

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

CASE NO: 3387/2020

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

DATE:

SIGNATURE:

In the matter between:

**ASCON TRADING CC t/a ASCON TRADING
CIVIL ENGINEERING**

Applicant

and

CLIVE WILSON

First Respondent

NELSON MANDELA BAY MUNICIPALITY

Second Respondent

JUDGMENT

POTGIETER J

INTRODUCTION

[1] This matter is a sequel to a contractual dispute relating to the construction of certain sewerage infrastructure by the applicant on behalf of the second respondent, the Nelson Mandela Bay Municipality (“the Municipality”) in terms of a construction contract concluded by the said parties.

[2] In an attempt to resolve the dispute, the applicant pursued the dispute resolution provisions of the contract which include adjudication and finally arbitration. The adjudication process was exhausted resulting in a decision having been made in favour of the applicant on 27 May 2022 for payment of the aggregate sum of R11 722 975.95 ('the adjudication capital sum') in respect of various individual amounts claimed by the applicant. The adjudicator found that no interest was payable on any of these individual amounts. The dispute was subsequently referred to arbitration and the first respondent was appointed as arbitrator. The arbitration is currently pending in respect of the various disputed claims and counter claims of the parties.

[3] Due to non-payment of the adjudication capital sum, the applicant obtained an interlocutory decision from the first respondent (styled by the latter as an Interim Measure in terms of the applicable arbitration rules) on 24 September 2022 ordering the Municipality to comply with the adjudication decision notwithstanding the pending arbitration. Pursuant to proceedings instituted in this court by the applicant, an order was granted by agreement between the parties on 27 July 2023, *inter alia*, directing the Municipality to pay the adjudication capital sum in the amount of R11 722 975.95 to the applicant. In terms of the order, the applicant's claim for interest on the adjudication capital sum calculated from 27 May 2022 and certain unresolved aspects of legal costs were separated and postponed for hearing on 14 September 2023. The prayer to make the interlocutory arbitration decision an order of court was not pursued. The adjudication capital sum has since been paid to the applicant by the Municipality.

[4] The present proceedings (the main application) concern the determination of the abovesaid separated issues. The application is opposed by the Municipality. The matter was fully argued and judgment was reserved on 14 September 2023. Mr Friedman, the applicant's attorney, appeared on its behalf and Mr Ford SC, together with Mr Richards, appeared on behalf of the Municipality. The arbitrator is not participating in the proceedings.

[5] On 19 September 2023 (while judgment was pending) the applicant's attorney unilaterally delivered via email supplementary heads of argument raising a new issue and informally sought leave to file the same. In view of the objection raised by the Municipality's attorney, the supplementary heads of argument were not considered and the applicant's attorney was directed to deal with the matter formally in terms of the rules of court. Subsequently on 27 September 2023, before judgment could be delivered, the applicant applied in terms of rule 28 to amend its notice of motion to claim interest in the alternative from 24 September 2022, being the date of the said interlocutory arbitration decision, instead of 27 May 2022 (the date of the adjudication decision). The application to amend was also opposed. Considerable delays were occasioned by the exchange of papers and re-enrolment of the matter to deal with the intervening opposed application to amend which was heard on 14 June 2024. It is apposite to deal with the merits of the application to amend before reverting to the main application.

APPLICATION TO AMEND

[6] Mr Beyleveld SC appeared on behalf of the applicant at the hearing of the application to amend and Mr Richards SC (who has since acquired the status of senior counsel) appeared on behalf of the Municipality.

The approach to applications to amend

[7] The approach to be adopted to applications to amend is not in issue between the parties and is in fact trite. The court has a wide discretion to permit amendments which discretion must be exercised judicially. The decision should not be arrived at capriciously, but for substantial reasons. The position has been stated as follows in *Devonia Shipping Ltd v Luis (Yeoman Shipping Ltd Intervening)*¹:

¹ 1994(2) SA 363 (C) at 369F-G

The general rule is that an amendment of a notice of motion, as in the case of a summons or pleading in an action, will always be allowed unless the application to amend is *mala fide* or unless the amendment would cause an injustice or prejudice to the other side which cannot be compensated by an order for costs or, in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the notice of motion which it is sought to amend was filed.

[8] The court indicated in *Caxton Ltd & Others v Reeve Forman (Pty) Ltd & Another*² that although ‘... *the decision whether to grant or refuse an application to amend a pleading rests in the discretion of the Court, this discretion must be exercised with due regard to certain basic principles*’. In *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd & Another*³ the court stated that ‘[h]aving already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show *prima facie* that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation’. White J held in *Commercial Union Assurance Co Ltd v Waymark NO*⁴ that the latter dictum is one of the ‘*basic principles*’ to which regard must be had in deciding applications to amend.

Submissions of the parties

[9] It is indicated in the founding affidavit that the applicant’s legal representative should have but inadvertently failed to address the issue that ‘*at the very least interest should be payable from the date of the Second Respondent’s Award of 24 September 2022*’ (the reference to Second Respondent is erroneous and should be first respondent). The contention accordingly is that interest should be payable at the very least from the date of the arbitrator’s decision if not from the date of the adjudication decision.

² 1990(3) SA 547 (A) at 565G

³ 1967(3) SA 632 (D) at 641A

⁴ 1995(2) SA 73 (TK) at 77G

[10] Mr Beyleveld submitted that the argument that the arbitrator's decision does not attract interest is misconceived and conflates 'post-judgement' interest with interest in terms of the agreement between the parties. The adjudicator's determination that no interest is payable, dealt with the situation prior to the award. In any event, the matter has advanced to the stage where there is an arbitral award and on a purposive interpretation it cannot be said that interest is not payable once an arbitral award has been made. Interest is payable in terms of both the Prescribed Rate of Interest Act, 55 of 1975 ("the Interest Act") and the Arbitration Act, 42 of 1965 ("the Arbitration Act"). The provisions of section 29 of the Arbitration Act⁵ are of some significance and make it abundantly clear that the arbitrator's award carries interest from the date of the award. The fact that this award was not made an order of court is of no moment because the starting date for interest is prescribed by statute and does not require repetition in a court order. Given that no prejudice has been shown by the Municipality, the application for the amendment of the notice of motion should be granted to provide for the payment of interest in the alternative from 24 September 2022 being the date of the arbitrator's decision. Mr Beyleveld finally contended that the argument is misconceived that this relief is not competent in the absence of the variation of the court order of 27 July 2023. He submitted that interest is payable *ex lege* on the arbitrator's award which renders the variation of the court order superfluous.

[11] Mr Richards submitted that the relief sought to amend the notice of motion in terms of rule 28 is not competent. The court order of 27 July 2023 specified the two reserved issues which are the only remaining issues for determination in the main application. To that extent the notice of motion was superseded by the court order. Comprehensive argument was presented on those reserved issues at the hearing whereafter judgement was reserved. Significantly, the applicant is not seeking the amendment of the court order in terms of rule 42 as it should have done. In any event,

⁵ The section provides as follows:

'Interest on amount awarded

Where an award orders the payment of a sum of money, such sum shall, unless the award provides otherwise, carry interest as from the date of the award and at the same rate as a judgment debt.'

there is no basis for amending the court order even *mero motu* by the court, as none of the circumstances set out in rule 42 applies in this case. The order is not interlocutory in nature but rather meets the attributes of an '*order or judgement*' as envisaged in the rules of court. It is final in effect and not susceptible to alteration by the court. It grants definite and distinct relief, and disposes at least of a substantial portion of the relief claimed in the main application, namely payment of the adjudication capital sum. Furthermore, the order was not erroneously sought or granted in the absence of the applicant nor does it contain an ambiguity or a patent error or omission. Finally, it did not result from a mistake common to the parties nor is there a causative link between a mistake and the grant of the order. He furthermore submitted that the guiding principle is the certainty of judgements and that rescission or variation of the court order should only be allowed in exceptional circumstances. The court has no discretion to set aside an order in terms of rule 42 in the absence of the relevant jurisdictional requirements contained in the rule. The application should therefore be dismissed with costs on this basis alone.

[12] Mr Richards contended that the rule 28 application in any event lacks merit. Firstly, it seeks to introduce a new cause of action. The case being pursued in the main application was that interest was payable from the date of the adjudication decision. Reliance was placed in this regard on the cause of action that the adjudication decision gave rise to an obligation to pay interest. The amendment on the other hand is in effect based on a different contention, namely that the arbitral decision relating to the adjudication capital sum gave rise to an obligation to pay interest. Accordingly, the prejudice which the Municipality stands to suffer having been deprived of the opportunity to address this new cause of action fully in the papers, cannot be compensated for by a costs order. The court will accordingly decline to exercise its discretion to allow an amendment in the circumstances.

[13] Secondly, the applicant has failed to establish that the amendment, if granted, would have any prospect of success or that it puts up '*something deserving of consideration, a triable issue*'. Pursuant to the Municipality's defence of *lis pendens*, the

applicant withdrew all interest claims (including to the extent applicable, also ‘post-adjudication award interest’) that were before the arbitrator. As a result, the adjudicator’s determination of contractual entitlements would have become final and contractually binding upon the parties. The contract provides for a two-fold dispute resolution process, namely adjudication and for any disagreements that result from that process to be determined in the succeeding component, being arbitration. The arbitration process has been engaged and has yet to be finalised. Any remaining issues of interest fall to be determined in that process. This deprives the court of jurisdiction to determine such issues, including interest on the arbitral decision, which arise from the contract.

[14] Thirdly, the adjudicator’s decision was not exhaustive of the dispute between the parties. Adjudication has been characterised by the Supreme Court of Appeal (SCA) as ‘*an intervening provisional stage in the dispute resolution process*’.⁶ The amount of the adjudicator’s decision was not a separate award in its own right but was simply the aggregate of the various amounts reflected in the decision. The adjudicator accordingly determined on a provisional and interim basis the contractual amounts considered to be due to the applicant but pertinently held that pursuant to the provisions of the contract, the applicant was not entitled to interest on such amounts. The arbitrator found in his decision that ‘*Respondent is indeed obliged to comply with the Adjudication Decision and accordingly order that it do so forthwith*’, however, that, enforcement of the decision should be sought in the competent court having jurisdiction. It is clear that the arbitrator did not go further than to declare that the Municipality was obliged to comply with the adjudication decision. The arbitrator’s decision could not found a claim for anything more than is provided for in the adjudication decision which expressly excluded any liability for interest whatsoever.

[15] Furthermore, the Interest Act does not assist the applicant. The amount of the adjudication decision, which does not concern an unliquidated debt, was not determined

⁶ *Framatome v Escom Holdings SOC Ltd* 2022(2) SA 395 (SCA) at para 20.

as contemplated in section 2A(1)⁷ of the Interest Act, nor did the arbitrator's decision amount to the determination of an unliquidated debt. The latter decision went no further than to record the trite principle that the amount of an adjudication decision is payable on an interim basis, pending the determination of any dispute with regard to that decision in the arbitration. The contract clearly provides that no interest is payable thus excluding the applicability of section 1(1)⁸ of the Interest Act. Neither the adjudication decision nor the arbitrator's decision constitutes a '*judgement debt*' or a '*judgement or order*' and section 2(1)⁹ of the Interest Act accordingly does not apply.

[16] It was finally submitted that the applicant's contention for *mora* interest, is unfounded. The contract does not provide for payment of an adjudication decision by a stipulated date. Its enforcement pending the final determination of disputes with regard thereto by arbitration, arises from general practice. The SCA cautioned that sight should not be lost that adjudication is merely an intervening, provisional stage in the dispute resolution process and that the parties '*... still have a right of recourse to litigation and arbitration. Only a tribunal may revise an adjudicator's decision*'¹⁰. The arbitrator's decision did not constitute the final determination of the disputes between the parties. It reflected nothing more than the practice that payment be made in the interim, subject to the right of recovery thereof to the extent that the disputes are determined in favour of the Municipality in the arbitration.¹¹ Neither the requirement that payment be made, as referred to by both the adjudicator and the arbitrator, nor any demand for payment converts the adjudication decision into anything other than what the contract provides. In this instance the contract pertinently provides that no interest is payable. It follows

⁷ The section provides as follows under the heading '*Interest on unliquidated debts*':

'Subject to the provisions of this section, the amount of every unliquidated debt as determined by a court of law, or an arbitrator or an arbitral tribunal or by agreement between the creditor and the debtor, shall bear interest as contemplated in section 1'.

⁸ The section is to the effect that if a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in other manner such interest shall be calculated at the rate prescribed in terms of subsection 1(2)(a).

⁹ The section provides that:

'Every judgement debt which, but for the provisions of this subsection, would not bear any interest after the date of the judgement or order by virtue of which it is due, shall bear interest from the day on which such judgement debt is payable, unless that judgement or order provides otherwise'. (emphasis added)

¹⁰ *Framatome supra* para 23.

¹¹ *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd & Another* 2013(6) SA 345 (SCA).

inexorably that the common law principles of *mora* cannot prevail and override the principle of *pacta sunt servanda*. The application to amend therefore falls to be dismissed with costs, including the costs of counsel on Scale C in terms of rule 69(7).

Evaluation

[17] Having considered the matter, I agree with the submission of Mr Richards that the application to amend the notice of motion in terms of rule 28, is not competent in the absence of an application for the variation or rescission of the court order of 27 July 2023 which defined the remaining issues for determination. The order that was taken by agreement clearly superseded the notice of motion in delineating the ambit of the hearing. Amending only the terms of the notice of motion would thus be ineffectual in the circumstances. The main application was fully argued on the basis of the court order. The application for the amendment was an afterthought (this much is acknowledged by the applicant) on the part of the applicant's legal representative seemingly prompted by a submission that was made by the Municipality's counsel during argument of the main application. It appears to have been based on the realisation that the claim for interest on the adjudication decision was bound to fail. Furthermore, the applicant failed to establish any of the jurisdictional requirements set out in rule 42 dealing with the rescission or variation of court orders. The argument lacks merit that there is no need to vary the court order of 27 July 2023 because there is statutory provision for interest on the arbitrator's award which renders the variation of the court order superfluous. In view of what is set out below concerning the merits of the application to amend, it is clear that the statutory provisions relied upon by the applicant find no application in the matter. The application accordingly falls to be dismissed on this ground alone.

[18] In any event, in my view the submission of Mr Richards is well-founded that the rule 28 application lacks merit. It purports to introduce a completely new cause of action not dealt with at all in the papers at the stage when the issues determined in terms of the relevant court order have been fully argued and judgement was reserved. A costs

order cannot adequately compensate the Municipality for the prejudice that it will clearly suffer in the circumstances should the application be granted. It follows that I do not agree with the submission of Mr Beyleveld that no prejudice has been established by the Municipality. I am not persuaded in the circumstances to exercise my discretion in favour of allowing the application to amend which would have the practical effect of re-commencing the matter on a completely new cause of action.

[19] The issue arising from the envisaged amendment concerns what is referred to by the applicant as '*post-judgement interest*' which according to Mr Beyleveld should not be conflated with interest in terms of the contract. The applicant's argument is that it is statutorily determined that the arbitrator's decision attracts '*post-judgement*' interest by virtue of the provisions of both the Interest Act and the Arbitration Act. In this regard, I agree with the submission by Mr Richards that this argument is not supported by any of the above provisions of the Interest Act relied upon by the applicant. Neither the adjudication decision nor the arbitration decision gave rise to a '*judgement debt*' in terms of a '*judgement or order*'¹² or amounts to the determination of an unliquidated debt. Moreover, the issue of interest is governed by the contract which provides that no interest is payable by the Municipality. The principles of *mora* interest equally do not apply given the said no-interest provisions in the contract.

[20] In my view, section 29 of the Arbitration Act equally does not assist the applicant. The nature of adjudication has been clearly established as an interim, provisional step in the dispute resolution process which does not finally resolve any issue. Equally, the arbitration decision did not determine any of the issues between the parties which issues await determination at the pending arbitration. It is akin to a *status quo* determination confirming, as it does, that the Municipality was obliged to comply with the terms of the adjudication decision despite the pending arbitration. It clearly does not qualify as an award that determines that the Municipality is liable to make payment and ordering it to pay a sum of money as contemplated in section 29. An award of that

¹² An arbitral award is not a judgment: *Administrasie van Transvaal v Oosthuizen en 'n Ander* 1990(3) SA 387 (W) at 397 I-J. The same would obviously apply to an adjudicator's decision.

nature could conceivably result from the pending arbitration. However, it cannot in my view be constituted by an Interim Measure simply confirming that the adjudication decision had to be complied with in the interim subject to reimbursement of any monies paid should the Municipality successfully challenge the adjudication decision in the pending arbitration. The fact that the arbitration decision indirectly facilitated payment of the adjudication capital sum, did not convert the decision into an award ordering the payment of a sum of money. It does not go any further than declaring that the Municipality was obliged to comply with the adjudication decision notwithstanding the pending arbitration and ordering it to do so. In my view section 29 envisages a decision taken by the arbitrator after due consideration of the merits of the claim finally determining a substantive issue and not rulings of an interim and procedural nature as in the present case.¹³ The issuing of an interim measure does not constitute an award¹⁴ and the interest provisions of section 29 accordingly do not apply to it.

[21] The applicant suggests that it is anomalous that no interest is payable where the capital sum is paid a considerable period after the relevant decision was made. The short answer is that enforcement steps are available to the successful claimant to ensure expeditious satisfaction of the decision. The claimant has no cause for complaint about late payment if it neglects to act promptly to enforce payment and would have no reason to complain where it does act promptly.

¹³ Law of South Africa (LAWSA) Vol 2 (3 ed) para 132; Jacobs *The Law of Arbitration in South Africa* p124 para 146; *Harlin Properties Ltd v Rush & Tomkins (SA) Ltd* 1963(1) SA 187 (1) at 196 D; cf Johannes Voet *Commentarius ad Pandectas* 4.8.18 (Gane's translation):

"Arbitration must dispose of every question submitted. – But there may be a submission not merely on a single matter, but also on many or all causes and disputes. That kind of submission is called a "full" submission, though that expression is also used in varying senses in the passages cited below. An arbitrator will not therefore be considered to have discharged his duty unless he has disposed of all questions by his award. Otherwise he must still be forced by the praetor to settle what has not yet been decided.

Disposition must be final. – But even if only one matter of controversy has been referred to him, it will not suffice for him to have made an interlocutory order in regard to it; but he must give such a judgment as to show his intention that in accordance with it, the litigants shall be done with the whole controversy. It is thus not possible for an arbitrator by his judgment to send the submitting parties away to another arbitrator or to the ordinary judge.'

¹⁴ LAWSA *op cit* para 132 footnote 4; *SA Breweries Ltd v Shoprite Holdings Ltd* 2008(1) SA 203 (SCA) para 22; P Ramsden *The Law of Arbitration: South African & International Arbitration* (2ed) p203 para 9.5.4.

[22] It follows that there is no merit in the rule 28 application to amend the notice of motion and that it does not raise a triable issue. The application thus falls to be dismissed. I now revert to the merits of the main application.

MERITS OF THE MAIN APPLICATION

Relevant background

[23] In the unamended notice of motion, the applicant is claiming interest on the adjudication capital sum at the rate of 7.25 percent per annum calculated from 27 May 2022 to date of payment, while the Municipality contends that in terms of the provisions of the contract no interest is payable by it.

[24] The issue concerning interest in fact arose during the adjudication proceedings. The adjudicator decided the issue in favour of the Municipality and held that in terms of the provisions of the contract, the applicant was not entitled to interest on the amounts awarded in the adjudication.

[25] There has been a flurry of supplementary papers exchanged between the parties in the main application. The most pertinent whereof for present purposes is a supplementary affidavit deposed to by the Municipality's attorney Mr Kailash Karsan which was filed on 5 September 2023. At the commencement of the hearing on 14 September 2023, I granted the Municipality's unopposed application for leave to file this affidavit. The affidavit disclosed material information that became available to the Municipality subsequent to having filed its opposing papers in the main application during November 2022. The Municipality contended in its answering affidavit that the relief sought by the applicant with regard to interest was *lis pendens* in the pending arbitration. The supplementary affidavit dealt with evidence supporting this contention, contained in a written submission by the applicant dated 8 August 2023 that was filed in the arbitration. This document made it abundantly clear that the issue of interest was indeed pending before the arbitrator. The document, for example, requested that the

issue whether or not interest was payable should be disposed of separately from the other issues in the arbitration. It also contains comprehensive submissions in support of the contention that interest was indeed payable.

[26] The supplementary affidavit of Mr Karsan reiterated the earlier contention contained in the Municipality's answering affidavit that the issue of interest was *lis pendens* before the arbitration and that the applicant's claim for interest should accordingly be dismissed.

[27] In response to the supplementary affidavit, the applicant promptly withdrew the claim for interest from the arbitration and filed a further affidavit, seemingly in response to the supplementary affidavit of Mr Karsan, confirming that the claim for interest on the awarded amounts is abandoned. The purpose clearly was to alleviate where the shoe pinched. The issue of *lis pendens* accordingly fell away.

[28] Both parties filed supplementary heads of argument dealing with the new developments.

Submissions on behalf of the parties

[29] In both his heads of argument and his address at the hearing, Mr Friedman indicated that the only issue for determination was whether the non-interest-bearing provisions of the contract cover all overdue payments. In view of the late payment of the adjudication capital sum, the question in his submission therefore was whether interest was payable from the date of the adjudication decision to the date of payment. I proceed to deal with this issue.

[30] The aforesaid ruling of the adjudicator that no interest was payable on the amounts constituting the aggregate capital sum was based on the amended provisions of clause 6.10.6.2 contained in Part C of the contract. In its initial unamended form, the

clause made provision for simple interest to be payable on outstanding amounts. However, it was subsequently amended to read:

“No interest shall be payable to the Contractor upon any monies retained or overdue in terms of the Contract.”

[31] Mr Friedman submitted that the amended provisions of clause 6.10.6.2 are limited to outstanding or arrear amounts due in terms of clause 6.10 of the contract. He indicated that the applicant accepts the ruling to that effect by the adjudicator. However, he submitted that once the adjudication decision was issued it constituted a judicial novation and gave rise to an entirely separate and new independent cause of action falling outside of the payment obligations of clause 6.10 of the contract. He submitted that the capital sum determined by the adjudicator was unaffected by the amended interest provisions of clause 6.10.6.2 and constitutes a new obligation bearing interest in terms of the Interest Act, as well as section 29 of the Arbitration Act from the date of the decision to the date of payment. He emphasised that the issue of ‘post-award’ interest was not before the adjudicator and was therefore an open question that was not decided by the adjudicator.

[32] Mr Ford submitted that the effect of the applicant’s withdrawal of the claim for interest before the arbitrator, was to render the adjudicator’s ruling final and binding that no interest was payable by the Municipality. The aggregate quantum of the capital sum is constituted by various individual items which the adjudicator found were due and payable by the Municipality. There was no composite lump sum awarded in favour of the applicant. The adjudicator’s ruling is final and was based upon the provisions of the contract. None of the individual claims upheld in the decision accordingly bears any interest in light of the provisions of clause 6.10.6.2. The withdrawal of the interest claim from the arbitration does not vest jurisdiction in the court to decide the same issue which was finalised by the adjudicator or to order the payment of interest contrary to the terms of the contract. That would be in conflict with the dispute resolution mechanism established in terms of the contract which provides for a progressive process

culminating in arbitration which is in fact currently pending before the first respondent. Any further legal remedies outside of the agreed dispute resolution process are circumscribed by the provisions of the Arbitration Act. The applicant accordingly does not enjoy unfettered access to judicial proceedings to resolve the contractual dispute between the parties. Mr Ford further submitted that there was no substance in the contention that the adjudication decision constituted a judicial novation or a new cause of action or that the interest provisions of the Interest and Arbitration Acts find application in the matter. Given the fact that interest is governed by the terms of the contract and that the adjudication decision does not create a judgment debt or constitute a judgment or order, the Interest Act does not apply. Moreover, the decision is not an arbitral determination. The interest provisions of the Arbitration Act therefore equally find no application in the matter.

Evaluation

[33] I am in agreement with the submission of Mr Ford that the adjudicator's ruling with regard to interest has become final pursuant to the withdrawal of the applicant's challenge in this regard before the arbitrator. The parties are bound by the dispute resolution process agreed upon in the contract. The issue of interest has now been finalised in the course of that process and cannot be reopened in the present application. The applicant's recourse to court has been curtailed by the dispute resolution provisions which the parties agreed upon and is further circumscribed by the Arbitration Act.

[34] As indicated, the applicant accepts the validity of the adjudicator's decision that no interest is payable on the individual amounts constituting the adjudication capital sum on the strength of the provisions of the contract. It, however, contends for what it terms statutory 'post-award' interest seemingly based on the provisions of the Interest and Arbitration Acts.

[35] The amended clause 6.10.6.2 expressly precludes the applicant from claiming interest on any of the amounts constituting the aggregate capital sum. The terms of that clause are, in my view, not limited to arrear or outstanding payments only, but apply to any payment due in terms of the contract including the quantum of the adjudicator's determination. All of the various individual items covered in the decision are subject to the provisions of clause 6.10.6.2. There is clearly no question of a judicial novation creating a new obligation or cause of action as contended by the applicant which somehow transformed the nature of these amounts and took them outside of the payment provisions of clause 6.10 of the contract. Novation whereby an existing obligation is extinguished and a new one substituted for it may take two forms. It may either come about voluntarily by consensus between the parties ie *novatio voluntaria*, or compulsorily by operation of law arising out of judicial proceedings between the parties ie *novatio necessaria*. There clearly is no scope for a *novatio voluntaria* in this matter. The question is whether the adjudicator's decision has given rise to a *novatio necessaria* extinguishing and replacing the contractual obligation of the Municipality. There is clear authority that a judgment enabling a claimant to enforce specific contractual rights, by execution if need be, without affecting the remaining rights under the contract, is not regarded as novating the enforced rights but rather as strengthening or reinforcing them.¹⁵ The same principles apply to an arbitral award which likewise does not novate but merely confirms and strengthens the enforced rights.¹⁶ *A fortiori*, the adjudicator's decision (which is neither a judgment nor an arbitral award) cannot conceivably give rise to a judicial novation or a *novatio necessaria* in the circumstances of this matter.

[36] Furthermore, the contract expressly deals with the issue of interest and the adjudication decision is quite obviously neither a judgement or order creating a judgment debt nor an arbitral award in terms of section 29 of the Arbitration Act. The

¹⁵ *Trust Bank of Africa v Dhooma* 1970(3) SA 304 (N) at 310A-C; *Swadif (Pty) Ltd v Dyke* NO 1978(1) SA 928 (A) at 944E-G. Whether a judgment for cancellation of a contract and damages would give rise to a *novatio necessaria* as suggested in the *Trust Bank* matter is not entirely clear but requires no further consideration, since the applicant has not sought the cancellation of the contract but payment of the amounts which it averred were due to it by the Municipality.

¹⁶ *Zygos Corporation v Salen Rederierna AB* 1984(4) SA 444 (C) at 455F&I.

interest provisions of either the Interest Act or the Arbitration Act accordingly do not apply to the adjudicator's decision and there cannot be any issue of 'post-award' interest. Mr Friedman's submission to the contrary is bereft of any merit. The applicant has accordingly failed to make out a case for so-called 'post-award' interest.

CONCLUSION

[37] I am in the circumstances not persuaded that there is any merit in either the application to amend or the main application, which both fall to be dismissed.

[38] In the court order of 27 July 2023, the applicant has been awarded the costs of set down and appearance consequent upon the successful proceedings to obtain payment of the adjudication capital sum. It is, however, unsuccessful in the further proceedings to amend the notice of motion and to pursue the separated issues and should be held liable for the costs of such further proceedings.

ORDER

[39] In the result, I make the following order:

- (a) the applications to amend the notice of motion and in respect of the separated issues relating to interest on the adjudication award and costs, are dismissed;
- (b) the applicant is directed to pay the costs of the above proceedings, including the costs of counsel on Scale C as contemplated in Uniform Rule 69(7).

D.O. POTGIETER
JUDGE OF THE HIGH COURT

APPEARANCE

Counsel for the Applicant: Mr G Friedman Attorney (in the main application);
Adv A Beyleveld SC (in the application to
amend),instructed by Friedman Scheckter, 75 Second
Avenue, Newton Park, Gqeberha

For the Second Respondent: Adv Ford SC with Adv JG Richards (in the main
application);
Adv JG Richards SC (in the application to amend),
instructed by Karsans Incorporated, 11 Bird Street,
Central, Gqeberha

Date of hearing: 14 September 2023 & 14 June 2024

Date of delivery of judgment: 20 August 2024