Yet, the respondent did not see it necessary to incorporate a clause in the contract that stated, 'an arbitration determination is stayed pending the outcome of the arbitration', which would have protected public funds and resolved this matter. The respondent now seeks that this be the effect of the dispute clause. In the premise, the facts do not support the

development of public policy to include the grounds argued by respondent, because should I allow the respondent to resist payment on these grounds, it would be tantamount to ordering the amendment of the contract without the applicant's consent.

[28] As has already been determined, a clause to the detriment of one of the parties or which is unduly harsh or unfair, is not per se contrary to public policy because persons are free to regulate their own affairs. Furthermore, since arbitration has not been concluded, granting the relief would offend the general rule of discouraging 'piecemeal litigation'.

Adjudicator's lack of jurisdiction

[29] Regarding the respondent's remaining two grounds for resisting the award, namely, the adjudicator's lack of jurisdiction to determine penalties, and the contra charges, I would need to delve into the merits to consider these. It has already been established that this court is not sitting as an appeal court, which was also observed in *Framatome v Eskom Holdings SOC Ltd*[14] where it was stated:

'What Eskom is asking the court to do is to interrogate the merits, an aspect which falls within the purview of the arbitrator.'

And in *Raubex/Nodoli Construction Joint Venture v MEC: Free State Department of Police, Roads and Transport,*[15] the court observed:

'I was not called upon to review the adjudicator's award and thus refrain from any comments in respect of the wording of the order and the paragraphs relating to interest.'

[30] In the circumstances, it would appear that the merits of the respondent's prospects of success before the tribunal are beyond my purview and therefore, it would be unusual for me to have regard to same.

Conclusion

[31] In the premises, I am not convinced that the respondent has made out a case to resist making payment in terms of the adjudicator's determination.

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[14] *Framatome v Eskom Holdings SOC Ltd* [2021] ZASCA 132; 2022 (2) SA 395 (SCA) para 23.
[15] *Raubex/Nodoli Construction Joint Venture v MEC: Free State Department of Police, Roads and Transport* [2023] ZAFSHC 56 para 11.

[32] Lastly, it is apposite to mention that at various stages of the prosecution of this matter, various monies which were sought to be paid have in fact been paid, and with the respondent consenting to the amount being set off, this necessitated a draft order being presented with a corrected amount being sought. While the draft order was not by consent, the amounts herein were agreed too by the parties.

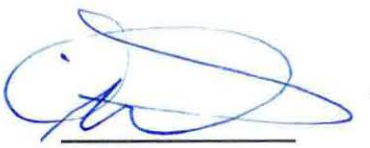
Costs

[33] With regard to costs, costs usually follow the result and no reasons have been advanced why that should not be the case in this matter.

Order

[34] I accordingly make the following order:

1. The adjudicator's determination dated 30 August 2022 is hereby made an order of court.
2. The respondent is directed to certify and pay the applicant the sum of R8 219 550.63 within ten working days.
3. The respondent is directed to pay the applicant the sum of R25 000 within ten working days.
4. The respondent is directed to pay the applicant interest in the sum of R15 980.76 in respect of the interest on payment certificate 12.
5. The respondent is directed to pay the costs of this application.



NICHOLSON AJ

Date heard: 26 July 2023

Judgment handed down: 18 August 2023

Appearances

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