IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

NOT REPORTABLE

Case no: 3010/2021

In the matter between:

BATALALA CONSTRUCTION (PTY) LTD **Applicant**
(Registration number :2011/106610/07)

and

ENOCH MGIJIMA LOCAL MUNICIPALITY **First Respondent**
QUEENSTOWN EASTERN CAPE

MONWABISI SOMANA **Second Respondent**

JUDGMENT

Govindjee J

[1] The applicant ('*Batalala*') and the first respondent ('the municipality'), entered into an agreement for the maintenance of surfaced roads situated within the boundaries of the municipality during October 2015.[1] Batalala, dissatisfied with an engineer's reconciliation, initiated an adjudication process in respect of a dispute

[1] The second respondent has been cited in his capacity as the administrator of the municipality.

regarding alleged indebtedness on the part of the municipality. The appointed adjudicator, having dismissed special pleas based on jurisdiction and prescription, ruled in its favour on 11 December 2020 ('the determination'). The present application seeks to give effect to the determination.

[2] The municipality opposes the relief sought. It claims that no payments are outstanding, that Batalala was overpaid and that there were several issues with the quality and quantity of its work so that the determination ought to be set aside and declared void *ab initio*. As an alternative to an order dismissing the application, the municipality's counter-application seeks declaratory relief, alternatively a stay of proceedings or the suspension of any judgment pending the determination of any dispute by way of arbitration.

[3] The main issues to be determined are whether the determination ought to be enforced, set aside and declared void *ab initio* or stayed pending arbitration. This involves consideration of the following sub-issues:

(i) Which edition of the General Conditions of Contract ('GCC') is applicable to the dispute?
(ii) Linked to that issue, whether mediation was mandatory, also in terms of a service level agreement ('SLA'), so that referral to adjudication was unlawful.
(iii) In the event that the GCC July 2010 ('the 2010 GCC) is applicable, whether Batalala performed in terms of the agreement, including the 'Dispute and Arbitration' clause contained in the 2010 GCC, upon which its case is premised.
(iv) Whether any claim against the municipality has prescribed.

Which Edition of the General Conditions of Contract is applicable?

[4] There is a dispute about whether it is the 2010 GCC or an earlier version ('the 2004 GCC') that was applicable. The applicant maintains that the agreement was regulated inter alia by the 2010 GCC. Various documentation appended to the papers support that interpretation. In particular, the 'contract document' itself, issued by the municipality and including the tender invitation, listed various 'contract documents'. Those documents expressly included the 2010 GCC. In addition, subsequent to Batalala's appointment as the preferred service provider, the parties entered into a detailed SLA, seemingly during April 2016. As the preamble to that document explains, 'the parties hereby reduce in writing the terms and conditions upon which their relationship will be governed in terms of this Agreement'.[2] The SLA defines 'GCC' to mean the 2010 second edition. It expressly provides:

'This agreement also encompasses and includes the term and conditions set in the documents listed as follows:

6.1 This Agreement;

6.2 The Contract, BID No. … (Part C1 of the tender document);

6.3 The Letter of Appointment;

6.4 *The General Conditions of Contract for Construction Works (2010, Second Edition)*; and

6.5 Bid Document submitted to the Lukhanji Local Municipality.' (Own emphasis).

[5] This position is maintained when considering the subsequent conduct of the parties or their agents. For example, the unsigned 'Minutes of a Special Site Technical Meeting', dated 20 September 2016, reflects that 'claims and disputes will be dealt with in accordance with the "General Conditions of Contract for Construction Works (GCC, 2nd Edition, 2010)".' It is also apparent that the municipality failed to dispute the applicability of the 2010 GCC, or raise the point that the 2004 GCC found application, during the adjudication proceedings. Had it seriously considered this to be the position then that was the time to take the point. Instead, it proceeded on the basis that the provisions of the 2010 GCC were to be applied.

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[2] Clause 4 of the SLA explains the 'statement of purpose' of the document as follows:

'a) The contents of this document have been formally negotiated between the Municipality and the Service Provide. Both [the] parties must approve this SLA. It details the service and associated service levels to be rendered by the Service Provider.

b) The purpose of this SLA is to establish a relationship between the Municipality and the Service Provider in respect of the maintenance of surfaced roads at Sada.'

[6] The municipality's reliance on the 2004 GCC is based on the 'contract data', which provides that 'the conditions of contract are the General Conditions of Contract for Construction Works (2004) published by the South African Institution of Civil Engineering (SAICE)'. The document containing the 'contract data' was seemingly signed on 11 March 2016.

[7] It is necessary to have recourse to various aids to construction in order to ascertain the intention of the parties. Various decisions have, for example, provided pointers to interpretation of contracts comprising more than one document. Other authorities, also from other jurisdictions, have considered the practice in the construction sector specifically, and are equally useful. When construing an agreement comprising more than one document, one must consider all the terms used by the parties in all the documents to determine the meaning thereof.[3] Significantly, where both parties have understood an ambiguous clause in a particular way the court will give it that meaning.[4] Where a preliminary contract of any description, whether verbal or written, is intended to be superseded by, and is in fact superseded by, one of a superior character, then it is the latter contract that prevails, so that stipulations in the earlier one can no longer be relied upon.[5] According to Ramsden, in the construction sector, contracts are frequently intended to have retrospective effect '… because the parties get on with the building project whilst the formalities are being attended to…'[6]

[8] This is borne out by what appears on the papers. The SLA was seemingly only signed on 8 April 2016 and stamped by the municipality on the same day, even though the SLA reflects that Batalala's appointment was for work commencing on 29 October 2015. It supersedes the documentation relied upon by the municipality in time and, read in its entirety, its nature is more indicative of a comprehensive contractual arrangement. As its preamble indicates, it constitutes the written terms

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[3] *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* 2005 (5) SA 276 (SCA). It follows that terms in a subsidiary document can prescribe how the terms in the main document are to be construed.
[4] *Breed v Van der Berg and Others* 1932 AD 283 at 292.
[5] *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2006] EWHC 2640 (TCC) as cited in PA Ramsden *McKenzie's Law of Building and Engineering Contracts and Arbitration* (7th Ed) (2014) at 28.
[6] Ramsden above n 5, citing *Trollope & Colls Limited v Atomic Power Constructions Limited* [1963] 1 WLR 333 at 339.

and conditions upon which the parties agreed to govern their contractual relationship. That agreement was deliberately defined to mean 'this Agreement of … the Municipality as set out in this document, including all appendices hereto (if any)'. The SLA itself added the submitted bid document, letter of appointment, 'the Contract, Bid No. … (Part C1 of the tender document)' and the 2010 GCC as constituting the 'extent of terms and conditions'. The apparent conflict between the reference to the 2004 GCC, in C1.2 of the contract data, and the stipulated 2010 GCC, must, for all these reasons, be resolved in favour of the latter. Considering the documentation as a whole, the probabilities favour this to be the parties' intention. The language of the documentation comprising the contract, read in context, favours the utilisation of the second edition of the GCC, which was also the more recent version of that text.[7]

The agreed dispute resolution pathway

[9] The subsequent conduct of the parties, described above, accords with this interpretation, and is equally decisive in resolving the issue of which GCC was intended to be applied.[8] That being the position, the next issue is to consider the agreed mechanism for dispute resolution. The apparent conflict is between the SLA's reference to mediation and arbitration, and the relevant 'claims and disputes' provisions detailed in the 2010 GCC, expressly incorporated as part of the 'extent' of the SLA.

[10] Again, the conduct of both parties is indicative of the manner in which they interpreted and construed the agreement. Batalala proceeded in terms of the 'Claims and Disputes' provision contained in the 2010 GCC. It issued a dissatisfaction claim

[7] A letter confirming Batalala's appointment, dated 16 September 2015, makes reference to the following: 'You are further required to note that the general conditions of the contract (GCC) are applicable, binding to the contract of this nature and will be strictly enforced during the implementation.' Absent further specification, the assumption must be that the more recent version of the GCC was referenced, which was confirmed upon signature of the SLA.

[8] *Comwezi Security Services (Pty) Ltd & Another v Cape Empowerment Trust Ltd* [2012] ZASCA 126 para 15: 'Now that regard is had to all relevant context, irrespective of whether there is a perceived ambiguity, there is no reason not to look at the conduct of the parties in implementing the agreement. Where it is clear that they have both taken the same approach to its implementation, and hence the meaning of the provision in dispute, their conduct provides clear evidence of how reasonable business people situated as they were and knowing what they knew, would construe the disputed provision. It is therefore relevant to an objective determination of the meaning of the words they have used and the selection of the appropriate meaning from among those postulated by the parties.'

on 5 June 2017.[9] No response was received. On 12 July 2017 a notice of dispute was served, followed by a notice of adjudication on 2 August 2017. On 2 June 2020, Batalala approached the South African Institution of Civil Engineering, requesting that they appoint an adjudicator to determine the dispute. Prof McCutcheon ('the adjudicator') was appointed as adjudicator on 1 July 2020 and Batalala served its statement of case on 29 July 2020. The municipality requested numerous extensions in order to serve its statement of defence. The adjudicator granted these requests and the municipality served its special plea on 28 September 2020.

[11] In essence, the municipality advanced two points: firstly, that Batalala had failed to deliver its dispute notice timeously, in terms of clause 10.3 of the 2010 GCC, so that the adjudicator lacked the requisite jurisdiction to adjudicate the matter; and secondly, that any claims had prescribed. Batalala responded on 9 October 2020. In response, on 21 October 2020 the municipality persisted with its stance 'that the claimant's claim should be dismissed on any or all of the special pleas'.

[12] It is apparent that the parties proceeded on the basis that the 2010 GCC dispute resolution mechanisms were applicable, to be read with the SLA's inclusion of arbitration in the event of non-resolution of a dispute. This supports Batalala's argument that the party referring a dispute had the discretion to select either dispute resolution by way of adjudication or mediation, given that the SLA did not contain any order of precedence clause. At no stage did the municipality raise the point that the 'disputes and arbitration' clause in the SLA, in so far as it provided for mediation

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[9] The GCC 2010 deals with a 'dissatisfaction claim' as follows:

'10.2.1 In respect of any matter arising out of or in connection with the Contract, which is not required to be dealt with in terms of Clause 10.1, the Contractor or the Employer shall have the right to deliver a written dissatisfaction claim to the Engineer. This written claim shall be supported by particulars and substantiated.

10.2.2 If, in respect of any matter arising out of or in connection with the Contract, which is not required to be dealt with in terms of Clause 10.1, the Contractor or the Employer fails to submit a claim within 28 days after the cause of dissatisfaction, he shall have no further right to raise any dissatisfaction on such matter.

10.2.3 The Engineer shall, within 28 days after the Contractor or Employer has delivered the dissatisfaction claim to him, give effect to Clause 3.1.2 and give his adequately reasoned ruling on the dissatisfaction, in writing to the Contractor and the Employer, referring specifically to this Clause. The amount thereof allowed by the Engineer, if any, shall be included to the credit of the Contractor or the Employer in the next payment certificate.'

In terms of clause 10.3 of the GCC 2010, either party may deliver 'a dispute notice' to the other 'within 28 days of the event giving rise to the dispute has arisen…' If either party has given notice in compliance with clause 10.3.1, 'the dispute shall be referred immediately to adjudication in terms of clause 10.5, unless amicable settlement is contemplated.'

and arbitration, took precedence over the GCC 2010 dispute resolution pathway, or that Batalala was restricted to pursuing mediation and arbitration in terms of the SLA, as opposed to adjudication followed by arbitration. The municipality did not seek clarification from the Engineer once Batalala chose to utilise clause 10 of the GCC 2010, suggesting that it accepted Batalala's entitlement to utilise this particular dispute resolution provision. It also failed to raise the jurisdictional point with the adjudicator.

2010 GCC Adjudication

[13] In cases where the 'contract data' does not provide for dispute resolution by a standing Adjudication Board, the 2010 GCC provides for the dispute to be referred to 'ad-hoc adjudication'.[10] Other than the municipality's averments pertaining to the applicability of the 2004 GCC, and the submission that Batalala failed to deliver a dispute notice timeously in terms of the 2010 GCC, there is no dispute on the papers as to the process for the appointment of an adjudicator or the adjudicator's powers. The municipality participated in the adjudication process, serving a special plea premised on the jurisdiction of the adjudicator and contending Batalala's claims had prescribed.

[14] In terms of the 2010 GCC Adjudication Board Rules ('the Rules'), the adjudicator effectively sat as an 'Adjudication Board'. The Rules provide that the adjudicator may conduct proceedings in any manner considered appropriate, subject to the contract and the Rules, guided by the principles of fairness and impartiality and taking the parties wishes into account. In terms of the Rules, the adjudicator was not required to observe any rule of evidence, procedure or otherwise barring 'the rules of natural justice'. Various powers were afforded to the adjudicator. In particular, the Rules provide that the adjudicator could determine their own

[10] Clause 10.5.2 of the GCC 2010. This is defined as 'a procedure for the particular purpose of reaching a fair, quick and inexpensive settlement of a dispute': clause 2.2 of the 2010 GCC Adjudication Board Rules ('the Rules'). Ad-hoc adjudication relates to 'an Adjudication Board which is appointed to consider a specific dispute which has already arisen': clause 1.2 of the Rules. 'Adjudication Board' means a tribunal which issues a decision on a dispute or disputes which has arisen between the parties to a contract.

jurisdiction to act and proceed with the matter if either party refused or failed to participate in any part of the proceedings.[11]

[15] The municipality's special plea noted a general reservation of rights 'including, but not limited to the right to respond to the averments contained in the Claimant's Statement of Case'. It also noted, from the outset, that Batalala had relied on the 2010 GCC, and proceeded to engage with the aspects it considered fatal to the claim. The adjudicator dismissed the municipality's special plea, challenging the adjudicator's jurisdiction and raising prescription, on 16 November 2020. He also found that Batalala had made considerable efforts to settle the matter amicably.

[16] The importance of the conduct of parties in implementing their own agreements has already been underscored. This constitutes evidence of the reasonable interpretation of the agreement, in respect of dispute resolution, and is a relevant consideration in deciding the point. It adds to the probabilities in favour of the construction offered by Batalala, namely that the parties were free to follow either the provisions of clause 10 (Claims and Disputes) of the 2010 GCC, or the provisions of clause 14 (Disputes and Arbitration) of the SLA. Batalala made its choice and their entitlement to do so remained unchallenged until the municipality opposed the present application. That opposition ignores the fact that the SLA does not contain any indication of precedence or hierarchy in respect of provisions contained in the SLA, rather than the 2010 GCC, which terms and conditions it incorporated expressly. These considerations combine to support the conclusion that Batalala was entitled to proceed in terms of the 2010 GCC, as it did.

[17] That finding impacts on what follows. As indicated, the contractual arrangement was such that the adjudicator enjoyed the power to determine their own jurisdiction.[12] Importantly, the authorities confirm that the adjudicator's determination is not exhaustive of the dispute, because of either party's right to 'disagree with any decision of the Adjudication Board and refer the matter to arbitration or court proceedings, whichever is applicable in terms of the Contract'.[13] Of crucial

[11] Clauses 6.4.11 and 6.4.12 of the Rules. Cf *Qualelect Investment Holdings (Pty) Ltd v Belo Kies Construction (Pty) Ltd* [2022] ZAGPJHC 430 ('*Qualelect*') para 23.
[12] See *Ex Novo Limited v MPS Housing Limited* [2020] EWHC 3804 (TCC) para 20.
[13] See *Framatome v Eskom Holdings SOC Ltd* [2021] ZASCA 132 ('*Framatome*') para 9.

significance is that clause 10.6.1.1 provides that 'the [adjudication] decision shall be binding on both parties unless and until it is revised by an arbitration award or court judgment, whichever is applicable in terms of the Contract.'[14] This is the case irrespective of whether the determination is erroneous in some or other respect. The purpose of such provisions has been described, in a comparable context, as follows:[15]

'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 … Sight should not be lost of the fact that adjudication is merely an intervening, provisional stage in the dispute resolution process. Parties still have a right of recourse to litigation and arbitration. Only a tribunal may revise an adjudicator's decision. As that decision has not been revised, it remains binding and enforceable. Eskom cannot partially comply with the award and decline to give full effect to the payment portion of the award. What Eskom is asking the Court to do is to interrogate the merits, an aspect which falls within the purview of the arbitrator.'

[18] In *Ethekwini Municipality v CMC Di Ravenna SC*,[16] ('*Ethekwini Municipality*') the SCA confirmed the usual position: in the ordinary course an adjudicator's decision pursuant to the 2010 GCC was binding on the parties to the contract from the time it was made. Ordinarily, therefore, an adjudicator's determination that sums of money were due to a contractor would be immediately enforceable. An employer's failure to discharge an obligation emanating from an adjudication determination could be met with an application to court, the court being 'relieved of the usual obligation of establishing the existence of the obligations in question [as] that had already been done through the process of adjudication agreed upon by the parties in the contract.'[17]

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[14] Cf *Framatome* above n 13 para 22. See *Freeman NO and Another v Eskom Holdings Limited* [2010] JOL 25357 (GSJ) para 17.
[15] *Framatome* above n 13 para 23.
[16] *Ethekwini Municipality v CMC Di Ravenna SC* 2023 (6) SA 384 (SCA) ('*Ethekwini Municipality*') para 8.
[17] *Ethekwini Municipality* above n 16 para11.

[19] In the present circumstances, it is apparent that the municipality gave 'notice of dispute in terms of clause 10.6.1.2 of the GCC 2010' on 9 March 2021, through its attorneys, in the following terms:[18]

'We do hereby give notice in terms of Clause 10.6.1.2 of the General Conditions of Contract for Construction Works, 2010 that the our Client (sic), the Enoch Mgijima Local Municipality, is disputing the validity and correctness of the whole of the decision by the Adjudicator, including rulings on special pleas and merits.'

[20] Significantly, that notice did not relieve the municipality of its obligation to make payment to Batalala without delay.[19] Instead, some two years later, the municipality, in replying papers to its counterclaim, contended that 'until such time as the Court has pronounced itself on the applicability of which contract [prevails] the matter cannot be dealt with by way of arbitration'. As indicated above, the municipality failed to raise this issue before the adjudicator and proceeded on the basis that the 2010 GCC applied, also by way of its notice of dispute in terms of clause 10.6 referencing the 2010 GCC. Considering that clause, as well as the 'Disputes and Arbitration' proviso in the SLA, the municipality effectively expressed its intention to exercise its right to disagree with the decision of the adjudicator by referring the matter to arbitration. It clearly considered this to be the appropriate pathway to follow after the adjudicator's decision, in terms of clause 10.6 of the 2010 GCC.[20] Of relevance is that clause 10.6.1.1 confirms that '[t]he decision [of the adjudicator] shall be binding on both parties unless and until it is revised by an

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[18] The clause provides as follows:
'A party shall not dispute the validity or correctness of the whole or a specified part of the decision [of the Adjudication Board] before 28 days or after 56 days from receipt of the decision. Unless either party shall on or after the said 28 days, or on or before the said 56 days from receipt of the decision, give written notice to the other party, referring to this Clause, disputing the validity or correctness of the whole or a specified part of the decision, he shall have no further right to refer such a dispute to arbitration or court proceedings, whichever is applicable in terms of the Contract.' The answering affidavit confirms the municipality's intention to refer its dissatisfaction with the determination to arbitration.

[19] *Ekurhuleni West College v Segal and Another* [2020] ZASCA 32 (*'Segal'*) para 9. The prevalent practice in the construction industry is that dissatisfied parties are required to give prompt effect to the decisions of adjudicators, notwithstanding notices of dissatisfaction, which merely allow a possible revision of these decisions without affecting their interim binding nature: *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd* 2014 (1) SA 244 (GSJ) paras 25, 27.

[20] See *Framatome* above n 13 para 24. For a useful, comprehensive consideration of the proper interpretation of clause 10 of the 2010 GCC, see the judgment of Olivier J in *Entsha Henra CC v The Sol Plaatje Municipality and Another* [2017] ZANCHC 61 and the judgment of Bezuidenhout AJ in *Umgungundlovu District Municipality v MLO, New Boss and Zamisanani JV and Another* [2021] ZAKZPHC 50.

arbitration award or court judgment, whichever is applicable in terms of the Contract'.[21] In contracting as they did, the parties agreed to vest such power in the adjudicator and that his decision would be binding, even if erroneous, until revised by an arbitration award.[22] In terms of clause 10.10.3 of the 2010 GCC, an arbitrator enjoys full power to reconsider any decision by the adjudicator and neither party is limited to the evidence or arguments relied upon before the adjudicator.

[21] The municipality's counter-application seeks to set aside the adjudicator's determination and declare same void *ab initio*, together with alternative relief. To the extent that the affidavit supporting the counter-application invites the court to enter into the substantive merits of the claims in question, this invitation must be refused in the present circumstances.[23] It is trite that judicial review is not concerned with the correctness of the result on the substantive merits of the decision in question, but with the fairness and regularity of the procedure by which the decision was reached. By agreeing to arbitrate unresolved disputes in the SLA, the parties effectively empowered an arbitrator to revise the adjudicator's determination, as a further step in the agreed procedure of the settlement of disputes.[24] The notice of dissatisfaction and pending arbitration, on its own, preclude any judicial review of the adjudicator's determination.[25] It may be added that there is no case on the papers suggesting grave injustice or the like so as to justify intervention by setting aside the adjudicator's determination absent an arbitration award.[26] The municipality invoked its remedy to refer the matter to arbitration and could have pursued it expeditiously, so that there cannot be grave injustice or irreparable harm in holding it to the contract.[27] As stated in *Hudson's Building and Engineering Contracts:*

'It should only be in rare cases that the courts will interfere with the decision of an Adjudicator, and the courts should give no encouragement to an approach which might aptly

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[21] 'Contract' is defined to mean 'the documentation of the agreement between the parties in terms of the Form of Offer and Acceptance, and such written amendments or additions to the Contract as may be agreed to between the parties'.
[22] See *Thomas-Frederic's (Construction) Limited v Keith Wilson* [2003] EWCA Civ 1494 para 33; *Ex Novo Limited v MPS Housing Limited* [2020] EWHC 3804 (TCC) para 20.
[23] *Segal* above n 19 para 16.
[24] See *Entsha Henra CC v The Sol Plaatje Municipality and Another* above n 20 para 66; *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Hattingh NO* 2022 (4) SA 420 (SCA) para 36.
[25] *Segal* above n 19 paras 11, 17, 18; *Framatome* above n 13 para 22.
[26] *Segal* above n 19 para 19 and following.
[27] *Segal* above n 19 para 22.

be described as “simply scrabbling around to find some argument, however tenuous, to resist payment”.’[28]

Prescription

[22] The municipality pleads that Batalala’s work was completed on 19 March 2017 and that any claims would have fallen due on that day, alternatively on a date no more than 30 days after completion. As summons or legal proceedings were not issued, any claims have prescribed in terms of s 11 of the Prescription Act, 1969.[29] The municipality adds that the adjudicator erred in deciding that issue in the manner he did, and that ‘an engineer was not the correct person or expert to decide on this legal issue’.

[23] It follows from the preceding analysis that the adjudicator’s determination is dispositive of the point, the adjudicator having been vested with the power to determine their own jurisdiction and the contractual arrangement providing that the adjudication outcome would remain binding unless revised by an arbitration award. Absent any arbitration award to the contrary, Batalala seeks to enforce the adjudication determination issued on 11 December 2020. That being its cause of action, there is no basis for holding that the present application had prescribed considering that it was issued on 23 September 2021.

[24] In any event, there is authority that prescription could only begin to run once an adjudication determination had been received. This is because of the contractual prerequisite for a claimant to follow the agreed dispute resolution procedure as a necessary component of establishing the cause of action.[30] For these reasons, the municipality’s prescription contention must be rejected.

Should the enforcement of the adjudication determination be stayed?

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[28] R Clay and N Dennys *Hudson’s Building and Engineering Contracts* 14 ed (2021) at 11-010.
[29] Act 68 of 1969.
[30] *Group Five Construction (Pty) Limited v Minister of Water Affairs and Forestry* [2011] JOL 26892 (SCA); *Group Five Construction (Pty) Limited v Minister of Water Affairs and Forestry* [2010] JOL 25414 (GNP) par 25.

[25] The municipality seeks to hold any order in favour of Batalala in abeyance pending arbitration. This on the basis that it will suffer undue hardship, also considering Batalala's delay in proceeding with the matter, the amount being claimed, its service delivery obligations and concern that public money to be paid may not be recovered.

[26] Such arguments have previously been given short shrift in the context of implementation of adjudication determinations.[31] The primary reason for this is the contractual arrangement entered into between the parties and the principle of pacta sunt servanda.[32] It bears emphasis that the purpose of the agreed adjudication process was to achieve expeditious resolution of the disputes. The arbitration proceedings are 'independent, separate and distinct' and Batalala would be unjustifiably frustrated and prejudiced if it was unable to enforce the determination in its favour on the scanty basis advanced by the municipality.[33] Despite the invocation of the argument based on public funds, it is certainly not against public policy to refuse to stay the enforcement of the determination.[34] Part of the reason for this is again rooted in the agreed contractual arrangement. It is for the party resisting enforcement of such a contractual obligation on public policy grounds to place the relevant facts before court, for the court to decide the point. Had the facts presented reflected that it would be contrary to public policy to grant the application, the outcome would reflect this as a matter of course, and absent any exercise of a discretion.[35] The present circumstances, as with cases such as *Enza Construction (Pty Ltd v Paarl Tissue (Pty) Ltd* and *Ethekwini Municipality*, do not justify this.[36]

[27] *Ethekwini Municipality* also involved an application to make the decisions of an adjudicator orders of court. On appeal, the Ethekwini Municipality ('the employer') accepted the adjudicator's decisions as legitimate, but relied on the possibility that they may be revised in due course, placing emphasis on the prevalent circumstances.[37] Of relevance is the employer's argument that the High Court

[31] See, for example *Qualelect* above n 11 para 41 and following.
[32] *Enza Construction (Pty) Ltd v Paarl Tissue (Pty) Ltd* [2019] JOL 42810 (KZP) paras 28, 29.
[33] *Qualelect* above n 11 para 43, 44.
[34] *Ethekwini Municipality* above n 16 para 19.
[35] *Ethekwini Municipality* above n 16 para 15.
[36] See *Ethekwini Municipality* above n 16 para 21.
[37] *Ethekwini Municipality* above n 16 paras 6, 8. In that instance, absent an arbitration clause, the disputed adjudicator's decisions had been challenged via pending proceedings in the High Court.

enjoyed a discretion whether to grant a money judgment, either because what was sought was an order for specific performance, or because enforcement of the adjudicator's decisions would, on the facts, be contrary to public policy. The employer also claimed that a proper exercise of discretion would have resulted in the dismissal of the application to enforce the adjudicator's decisions.

[28] The SCA noted that it was inappropriate to rely on Uniform Rule 45A as authority for the exercise of a discretion to stay the enforcement of the adjudicator's determination, 'as no question of execution arises until after an order for payment of money has been granted'.[38] It also grappled with the argument that specific performance should be refused in the exercise of a judicial discretion because to grant it would cause 'unreasonable and undue hardship' upon the employer. This even though there was 'no alternative or substitute relief which could be granted in such a case, without the court in effect rewriting the contract to create one'. Olsen AJA, on behalf of a unanimous bench, held that there was no good authority for the proposition that a court enjoyed a discretion to refuse judgment for payment of a contractual debt on the basis that such a claim was to be equated to a claim to enforce a contractual obligation to perform an act.[39] The discretion arose when a claim *ad factum praestandum* was made and an alternative of awarding damages was available, and the difficulties associated with respect to an order for performance of an act, which had generated the need for a discretion, did not arise in the case of money judgments.[40] The result was that an order for payment of a contractual debt was not a discretionary remedy:[41]

'Allowing courts a general discretion to refuse judgments for contractual money debts, perhaps "in the interests of justice" or to "avoid undue hardship", gets perilously close to rendering the simplest instances of judicial enforcement dependent on the "idiosyncratic inferences of a few judicial minds". The power of a court to refuse judgment for a money claim arising from contract, when to grant it would be contrary to public policy, is a sufficient brake on excesses.'

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[38] *Ethekwini Municipality* above n 16 para 10.
[39] *Ethekwini Municipality* above n 16 para 35.
[40] *Ethekwini Municipality* above n 16 para 36 and following.
[41] *Ethekwini Municipality* above n 16 paras 37, 39.

[29] This authority appears to be dispositive of the point in question. In any event, to the extent that this court nonetheless has the power to stay these proceedings or the enforcement of the determination at this point in the proceedings, there is, as indicated, no apparent basis to exercise a discretion to do so. The municipality has failed to press its notice of dissatisfaction to arbitration for a period of almost three years, ostensibly on the basis of uncertainty of which edition of the GCC was applicable. During this time Batalala has not enjoyed the benefit of the determination in its favour and there is no indication that real and substantial injustice will occur in the event that the relief sought by Batalala is granted, which is the order to be made.[42]

Costs

[30] Batalala seeks costs on a punitive scale. The main basis for this is that the municipality has purposefully, and unconscionably, delayed and frustrated proceedings by raising unmeritorious submissions and failing to advance the arbitration proceedings.

[31] It is trite that attorney and client costs are not readily granted. Special considerations, arising either from the circumstances giving rise to the proceedings or the conduct of the losing party, are required in order to justify such an award. Courts have, for example, previously refused attorney and client costs where conduct was misguided, rather than malicious.

[32] In the present circumstances, I am constrained to agree with Batalala's submissions. The municipality, in concluding the agreement, agreed to comply with decisions of an adjudicator. Its subsequent conduct as an organ of state amounted to an unwarranted refusal to either give effect to the determination or proceed with arbitration, in circumstances where the suggestion that the 2004 GCC was applicable could be nothing more than a whimsical afterthought. Deliberately dilatory conduct of this nature on the part of an organ of state warrants the punitive costs order sought.

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[42] See, in the context of Uniform Rule 45A, *Contract Core Construction CC v JLK Construction (Pty) Ltd* [2020] ZAWCHC 167 para 30 and following.

Order

[33] The following order is issued:

1. The first respondent is ordered to give effect to the Adjudicator's Determination dated 11 December 2020 ('the Determination').

2. The first respondent is ordered to:

    2.1 effect payment to the applicant in the amount of R3 025 072,69 (three million twenty-five thousand and seventy-two rand and sixty-nine cents) exclusive of VAT;

    2.2 effect payment to the applicant of simple interest in the amount of R827 617,37 (eight hundred and twenty-seven thousand, six hundred and seventeen rand, and thirty-seven cents);

    2.3 effect payment to the applicant in the amount of R837 150,02 (eight hundred and thirty-seven thousand, one hundred and fifty rand and two cents) exclusive of VAT;

    2.4 effect payment to the applicant of simple interest in the amount of R229 034,94 (two hundred and twenty-nine thousand and thirty-four rand and ninety-four cents);

    2.5 effect payment to the applicant in the amount of R75 329,20 (seventy-five thousand, three hundred and twenty-nine rand, and twenty cents) exclusive of VAT;

2.6 effect payment to the applicant of simple interest in the amount of R20 609,01 (twenty thousand, six hundred and nine rand and one cent);

2.7 effect payment to the applicant of the adjudicator's costs in the amount of R76 800,00 (seventy-six thousand eight hundred rand).

3. The first respondent is to pay the costs of suit on the attorney and client scale.

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A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 09 November 2023

Delivered: 25 January 2024

Appearances:

Counsel for the Applicant:	Adv T S Miller St George's Chambers, Makhanda
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Counsel for the Respondent:	Adv L A Roux Chambers, Bloemfontein
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