

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Appeal Court Case No: A2023-099598
Court a quo Case No: 21/32783**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
03/09/2024	
DATE	SIGNATURE

In the matter between:

ESKOM HOLDINGS SOC LTD

APPLICANT

And

**BABCOCK NTUTHUKO ENGINEERING (PTY) LTD
t/a BABCOCK NTUTHUKO POWERLINES**

RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date for hand-down is deemed to be 10h00 on 3 October 2024.

Key words: Appeal- Enforceability of Adjudicator's Award- until revised, is enforceable as a matter of contractual obligation.

JUDGMENT

THE COURT:

Introduction

- [1] This is an appeal against the judgment of Makume J (“the court *a quo*”) brought with leave of the Supreme Court of Appeal granted on 4 September 2023. The appeal relates to the enforcement of an adjudicator’s decision communicated to the parties on 16 November 2020 (‘the Decision’).

Condonation

- [2] The appellant, Eskom, has delivered, rather belatedly, a reinstatement and condonation application on 3 July 2024, no doubt as a response to the respondent’s, Babcock’s, heads of argument delivered on 30 May 2024, regarding the lapse of this appeal. In addition, Babcock notified Eskom of the lapsing of the appeal earlier than the delivery of Babcock’s heads, in two letters dated 2 May and 8 May 2024 respectively. Eskom seeks (conditional) condonation for the late filing of the record as well as the delivery of security for costs, which is opposed.
- [3] Eskom’s version in this reinstatement application is that it could not apply for a hearing date without delivering the record, and that it could not deliver the record without entering into security for costs. Eskom’s initial tender of R 50,000 as security for Babcock’s appeal costs, was unsurprisingly rejected by Babcock. Eskom in turn, rejected Babcock’s proposal of R 250 000. Subsequently, on 8 February 2024, after hearing both parties pursuant to rule 49(13)(b) of the Uniform Rules of Court, the Registrar fixed R 350 000 as the amount for security, to be provided by way of bank guarantee or as agreed otherwise between the parties. However, there was no such agreement.
- [4] Eskom sought to review the Registrar’s decision, which it never pursued. It is common cause that, Eskom’s attorneys filed a written notice that it holds R 350,000 as security. However, it does not secure Babcock to the same extent and falls short of the Registrar’s ruling that security in favour of Babcock be provided by bank guarantee. At the appeal hearing, Eskom tendered to correct the position by providing the requisite bank guarantee the very next day.

- [5] It is trite that in all cases of time limitation, whether statutory or in terms of the Rules of Court, this Court has inherent powers to condone the non-compliance with time limits where the principles of justice and fair play demand it and where the reasons for non-compliance with the time limits have been explained satisfactorily.¹
- [6] Relevant considerations may include not only the explanation therefor, but also include the degree of non-compliance with the rules, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his or her judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice. There is no exhaustive list.²
- [7] Rule 49(2) of the Uniform Rules requires delivery of a notice of appeal within 20 court days of the granting of leave to appeal. Eskom's notice of appeal was promptly delivered on 28 September 2023 as required by the rule. Rule 49(6)(a) prescribes that an appellant shall make written application to the Registrar for a date for the hearing of the appeal, within 60 court days after delivery of the notice of appeal, in this instance by 21 December 2023, failing which the appeal would be deemed to have lapsed 10 court days later. It is not in dispute that the appeal record in this matter was available to Eskom on 23 November 2023. The respondent correctly pointed out that Eskom could and should have delivered the appeal record together with an application for a hearing date on 21 December 2023.
- [8] On Eskom's version, it belatedly sought to apply for a date by 17 January 2024, but only delivered the record on 9 April 2024. Whilst Babcock is correct in pointing out that Eskom failed to make timeous written application to the Registrar for a hearing date, the vexed issue of payment of security has been laid to rest. As pointed out above, there is the overriding interest for both parties in bringing finality to this matter, and to avoid needless delay in the administration of justice and the disbursement of public funds regarding this

¹ See *SWA Munisipale Personeel Vereniging v Minister of Labour* 1978 (1) SA 1027 (SWA) at 1038B; see also *Yunnan Engineering CC v Chater and Others* 2006 (5) SA 571 (T) at para 22; and *Aymac CC v Widgerow* 2009 (6) SA 433 (W) at para 7.

² See in this regard *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) at 720E–G; and *PAF v SCF* [2022] ZASCA 101; 2022 (6) SA 162 (SCA) at para 15.

matter. For reasons that will become apparent regarding the merits of the appeal, condonation and reinstatement of the appeal is granted.

The Merits of the Appeal

- [9] Eskom and Babcock concluded a contract in terms of which Eskom retained Babcock to construct 400kV transmission lines.
- [10] The contract, was in broad terms, governed by the NEC3 Core Clauses: Engineering and Construction Contract April 2013 edition. Dispute resolution was governed by the W Clauses³ which in turn provided for a dispute resolution process which contemplated the referral of disputes between the parties first to adjudication and thereafter to arbitration.
- [11] Babcock contended that it had claims under the contract. It referred a dispute to adjudication. Eskom responded to the claim. The adjudicator considered the referral made by Babcock as well as Eskom's response and delivered the Decision. Given its relevance to our judgment, it is necessary to say something about the Babcock referral and the Eskom response.

The referral and response

- [12] Seven disputes were referred by Babcock. In relation to the disputes referred, Babcock devoted a considerable portion of the referral dealing with why it contended that its referral to the adjudicator was timeous.
- [13] In its response, Eskom dealt comprehensively with the topic of whether there had been timeous referral of the disputes. The broad thrust of Eskom's defence was that the disputes were time barred in the sense that there had not been timeous referral of the disputes by Babcock to adjudication.
- [14] In its response, Eskom *verbatim* "[a]dmits that the Adjudicator has jurisdiction to hear these claims and submit [sic] that the issue is not about jurisdiction but about whether in terms of the contract the claims were notified, the disputes notified or the disputes referred, in time." Eskom explained this by asserting that it is its "...*submission that the Contractor (Babcock) is time barred from*

³ In this contract the W1 option was chosen.

referring the dispute to the Adjudicator since it did not notify and neither referred the dispute in time and lost its rights to claim any relief in respect thereof.” (the Time Bar question”). The Time Bar question was what the adjudicator had to answer.

- [15] The adjudicator considered Babcock’s referral and Eskom’s response, including the Time Bar question. Ultimately, the adjudicator answered the Time Bar question against Eskom. All of this was, rightly, conceded by counsel for Eskom.
- [16] The Decision determined certain monies were to be paid by Eskom. Eskom, as it was entitled to do, noted a dissatisfaction with the Decision. This meant that the matter would proceed to arbitration. Eskom in relation to the arbitration has indicated that it would be agreeable to an expedited arbitration.
- [17] In the meantime, Babcock brought an application to enforce the Decision. It said as much in its notice of motion. As to enforcement of an adjudicator’s Decision, pending the arbitration, this Court (per Wepener J) in *Stefanutti Stocks (Pty) Ltd v S8 Property (Pty) Ltd*⁴ made the position plain. The Court explained the position as follows:

“[5] Adjudication was first introduced in the United Kingdom through the Housing Grants Construction and Regeneration Act 1996 (‘the Housing Act’). The Housing Act provides for an accelerated process for deciding disputes. It provides in particular that an adjudicator’s decision may be rejected by either party and submitted to arbitration but it is provisionally binding on the parties unless and until overturned in the subsequent arbitration. The enforcement of an adjudicator’s decision and the referral of the dispute to arbitration is dealt with in England and Wales by a scheme promulgated as regulation 1998 which is quoted in the judgment of the Queen’s Bench Division in *Carillion Construction Ltd v Devonport Royal Dock Yard* [2005] EWHC 778 (TCC) at para 6. The relevant regulation provides that:

‘The decision of the adjudicator shall be binding on the parties and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration...or by agreement between the parties’.

⁴ 2013 JDR 2441 (GSJ) at paragraph 5

[6] At para 59 of *Carillion*, and discussing the law, the court explained the purpose of adjudication as follows:

‘It 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 final determination of disputes by arbitration, litigation or agreement.’

In *Carillion* at para 80 the court found that even errors of procedure, fact or law by the adjudicator did not constitute defences to the enforcement of the adjudicator’s decision.

[7] In South Africa adjudication has found its way into major construction agreements, such as the JBCC agreement, and is regulated contractually. The purpose, however, of the two procedures and the enforcement of the adjudicator’s decision are, in my view, similar.

[8] Eyvind Finsen *The Building Contract - A commentary on the JBCC Agreements*, 2 ed p 229 explains the enforcement of the adjudicator’s decision as follows:

‘The purpose of adjudication being the quick, if possible temporary, resolution of a dispute and the granting of interim relief to the successful party, the whole purpose of adjudication would be frustrated if the successful party was unable to enforce the determination against the other party’.”

[18] The court *a quo* granted the application for enforcement of the Decision. Eskom says the application was incorrectly granted. There were three main arguments made by Eskom in the appeal in support of why the court *a quo*’s decision was wrong.

[19] The first is that the Decision was not enforceable because it was made in circumstances where the adjudicator did not have jurisdiction and in consequence was unenforceable (“the Jurisdictional Complaint”). The argument was premised upon Eskom’s reading of the decision in *Framatome v Eskom Holdings SOC Ltd*⁵ in which the court stated that “[i]t is trite that, if upon an application for enforcement of an adjudication decision, it is found that the adjudicator did not have the requisite jurisdiction, his decision will not be

⁵ [2021] ZASCA 132; 2022 (2) SA 395 (SCA) (“*Framatome*”).

binding or enforceable".⁶ The reason that the adjudicator did not have jurisdiction, according to Eskom, was because the referral by Babcock was time barred, in other words, the Time Bar question. Eskom's complaint was that the Time Bar question was wrongly decided by the adjudicator. Of course, what this also means is that Eskom contended that the court *a quo* should have considered the Time Bar question and should have decided it in its favour.

[20] The second is that the court *a quo* decided the matter on a basis other than the pleaded case. In this regard the contention was that the court *a quo* found that there had been an agreed extension of the time periods for a referral of the dispute. This of course traces back to the Time Bar question. It is not an issue, given our findings later in this judgment, that is of relevance. This is so because the adjudicator decided the Time Bar question, albeit not in the way that Eskom wanted him to. We shall explain the import of this when we deal with the Jurisdictional Complaint.

[21] The third was that the relief that was sought by Babcock did not "*constitute an enforcement of the Decision and it was not authorised by the contract*". In this regard Eskom's argument is two pronged. It says: (1) Babcock calculated its own amounts as opposed to using the amounts decided by the adjudicator; and (2) Babcock's entitlement to payment only arises from payments certified by the Project Manager in terms of the contract (the Payment Complaint). Tied to this Eskom criticises the court *a quo* for making credibility findings in relation to the Project Manager and his impartiality.

The Jurisdictional Complaint

[22] Eskom has misconceived the statement made in *Framatome*.

[23] A useful starting point are the English cases on the topic. The first decision is *C&B Scene Concept Design Ltd v Isobars Ltd*⁷ where it was held that that the enforcement of an adjudicator's decision cannot be prevented whether it was

⁶ *Id* at para 25. An endorsement of the position is in *Carillon Construction v Devonport Royal Dockyard Ltd* [220] EWCA Civ 1358 which held "where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision". *Carillon* was quoted with approval in Supreme Court of Appeal judgment of *Sasol Africa (Pty) Ltd v Murray and Roberts Ltd* [2021] ZASCA 94.

⁷ [2002] EWCA Civ 46; [2002] BLR 93 (TCC) at paragraph 30

caused by errors of procedure, fact, or law, unless the adjudicator has purported to decide matters which were not referred to him. The second is the decision in *Bouygues UK Ltd v Dahl-Jensen UK Ltd*.⁸ Albeit that *Bouygues* dealt with adjudication in the statutory context, the principle in the case is, in our view, of application.

[24] The court in *Bouygues* held the following in relation to an argument that the adjudicator's decision was not binding:⁹

"27. The first question raised by this appeal is whether the adjudicator's determination in the present case is binding on the parties - subject always to the limitation contained in section 108(3) and in paragraphs 4 and 31 of the Model Adjudication Procedure to which I have referred. The answer to that question turns on whether the adjudicator confined himself to a determination of the issues that were put before him by the parties. If he did so, then the parties are bound by his determination, notwithstanding that he may have fallen into error. As Knox J put it in *Nikko Hotels (UK) Ltd v MEPC PLC* [1991] 2 EGLR 103 at page 108, letter B, in the passage cited by Buxton LJ, if the adjudicator has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity."

[25] This theme was re-affirmed in the third decision, the matter of *Prater Ltd v John Sisk & Son (Holdings) Ltd*.¹⁰ In *Prater*¹¹, a decision cited by Eskom in support of its argument, the court dealt with a jurisdictional complaint which in turn was raised as an impediment to enforcement. The court said the following:

"15. I take as my starting point the fundamental principle set out at paragraph 7.37 of Coulson On Construction Adjudication (4th Ed.):

'The fundamental principle that governs all enquiries into the adjudicator's jurisdiction can be simply stated. If a dispute has arisen between two parties to a construction contract and the adjudicator is validly appointed to decide that dispute, then, provided his decision attempts to answer that dispute, his decision will be binding in accordance with the 1996 Act, regardless of errors of fact or law or procedure. If, on the other hand, he was not validly appointed, or he decided something other than the

⁸ [2000] EWCA Civ 507 ("*Bouygues*").

⁹ See *Boygues* at paragraph 27

¹⁰ [2021] EWHC 1113 (TCC) ("*Prater*").

¹¹ See paragraph 15 of *Prater*

dispute that was referred to him, his decision will be unenforceable because it would have been made without jurisdiction. Thus it follows that it is not enough for the defendant to show an error on the part of the adjudicator. What matters, in the words of Sir Murray Stuart-Smith in *C&B Scene*, is whether the error on the part of the adjudicator went to his jurisdiction, or was merely an erroneous decision of law (or fact) on a matter within his jurisdiction. If it was the former, the decision would be unenforceable; if it was the latter, the decision would be enforceable by way of summary judgment'."

[26] This theme is also present in *Framatome* where the court was careful to point out the following:

"[29] In the final analysis, the question to be asked is whether the adjudicator's determination is binding on the parties. The answer to that question turns on whether the adjudicator confined himself to a determination of the issues that were put before him by the parties. If he did so, then the parties are bound by his determination, notwithstanding that he may have fallen into an error." Our underlining.

[27] Eskom thus misunderstands the *dicta* in *Framatome*. It is in keeping with a long line of established cases which we have referred to. It says no more than this: If the adjudicator confined himself to the question put before him, whether he answers it wrongly, the parties are still bound.

[28] That he may wrongly answer a deeply contested issue about whether a time bar is of application does not, in our view, mean that he has acted in excess of his jurisdiction. He is simply answering that which has been asked of him by the parties. A permissible attack on jurisdiction (and in consequence enforceability of the Decision) because a party is aggrieved with the outcome of a question put to the adjudicator is not what *Framatome* says at all.

[29] To summarise, the Time Bar question was put before the adjudicator and the adjudicator considered it and decided it. When dealing with the Time Bar question, it is stated in the Decision that: "[t]he Adjudicator has taken into account the arguments put forward by the Parties". He may be wrong in his answer, he may also be right. But that is not for this Court to consider. Eskom has its remedy in the arbitration, which it is pursuing.

[30] Further, it is also not for this Court to pre-empt what is to be determined by the arbitrator in due course. If this Court, as Eskom invites it to do, deals with the Time Bar question and rules in Eskom's favour, it will be doing precisely that. What then, rhetorically speaking, is the use of the arbitration?

[31] For the reasons canvassed, we do not consider there to be any merit in the Jurisdictional Complaint raised by Eskom.

The Payment Complaint

[32] Firstly, Eskom argues that Babcock claims for sums which are not in accordance with the Decision. It is necessary to pay closer attention to the Decision in order to deal with this issue. We deal with the Decision on each dispute, which we quote *verbatim* below.

[33] Dispute 1:

"63. The Adjudicator rules that the quotation is accepted; the 24 day extension to be applied to the Completion Date for the whole of the works; the change in Prices is R620 916.49 (excl VAT); the change in Prices is to be adjusted for inflation in terms of the Contract; interest is payable on the amount of the change in Prices plus adjustment for inflation, In terms of the Contract; any delay damages applied erroneously because of the invalid Key Date and Sectional Completion Date penalties, prior to the Completion Date for the whole of the works are to be returned and interest applied in terms of the Contract."

[34] Dispute 2:

"68. Because of the non-validity of the Key Date, Sectional completion and delay damages associated therewith, as discussed above. The Adjudicator rules any delay damages applied erroneously because of the Invalid Key Date and Sectional Completion Date penalties, prior to the Completion Date for the whole of the works are to be returned and interest applied in terms of the Contract. I am informed by the Claimants submission that the sum is R12 935 656.50 (excl. VAT). In addition interest in terms of the Contract is payable to the Contractor for the amounts wrongly deducted." [underlined for emphasis]

[35] Dispute 3:

“90. The Adjudicator assessment is to proportion the 9 working day quotation of R 4,767,017.24 (excl VAT) to 6 days which equates to R3,178,013.08 (excl VAT).

91. The change to the Prices above is subject to price adjustment due to Inflation in terms of X1 using Indices at the adjusted Completion Date. Interest is payable on the amount of the change In Prices plus adjustment for Inflation. In terms of the Contract.”

[36] Dispute 4:

“106. The Adjudicator decides the Completion Date for the whole of the works be extended by 11 days.

107. Any deduction of penalties prior to the Completion Date for the whole of the works, for missing invalid key dates and invalid sectional completion dates are to be returned together with interest payable to the Contractor.

108. Both quotations are accepted with changes to the Prices being R1, 191,286.29 (excl VAT) and R2,955,723.35 (excl VAT) respectively.

109. The changes to the Prices are both to be adjusted for inflation in terms of X1.

110. Interest in terms of the conditions of contract is payable.”

[37] Dispute 5:

“114. The Adjudicator decides that the estimated extension of the Completion Date to April 2018 should be re-assessed and finalised in terms of the extensions to the Completion Date as decided by the Adjudicator above.

115. The Adjudicator decides that the Parties meet in attempt to reach agreement on CPA relating to payment certificates number 29 & 30. This should be re-assessed in light of the Adjudicator's decisions concerning the adjusted Completion Date as well as compensation events being valued at current rates or not.

116. The Defendant shall pay Interest on the late payments in terms of the Contract.”

[38] Dispute 6:

- “132. The Adjudicator decides the Defendant must pay the Claimant the settlement amount offered by the Claimant. i.e.
..... R 696 792.15 (excl. VAT).
..... R 666 250.25 (excl. VAT).
133. The Adjudicator decides the Defendant must pay the Claimant on the sum above, the calculated amount in terms of X1 Price Adjustment for inflation.
134. The Adjudicator decides the Defendant must pay the Claimant Interest in terms of the Contract.”

[39] Dispute 7:

- “147. The Adjudicator decides the compensation event arising from carrying out the verbal Instruction is valid and the Adjudicator assesses the change in the Prices to be the amount as quoted by the Contractor being R288,392.96 (excl Vat)
148. The Adjudicator decides interest is payable on this amount in terms of the Contract.”

[40] Apart from this the Decision specified that Babcock would send Eskom an invoice and Eskom would pay within the time stipulated in the Contract. Moreover, the parties were required to meet within a week to resolve the issue of interest to be levied on the late payments identified in the Decision. It is clear that the Decision required an arithmetical update. This is precisely what Babcock did. That it did this in accordance with the Decision, does not mean that it is not enforcing the Decision in its terms.

[41] First, Babcock states that the capital amounts invoiced and claimed in enforcement proceedings are the exact amounts stated in the Decision. Eskom disagrees in its answering affidavit but does not explain why. This does not give rise to a genuine dispute.¹²

[42] Second, Babcock states that inflationary adjustments were made in accordance with the contract, more particularly Option X1. This Option sets out an objective mechanism to calculate inflation. Eskom does not dispute the mechanism, nor does it seriously dispute Babcock’s calculation.

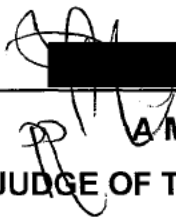
¹² *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; 2008 (3) SA 371 (SCA), at par 13.

- [43] Third, Babcock explains that in relation to interest, it utilised the contractual mechanism to calculate this. Indeed, Babcock annexed a schedule to its papers setting out the relevant rate per month. Again, Eskom does not seriously dispute this.
- [44] In our view the amounts claimed are in line with the Decision and as we have said, are merely the arithmetical updates contemplated by the Decision.
- [45] The second contention by Eskom is that Babcock was only entitled to be paid upon certification by the Project Manager. But that is not what the Decision says. The Decision requires of Eskom to pay on receipt of Babcock's tax invoice within the contractually agreed time period. It makes no mention of further certification. We point out that Eskom's stance is that there can be further certification and if Babcock is unhappy with the certification, it must then initiate a further dispute about the certification. This is the antithesis of a speedy resolve of a dispute. What it does is perpetuate it. The Decision does not interpose a requirement of certification. It expressly provides for payment within a specified time.
- [46] We are of the view that there is no merit in the Payment Complaint.
- [47] In our view this disposes of the main arguments and grounds persisted with by Eskom.
- [48] We point out that this Decision was made in December 2020. It is now almost four years later. There has been no arbitration on the issue in the meantime. There has been no payment by Eskom. The rationale of adjudication has been subverted.
- [49] For the reasons expressed herein, the appeal has no merit.
- [50] In the result, we make the following order:
- a. The appeal is dismissed.

- b. The appellant is to pay the costs of the appeal including the costs of the application for condonation, with such costs to include the costs of two Counsel on Scale C.



TP MUDAU
JUDGE OF THE HIGH COURT
JOHANNESBURG



A MAIER-FRAWLEY
JUDGE OF THE HIGH COURT
JOHANNESBURG



A GOVENDER
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES:

For the Appellant:

Adv S Tshikila assisted by Adv T Mpulo-
Merafe

Instructed by:

Dlamini Attorneys

For the Respondent:

Instructed by:

A Kemack SC assisted by M Nieuwoudt

Hattingh Massey Bennett Inc Attorneys

Date of Hearing:

13 August 2024.

Date of Judgment:

3 October 2024

