Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

CASE NO: 1953/2020

In the matter between:

SEDTRADE (PTY) LIMITED	**Appellant**
and	
SCARLIWEB (PTY)LTD t/a COOLING SOLUTIONS PROJECTS	**First Respondent**
ROBURN CONSTRUCTION CC	**Second Respondent**
SOL PLAATJIE UNIVERSITY	**Third Respondent**
AECOM SOUTH AFRICA	**Fourth Respondent**
STANDARD BANK OF SOUTTH AFRICA LTD	**Fifth Respondent**

CORAM: LEVER, NXUMALO JJ et CHWARO AJ

JUDGMENT

CHWARO AJ:

Introduction

[1] This is an appeal against the whole judgment and order granted by the court a quo (*per* Mamosebo J) and handed down on 30 July 2021 in terms of which Sedtrade (Pty) Ltd, (“the appellant”) was ordered to pay the amounts due to Scraliweb (Pty) Ltd t/a Cooling Project Solutions , (“the first respondent”) and Roburn Construction CC, (“the second respondent”).

[2] The appellant was unsuccessful with its application for leave to appeal in the court *a quo* and this appeal comes before us after leave was granted by the Supreme Court of Appeal pursuant to an order handed down on 26 January 2022.

Background

[3] During early 2019, the Sol Plaatjie University, the third respondent, engaged the services of the appellant as a contractor to execute a project for the building of a combination cricket oval and two fields for rugby and soccer, provision of ring main carrying electricity, data fibre optic, potable and fire water, waste water, sewerage and the TABS supply to all future buildings on the South Campus of the university.

[4] Subsequent to the said appointment, the appellant in turn engaged the services of the first and second respondents as sub-contractors. The subcontracting relationship between the parties was regulated by the terms of the standard Subcontract Agreement and Provisions of Contract (Fourth Edition, 2011) which incorporated the General Conditions of Subcontracting for civil engineering construction.

[5] The subcontracting work which the first and second respondents were employed to execute was expected to be finalised by 20 August 2021. In consideration for the work that the first and second respondents were to render as subcontractors and upon them having submitted monthly statements of the amounts claimed, the appellant was expected to pay them by the thirty seventh day or within two days of the latter having received payment, whichever was the soonest.

[6] The first respondent submitted two payment certificates dated 30 September 2020 and 5 October 2020 respectively, in which it claimed respective amounts of R267 351-33 and R531 000-31 from the appellant representing claims in respect of the final work done as at the end of the completion date. The appellant deducted the entire aforesaid amounts as claimed by the first respondent as penalty deductions, effectively resulting in the said amounts not being due and payable to the first respondent.

[7] The second respondent submitted a final invoice in the total amount of R6 192 252-91, made up of the claim for work done, outstanding amount for soil provided to the appellant and for material returned to the university after the completion of the project. The appellant failed to effect payment of this amount to the second respondent.

Ex *parte* anti-dissipation order

[8] The appellant's failure to pay the first and second respondents the amounts claimed and its decision to deduct the entire claimed amount by the first respondent as constituting penalty deductions, created a cloud of suspicion that should the university effect payment to the appellant, the latter would, to their respective prejudice, dissipate the amount paid.

[9] This was also informed by what the first respondent alleged to be a direct statement made by the appellant's representative to the effect that future payments due to the first respondent will be voided. This led them to launch an urgent *ex parte* application, in the form of a *rule nisi*, which served before Williams J on 4 November 2020.

[10] The *rule nisi* that was granted, amongst others, effectively:

10.1. Interdicted and restrained the university from making any payment over to the appellant and the latter from receiving any payment from the university in respect of the contract;

10.2. Ordered the university to pay any due amounts in relation to the contract to the trust account of the first and second respondents' attorneys;

10.3. Granted leave to the first and second respondents to approach Court on the same papers, duly amplified, for the payment of the due amounts into the banking accounts of the said respondents upon finalisation of the pending investigation or adjudication of the disputes; and

10.4. Ordered that, in the event where payment was already made, the appellant was interdicted from paying out any such amount from its banking account to any other person or institution pending the finalisation of the dispute between the parties and that the amount of R6 990 604-55 found in the appellant's bank account be frozen.

[11] In the process of implementing the anti-dissipation order, the first and second respondents managed to secure an amount of R2 217 160-67, which was transferred into the trust account of their attorneys pending the settlement and calculation of the amounts due to them.

[12] The appellant felt aggrieved and prejudiced by the anti-dissipation order and anticipated the return date. The anticipation hearing served before Tlaletsi JP on 27 November 2020, who, after hearing submissions from the parties' representatives, granted an order providing for, amongst others, the extension of the *rule nisi* to 22 January 2021 with the parties having to report on the extent of the resolution of the dispute on the return date.

Referral of the dispute to the Adjudicator

[13] In the midst of the litigation relating to *ex parte* anti-dissipation order referred to above and in line with the provisions of clause 15 of the subcontracting agreement, the first and second respondents referred the dispute about the outstanding payments to an adjudicator as provided for in

the terms of the agreement regulating their appointment by the appellant. All the parties fully subjected themselves to and participated in the adjudication process.

[14] On 14 May 2021, the adjudicator handed down his decision in relation to the disputes referred to him by the first and second respondents on whether the decision of the appellant to impose a penalty deduction on the claims submitted by the first and second respondents for the delays of eleven days was in accordance with the terms of the agreement.

[15] In respect of the two disputes relating to the first and second respondents, the adjudicator found that though there was delay of eleven days in the completion of the project, the quantum of the penalty to be levied for such delay was zero in respect of the two claims, effectively meaning that the appellant was not entitled to effect any penalty deductions for the delay from the respective claims of the first and second respondents.

Confirmation of the *rule nisi* in the court *a quo*

[16] The confirmation proceedings served before Mamosebo J on 28 May 2021, after the *rule nisi* was extended by agreement on 22 January 2021, pending the finalisation of the adjudication process. The adjudicator's decision was filed on 19 May 2021, providing a report on the extent of the resolution of the dispute between the parties.

[17] Armed with the adjudicator's decision on the dispute relating to the claims of the first and second respondents, the court *a quo* was thus called upon to decide whether there was a case made for the confirmation of the *rule nisi*, particularly paragraph 2.4 thereof which provided thus:

> "2.4 *That the Applicants be granted leave to approach the above Honourable Court on the same papers, duly amplified, for the payment of the due amounts into the bank accounts of the Applicants upon finalisation of the pending investigation and/or adjudication of the disputes*"

[18] Before the court a quo, it was argued on behalf of the appellant that the rule nisi ought to be discharged since the first and second respondents did not file either an amended notice of motion or a supplementary affidavit to deal with the decision of the adjudicator in support of the relief sought in paragraph 2.4 of the initial notice of motion.

[19] On the other hand, the first and second respondents contended that the issue before the adjudicator was resolved and since the payment certificates and invoices were already submitted and outlining the amounts due, there was no need to file either an amended notice of motion or supplementary affidavit.

[20] The court *a quo* found that the issue for consideration in relation to the payment of amounts due to the first and second respondents was not about the exact quantum of the said amounts but rather whether they were entitled to payment from the appellant or not. The court held as follows at paragraph 19 of its judgment:

> "The *fact that there are certificates to confirm actual work done and calculations to be verified before payment, does not support the application for payment not to be effected. The issue is not 'how much' but whether the applicants are entitled to payment or not. Once the answer is in the affirmative, the question of the exact figures, in my view, is an exercise that can be confirmed and finalised by the parties based on the available records*".

[21] The court *a quo* further held that the adjudicator's decision was binding on the parties unless revised through an arbitration award. In the end, the court found that the appellant was liable to pay the amounts due to the first and second respondents, including costs of the application.

In this Court

[22] Distilled to its essence, the appellant's complaint is that the court *a quo* was wrong in granting an order directing it to pay the amounts due to the first and second respondents under circumstances where the latter did not specifically seek an order for payment of an amount in their notice of motion or through an amendment thereto and where there was no supplementary affidavit filed to specifically deal with the decision of the adjudicator in support of the relief for payment of the amount due.

Evaluation

[23] Our adversarial system of litigation dictates that a party approaching a court of law must set out its case fully in the pleadings to enable the opposing party to appreciate and respond to such a case with precision and clarity and the court adjudicating the dispute to know the issues that ought to be decided upon. This was articulated in **Fischer and Another v Ramahlele and Others**[1] in the following terms:

> "*Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of the dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded." There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for*

[1]2014 (4) SA 614 (SCA) at para 13. This position was also confirmed in Molusi and Others v Voges NO and Others 2016 (3) SA 370 (CC) at para 28.

the parties to identify the dispute and for the court to determine that dispute and that dispute alone"

[24] The first and second respondents (*qua* applicants) approached the court on an *ex parte* and urgent basis seeking a myriad of orders against the appellant in their effort to secure payment of their claims that were submitted to the appellant. One of the prayers sought in the notice of motion and contained in paragraph 2.4 thereof, related to them approaching court after possible amplification of the papers to substantiate their case for payment of due amounts after finalisation of the process of adjudication of the dispute.

[25] The dispute relating to their claims, contained in the certificates submitted to the appellant and attached to the founding affidavit, was about whether the appellant was contractually entitled to deduct certain amounts of money from their respective claims as penalty for the delay of eleven days in completing the project.

[26] There cannot be any suggestion that the appellant was not afforded an opportunity to canvass or dispute any aspect pertaining to its liability towards the first and second respondents emanating from the certificates that were rendered to it and that were the subject matter of the adjudication process. All possible areas of dispute between the parties were ventilated through the adjudication process, which was preceded by the following common cause facts:

26.1. The first and second respondents rendered final payment certificates to the appellant for payment in terms of the subcontracting agreement;

26.2. The appellant raised a dispute about the payments and decided to apply penalty deductions thereon due to delay in completing the project; and

26.3. An attempt to reach an amicable settlement of the dispute in terms of clause 15.1 of the subcontracting agreement failed.

[27] The full decision of the adjudicator, which was considered together with the affidavits filed by the parties, clearly set out the outcome of the dispute between the first and second respondents and the appellant.

[28] Contrary to the contention by the appellant, the initiation of the urgent application was not only about the preservation of money to be paid or already paid out to the appellant but was also about an order pertaining to the determination of the appellant's liability to pay amounts of money due to them after the adjudication of the dispute.

[29] The appellant's misgivings about the correctness of the adjudicator's decision is a matter that should not have detained the court *a quo*. I am of the view that this Court should also not be concerned about such misgivings based on what is commonly known as "*pay now argue later*" principle. In terms of clause 15.2 of the subcontracting agreement, the adjudicator's decision take immediate effect until such time that it is overturned by an arbitration award or litigation, which challenge must be undertaken within a specified period of time.

[30] The above position is in line with how courts have interpreted and applied contractual clauses dealing with adjudication decision in construction contracts. In **Framatome v Eskom Holdings SOC Ltd**[2] the court put the position thus:

> "*If the interpretation contended for by Eskom is correct, it will substantially undermine the effectiveness of the scheme of adjudication. It is plain that the purpose of adjudication was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis and requiring the decisions of*

[2]2022 (2) SA 395 (SCA) at para 23. See also Murray & Roberts Ltd v Alstom S&E Africa (Pty) Ltd 2020 (1) SA 204 (GJ)

adjudicators to be enforced pending the final determination of the dispute by arbitration…"

[31] In its judgment, the court *a quo* gave appropriate regard to the above position of our law by referring to similar cases upholding the principle that the decision of an adjudicator becomes immediately enforceable until disturbed by either an arbitration award or through a court order.

[32] Of importance is the fact that the court *a quo* correctly declined an invitation by the first and second respondents to pronounce on the exact amount which the appellant was supposed to pay towards them. That decision was sound and cannot be faulted as it recognised the fact that the parties can determine the quantum payable to the respondents flowing from the certificates rendered and the outcome of the adjudication process.

[33] In the premises, the appeal falls to be dismissed and the judgment of the court *a quo* must be upheld.

Order

[34] In the premises, the following order is made:

1. The appeal is dismissed.
2. The appellant is ordered to pay the costs of the appeal.

O.K. CHWARO
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY

I agree

L.G LEVER
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY

I agree

A.P.S. NXUMALO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY

DATE OF HEARING: **20 February 2023**
DATE OF JUDGMENT: **10 March 2023**

REPRESENTATION:

For the Appellant: **Adv. S Grobler SC**
Instructed by:
Raees Chothia Attorneys, Johannesburg
(Haarhoffs Inc, Kimberley)

For the First and Second Respondents: **Adv. R Bester**
Instructed by:
Horn & Van Rensburg Attorneys Bloemfontein
(Engelsman Magabane Inc, Kimberley)