



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No. 9103/2023

In the matter between:

PRO-KHAYA CONSTRUCTION CC

Applicant

and

CITY OF CAPE TOWN

First Respondent

JOHAN G WASSERMAN SC

Second Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email publication and release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 15 August 2025.

JUDGMENT

MAPOMA, AJ

[1] This is an opposed application for enforcement of the adjudicator's determination in a construction dispute. The applicant, Pro-Khaya Construction cc ("Pro-Khaya"), a

construction company and former service provider to the first respondent, the City of Cape Town (“the City”), seeks an order compelling the City to comply with the adjudicator’s determination dated 10 March 2023 (“the determination”).

[2] The determination was issued by the second respondent, Adv Johan G Wasserman SC, (“the adjudicator”) in his official capacity as an adjudicator in the adjudication dispute resolution process of a dispute that was referred by Pro Khaya for resolution in terms of the standard Joint Building Contracts Committee (JBCC) Principal Building Agreement, Edition 6.1 of March 2014 (“the JBCC Contract”), which were published in January 2020, and the procedure set out in the JBCC Adjudication Rules (“the JBCC rules”). The construction contract between the parties provides for the JBCC rules to be used as the dispute resolution mechanism in the event of there being a dispute between the parties.

[3] In the determination, the adjudicator ruled that the City is required to make payment to Pro Khaya, of the final payment certificate in the amount of R8 095 536.22 excluding VAT. The City failed to honour the ruling of the adjudicator. Pro Khaya has approached the Court seeking a declaration order and consequential reliefs which enforces the decision of the adjudicator. Although determination is at the centre of these proceedings, no substantive relief is sought against adjudicator personally, hence he took no part in the proceedings.

[4] The City is resisting Pro Khaya’s enforcement application on the basis that the determination is invalid and unenforceable because, according to the City, the adjudicator lacked jurisdiction to determine the dispute. In so doing, the City launched a counter-application wherein it seeks the Court to review and set aside of the adjudicator’s determination on various grounds.

[5] Pro Khaya is opposing the City’s review application, contending that the decision of the adjudicator is not open for judicial review. This contention is advanced on various bases, that include that the dispute had been determined in terms of the contractual agreement which encapsulates the JBCC rules as a dispute resolution mechanism; that in terms of the JBCC rules the determination is final, binding and

enforceable; and that the review procedure is not applicable on the adjudicator's determination and, as such, the court has no review jurisdiction on this matter.

Background facts

[6] During 2018, pursuant to the City's public procurement process for appointment of a service provider to undertake construction of a new electrical depot in Hout Bay, Western Cape, Pro-Khaya was a successful bidder and was duly appointed by the City as a preferred service provider to implement the project. The depot comprised of a double-storey administration building with lift system, as well as a single-story building, a guardhouse, parking carports and a boundary wall. The total construction value was R34 658 874.16 (Including VAT), which was re-measurable and subject to actual work performed and adjustments in terms of the contract.

[7] On 12 November 2018, the construction contract for the value of R34 658 874.16 (Including VAT) was concluded between the Pro Khaya and the City. The contract comprised of the standard terms of the Joint Building Contracts Committee (JBCC) Principal Building Agreement, Edition 6.1 of March 2014 ("the JBCC Contract"), subject to the changes specified in the Part C12 (Contract Data) of the City's tender document.¹ The contract also included contract data with annexures, bill of quantities, the model preambles for trade and contract documents which included programme and technical documents such as drawings. The City also appointed EBESA Architects (Pty) Ltd as the principal agent in terms of the JBCC contract ("the principal agent").

[8] The contract commenced on 12 November 2018, to the date of its conclusion. The duration of the contract was 15 months, which would be a 10 months' period for construction until practical completion, a three months' defects period, and two months for builders' annual leave. Accordingly, the contract expired on 12 February 2020 but was renewed on 24 February 2020, for a period of six months commencing

¹ These include the Bills of Quantities, The Model Preambles for Trade, and other Contract Documents like programme and technical documentation such a drawings

on 1 March 2020 to 31 August 2020. As a consequence of the contract renewal, the contract sum was increased by R2 733 545 (excluding VAT).

[9] On 16 January 2019, the City handed over the construction site to Pro-Khaya with the agreed timelines for project completion. Project delays leading to various extensions of time and disagreements between Pro Khaya and the principal agent occurred during the period leading up to 31 August 2020. Pro Khaya did not finish the project on the completion date 31 August 2020.

[10] On 26 August 2020, the principal agent suspended Pro Khaya from operations on site upon noting that inevitably Pro Khaya would not finish the project by the completion date of 31 August 2020. A disagreement arose between the City and Pro Khaya regarding, *inter alia*, the termination of the agreement and various extensions of time (EOT). This culminated in the termination of the construction contract by Pro Khaya on 14 October 2020, citing repudiation of the contract by the City on 26 August 2020. On 16 October 2020, Pro Khaya vacated the construction site and did not return.

[11] The issue of the termination of the contract mutated into a dispute that was referred to an adjudicator in the person of Mr Jamieson. On 15 January 2021, Mr Jamieson handed down a determination ("the Jamieson determination"), where he found that the purported termination by Pro Khaya was of no force and effect. For some reasons not relevant in this matter, the determination was only published on 18 June 2021. On 26 June 2021, Pro Khaya, acting in terms of clause 30.6.4 of the JBCC contract, submitted a notice of dissatisfaction with the Jamieson determination. Thence, the dispute regarding termination of the contract remained open and Pro Khaya did not go back to site. Pro Khaya did not proceed with neither arbitration nor litigation after it issued a notice of dissatisfaction with Jamieson determination of 26 June 2021.

[12] Clause 30.2 of the JBCC contract provides that where disagreement arising between the parties (employer or the principal agent or an agent and the contractor) and the disagreement is not resolved within ten (10) working days of receipt of the notice of disagreement, the disagreements will be deemed to be a dispute. Clause

30.3 provides that the dispute shall be referred to adjudication within ten (10) working days of the expiry of the period referred to in 30.2 by means of a notice of adjudication by the party that gave the notice of disagreement. The dispute is adjudicated in terms of the procedure set out in the JBCC adjudication rules.

[13] On 13 February 2022, Pro Khaya delivered the first notice of disagreement, followed by the notice of adjudication on 4 March 2022. This dispute concerned the termination of the contract on 30 August 2020; failure of the principal agent to issue the final account pursuant to the termination of the contract and non-compliance by the principal agent and the City with the provisions of clauses 29.28 to 29.32 of the JBCC contract; proper valuation of the final account including contractors claim for extension of time and additional costs, which remained uncertified by the principal agent and unpaid by the City; and City's failure to return the construction guarantees to the contractors in terms of clause 29.17.5 of the JBCC contract following termination.

[14] Later on, in particular on 31 October 2022, Pro Khaya issued the second notice of disagreement, followed by the notice of adjudication on 18 November 2022. This dispute concerned Pro Khaya's position regarding the principal agent's failure to adjudicate alternatively, rejection of Pro Khaya's extension of time claims 19 and 20 for late issuance of construction information and time lost due to civil unrest respectively.

[15] On 23 January 2023, the Association of Arbitrators duly appointed the second respondent as the adjudicator, as required by the JBCC contract to adjudicate the dispute in terms of the procedure set out in the JBCC rules and make the determination.

[16] On 6 February 2023, Pro Khaya delivered a referral submission for the adjudication of the dispute by the adjudicator. In the referral submission, Pro Khaya set out its version of the dispute in detail as required by Rule 5.1 of the JBCC Adjudication Rules. Essentially, Pro Khaya elaborated and based its submissions on the issues that characterised the dispute set out in the two notices of adjudication referred to above. I pause to point out that notably, the historical facts preceding the

referrals of 4 March 2022 and 18 November 2022 were not placed before the adjudicator. These include the notices of dissatisfaction with the Jamieson determination dated 21 June 2022 and the notices of disagreement dated 11 February 2022 and 21 October 2022 that preceded the referrals of 4 March 2022 and 11 November 2022 respectively.

[17] In terms of Rule 5.2 of the JBCC Rules, the City was required to deliver its response to Pro Khayas submissions, if any, within 10 days of the referral date, that is, by 20 February 2023. It is common cause that the City did not submit its response by the date mentioned above. Instead, the City delivered its response out of time on 9 March 2023, the date preceding the issuance of the adjudication determination.

[18] On 10 March 2023, the adjudicator proceeded to make his determination by default against the City without having regard to the City's response. The adjudication determination effectively awarded all the reliefs sought by Pro Khaya. In short, the determination was that:

1. The Determination set out below is issued.
2. The Contractor is entitled:
 - 2.1. to a determination that the Contract between the Contractor and the Employer dated 12 November 2018 has terminated on 30 August 2020;
 - 2.2. to:
 - 2.2.1. be granted extensions of time in an aggregate extension of 130 days and concomitant revision of the date for Practical Completion to 26 August 2020; and,
 - 2.2.2. an adjustment to the Contract Value, certification of and, pursuant thereto payment of concomitant preliminary and General costs in the amount of R999 528 40 (excluding VAT);
 - 2.3. to a determination that:
 - 2.3.1. the Principal Agent is obliged to issue the final account in accordance with the account, R26 to the Referral (and attached is X hereto), to reflect the amount of R8 095 536.22 (plus VAT to be added thereon);

- 2.3.2. the Principal Agent is required to issue the Final Payment Certificate within 7 calendar days of the date of this determination, taking into account the Final Account as determined herein and reflecting the amount of R8 095 536.22 (plus VAT to be added thereon) as being due by the Employer to the Contractor;
- 2.3.3. the Employer is required to make payment in terms of the Final Payment Certificate as issued in accordance with paragraph 2.3.2 above, within 14 calendar days of the issuance thereof;
- 2.3.4. the Employer is obliged to return the Construction Guarantee to the Contractor;
- 2.3.5. the Employer is obliged to make payment of the adjudicator's fees/costs."

[19] The City did not file a notice of disagreement with the adjudicator's determination as it is allowed to do in terms of clause 30.6.4 of the JBCC contract if it disagrees with a determination, where upon the matter would be referred to litigation. Nor did the City on its own litigate to challenge the determination in terms of clause 30.6.4 of the JBCC contract. Further, the City did not comply with the award that is contained in the adjudicator's determination hence Pro Khaya has approached the Court to apply for enforcement of the determination.

Dispute Resolution Mechanism

[20] The following are the relevant provisions of the JBCC contract so far as it relates to the settlement of the disputes between the parties and in particular, the adjudication process:

"30.0 DISPUTE RESOLUTION

Settlement by the parties

30.1 Should any disagreement arise between the employer (or the principal agent or an agent) and the contractor arising out of or concerning the action or inaction of the employer (or the principal agent or an agent) or the contractor, or any other matter concerning this agreement (including

the validity thereof), either party may give notice of a disagreement to the other. The parties shall attempt to resolve such disagreement between them and record such resolution in writing signed by them.

30.2 Where the disagreement is not resolved within ten (10) working days of receipt of the notice of disagreement, the disagreement shall be deemed to be a dispute.

30.3 The dispute shall be referred to adjudication within ten (10) working days of the expiry of the period [30.2] by means of a notice of adjudication by the party (the referring party) which gave the notice of disagreement.

30.4 The notice of adjudication shall clearly define the scope of the dispute and the relief sought by adjudication.

30.5 Failure to comply with the procedure described [30.3-4] shall cause the dispute to be resolved by arbitration and not by adjudication.

Adjudication

30.6 Where a dispute to be referred to adjudication:

30.6.1 The adjudication shall be appointed in accordance with JBCC® Rules of Adjudication current at the time when the dispute was declared and the adjudication shall be conducted in terms of such rules.

30.6.2 The adjudicator shall not be eligible for subsequent appointment as the arbitrator.

30.6.3 A determination given by the adjudicator shall be immediately binding upon and implemented by the parties.

30.6.4 Where the adjudicator has given a determination, either party may give notice of dissatisfaction to the other party and to adjudicator within ten

(10) working days of receipt of determination, or an extended time period provided in the JBCC® Rules of Adjudication wherein such dispute is referred to arbitration.²

30.6.5 Where the adjudicator has not given a determination within the time period allowed or extended time period provided in the JBCC® Rules of Adjudication, either party may give notice to the other party and to the adjudicator that if such determination is not received within ten (10) working days of receipt of this notice his appointment is thereupon automatically terminated and such dispute is then referred to further adjudication or arbitration, at the option of the claimant.”

Issues for determination

[21] In light of the facts set out above, the issues to be determined by the Court are the following:

- a) whether the adjudication determination is valid and enforceable. The integral sub-issue in this regard is whether the adjudicator had jurisdiction to determine the issues.
- b) Embedded to the above issue, is whether the adjudication determination is susceptible of review on the grounds advanced by the City.

Pro Khaya's contentions

[22] Pro Khaya contends that the City is bound to comply with the adjudicator's determination, because the latter is an outcome of a dispute resolution mechanism that was employed to resolve a dispute that arose between the parties under the JBCC agreement and its rules, which is the alternative dispute resolution mechanism agreed upon by the parties. Pro Khaya contends that it has complied in all material

² It must be noted that in the instant case, the contract was amended to exclude arbitration but to include litigation instead.

respect with all its contractual obligations and satisfied all the requirements for the relief it seeks.

[23] Pro Khaya's argument goes on to contend that the City's participation in the adjudication process is a contractual obligation which the City failed to comply with, and as such, the City cannot approach this court to seek intervention in circumstances where it failed to comply with its own contractual remedies. The applicant concludes by arguing there is no basis in law for the court's intervention in a contractual process.

[24] In asserting its enforcement rights, Pro Khaya relies on Rule 6.1.3 of the JBCC Rules which provides that the adjudicator's determination shall be final and binding and that the parties shall carry out without delay. The applicant argues that based on the above and the fact that the City failed to issue a notice of dissatisfaction within the prescribed period stipulated in the JBCC Rules the adjudication determination is final and binding.

[25] Further reliance is placed on Item 5.2 of the JBCC Adjudication Rules which provide as follows:

"5.2 The respondent may submit a written response to the details of dispute not later than ten (10) working days from the referral date. Should the respondent not submit such written response to the adjudicator within the said period, it shall be assumed that he does not dispute the details thus submitted by the claimant."

[26] It is common cause that the City did not submit the written response to the adjudicator within the prescribed period set out above. The City did not submit a notice of dissatisfaction with the determination either. On this basis, Pro Khaya argues that the determination is final and binding, and as such, the court should grant the order enforcing the determination.

[27] Regarding the City's review application that seeks to set aside the determination, Pro Khaya contends that the determination is not reviewable. The thrust of this contention is that to the extent that the City relies on common law,

alternatively arbitration in terms of the Arbitration Act 42 of 1965 (“the Arbitration Act”), the application is misplaced, in that, according to Pro Khaya, neither common law nor the Arbitration Act applies to the adjudicator’s determination, for there was no arbitration agreement between the parties, and that the determination was made by the adjudicator as an expert, not an arbitrator.

The City’s response

[28] In resisting the application, the City launches a two-pronged approach in attacking the adjudicator’s determination. In its first leg, the City contends that the adjudication determination is invalid and unenforceable for lack of jurisdiction on the part of the adjudicator. In such situation, so argues the City, the court should simply decline to enforce the determination on the basis that it is invalid and thus unenforceable.

[29] In the second leg, the City contends that the determination is riddled with reviewable defects, including the jurisdictional point, and therefore falls to be reviewed and set aside in terms of common law, alternatively the Arbitration Act 42 of 1965 (the Arbitration Act). In advancing its reasoning for the review, the City further contends that in cases like the present, where the determination has become both final and binding, the most suited approach is to have the determination set aside for lack of jurisdiction.

[30] In seeking to have the adjudicator’s determination reviewed and set aside, the City has advanced various grounds on the basis of which it argues that the determination award is manifestly unjust and cannot be sustained. The grounds are the following:

- i) the first and second referrals to adjudication were irregular and as such the adjudicator lacked jurisdiction;
- ii) the extension of time (EOT) claims 16, 17 and 18 were irregularly before the adjudicator, in that they were not part of the notice of disagreement that preceded the referral notice;

- iii) the issue of whether the applicant had cancelled the contract as a result of the City's alleged repudiation is a matter to be resolved by the courts;
- iv) the adjudicator acted unreasonably, inexpertly and *ultra vires*;
- v) the adjudicator's determination was made on a default basis;
- vi) the determination was incompetent in terms of the JBCC contract procedure;
and,
- vii) there were further clear irregularities and misdirections characterising the adjudicator's endorsement the applicant's final account.

Applicable Legal Principles

[31] The purpose of adjudication as a first-tier dispute resolution mechanism is to provide a quick and interim resolution of a construction disputes so that the construction is not interrupted or stalled by the disputes that might mutate to prolonged arbitration or litigation process. This is also restated by the JBCC adjudication rules, where Rule 1.1 of the JBCC adjudication rules defines adjudication as:

“an accelerated form of dispute resolution in which a natural person determines the dispute as an expert (and not as an arbitrator) and whose determination is binding on the parties for immediate compliance and which shall remain in force until verdict overturned by an arbitration award.” (Own emphasis)

[32] Further, Rule 5.1.4 of the JBCC Rules reinforces this principle by stating that “*the adjudicator shall act as an expert in determining the dispute.*”

[33] The adjudicator's determination is final and binding on the parties unless overturned by arbitration, litigation or mutual agreement between the parties. (See *Stefanutti Stocks (Pty) Ltd v S8 Property (Pty) Ltd* [2013] ZAGPJHC 388 (23 October

2013). Courts are reluctant to interfere with or set aside such a decision unless there are serious procedural irregularities or if the adjudicator acted outside their jurisdiction.

[34] It is trite that the adjudicator's determination is generally binding and enforceable even if it contains an error of law effect. (See *Sasol Chemical Industries Ltd v Odell and Another* (401/2014) [2014] ZASFHC 11). Further, clause 30.6.3 of the JBCC contract provides that “A determination given by the adjudicator shall be immediately binding upon and implemented by the parties.”

[35] In the event where no notice of dissatisfaction against the decision of the adjudicator has been given within the prescribed period, the decision becomes final and binding on both parties. (See *Tubular Holdings (Pty) Ltd DBT Technologies (Pty) Ltd* 2014 (1) SA 244 (GSJ). Further, Clause 30.6.4 of the JBCC contract provides that where the adjudicator has given a determination, either party may give notice of dissatisfaction to the other party and to adjudicator within ten (10) working days of receipt of determination, or an extended time period provided in the JBCC Rules of Adjudication wherein such dispute is referred to arbitration. The JBCC contract in this regard has replaced arbitration clause with a litigation clause.

[36] However, where there is clearly no jurisdiction on the part of the adjudicator to decide a dispute, the court may decline enforcement on the basis that the determination is invalid. (See *Framatome v Eskom Holdings SOC Ltd.* [2020] ZAGPJHC 233 (30 September 2020). It is apposite to point out that the Supreme Court of Appeal (SCA) overturned the High Court decision in *Framatome v Eskom Holdings SOC Ltd* 2022 (2) SA 395 (SCA), the SCA did not temper with the principle relating to the court's power to decline to enforce the determination where there is lack of jurisdiction.

[37] In deciding whether the adjudicator had jurisdiction, the test is whether the adjudicator strayed from the mandate as proscribed in the referral notice of adjudication. Crucially, the adjudicator derives his mandate from the notice of adjudication. A contention of lack of jurisdiction will be sustainable if the adjudicator acted outside the mandate as set out in the referral notice.

[38] The adjudicator acts as an expert and not an arbitrator. The significance of the distinction between an expert and an arbitrator in review proceedings is that unlike the arbitrator, the adjudicator does not perform a quasi-judicial function but reaches his or her said decision based on his or her knowledge independently, based on the material placed before him. Further, unlike arbitration, adjudication is not subject to common law. Accordingly, the power of the court to interfere with an expert decision in review proceedings is severely circumscribed. (See *Transnet National Ports Authority v Reit Investments (Pty) Ltd* 2020 DJR 2104 (SCA) at para 33).

[39] The principle regarding the limited powers of the court to review and set aside the adjudicators determination was well pronounced in *Chelsea West (Pty) Ltd v Roodebloem Instant's (Pty) Ltd* 1994(1) SA 837 (C) at 856 (C-D), where the court held that unless there is fraud, collusion or capriciousness, or a manifestly unjust valuation, the parties are bound by the adjudicator's determination. This principle was also confirmed in *Caviar Helicopter CC v Executive Turbines CC and Another* 2003 (3) SA 475 (W) at para 34, where the court stated as follows:

“The principles determining the circumstances in which a Court would review and set aside a valuer's determination have been applied in respect of the determination of other expert umpires. According to these principles, the determination of an expert can be set aside only in the case of fraud, collusion or capriciousness or in the event of the issuing of a manifestly unjust valuation. Otherwise, the parties are bound by the expert's determination.”

Jurisdictional challenge

[40] In this matter, Pro Khaya's contention is that adjudicator's award is final, binding and enforceable subject only to limited defences, none of which apply in this case. According to Pro Khaya, the court can only review the award in terms of the section 33(1) of the Arbitration Act, which is not applicable in this case because the adjudicator acts as an expert not an arbitrator. The City conceded this contention and submitted that it would not be necessary to determine the applicability of the Arbitration Act to the adjudication proceedings. Moreover, so goes Pro Khaya's

argument, there is no arbitration clause as the applicable dispute resolution mechanism is expressly stated in the JBCC contract, and as such there is no legal basis for the court to review the determination. Relying on the general legal principles stated above and also rule 6.1.3 of the JBCC Rules which provides that the adjudicator's determination is final and binding, and the parties shall carry it out without delay, Pro Khaya firmly asserts that the Court should enforce the determination.

[41] The City's contention of lack of jurisdiction on the part of the adjudicators is based on three broad strokes. The first ground is that the referrals of the disputes were incompetent, in that they had not been properly referred in compliance with the dispute resolution procedure. The second ground is that the disputes that were referred for adjudication were not the disputes as captured in the notices of disagreement and referral notice of adjudication. The third ground is that relief claimed in relation to the final account was not contemplated by the empowering provisions of the JBCC contract.

[42] The question therefore is whether the adjudicator lacked the requisite jurisdiction to make the determination in the circumstances of this case. The argument is that he had no proper mandate, and that he acted *ultra vires*, in that he acted outside the purported mandate. It is trite that, if the adjudicator lacked jurisdiction, the determination cannot be enforceable. In the Court's view, based on the contentious issues in this case, the answer lies on two-staged inquiry. The first is, whether the dispute was properly referred. The second, which should follow if the answer to the first is affirmative, is whether the adjudicator acted within or strayed outside what was referred to him to make the determination.

[43] The City contends that the two referrals of the respective disputes for adjudication were incompetent, for they were not issued in accordance with the required accelerated procedure with strict timeframes, in that these disputes were referred out of time and way after Pro Khaya's notice of disagreement, and long after Pro Khaya terminated the contract and vacated the site. Further contention is that the dispute relating to termination of contract was determined by Jamieson and mutated to a matter for litigation. As such, so argued the City, these disputes fell to

be resolved by courts through litigations based on the incompetent referrals which were not in accordance with the procedure set out in clause 30 of the JBCC contract.

[44] Pro Khaya denies the City's contention regarding the alleged irregular referrals, on the basis that the time periods referred to by the City in relation to the notices of disagreement and subsequent notices of referral of the disputes were complied with as the timeframes prescribed in clause 30 of the JBCC contract.

[45] As stated above, the jurisdiction of the adjudicator is founded on the referral notice. Now that the City takes issue with the process followed by Pro Khaya leading up to the issuance of the determination, it behoves the Court to retrace the steps and make the necessary assessment of the contested referrals and determine whether the referrals were properly placed before the adjudicator to found the mandate. This is so because in my view, the mandate of the adjudicator in the dispute is derived from two referrals that gave rise to the determination in question.

[46] The first referral was through the notice of adjudication dated 4 March 2022 that was preceded by the notice of disagreement dated 13 February 2022 (the first notice of disagreement"). The second referral was through the notice of adjudication dated 18 November 2022, that was preceded by notice of disagreement dated 31 October 2022 (the second notice of disagreement). The referrals were submitted in terms of clause 30.3 of the JBCC contract.

[47] The City contends that the referrals were unreasonably out of time. In particular, the City alleged that the first referral notice of 4 March 2022, that is preceded by the notice of disagreement of 13 February 2022 is 'some eleven months' late. It is also contended that the referral notice of 18 November 2022 that was preceded by the notice of disagreement dated 31 October 2022 is 'more than two months' late. Notably, on perusal of the referral notices mentioned above, it appears that the City did not respond to any of the two notices of disagreement to take issue with the alleged unreasonable lateness of the notices or any procedural defect thereof.

[48] In terms of clause 30.2 of the JBCC contract, the parties are allowed 10 working days after the notice of disagreement to resolve the dispute. If the dispute remains

unresolved after the expiry of the 10 days period mentioned in clause 30.2, the dispute shall be referred to adjudication in terms of clause 30.3 within ten (10) working days after the expiry the 10 days period referred to in clause 30.2. In my view, both referrals through the respective notices of adjudication were submitted within the stipulated timeframes and in terms of the procedure set out in clause 30.2 and 30.3.

[49] The City's contention that first notice of disagreement was some eleven months late and that the second notice of disagreement was more than two months is not backed by facts. Pro Khaya proceeded to adjudication in terms of clause 30.3. In any event, the Court's view is that the City acquiesced to the adjudicator's jurisdiction. It cannot come at this late hour challenging jurisdiction to which it did not object throughout the stages. The contention that the referrals are incompetent in my view, lacks merit.

[50] Another contention by the City is that the dispute referred on 4 March 2022 is a matter for litigation and was therefore improperly referred to the adjudicator. According to the City, the dispute relates to the termination of the contract on 31 August 2020 and is essentially the same dispute that was adjudicated by Jamieson, who issued a determination that was published on 18 June 2021. This dispute, according to the City, was left live after Pro Khaya delivered a notice of dissatisfaction dated 26 June 2021 with the determination by Jamieson. The dispute, so goes the argument, should have been resolved by litigation as provided for in clause 30.6.4 of the JBCC contract, and not by adjudication. In essence, the adjudicator acted *ultra vires*. This is denied by Pro Khaya.

[51] On the papers placed before court, the City did not object to the mandate of the adjudicator to determine this issue. The adjudicator found that the parties are *ad idem* that the contract was terminated on 30 August 2020. Thus, the dispute relating to the termination of the contract is moot. In any event, clause 30.6.4 of the JBCC contract provides that where the adjudicator has given a determination, any party may give notice of dissatisfaction to the other party and to the adjudicator within ten (10) working days of receipt of the determination wherein dispute is referred to litigation. No notice of dissatisfaction was submitted by the City.

[52] The second referral was submitted on 18 November 2022, having been preceded by a notice of disagreement dated 31 October 2022. This notice related to the principal agents' failure to adjudicate, alternatively his rejection of Pro Khaya's EOT Claims numbers 19 and 20 that the adjudicator determined. The EOT Claims 16, 17 and 18 were placed before the adjudicator for adjudication through the referral submission that was delivered by Pro Khaya on 6 February 2023, when elaborating in the extension of time claims. The mandate of the adjudicator is derived from the referral. The referral was not contested. In the determination, the adjudicator found that all the EOTs were properly motivated in Pro Khaya's referral and that he found no reason why he ought not to accede to the relief sought by Pro Khaya.

[53] In the Court's view the adjudicator was within his powers to determine all the EOT claims that were placed before him. To the extent that the City contends that the adjudicator was wrong in his adjudication and determination, that is a matter that delves into merits, and not a matter for review that ousts the jurisdiction of the adjudicator. Consequently, the adjudicator's determination in respect of all the EOT claims, including claims no 16, 17 and 18 that were placed before him for determination, were properly quantified and supported. Such a determination could be reasonably arrived at by an expert in the form of an adjudicator. In my view, the adjudicator's determinations are valid.

[54] In light of the reasoning laid out above, the Court finds that the dispute resolution process prescribed in Clause 30 was complied with. It follows that the adjudicator had the requisite jurisdiction to determine the disputes that were properly referred to him. Thus, the contention that the adjudicator lacked jurisdiction to make determination is not sustainable and plainly appears to be an afterthought in the instant case. Consequently, the Court finds that the determination is enforceable.

Review counter application

[55] In its counter application for review, the City argues that adjudicators determination should be reviews and set aside in terms of common law or the Arbitration Act. Pro Khaya contends that there is no legal basis in this case to review

adjudicator's decision, for the narrow grounds upon which the court interfere do not exist in this case. Arbitration Act does not apply to the adjudicator, purely because the adjudicator acted as an expert not arbitrator, and there is no arbitration agreement inviting the review of the adjudicator's decision. That was rightly conceded by the City.

[56] In this case, the court has found that the adjudicator acted within his mandate that is derived from the referrals of the dispute in terms of the JBCC contract and in compliance with the JBCC adjudication rules. There is no contention that suggests that the determination was predicated on fraud, collusion, capriciousness, and the court did not find that either.

[57] The adjudicator acted as an expert and not an arbitrator, and as such, there is no room for the court to review the adjudicator's decision in terms of the arbitration act. Further, the powers of the court to review are strictly narrow and limited. This is also because the parties bound themselves in the contract to follow to resolve a dispute through the adjudication process. The general approach by the court is to respect the contract agreed upon between the parties. The Court is not empowered to re-write the terms of the contract for the parties, in this instance, by tempering with the powers and jurisdiction of the adjudicator that was agreed to by the parties.

[58] Notwithstanding the above, it is trite that where the adjudicator's decision is tainted with irregularities that render the determination manifestly unjust, the court enjoys the power to interfere with the adjudicator's decision. In the *City of Cape Town v Namasthethu Electrical (Pty) Ltd* [2018] ZAWHC 150, at paragraphs 86-89, where an expert appointed on the basis of their skills and experience delves on a knowledge area that is not his speciality, the court took a view that there was a nuanced issue that called for the court's intervention, for the determination was manifestly unjust.

[59] Citing the abovementioned case, the City contends that the adjudicator, being a practising advocate, made determination on a dispute that involves a complex technical area of extension of time (EO) and for the production of a final account without deferring to technical expert in the area of the built environment. The

question is whether on the facts of this case, it can be found that the adjudicator made findings on a knowledge area that is outside his expert knowledge and expertise.

[60] While the Court accepts that manifest injustice might arise in circumstances where the adjudicator pontificates on an unfamiliar specialist knowledge area without deference, it does not follow that such a situation obtained in the instant case. On the facts, the adjudicator possesses not only legal knowledge and skill. He was appointed by the Association of Arbitrators based on his skills as a seasoned practitioner in construction law for more than 30 years, including years of experience in construction dispute resolution mechanism. Surely, if there was a cause for concern insofar as jurisdiction is concerned, he could have pointed that out to Pro Khaya and or refused to adjudicate the matter. Notably, at no stage did the City object on the appointment of the adjudication for lack of skills in the area. The Court has not been taken into confidence in illustrating lack of expertise on the part of the adjudicator to determine the dispute. In the premise, the Court is not persuaded that the adjudicator was not armed with the necessary expertise to adjudicate the dispute so much so that the decision was vitiated by irregularities and or manifestly unjust.

[61] Another ground of review advanced is that the adjudicator made the determination on a default basis. The argument advanced is that the adjudicator may not enter a default judgment, and that in the absence of the other party, the adjudicator was required to apply his mind and conduct expert investigation on the submissions of the other party. Rule 5.2 of the JBCC rules provides that should the respondent not submit such written response to the adjudicator within the said period it shall be assumed that he does not dispute the details thus submitted by the claimant. Admittedly, the adjudicator is bound to apply his mind on the argument placed before him. In this case, Pro Khaya made written submissions to the adjudicator, to which the City failed to respond within the time stipulated by the JBCC rules.

[62] In the Court's view, the adjudicator acted well within his mandate and powers in terms of the JBCC contract in proceeding with determination by default. Moreover, he made the findings within his knowledge and expertise. It does not appear on the

facts that in the determination of the dispute the adjudicator did not apply his expertise to interrogate the contractor's submissions placed before him in making the determination simply because he made the determination by default. It is not for the court to cast aspersions on the correctness of the expert's determination that was made within the scope of the dispute referred to him by the parties. On the facts, it seems to me that the adjudicator considered the contractors submission and delivered a written determination and expressed reasons for his decision.

[63] In this matter, the Court finds that a case has not been made for the Court to justify the Court's interference with the determination of the adjudicator. The review grounds advanced by the City do not fall within the threshold of the narrow grounds for review of the adjudicator's determination. Accordingly, the Court does not find any reason to set aside the determination. Consequently, the counter-application seeking to review and set aside the determination must fail. It follows that the determination is final and binding between the parties and thus enforceable. Accordingly, the determination falls to be complied with forthwith.

Costs

[64] In this application, Pro Khaya has succeeded. The general principle is that costs follow the results. The Court does not find any reason that this principle should not find application in this case. It follows that costs should be awarded to the successful party. In my view, the complexity of this matter warrants that costs be granted at Scale C of the High Court.

Order

In light of the above, the following order is made:

- 1 The respondent is ordered to comply with the Adjudication Determination dated 10 March 2023 published by the Adjudicator Adv JG Vasserman SC.
- 2 The counter application to set aside the adjudicator's determination is dismissed.

- 3 The respondent is ordered to pay costs of this application, including costs of the counter application, at Scale C of the High Court

ZL MAPOMA

Acting Judge of the High Court

Western Cape Division

Appearances

Counsel for the Applicant : Adv P Tredoux

Instructed by : Thiefenthaler Attorneys Inc, Cape Town

Counsel for the Respondent: Adv S Rosenberg SC with him Adv M Greig

Instructed by : Timothy and Thimothy Attorneys, Cape Town