

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

- | | | |
|-----|-----------------------------|----|
| (1) | REPORTABLE | NO |
| (2) | OF INTEREST TO OTHER JUDGES | NO |
| (3) | REVISED | |

25/10/2024

DATE

SIGNATURE

CASE NUMBER : 6577/2019

In the matter between:

KWAGGA HOLDINGS (PTY) LTD

Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR
ROADS AND TRANSPORT OF THE GAUTENG
PROVINCIAL GOVERNMENT

1st Respondent

THE GAUTENG DEPARTMENT OF ROADS AND
TRANSPORT

2nd Respondent

ADV GHANDI BADELA N.O.

3rd Respondent

CASE NUMBER : 40523/2019

In the matter between:

TALEDI MOROSI BUILDING CONSTRUCTION CC

Applicant

and

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR
ROADS AND TRANSPORT OF THE GAUTENG
PROVINCIAL GOVERNMENT**

1st Respondent

**THE GAUTENG DEPARTMENT OF ROADS AND
TRANSPORT**

2nd Respondent

ADV GHANDI BADELA N.O.

3rd Respondent

CASE NUMBER : 11460/2022

In the matter between:

CATAGRICT IMPRIMERE (PTY) LTD

1st Applicant

MAFUBE ENGINEERING SERVICES CC

2nd Applicant

BASIC BLUE TRADING 689 CC

3rd Applicant

and

ADV GHANDI BADELA N.O.

1st Respondent

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR
ROADS AND TRANSPORT OF THE GAUTENG
PROVINCIAL GOVERNMENT**

2nd Respondent

**THE GAUTENG DEPARTMENT OF ROADS
AND TRANSPORT**

3rd Respondent

CASE NUMBER : 23359/2022

In the matter between:

KOPANO KOFIFI PROJECTS CC

Applicant

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR
ROADS AND TRANSPORT OF THE GAUTENG
PROVINCIAL GOVERNMENT

1st Respondent

THE GAUTENG DEPARTMENT OF ROADS AND
TRANSPORT

2nd Respondent

ADV GHANDI BADELA N.O.

3rd Respondent

J U D G M E N T

VAN DER BERG AJ

- [1] The applicants in these four applications concluded agreements with the Department of Roads and Transport, Gauteng (*"the Department"*) in terms of which the applicants were to perform road maintenance in the Gauteng Province. Disputes arose between these applicants and the Department. The disputes were referred to adjudication under circumstances explained below.
- [2] The six applicants (three applicants joined in the one application) were joined as claimants before the adjudicator. The adjudicator dismissed all their claims.

- [3] These are applications to set aside the award of the adjudicator. The applicants (in at least three of the applications) ask that his award be substituted with an order for payment of a specific amount.
- [4] The MEC for Roads and Transport of the Gauteng Provincial Government is cited as a respondent in all the applications. I refer to the MEC and the Department collectively as *"the respondents"*. The adjudicator (*"the adjudicator"* or *"Adv Badela"* to distinguish him from a previous adjudicator) is cited as a respondent and abides the decision of the court.
- [5] I shall refer to the six applicants jointly as *"the claimants"* as in the adjudicator proceedings. The particulars of the applicants/claimants and applications and how they will be referred to are: Kwagga Holdings (Pty) Ltd (Case no 6577/2019) (*"Kwagga"*); Taledi Morosi Building Construction CC (Case no 40523/2023) (*"Taledi"*); CatagRICT Impremere (Pty) Ltd, Mafube Engineering Services, and Basic Blue Trading 69 CC (Case no: 11460/2022) (*"CatagRICT"*, *"Mafube"* and *"Basic Blue"*); Kopano Kofifi Projects CC (Case no 23359/2022) (*"Kopano Kofifi"*).
- [6] By agreement between the parties and by directive of the Deputy Judge President the four applications were heard together. The applications were heard over two days in two separate motion court weeks.
- [7] I intimated at the hearing that I would hand down four separate judgments. I have since decided to hand down one judgment. It would lead to unnecessary repetition to hand down four judgments where most of issues are common to

all the applications. Where the same adjudication award is sought to be set aside it would be illogical to hand down separate judgments. I shall however cater for the differences between the applications in the judgment.

- [8] Issues (factual and legal) which are common to all the applications will first be dealt with. It is necessary to determine whether the adjudicator's award is reviewable and whether the claimants could bring reconsideration applications in terms of the NEC contract. Thereafter the individual applications are discussed.

EARLY HISTORY AND APPOINTMENT OF ADJUDICATOR

- [9] It is relevant to explain how Adv Badela was appointed as adjudicator, as it has a bearing on the submission that he exceeded his powers. On the early history of the matter and the appointment of the adjudicator I follow the respondents' version as set out in the answering affidavit in the various applications as these facts have not been disputed.
- [10] On 28 September 2008, the Department appointed sixty-nine (69) contractors (including the claimants) to perform routine road maintenance of Gauteng Provincial Roads. The appointment of the contractors was done after a competitive procurement process. Subsequently, during December 2008, the Department and each of the claimants concluded NEC 3 contracts to perform routine road maintenance for a specified region in Gauteng (*"the NEC 3 Contract"*).

- [11] I shall set out some of the relevant terms of the NEC 3 Contract below. For current purposes it is relevant to note that Mr Lloyd Mogotsi (*“Mr Mogotsi”*) was appointed by the parties as the adjudicator in terms of the contract data which formed part of all their contracts.
- [12] During March 2010 the Department and each of the claimants concluded an addendum to the main contract (*“the first addendum”*). In terms of the first addendum the fixed contract amount fell away and all work was done according to a “signed works order with quantities and rates”.
- [13] In March 2012 the Department and each of the claimants concluded a second addendum to the main contract. It *inter alia* amended the contract to be effective from 1 April 2011 and to terminate on 31 March 2013.
- [14] Both the first and second addenda form part of the contractual relationships between the Department and the claimants.
- [15] On or about 25 June 2013, the six claimants referred the disputes that had arisen between them and the Department to adjudication. Mr Mogotsi, who had been appointed as adjudicator in all these disputes, did not finalise the adjudication within the timeframes stipulated in the contracts or at all. (This is disputed by some of the claimants and dealt with below.)
- [16] During 2019 the six claimants – dissatisfied with the failure of Mr Mogotsi to finalise the contractual claims submitted to him – approached the High Court for relief under case number 6577/19. The six claimants’ claims before the

High Court were based purely on an alleged breach of contract by the Department. The six claimants sought payment in the combined amount of R102 008 389.99.

[17] The claimants did not claim for the enforcement of any award.

[18] The matter became before Yacoob J who on 7 November 2019 made the following order (*"the Yacoob J 2019 order"*¹):

"1.1 The application is postponed sine die.

1.2 The applicants have tendered to pay the first and second respondents ("the respondents") wasted costs of the application for the set down of the matter on 7 November 2019, from 29 April 2019.

1.3 By no later than Friday 15 November 2019, the parties' respective attorneys shall each furnish to the other, a list of three names, of persons to act as the adjudicator, in the place and stead of the third respondent, in terms of clause W.1.1 of the NEC contract concluded between the parties ("the NEC contract").

1.4 By no later than Friday 22 November 2019, the parties shall agree on the identity of the nominated adjudicator. Failing such agreement, by no later than Tuesday 26 November 2019, the

¹ Yacoob J also handed down an earlier judgment in a matter between other contractors and the Department.

Chairman of the Johannesburg Society of Advocates shall appoint the adjudicator from one of the six names submitted.

1.5 The claims forming the subject-matter of the application shall be referred to the adjudicator, who shall commence his/her adjudication by no later than 31 January 2020 and conclude same within the time periods provided for in the NEC contract.

1.6 The parties shall be entitled to raise all arguments in relation to the adjudication process before the adjudicator and all the parties' rights in relation to the NEC contract in general and the adjudication in particular, are strictly reserved.

1.7 A rule nisi shall issue, calling upon the adjudicator [Mr Mogotsi] to show cause by no later than 25 November 2019, why and order should not be granted, directing the third respondent, in respect of the failed adjudication process to:

1.7.1 Refund by no later than 2 December 2019, all adjudication fees paid by the applicants to adjudicator in May 2018;

1.7.2 pay mora interest on amount to be refunded, reckoned from the date when the funds were paid by the applicants, to the date when the refund is received by the applicants;

1.7.3 return to the applicants by no later than 2 December 2019, all their claim records and all other records of the failed adjudication proceedings.”

[19] Adv Badela was appointed as the adjudicator pursuant to the Yacoob J 2019 order. After the exchange of pleadings and submissions, Adv Badela delivered an adjudication award which was dated 17 August 2020. He dismissed all the claimants' claims. I return to the award below.

PREVIOUS DETERMINATIONS AND HIGH COURT CASES

[20] Some of the claimants referred – either in their heads or their founding affidavits – to High Court cases where awards of Mr Mogotsi have been upheld.

[21] By way of example (other claimants made similar submissions), in its founding affidavit Taledi refers to these High Court cases and makes the following submission:

“I submit that all the facts, disputes and defences of the first and second respondents have been comprehensively covered by no less than 5 judgments of the above Honourable Court.

These judgments have determined all the issues and defences between the parties and this Honourable Court have found for other contractors in the same position as the applicants and all 4 (sic) judgments were in favour of the applicants.” (sic)

[22] Taledi then submits in its heads of argument that the adjudicator “*ventured outside the scope of the enquiry that was referred to him and disregarded five judgments of the above Honourable Court, which already dealt with the dispute and defences raised by the First and Second Respondents*” and that these High Court cases constitute binding precedent.

[23] I disagree. There is no evidence of what facts served before Mr Mogotsi in those matters. Factual findings in one case do not bind another court.² I could not find any *legal* principle enunciated in any of those cases which supports the claimants’ case, and I was not referred to any. The adjudicator (if he was made aware of these judgments) would for the same reason also not have been bound by these judgments.

[24] In addition, Mr Mogotsi may have erred which would not necessarily have rendered his awards reviewable due to the narrow basis on which awards are reviewable (see below).

SCOPE OF THE ADV BADELA’S POWERS

[25] Taledi contends that the “initial adjudicator” (this is a reference to Mr Mogotsi) has determined all the disputes before him and all that was required of the adjudicator was a quantification of the amount due to the applicant. Taledi further submitted that the scope of Adv Badela’s enquiry was limited to issues “*undecided by the initial adjudicator, and he was certainly not entitled to*

² VN v Member of the Executive Council for Health & Social Development of the Eastern Cape Province 2022 JDR 1691 (ECP), para 20

consider disputes de novo, ignoring the initial adjudicator's award." Kopano Kofifi avers that Adv Badela's "*re-assessed the merits of the initial dispute, an aspect that falls within the purview of the initial adjudicator*" and that he thereby exceeded his powers. Kwagga makes the same submission but also refers to an alleged earlier award made by Mr Mogotsi, which will be dealt with below.

[26] There is absolutely no factual basis for these contentions and they fly in the face of the undisputed evidence:

[26.1] At the time when the Yacoob J 2009 order was made Mr Mogotsi had not made published any award. It must be borne in mind that Mr Mogotsi was joined as a respondent in the proceedings before Yacoob J. As pointed out by the respondents, and shown above, the claimants approached the High Court on the basis that Mr Mogotsi had not made any award.

[26.2] Also damning for the claimants is the fact that in the proceedings before Adv Badela the six claimants filed a statement of claim, a replication and written submissions. It was not the case presented to the adjudicator that he only had to determine the "*final figures*". For example the claimants *inter alia* stated the following in the adjudication proceedings:

[26.2.1] The proceedings before Mr Mogotsi were referred to as "*the failed adjudication proceedings*" (paragraph 30 of the statement of claim);

[26.2.2] Reference was made to the *“termination of the mandate of Mr Mogotsi”* (paragraph 100 of the replicating statement);

[26.2.3] *“Mr Mogotsi refused to attend to the adjudication proceedings pending payment of his adjudication fees.”* (Claimants’ heads of argument, paragraph 31);

[26.2.4] *“This [Mr Mogotsi’s failure to adjudicate the dispute] let the claimants to refer the outstanding dispute to the High Court for a decision in terms of W1.4 of the contract.”* (Claimants’ heads of argument, paragraph 35).

[27] Accordingly, the claimants’ challenge to the adjudicator’s award on the basis that he exceeded his powers must fail.

NEC 3 CONTRACT: DISPUTE RESOLUTION

[28] The NEC 3 Contract contains the following provisions dealing with dispute resolution, the adjudicator’s powers and how the adjudicator’s decision can be revised:

[28.1] Any dispute arising under or in connection with the contract has to be referred to and decided by the adjudicator (clause W1.1);

[28.2] The adjudicator acts impartially and decides the dispute as an independent adjudicator and not as an arbitrator (clause W1.2(2));

- [28.3] The adjudicator has the power to decide a dispute referred to his/her predecessor but not decided at the time when the predecessor resigned or became unable to act (clause W1.2(4));
- [28.4] The adjudicator decides the dispute and notifies the parties of his decision within four weeks of the end of the period of receiving information from a party referring the dispute (clause W1.3(8));
- [28.5] Clause W1.3(10) of the NEC 3 Contract provides: *The Adjudicator's decision is binding on the Parties unless and until it is revised by the tribunal and is enforceable as a matter of contractual obligation between the parties and not as an arbitral award. The Adjudicator's decision is final and binding if neither Party has notified the other within the times required by this contract that he is dissatisfied with a decision of the Adjudicator and intends to refer the matter to the tribunal.* (Own emphasis)
- [28.6] Clause W1.4 of the NEC 3 Contract provides in relevant part:
- “(2) If, after the Adjudicator notifies his decision a Party is dissatisfied, he may notify the other Party that he intends to refer it to the tribunal. A Party may not refer a dispute to the tribunal unless this notification is given within four weeks of notification of the Adjudicator's decision...”*

- (4) *The tribunal settles the dispute referred to it. The tribunal has the powers to reconsider any decision of the Adjudicator and review and revise any action or inaction of the Service Manager related to the dispute. A Party is not limited in the tribunal proceedings to the information, evidence or arguments put to the Adjudicator.*” (Own emphasis)

[28.7] The “*tribunal*” is defined as “a South African court of law”.

REVIEWABILITY OF ARBITRATOR’S AWARD

[29] In *Framatome v Eskom*³ the Supreme Court of Appeal (per Mathopo JA) referred to the same clause W1.3(10) in the NEC3 contract and found that “*arbitration is the appropriate forum*”.⁴ In that matter the “*tribunal*” was defined as arbitration, whereas in this instance the “*tribuna*” is defined as “a South African court of law.” It is clear from this judgment that the court cannot be approached outside the provisions of clause W1.3(10) and W1.4.

[30] Mathopo JA continued:

“[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*

³ *Framatome v Eskom Holdings SOC Ltd* 2022 (2) SA 395 (SCA)

⁴ Para 22

he did so, then the parties are bound by his determination, notwithstanding that he may have fallen into error.”

[31] A court will only interfere with an adjudication where the adjudicator has acted in excess of his jurisdiction or mandate, or in serious breach of the rules of natural justice. A court will not examine the merits of the award.⁵

[32] I have already rejected the claimants' submissions that the adjudicator exceeded his mandate.

[33] No case has been made out that the adjudicator breached the rules of natural justice.

[33.1] Some of the claimants submitted that adjudicator acted with bias, fettered his discretion, took irrelevant considerations into account, and acted arbitrarily or capriciously. Very few factual averments are made in support of these alleged grounds of review.

[33.2] The adjudicator gave a well-reasoned determination. He also considered a number of the respondent's defences, i.e. prescription and that the disputes have been settled, and dismissed these defences.

⁵ *Sasol South Africa (Pty) Ltd v Murray & Roberts Ltd* (Case No: 425/2020) [2021] ZASCA 94 (28 June 2021); *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd* 2014 (1) SA 244 (GSJ)

[34] The other so-called “grounds of review” are merely allegations of errors committed by the adjudicator on the merits and do not fall within the ambit of instances which render an adjudicator award reviewable.

RECONSIDERATION APPLICATION

[35] In terms of clause W1.4 of the NEC contract the tribunal (here the court) can reconsider the adjudicator’s award. As pointed out by Yacoob J,⁶ clause W1.4(4) grants the aggrieved party an “*appeal in the wide sense*”. That means it is a complete rehearing and a fresh determination on the merits of the matter with or without additional evidence or information. It corresponds with the first category of “appeal” set out in *Tikly v Johannes N.O.*⁷

[36] The claimants therefore had the opportunity to have presented evidence on aspects where it fell short before the adjudicator. They all however failed to do so.

Delay

[37] Clause W1.4(2) expressly states that the matter may not be referred to the “tribunal” (in this instance a court of law) unless a notification was given to the

⁶ *Department of Roads and Transport v Mogotsi NO and 3 others* (GJ Case Numbers 5163/2018 & 5164/2028)(11/02/22). The case was referred to by claimants and attached to the papers. In that case the Department brought applications to review an adjudication award made by Mr Mogotsi.

⁷ *Tikly v Johannes N.O.* 1963 (3) SA 588 (T)

other parties of the intention to do so within four weeks of the date of which the adjudicator notified his decision.

[38] Whereas a court has a discretion to consider a legality review or a review in terms of Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”) where an applicant delayed in bringing it, a court has no discretion to consider an application to reconsider the adjudicator’s award in terms of clause W1.4(4) where notification has not been given timeously. It is a contractual term which is binding on the parties.

[39] Kwagga and Taledi have not given notification to the other parties of the intention to refer the matter to court (i.e. the tribunal) within four weeks of the date of which the adjudicator notified his decision. They have thus not met the jurisdictional requirement for reliance on clause W1.4(4).

ADV BADELA’S AWARD

[40] The adjudicator dismissed the claimants’ claims, and *inter alia* held:

[40.1] the claimants had referred their contractual claims for adjudication outside the timeframes prescribed in clause W1 of the NEC 3 Contract;

[40.2] the time-bar provisions of the NEC 3 Contract are not contrary to public policy and the Constitution of the Republic of South Africa, 1996;

[40.3] the contractors had failed to substantiate their contractual claims;

[40.4] the contractors failed to produce invoices which reflected the amounts claimed or at all;

[40.5] the claims were formulated to be for works completed when in fact no works had been executed;

[40.6] the amounts claimed had not been certified and signed by the consulting engineers as required in terms of the NEC 3 Contract.

[41] I now briefly deal with some of these findings.

Time Bar

[42] Clause W1.3 sets out in an adjudication table when disputes are to be notified. In four instances a time period is provided when notification of the dispute must be given, and how long after that it must be referred to the adjudicator. However, the dispute in this matter falls under “*any other matter*” in the adjudication table and the clause providing when a dispute must be referred to the Adjudicator reads:

“Between two and four weeks after notification of the dispute to the other party and the service manager.”

[43] There is no provision as to when notification must be given. The adjudicator upheld the Department’s defence based on the time bar on the basis that a dispute was referred to the adjudicator more than four weeks after the dispute

arose. The date of the dispute is however not the date when the “*clock starts ticking*”.

[44] The claimants argued that they did not have to give notification at all, and this became an issue in the adjudication. The claimants also argued that the time clause had been waived as there were settlement discussions which took some time before the disputes were referred to adjudication (before Mr Mogotsi).

[45] The fact that the adjudicator may have erred in this regard does not avail the claimants and is not an issue I have to decide.

[46] Firstly, the adjudicator also dismissed claimants’ claims on the merits. The finding on the time bar was thus not determinative to his ultimate award. (Taledi’s statement in its supplementary affidavit that the adjudicator dismissed the claims only on the basis of the time bar is patently false.)

[47] Secondly, this would not be the type of error which is reviewable.

Merits: No certification, lack of evidence, fees for no work done

[48] The adjudicator carefully considered the claimants’ claims, and *inter alia* made the following findings on the merits:

“69 Clause Part C1.2 (51.2) provides that amounts on which interest is payable are those amounts that were due and certified by the RMPT [Road Maintenance Professional Team] which the employer

failed to pay within 4 (four) weeks. The said amounts must not only be due but must also have been certified by the RMPT. The claimants have not alleged that the amounts forming part of the dispute have been certified by the RMPT.” (The adjudicator’s emphasis.)”

“75 The 1st addendum neither guaranteed a minimum number of work orders nor minimum value amount for work to be done in a month or for the remainder of the contract between the parties.”

77 The Claimants submitted annexures “C1” to “C6” as quantification of amounts claimed by the claimants. The quantification of claims in these annexures is not supported by relevant documentation. Further, the said amounts have not been certified by the RMPT as required in terms of the NEC3 contract.”

“79 The contract between the parties at clause Part C1.2(Z3) provides that in order for a claimant to be entitled to payment ‘The contractor submits his payment certificate which includes an original tax invoice to the RMPT for certification. The certification should be done within twenty-four hours, and submitted to the Project Manager for approval in terms of cluse 51.1 of NEC3 contract. The contractor must submit his valid tax certificate, original tax invoice, vender number and an original certificate signed by the RMPT within the time required…….”

"80 The Claimants did not submit, in these proceedings, any tax certificate, tax invoice, vender number and a certificate signed by the RMPT to substantiate both their entitlement and claims."

"113 The Claimants failed to state the contractual terms they rely on for alleged rights to guaranteed minimum works orders. The terms of both the 1st and 2nd addenda replaced guaranteed contract value with works orders with bills of quantities and rates. There is not term in both the 1st and 2nd addenda that guarantees a number of works order that must be issued by the 2nd Respondent to each Claimant."

"118 The Claimants' claims, except for alleged unpaid invoices, were formulated as though the Claimants executed works and incurred expenses yet no works were executed. In this case the claimants did not execute any work under the new regime introduced by the 1st and 2nd addenda. Yet, in reality the claim should have been for damages (loss of profit) as a result of alleged contractual breach."

[49] These findings are unassailable and justified on the material furnished by the claimants to the adjudicator. These shortcomings in the claimants' case have not been addressed in the applications in the High Court.

LACK OF CERTIFICATION

[50] Kwagga and Taledi submit that certification by the RMPT was no longer necessary due to an amendment in the second addendum. The second addendum however amended clause 14 of part C3.1, which provides that the RMPT was entitled to make any variations for the quality or quantity of the work and deals with additional works or compensation events. In the second addendum “the RMPT” was merely replaced with “the employer”. The certification clause contained in part C1.2, clause 51.2 has not been amended in the second addendum.

[51] In the absence of certification, the claimants’ claims are unliquidated claims for damages which must be pursued by the institution of an action. Motion proceedings are unsuited to the prosecution of claims for unliquidated damages.⁸

CLAIM FOR WORK NOT RENDERED

[52] All the claimants claim for work not actually rendered. The adjudicator correctly found that there is no clause that provides for such a claim.

[53] Kopano Kofifi also relies on a letter from the Department and argues that there was an implied provision in the MEC Contract that the contractors were entitled to monthly work order. The letter reads:

⁸ *Economic Freedom Fighters and Others v Manuel* 2021 (3) SA 425 (SCA) at paragraph [105]

"The Department of Road and Transport offers this contract on the basis of a 100 km work schedule, wherein the work will be allocated according to the monthly issued works order."

[54] CatagRICT, Mafube and Basic Blue refer to a letter addressed by the respondents where they said that they had not issued any work orders due to budgetary constraints.

[55] These letters do not form part of the written contracts and are excluded in terms of the parol evidence rule. In any event, these letters do not support an interpretation that contractors can charge for work not rendered.

[56] CatagRICT, Mafube and Basic Blue further rely on the first addendum which provides that *"all work would be done according to a signed works order with quantities and rates"*. This term does not support the submission that they can claim for work not done.

[57] Insofar as the claimants rely on a tacit term, they face a number of problems:⁹

[57.1] A tacit term was not pleaded.

[57.2] It is incumbent on a party relying on an alleged tacit term to formulate the tacit term. The applicant has failed to do so.

⁹ See in general: *Alfred Mcalpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531

[57.3] There can be no tacit term contrary to an express term. The references to work orders make it quite clear that payment can only take place in respect of work orders issued by the Department.

[57.4] The claimants have not shown that a tacit term is required to give business efficacy to the agreement.

KWAGGA

Mogotsi Kwagga Award

[58] Kwagga avers that Mr Mogotsi did make an award in its dispute with Department (*"the Mogotsi Kwagga Award"*). Kwagga contends that all that was required of the adjudicator (Adv Badela) was to have examined the final figures of the "initial adjudication". Kwagga then submits that Adv Badela exceeded his powers by making an award on the merits. As shown above, this was not the case presented to Adv Badela.

[59] Kwagga however goes further and seeks an order that the so-called *"initial adjudication"* be declared final and binding and enforceable.

[60] A copy of the (purported) award did not form part of the court record. An attempt to upload it to CaseLines during the hearing was opposed by counsel for the respondents, and the attempt was abandoned. According to the notice of motion the award is unsigned. No evidence was presented as to how it came to the knowledge of the parties, or how it was purportedly published.

[61] It was submitted that it is common cause that the Mogotsi Kwagga Award exists, and that the award therefore stands until set aside by a court. Reliance was placed on the *Oudekraal*¹⁰ rule which says an unlawful administrative act exists in fact and may give rise to legal consequences for as long as it has not been set aside. In my view the *Oudekraal* rule finds no application in this matter.

[61.1] It is not clear to me that it is common cause that the Mogotsi Kwagga Award exists *as an award*. The respondents refer to it in their answering affidavit as a “purported award”. There is no evidence that it was published in terms of the NEC3 contract.

[61.2] The Yacoob J 2019 order (properly construed) contemplates that any proceedings before Mr Mogotsi ceased, and that Mr Mogotsi’s appointment as adjudicator came to an end. Any purported award which Mr Mogotsi may have produced after the Yacoob 2019 order was not an award at all. Mr Mogotsi was no longer a decision-maker whose decisions had any effect.

[61.3] The following dictum is apposite:¹¹

“There is a distinction in law between the improper exercise of power as in Oudekraal and the purported exercise of power where none exists. In the present matter Hani did not

¹⁰ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) paragraph [26].

¹¹ *Nelson Mandela Bay Municipality v Tsatsire* (1479/14) [2015] ZAECPHC 19 (31 March 2015); 2015 JDR 0676 (ECP)

improperly exercise his power by signing the second contract. He simply possessed no conferral of power or jurisdiction to extend the first contract."

[61.4] The respondents do not have to set the Mogotsi Kwagga Award aside – the Yacoob J 2019 order has already dealt with this issue.

[61.5] If the Mr Mogotsi attempted or purported to publish the Mogotsi Kwagga Award after Adv Badela's award had been published, it could not undo or wipe out Adv Badela's award.¹²

[62] Accordingly, Kwagga's challenge to the adjudicator's award on the ground that he exceeded his mandate (based on the Mogotsi Kwagga Award) must fail. The prayer in the notice of motion seeking that Mr Mogotsi's award be declared final and binding and enforceable also stands to be dismissed.

Kwagga: other prayers

[63] The applicant styles its review of the adjudicator's award a "legality review". The award is however not reviewable.

[64] In the alternative to its prayers for reviewing and setting aside Adv Badela's award and for the Mogotsi Kwagga Award to be held binding, Kwagga brings a contractual claim relying on clause W1.4. However, it cannot do so as it was

¹² *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO and Others* 2020 (4) SA 375 (CC), paragraph [43]

out of time in notifying the other parties.

[65] It may be mentioned that even if Kwagga did give timeous notice, it still would not have proved its case. I briefly state my reasons for coming to this conclusion.

[66] Kwagga has not remedied the defects in its case that there was no certification of the works, and that invoices and the like have not been submitted. In this regard the adjudicator's determination and reasoning still applies.

[67] Kwagga's attempt to prove its alleged damages in the founding affidavit is wholly inadequate. It contains lists of invoice numbers, months, and global amounts. No attempt is made to explain the figures. The invoices are not even annexed. It is impossible to determine how Kwagga calculated its damages from these numbers.

TALEDI

[68] Taledi has framed its application as a review. In its heads of argument it is referred to as a legality review. The adjudicator's award is however not reviewable.

[69] Taledi also relies on clause W1.4, presumably as an alternative to its review application.

- [70] As mentioned Taledi was out of time to bring a reconsideration application. It may be mentioned that even if Taledi did give timeous notice, it still would not have proved its case. I briefly state my reasons for coming to this conclusion.
- [71] Taledi has not remedied the defects in its case that there was no certification of the works, and that invoices and the like have not been submitted. In this regard the adjudicator's determination and reasoning is still applicable.
- [72] Taledi in the founding affidavit states that a "complete breakdown" of its claim is attached as annexure FA15. This annexure consists of tables showing the relevant periods, invoice numbers and a column headed as "outstanding works order". The invoices are not attached. The claims for most periods are stated to be "...where no work was issued and there was no compensation." This clearly does not constitute proof of any damages or loss. No other proof of Taledi's alleged damages is offered.

CATAGRICT, MAFUBE AND BASIC BLUE

- [73] In prayer 1 of their notice of motion Catagrict, Mafube and Basic Blue expressly state that they seek that Adv Badela's determination be set aside in terms of clause W1.4(2) of the MEC3 Contract. It is confirmed in the founding affidavit that the application is based on this clause. These claimants did timeously give notice in terms of clause W1.4(2).
- [74] This is therefore not a legality review or a review in terms of PAJA, but a reconsideration application. However, in the founding affidavit the attacks on

the award create the impression that this is in fact a legality or PAJA review. Insofar as CatagRICT, Mafube and Basic Blue did intend in the alternative to rely on a legality review, I repeat that the award is not reviewable.

Reconsideration application

[75] In this application the claimants have timeously given notice in terms of clause W1.4(2) and it is the only application of the four applications where the claimants get out of the starting blocks.¹³ I shall therefore deal with the merits of their reconsideration application in some detail.

[76] In the founding affidavit it is averred that the claims of CatagRICT, Mafube and Basic Blue are made up of the following:

[76.1] shortfall on payments received;

[76.2] annual escalations;

[76.3] outstanding work orders;

[76.4] late payments and carry over interest;

[76.5] interest accumulated from 2014 to 2017 financial years.

[77] It is then stated that the quantifications of the amounts of these items appear

¹³ Kopano Kofifi also gave timeous notice, but its application has other problems. This is dealt with below.

in annexures "J1" to "J3" attached to the founding affidavit.

[78] When one turns to annexure "J1" (actually attached as annexure "CM18") one finds a document of 96 pages. The first page seems a covering page of an email addressed to Mr Mogotsi. The next 54 pages contain parts (or the whole) of the MEC3 Contract, the addenda and an annexure thereto. The last 41 pages seem to be the quantification of CatagRICT's claim and contain (as far as I can tell) different categories of the claim:

[78.1] There is a category called "shortfall on payment received". It has a column setting out the payment date, a column mysteriously headed "expected works order", a column headed "amount paid" and a column headed "shortfall amount". No explanation is furnished for these entries.

[78.2] One then finds a category for "escalation on payments received". Here we have a column for dates, a column for amounts received, a column headed "escalated amounts received at 10%", and the final column being the claim amount (including VAT). There is no indication what the "escalated amounts received" is, and no explanation whatsoever as to what the claim amount is. There is no discernible correlation between the amounts in the last column and the previous columns.

[78.3] There follows a category styled "outstanding work order". It has a column named "outstanding month" and then a column headed

“amount of outstanding works order”. No breakdown of these amounts is furnished.

[78.4] The next category is “interest on late payment”. There are columns for amounts paid, invoice dates, payment date, paid late, and then “average interest”. It is unclear how this rate is calculated. I will return to interest on late payments.

[78.5] Lastly one finds a category “calculation of carried over interest”. This phrase is not explained. There is an “interest rate” column (without stating how the interest rate is determined), a column headed “interest opening balance”, a column “interest per month”, and a column “interest closing balance”. The amounts do not correlate with one another. The court is not informed where the opening balance comes from. How the closing balance is determined remains a mystery.

[79] Annexures “J2” and “J3” which pertain to Mafube and Basic Blue are in the same vein.

[80] There is no indication in the founding affidavit on what contractual clause(s) in the MEC3 Contract or the addenda these items are based. It is trite that a founding affidavit constitutes both the evidence and the pleadings.¹⁴ An applicant or plaintiff must at least plead the relevant terms of the contract and

¹⁴ *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793C – G

the applicability of those terms to its claim.¹⁵ The founding affidavit in this case does not even meet the requirements of a pleading based on contract let alone furnishing sufficient evidence.

[81] It is not for the respondents or the court to page through these annexures and try to determine how the applicants attempted to calculate their claim. This type of documentation, without any explanation in the founding affidavit, does not constitute proof.

[82] In *Lipschitz and Schwartz NNO v Markowitz* ¹⁶1976 (3) SA 772 (W) the court observed at 775H-776A:

“Mr Peart ultimately took refuge in the last paragraph of the founding affidavit This is the blanket allegation that perusal of the record of evidence will reveal some prima facie case of misfeasance. I am not prepared to accept this proposition. A litigant cannot, as it were, throw a mass of material contained in the record of an enquiry at the Court and his opponent, and merely invite them to read it so as to discover for themselves some cause of action which might lurk therein, without identifying it. If this were permissible, the essence of our established practice and which is designed and which still evolves as a means of accurately identifying issues and conflicts so that the Court and the

¹⁵ *Prins v Universiteit van Pretoria* 1980 (2) SA 171 (T) at 174G-H.

¹⁶ *Lipschitz and Schwartz NNO v Markowitz* 1976 (3) SA 772 (W) at 775H-776A

litigants should be properly apprised of the relevant conflicts, would be destroyed."¹⁷ (Own emphasis)

[83] Accordingly, not only has CatagRICT, Mafube and Basic Blue failed to prove their case before the adjudicator, in this rehearing application they have also dismally failed to do so.

Alleged Irregularities

[84] CatagRICT, Mafube and Basic Blue aver that there are a number of irregularities in the award. Even if this is correct, this will not avail CatagRICT, Mafube and Basic Blue as they have failed to prove their case. I shall however briefly refer to the alleged irregularities.

First ground: time bar

[85] I have already dealt with the time bar and the fact that it is not determinative of the application.

Second ground: guaranteed minimum works orders

[86] CatagRICT, Mafube and Basic Blue complain about the adjudicator's finding (in paragraph 113) that there was no guaranteed works order. They say it was

¹⁷ See also: *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 324G: "(I)t is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met."

not pleaded as a defence and that the adjudicator accordingly fashioned out a defence on behalf of the respondents. As found by the adjudicator, the claimants had to “*state the contractual terms they rely on for alleged rights to minimum works order.*” They bore that onus. In any event, Catagrict, Mafube and Basic Blue have also failed to prove in these proceedings that they were entitled to payment for work not done.

Third ground: amendment of claims

[87] Catagrict, Mafube and Basic Blue challenge the adjudicator's finding that the claimants had no basis to amend their claims 6 years after referral of the dispute to adjudication.

[88] However, the adjudicator also (correctly) found that the claimants did not plead any invoices in support of their alleged claims to escalation and interest (which form part of the amended claims).

[89] For reasons set out above, Catagrict, Mafube and Basic Blue have failed in this application to prove any claim whatsoever.

Fourth ground: certification

[90] Catagrict, Mafube and Basic Blue aver that the absence of certification was not pleaded before the adjudicator, and that the adjudicator therefore fashioned out a defence on behalf of the respondents. This misses the point. In the absence of certification, Catagrict, Mafube and Basic Blue had to prove their claim and quantum.

Fifth ground: interest

[91] Catagrict, Mafube and Basic Blue take issue with the adjudicator's finding that because the claimants' claims were time barred, the question of interest does not arise. In that the claim was not time barred, Catagrict, Mafube and Basic Blue aver that the adjudicator therefore erred and that interest should accrue to their claims. This is incorrect, as the arbitrator also found that no invoices were pleaded by the claimants in support of their claim to interest. In other words, he also dismissed the interest claim on the merits.

[92] Catagrict, Mafube and Basic Blue have failed to prove the interest claim in these proceedings. It was required of Catagrict, Mafube and Basic Blue to have at least pleaded and to have furnished documentary and/or other evidence as to:

[92.1] date when payment was due in respect of each invoice (with due reference to the relevant terms of the contract);

[92.2] the amount of the invoice;

[92.3] date when it was paid;

[92.4] contractual entitlement to a specific rate of interest, or proof of the interest as a damages claim or that they claim *mora* interest.

Allegation that decision is irrational

[93] It is further averred that the adjudicator's decision is irrational. The grounds for this finding are simply based on a number of findings the adjudicator made against the claimants, for example that there were no tax certificates, invoice numbers or certification. There are no grounds for finding that the award was irrational.

Constitutional Considerations

[94] CatagRICT, Mafube and Basic Blue also submit that the contract should be viewed "*within the purview of the Constitution and public policy*". It is not spelt out how the adjudicator or this court should deal with the matter differently in light of the Constitution or public policy. The issue is whether CatagRICT, Mafube and Basic Blue proved their contractual claim against the respondents.

KOPANO KOFIFI

Noice of motion and proposed amendment

[95] Kopano Kofifi in prayer 1 of its notice of motion seeks that the determination of the adjudicator be reviewed and set aside. Prayer 2 then reads:

"2. That the dispute previously referred to Mr Lloyd Mogotsi be finally determined by the above Honourable Court."

Prayer 3 deals with the costs of the application.

[96] No case for payment is made out in the founding affidavit.

[97] The applications were heard over two days, more than a week apart. On the eve of the second day of the hearing Kopano Kofifi caused a notice of amendment of the notice of motion to be uploaded on CaseLines. In terms of the proposed amendment prayer 2 was to be deleted in its entirety and replaced by the following:

"2. Directing the first and second respondents jointly and severally, the one paying the other to be absolved, to pay the applicant the sum of R27 810 304,42 (VAT inclusive)."

The proposed amendment also includes interest on the above amount.

[98] At the hearing on the next day counsel moved for the amendment from the Bar. He relied on rule 28(10). There was no affidavit in support of the application. The proposed amendment was vigorously opposed by respondents' counsel.

[99] In the midst of the debate about the proposed amendment, further documentation was uploaded on CaseLines without prior notice. The first document consists of one page headed "*Financial Year 2017*" with various columns and amounts. The second document is a document of 41 pages headed "*Submission, Calculations: Kopano Kofifi Projects*". There is also a third document, but it appears to be a duplication of the first document. The documents are not confirmed on oath.

[100] When it came to light that these documents had been uploaded onto CaseLines, respondents' counsel obviously objected to their admissibility. I stated that I will rule on the amendment and the admissibility of the documents in this judgment.

[101] The documents have not been confirmed on oath. These documents do not fall within any recognised class of documents which prove themselves on mere production. They are inadmissible in evidence.

[102] The factors which a Court will consider before granting a late amendment are trite.

[102.1] A party who seeks the amendment bears the onus of proving that the other party will not suffer prejudice as a result. Doubt as to whether the other party might suffer prejudice will result in refusal of the application.¹⁸ In this instance the respondents will clearly suffer prejudice, as they had no opportunity to deal with the relief seeking a monetary payment.

[102.2] The party seeking a late amendment must also prove that it did not delay in making the application after becoming aware of the evidential material upon which reliance is placed and must provide

¹⁸ *Kali v Incorporated General Insurance* 1976 (2) SA 179 (D) at 128B - D

a satisfactory reason why the amendment was not sought at an earlier stage.¹⁹ Kopano Kofifi did not do so.

[102.3] The party seeking the amendment must also show that it has a triable issue, ie a dispute which will probably be established by the evidence foreshadowed.²⁰ In this case the applicant relies on documentation which has not been confirmed under oath and does not constitute evidence. In addition, for the same reasons that apply to the applications of the other claimants, the documents (even if admissible) would in any event have been insufficient to establish a monetary claim.

[103] The application for amendment of the notice of motion is dismissed, and it is ruled that the documents filed on CaseLines on 01-281 to 01-324 are inadmissible.

Merits and additional submissions

[104] Kopano Kofifi did give timeous notice in terms of clause W1.4, and therefore could bring a reconsideration application. In the light of the fact that it did not present any admissible evidence, its application for reconsideration must fail.

¹⁹ *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 641A – B; *Apex Truck & Trailer v PPCF Boerdery CC* 2024 JDR 2028 (GJ) at para 10

²⁰ *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* 2005 (6) SA 23 (C) at 36I–J.

[105] Its application was similarly worded as a review application if regard is had to the contents of prayer 1 of the notice of motion and the founding affidavit. However, as found above, the award of the adjudicator is not reviewable.

[106] I need to deal with an additional issue raised by Kopano Kofifi in its founding affidavit. In the founding affidavit the following is stated:

“The third respondent [Adv Badela] reassessed the merits of the initial dispute, an aspect which falls within the purview of the initial adjudicator. He thereby exceeded his powers by assuming the power to review the merits of the first adjudication award, when the Contract did not afford him those powers. Indeed, it can be argued that he usurped the role of the Tribunal by examining the merits.” (Own emphasis)

[107] I have already indicated that no such argument was presented to Adv Badela.

[108] Kopano Kofifi refers to a document attached to its founding affidavit which is an email addressed by Mr Mogotsi which shows that Mr Mogotsi had started to consider the claims. In the email he raised certain queries and asked for further information. There is however no evidence of a “first adjudication award”.

[109] During oral argument on behalf of Kopano Kofifi, reference was made to a portion of a disputed settlement agreement which had been concluded between the contractors and the Department years ago. The claimants in the proceedings before Adv Badela opposed the introduction of the settlement

agreement and the adjudicator found in their favour. A party cannot cherry pick portions of an inadmissible settlement agreement in order to support its case.

COSTS AND CONCLUSION

[110] The application stands to be dismissed, and costs should follow the result. A cost order should be made under rule 67A(3) read with rule 69 in respect to work rendered after 12 April 2024.²¹ Scale C is appropriate if regard is had to the importance, value and complexity of the case. In respect of work rendered before 12 April 2024, the respondents are entitled to party and party costs. Whilst I am of the view that the employment of senior counsel was justified, a court does not make a specific order stipulating that the costs should include the costs of senior counsel.²²

ORDERS

[111] I accordingly make the following orders:

Case number 6577/2019:

1. The application is dismissed.
2. The applicant is ordered to pay first and second respondents' costs, such costs to be on the party and party scale to 11 April 2024, and with effect

²¹ *Mashavha v Enaex Africa (Pty) Ltd* (2022/18404) [2024] ZAGPJHC 387 (22 April 2024); 024 JDR 1686 (GJ)

²² *Singh v BMW Financial Services (SA) (Pty) Ltd* 2010 JDR 1157 (SCA) para 28

from 12 April 2024 on scale C in terms of rule 67A read with rule 69 of the Uniform Rules of Court.

Case number 40523/2023:

1. The application is dismissed.
2. The applicant is ordered to pay first and second respondents' costs, such costs to be on the party and party scale to 11 April 2024, and with effect from 12 April 2024 on scale C in terms of rule 67A read with rule 69 of the Uniform Rules of Court.

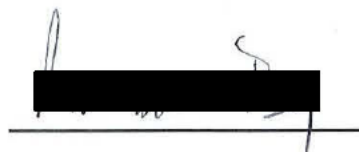
Case number 11460/2022:

1. The application is dismissed.
2. The applicants are ordered to pay second and third respondents' costs, jointly and severally, such costs to be on the party and party scale to 11 April 2024, and with effect from 12 April 2024 on scale C in terms of rule 67A read with rule 69 of the Uniform Rules of Court.

Case number 23359/2022:

1. The application is dismissed.
2. The applicant is ordered to pay first and second respondents' costs, such costs to be on the party and party scale to 11 April 2024, and

with effect from 12 April 2024 on scale C in terms of rule 67A read
with rule 69 of the Uniform Rules of Court.



VAN DER BERG AJ

APPEARANCES

Case no 6577/2019

For the applicant:

Adv J A Venter
Des Naidoo & Associates

For the first and second respondents:

Adv M B Lecoge SC
Instructed by:
Malatjie & Co Attorneys

Case no 40523/2023

For the applicant:

Adv J A Venter (heads of argument drawn by attorney)
Instructed by:
Des Naidoo & Associates

For the first and second respondents:

Adv M B Lecoge SC
Instructed by:
Malatjie & Co Attorneys

Case no: 11460/2022

For the applicants:

Adv LH Lekalakala
Instructed by:
Ndobe Inc. Attorneys

For second and third respondents:

Adv M B Lecoge SC
Instructed by:
Malatjie & Co Attorneys

Case no 23359/2022

For the applicant:

Adv H Salani (1st day) and Adv LH Lekalakala (2nd day)
Instructed by:
Ramatshila-Mugeru Inc

For first and second respondents:

Adv M B Lecoge SC
Instructed by:
Malatjie & Co Attorneys

Dates of hearing: 29 July 2024 and 7 August 2024

Date of judgment: 25 October 2024