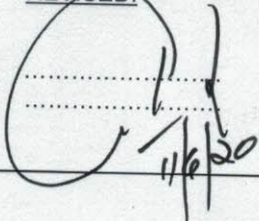




**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED:



CASE NO:7460/2019

REKHUDITSE CLEANING AND CONSTRUCTION
SERVICES CC

APPLICANT

And

ELIAS MOTSOLEDI LOCAL MUNICIPALITY
VAN DER HOVEN, EMILE N. O

FIRST RESPONDENT

SECOND RESPONDENT

JUDGMENT

MULLER J:

- [1] This application has its origin in an award made by the second respondent, who was appointed as adjudicator in a dispute between the applicant and the first

respondent in terms of the Construction Industry Development Board (CIDB adjudication Procedure Document (First Edition, March 2004)).¹

- [2] The application would have been less complicated if that was the only dispute that originated from the second respondent's appointment as adjudicator. The second respondent, who is a practicing advocate instituted action against the first respondent in the Groblersdal magistrate court for the recovery of outstanding portion of his fees for the work he has done as the appointed adjudicator. The first respondent instituted a counter-claim to recover the money on the basis of unjust enrichment. The magistrate found in favour of the second respondent. When the matter came on appeal to this court (Mudau J, with Makgoba JP concurring)². The appeal succeeded. The following order was made on 22 May 2020:

"27.1 The appeal is upheld

27.2 The order made by the court of first instance is set aside and substituted with an order in the following terms:

(a) The plaintiff's claim is dismissed with costs.

(b) The defendant's counterclaim is granted.

(c) Judgment is granted against the plaintiff for the payment of R31 181.90 (THIRTY ONE THOUSAND ONE HUNDRED AND NINETY CENTS) with interest from the date of the judgment (24 May 2019) to date of final payment at the applicable rate.³

(d) Costs of suit

[28] No order is made in respect of the costs of the appeal."

¹ Hereinafter "the CIDB Procedure document."

² Hereinafter "the High Court."

³ The amount in words in the order is patently wrong. Nothing turns on that error in this application.

- [3] I will revert to the contents of the appeal judgment. The reason why reference is made to the said judgment will become clear in due course.
- [4] I turn now to the application and the facts upon which the application is founded and, of course, also the facts relied upon by the first respondent. The applicant seeks final relief. When an applicant seeks final relief in motion proceedings disputes of fact must be determined on the facts as stated by the respondent together with the admitted or undenied facts in the founding affidavit of the applicant which provides the factual basis for determination unless denials or disputes raised in the version of the respondent are not real or genuine or the denials are bald or unworthy of credit or the respondent's version raises such obvious fictitious disputes of fact or so untenable or implausible or far-fetched that a court is justified in rejecting that version.⁴
- [5] The applicant seeks, firstly, a declaratory order that clause 7.4 of the CIDB Procedure document and the contract concluded between the parties as well as the second respondent's adjudication award dated 26 April 2017 is binding and enforceable. Secondly, payment of the amount of R507 804.56 (inclusive of VAT) and the amount of R203 429.27 (inclusive of VAT) as determined by the second respondent in the award, is sought.
- [6] It is common cause or, at least, not disputed that the second respondent was appointed in terms of the appointment procedure prescribed by the CIDB procedure document. It is further common cause that the second respondent in fact adjudicated disputes referred to him by the parties, in terms of the CIDB

⁴ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634H-635C; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) par 26.

Procedure document.⁵ The second respondent made two interim awards both of which were set aside in the South Gauteng High Court. A final award was published on 26 April 2017, but was only delivered to the parties on 26 May 2017, due to the costs of the second respondent not having been paid on 26 April 2017.⁶ It bears mentioning that the final award had neither been attacked nor set aside by a competent court.

- [7] The respondent averred *in limine* that the mandate of the second respondent was terminated on 3 April 2017 by the first respondent in terms of a letter addressed to the second respondent, with a copy to the attorneys acting on behalf of the applicant who tacitly consented, with the result that the final award is invalid and is null and void.
- [8] The second point *in limine* is that this court is bound by the decision of the High Court which confirmed that the mandate of the second respondent was terminated on 3 April 2017.
- [9] I revert to the first point *in limine*. Counsel for the respondent, during argument, conceded (and correctly so, in my view) that the agreement between the applicant and the first respondent in terms whereof the second respondent was to be appointment as adjudicator is not a contract of mandate. The parties resorted to adjudication to resolve disputes speedily which might have arisen during construction. It was explained in *Radon Projects(Pty) Ltd v NV Properties (Pty) Ltd and Another*⁷ that:

⁵ Whether he conducted himself properly as adjudicator is in dispute.

⁶ The award is referred to as the final award to distinguish it from the two interim reports that have been set aside.

⁷ 2013 (6) SA 345 (SCA) par 4.

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

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

[10] An adjudicator is a neutral third party who must determine the dispute as an expert. The adjudication agreement is a tripartite contract between the applicant, the first and second respondent which has the attributes of a contract of mandate.⁸ Adjudication, again, is a species of arbitration.⁹ They must be interpreted like any other contract as enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁰ that:

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the

⁸ *Mandatum* is a consensual contract between the mandator and another, the mandatory, in terms whereof the mandatory undertakes to perform a mandate or commission for the mandator. The principal characteristic of the contract is that the mandatory undertakes to do something at the request or on the instruction of the mandator. WA Joubert (ed) *LAWSA Vol 17 (Part 1)* LexisNexis (2009) 3.

⁹ "Arbitration is a private process for binding resolution of a dispute through the decision of one or more private individuals selected by the parties to the dispute. Compared to other methods of third-party intervention, it is distinguished from court adjudication through its private nature and from mediation or conciliation through its binding character" per Buhring-Uhle C. *Arbitration and Mediation in International Business* (Kluwer Law International The Netherlands) (1996) 39.

¹⁰ 2012 (4) SA 593 (SCA) para 18.

provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[11] Reference must be made to the CIDB Procedure document which contains the terms, conditions, and the procedure to be followed to instigate, adjudicate and conduct the adjudication. The relevant provisions are:

"6.1. The Adjudicator shall reach his decision within 28 days, or such longer period as agreed by the Parties in writing, after the dispute has been referred to him for adjudication. The period of 28 days may be extended by up to 14 days with the consent of the referring Party.

7.1. The Adjudicator shall reach his decision and so notify the Parties together with his reasons within the time limits in paragraph 6.1 and may reach a decision on different aspects of the dispute at different times.

7.3. Should the Adjudicator fail to reach his decision and notify his decision and notify the Parties in the due time either party may give 7 days notice of its intention to refer the dispute to replacement adjudicator appointed in accordance with the procedure in paragraph 4.3.

4.3. If confirmation is not received under paragraph 4.1 or a selection is not made under paragraph 4.2, or the adjudicator does not accept or is unable to act, then either party may

within a further 3 days request the person or body named in the contract or if the Board to appoint the Adjudicator within 5 days. Such request shall be in writing on the appropriate form of application for the appointment of an Adjudicator, if any, and be accompanied by a copy of the Notice of Adjudication and any applicable fee.

7.4. If the Adjudicator fails to reach and notify his decision in due time but does so before the dispute has been referred to a replacement adjudicator under paragraph 7.3 his decision shall still be effective. If the Parties are not so notified then the decision shall be of no effect and the Adjudicator shall not be entitled to any fees or expenses but the Parties shall be responsible for the fees and expenses of any legal or technical advisor appointed under paragraph 6.6 subject to the Parties having received such advice.

7.6. At any time until 7 days before the Adjudicator is due to reach his decision, he may give notice to the Parties that he will deliver it only on full payment of his fees and expenses. Any party may pay these costs in order to obtain the decision and recover the other Party's share of the costs in accordance with paragraph 7.5 as a debt due.

7.7. The Parties shall be entitled to the relief and the remedies set out in the decision and to seek summary enforcement thereof, regardless of whether the dispute is to be referred to legal proceedings or arbitration. No issue decided by an adjudicator may subsequently be laid before another adjudicator unless so agreed by the Parties"

[12] The letter dated 3 April 2017 that purportedly suspended the appointment of the second respondent as adjudicator states:

"We refer to the above matter and to the so-called "interim decision" dated 8 February 2017, the correspondence previously exchanged between yourself, the "amended interim decision" dated 28 February 2017. And the "General Notice 1" dated 30 March 2017.

In the so-called decisions you purported to determine an issue not in dispute between the parties. In so doing you exceeded your jurisdiction and mandate. The costs award that followed is improper.

We have previously corresponded extensively, in this regard and have repeatedly expressed our client's dissatisfaction with regard thereto. Our client has, subsequently secured the

services of counsel who, having reviewed the record and the award has advised our client to apply to the High Court for the review and setting aside of the decision and of your appointment as adjudicator. It follows, as a result, that our client will not be paying your invoice, generated as a result of the impugned decision

You are also called upon to desist in any further handling of the matter until the aforesaid review has been concluded.

To this extend a roundtable meeting was held with the legal representatives of the client. They have indicated, unequivocally, that they will abide our client's application to the High Court for the review and setting aside the impugned interim award.

You are called upon, immediately, to acknowledge receipt of this letter and to give the undertaking sought in paragraph 5 above, failing which, the necessary urgent relief will be sought against you."

[13] The applicant's attorneys reacted to the letter in an email dated 6 April 2017. He stated:

"Your letter of the 3 April 2017 addressed to the Adjudicator bears reference.

On the onset, we need to record that our meeting of the 31 March 2017 was without prejudice and our client's rights were reserved.

It is startling that despite the interim award being issued on the 08 February, you are only taking a decision to challenge it now. It is more startling that you intend to challenge the said award despite your client having followed its terms by inter alia amending its papers and even paying the 50% of the costs awarded against your client. In our view you cannot comply with the award and challenge it as the same time.

In our view the intended review application is nothing but a tactic to delay the matter and an abuse of court processes and public funds by your client. Having said that we have no issue with abiding by the decision of the court. However, we shall only make a firm decision once we have received the court papers."

- [14] I do not agree with the submission that the letter purports to terminate the appointment of the second respondent as adjudicator. At best, the letter conveys to the second respondent and the applicant that a decision by the first respondent had been made to unilaterally suspend the adjudicator from further acting as such, pending an application to review his two interim decisions of 8 and 28 February 2017 together with the "General Notice 1" dated 30 March 2017, and no less, review and to set aside his appointment.
- [15] It is as stated before, common cause that an application was launched on 13 July 2017 only to set aside the two aforesaid interim decisions only. Of the threat to set aside the appointment of the second respondent, came nought.
- [15] The letter of suspension ought to have been addressed to the second respondent by the applicant and first respondent jointly, after they had agreed to suspend the second respondent which clearly, never had taken place.
- [16] In any event, the CIDB Procedure Document does not contain any provision which grant any of the parties the authority to unilaterally suspend the adjudicator. The first respondent does not rely on such a provision, but rely exclusively on its letter dated 3 April 2017.
- [17] What is clear from the contents of the letter dated 6 April 2017 is that the applicant's attorneys considered the proposed review application as an abuse of process, and added that they await the application. When the application was eventually launched three months later it did not address the setting aside of the appointment of the second respondent. This letter cannot, with any stretch of the imagination, be construed as an instrument in terms whereof consent was granted to the first respondent to terminate (or suspend) the appointment

of the second respondent or simply as acquiesce. Nor can the letter which the applicant's attorney addressed to the first respondent be construed as an unequivocal waiver of any of its contractual rights. In any event, the applicant and first respondent must act jointly, which plainly was not the case.

- [18] The adjudicator's agreement is attached to the papers. In terms of that agreement the adjudicator agreed to conduct the adjudication in accordance of the CIDB Procedure document. It is accepted that the contract in terms whereof the second respondent was jointly appointed is a contract of mandate entered into by both the applicant and the first respondent. The ineluctable conclusion is that the applicant and the first respondent had to act jointly to suspend or terminate his appointment.
- [19] Clause 7.1 of the CIDB Procedure Document sets out the procedure to terminate the appointment of an adjudicator. To do so, the party who wishes to do so must follow a prescribed procedure. If an adjudicator failed to reach and notify his decision in the 28 days period or an extension of the date (clause 6.1), either party may give 7 days' notice of its intention to refer the dispute to a replacement adjudicator. And if the adjudicator fails to reach and notify his decision in due time but does so before the dispute has been referred to a replacement adjudicator under clause 7.3 his decision shall be valid and effective. The purpose of the document is to provide a mechanism to facilitate the resolution disputes rather than to obstruct their resolution. If a party wishes to remove the adjudicator it must act positively.
- [20] It is common cause that neither party invoked clause 7.3 and 7.4 to terminate the appointment of the second respondent as the adjudicator in terms of the

CIDB Procedure document. The letter, moreover, fails to invoke the provisions clause 7.3 as a means to terminate the appointment of the second respondent. The letter dated 3 April 2017 had no legal effect and is invalid for the reasons set out before.

- [21] The first respondent, accordingly, acquired no right in terms of the CIDB Procedure document, in terms whereof it was authorised to suspend or terminate the appointment of the second respondent for the reasons set out in the letter.
- [22] The provisions of clause 7.1 is merely directory. It cannot be construed as peremptory, the failure of which will visit a decision with invalidity, if the decision is given after the expiry of the 28 day period (or an extension of the date by agreement), simply by reason of its lateness.¹¹ Clause 7.4 makes it plain that as long as notice is given by the adjudicator, and, if no notice had been given to appoint a replacement adjudicator, the decision so rendered will be valid and thus effective.
- [23] When the second respondent notified the parties of his decision on 26 April 2017 and when he delivered it on 27 May 2017, his appointment as adjudicator was unaffected and valid in terms of the CIDB Procedure document.
- [24] The first point *in limine* has no merit and is dismissed.
- [25] This brings me to the second point *in limine* that this court is bound by the judgment of the High Court sitting in the appeal from the Groblersdal

¹¹ *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) 433H-434A. *Ludidi v Ludidi and Others* (658/2017) [2018] ZASCA 104 (23 July 2018) par 29.

magistrate's court. Reference was made earlier in this judgment to the said judgment and I will revert to that judgment.

[26] It is important to realise that the applicant was not a party in the action instituted by second respondent against the first respondent, when the trial commenced. The starting point, I believe, is the *exceptio res judicatae*. In *African Farms & Townships v Cape Town Municipality*¹² it was held that:

"The parties are the same, and the appellant in the action it has instituted, seeks the same order as in the original proceedings, i.e. an order declaring the notice of expropriation invalid. What is disputed is that the appellant is now demanding the same thing on the same ground...

In regard to the requirement that the ground of the demand must be the same, the authorities refer to the *causa petendi* or *origo petitionis*. According to Voet, 44.2.4, it is not the form of action which determines the sameness of the *causa petendi*, but the identity of the question which is again raised or set in motion.... The rule appears to be that where a court has come to a decision on the merits of a question in issue, that question, at any rate as a *causa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent proceedings."

[27] The reason for the *exceptio* to be pleaded is that the authority of *res judicata* induces a presumption, which is premised on public policy, that the judgment upon a claim submitted to a court is correct and excludes proof to the contrary.¹³

[28] In the present application the applicant claims from the first respondent recovery of the amounts awarded to it by the second respondent. The *exceptio res judicata* is, therefore not enforceable

¹² 1963 (2) SA 555 (A) 562A-562D.

¹³ *Bertram v Wood* (1893) 120 SC 177, 180.

- [29] Counsel for the first respondent conceded that a tripartite agreement was entered into by all the parties, but argued that it is of no moment because a two-judge court has pronounced upon the question. The *ratio decidendi* was that the second respondent was appointed in terms of a contract of mandate which was suspended by the first respondent. The suspension deprived the applicant of its jurisdiction to make a final award. This court, comprising of a single judge of this Division, is obliged to follow a two-judge decision of his own Division on the same question.
- [30] If the submission of counsel is to be accepted, this court will be bound to follow a judgment between different parties, as if the applicant was a party to that action, despite not being a party. Put differently, the second respondent derived his authority to adjudicate the dispute between the applicant and the first respondent from a contract between them, in terms whereof he was appointed to adjudicate the dispute in terms of the provisions of CIDB Procedure document. The fees of the adjudicator was agreed in terms of the adjudicator's agreement which is included in and formed an integral part of the in the CIDB Procedure document. The claim that the second respondent instituted in the magistrates' court was for payment of his professional fees for adjudication of the dispute, referred to him in terms of the CIDB Procedure document, by the parties. In terms of the adjudicator's agreement, the second respondent agreed and undertook to conduct the adjudication in accordance with the provisions contained in the CIDB Procedure document.
- [31] The defence of the first respondent, against the claim of the second respondent was that his "mandate" was suspended and that his award was invalid as a result. Again, the defence was premised on the existence of the very

contractual arrangement between the applicant, the first respondent and the second respondent.

[32] In relation to the claims instituted in the magistrate's court it must be clear, at least, that in that action in terms whereof the second respondent claimed his fees from the first respondent, the entitlement of which emanated from his agreement with the first respondent and the applicant. It leaves little doubt, to my mind, that the applicant ought to have been joined as co-defendant in that action with the first respondent, as a result of the financial interest that the applicant had and still has in the outcome of that action. It has been authoritatively laid down, as far back as 1935, by the then Appellate Division in *Morgan and Another v Salisbury Municipality*¹⁴ that:

"Now the feature which is common to the cases of joint owners, joint contractors, and partners, is that that in all of them there is a joint financial or proprietary interest. The position may therefore be broadly stated to be that by South African practice the only cases in which a defendant has been allowed to demand a joinder as of right are the cases of joint owners, joint contractors and partners, in all of which cases there exist a joint financial or proprietary interest. But that in other cases a defendant, as a general rule, has not been allowed to demand such a joinder."¹⁵

[33] It will be recalled that the parties agreed in clause 2.1 that the adjudication shall be conducted in terms of the CIDB Procedure document and that the second respondent has made an award sounding in money in favour of the applicant, which the applicant wishes to enforce, in this court, in terms of clause 7.7 of the CIDB Procedure document. The High Court order cannot raise the *exceptio res judicata* against the applicant, but as can be seen, the same issue, namely,

¹⁴ 1935 AD 167. Also *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) 661.

¹⁵ 171.

whether the second respondent was suspended which rendered his decision null and void, is also raised against the applicant, in these proceedings. The applicant is prejudiced, due to its non-joinder in the proceedings in the magistrates' court and the High Court. Although the High Court order does not directly affect the applicant, the position is undesirable and prejudicial and cannot be dispensed with unless the applicant has waived his rights to be joined. It was held in *Home Sites (Pty) Ltd v Senekal*:¹⁶

"It is true that if she remains outside the litigation a decision... would be *res inter alios acta* as far as she is concerned and would not be binding by way of *res judicata* upon her. But if such a decision were given by this Court it would be authority on the legal issues which would be directly in point and calculated to operate with decisive effect upon her claim to be entitled to the servitude. Accordingly it seems to me that she has, in the language used in *Collin v Toffie* 1944 A.D. 456 at p. 464 a direct and substantial interest in the results of the decision of this issue, which cannot properly be decided without her being joined as a party."

[34] The effect of the passage *supra* on the facts of this matter is that the decision of the High Court is not binding on the applicant by way of *res judicata* but nevertheless has a direct and decisive effect on the claim of the applicant.

[35] On the factual issues, the decision by the High Court is not authoritative. I am mindful of the *dictum* in *R v Wells*¹⁷ to the effect that:

"Decided cases are, however, of value not for the facts but for the principles of law which they lay down. In this connection I can do no better than quote the remarks of Lord Finlay in *Thomson v Inland Revenue* (1919 S.C (H.L.) 10-

¹⁶ 1948 (3) SA 514 (A)

¹⁷ 1949 (3) SA 83 (A).

"No enquiry is more idle than one which is devoted to seeing how nearly the facts of the two cases come together: the use of cases is for the proposition of law they contain, and it is of no use to compare the special facts of one case with the special facts of another for the purpose of endeavouring to ascertain what conclusion you ought to arrive at in the second case."¹⁸

[36] I am not bound to follow a judgment on the factual issues. But if the facts upon which the High Court decision is based are substantially similar, this court will be bound to follow the High Court decision of this Division.¹⁹

[37] When the facts of the two cases are considered they show that certain underlying facts are the same. The second respondent claimed professional fees from both the applicant and the first respondent. The claim arose from the dispute between them and the appointment of the second respondent by them as adjudicator. The claim against the applicant was withdrawn prior to the trial. The first respondent instituted a counterclaim against the second respondent for payment of an amount of R31 186.90 erroneously paid to the second respondent in respect of wasted costs and expenses in the amount of R62 373.80 less certain expenses. A meeting took place between the legal teams of the applicant and the respondent. Subsequent to that meeting a letter was addressed to the second respondent that proceedings to review his interim decisions and that he should desist from handling of matters until the aforesaid review has been completed.

[38] However, on 26 April 2017 the second defendant notified the first respondent that his decision is handed down. The review of the two interim awards was

¹⁸ 87-88.

¹⁹ *Shepard v Mossel Liquor Licencing Board* 1954 (3) SA 852 (C) 861.

successful and the awards were set aside. The counterclaim of the first respondent was based on unjust enrichment as a result of the setting aside of the interim awards. The second respondent abandoned his first claim but persisted with his claim for his fees in respect of the final award.

- [39] It is reasonable to accept that the applicant played no further role in the action from that date the claim against the applicant was withdrawn and when evidence was adduced in the magistrates' court. The applicant, therefore, was not privy to the evidence and not able to contest any of it, not even evidence which had a direct bearing what the applicant had done or did not do. In short, the version of the applicant was never put any of the witnesses. It seems that the letter of 6 April 2017 addressed to the first respondent was not presented as evidence at the trial.²⁰ Notwithstanding, the High Court made an adverse finding against the applicant with regard to its conduct or lack thereof in relation to the letter of 3 April 2017. The High Court held:

"22. Adopting the approach in *Mc Williams*, I hold that the learned magistrate was in this instance wrong in concluding that the appellant [the first respondent] acted unilaterally in suspending the mandate of the respondent without the support of *Rekuditse*, [the applicant] whereas the latter was notified of this fact in writing, but remained silent. Silence is equivalent to consent when there is a duty to speak. I accordingly hold that on the probabilities, *Rhekhuditse* had acquiescence in the conduct of by the appellant in the instruction given to the respondent to desist in any further handling of the matter until the review was completed, as it had a direct interest in the matter."

²⁰ No reference is made in the High Court judgment of the letter or its contents.

[40] I part ways with the High Court, on whether the applicant's failure to reply specifically to the letter constitute acquiescence with the suspension of the second respondent or that the applicant had a "duty to speak up". The applicant addressed an email to the first respondent. The judgment creates the impression that the applicant did not react at all to the letter of suspension addressed to the second respondent. Be that what it may; the letter of suspension which the first respondent addressed to the second respondent, was copied to the applicant. The applicant and the second respondent each were simply informed of the unilateral decision which had been taken by the first respondent to suspend the second respondent. Sight cannot be lost that they were entangled in a dispute. There was no reason to believe that the applicant would have consented, *ex post facto*, with the unilateral suspension of the adjudicator.

[41] No duty has arisen with regard to the contents of the letter "to speak." The silence on the part of the applicant to the assertion made in the letter cannot be construed as an acceptance of the assertion or a waiver of its rights. Both *Commalle v Steyn*²¹ and *McWilliam v First Consolidated Holdings*²² cases upon which the High Court relied, are authority for the broad proposition that a party may accept an obligation by his silence, but it will depend upon the type of obligation, the particular circumstances and the relationship between the parties.

²¹ 1914 CPD 1100.

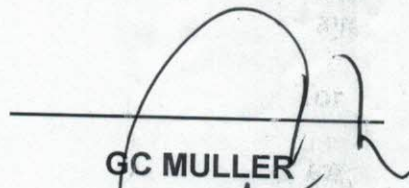
²² 1982 (2) SA 1 (A); See Christie RH *The Law of Contract* 6th ed Butterworths (1996) 70-71 where both cases are discussed under the rubric "Silence as Acceptance."

- [42] This court now has to deal with the facts put up by the applicant which the High Court was unable to consider in the action. The evidence of the applicant is not substantially similar to the evidence which was placed before the magistrate of the first and second respondent and which High Court considered on appeal. The defence put up by the first respondent whether the second respondent was suspended when he delivered his final award or not, is a factual issue. This court, as stated before, is not bound by the decision of the High Court.
- [43] This court is called upon to adjudicate the application on the facts put before it, and not on the facts which emerged from the judgment of the High Court. This court is also not sitting as a court of appeal.
- [44] The conclusion which I have reached is that the first respondent has failed to show that the second respondent's appointment was terminated or suspended in terms of its letter, dated 3 April 2017, addressed to the second respondent. The impugned suspension was contractually unlawful and invalid. The first respondent never applied to court for the removal of the second respondent, despite a threat to do so. Nor was any attempt made to set aside the award by the second respondent which, according to the first respondent was invalid. The applicant, therefore, is entitled to enforce the award in terms of clause 7.7 of the CIDB Procedure document.
- [45] This court has a wide discretion to grant declaratory orders. The existence and validity of the CIDB Procedure document was not disputed. The validity of the final award of the second respondent was disputed. That question was determined in favour of the applicant. The applicant is entitled to a declaratory order to put that issue beyond doubt between all the parties.

- [46] There is no reason why costs should not follow the result. The Applicant requested that costs should be awarded on a punitive scale. However, the opposition was not frivolous or unreasonable. Counsel for the applicant could not advance any acceptable reasons why the respondent should pay costs on a punitive scale.

ORDER

- 1. It is declared that the decision of the second respondent dated 26 April 2017 is binding and enforceable between the applicant and the respondents in terms of clause 7.4 and clause 7.7 of the CIDB Procedure document.**
- 2. The first respondent is ordered to pay the applicant the amount of R507 804.57 as well as the amount of R203 429.27 (both amounts are VAT inclusive) as determined by the second respondent within 14 days.**
- 3. The first respondent is ordered to hand the original Performance Guarantee within 14 days from service of this order to the attorney of record of the applicant.**
- 4. The first respondent is ordered to pay the costs of the application.**

A handwritten signature in black ink, consisting of a large, stylized 'M' followed by a smaller 'u' and a horizontal line extending to the right.

GC MULLER
JUDGE OF THE HIGH COURT
LIMPOPO DIVISION: POLOKWANE

APPEARANCES

- | | |
|----------------------------|----------------|
| 1. For the Applicant | : M Skhosana |
| 2. For the Respondents | : S Kroeze |
| 3. Date of hearing | : 02 June 2020 |
| 4. Date judgment delivered | : 11 June 2020 |