



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

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED: Yes

Case 2025-026408

Date: 08 March 2025

In the matter between:

SLIM B AND D CONSTRUCTION (PTY) LTD

Applicant

And

DENNIS SINKONDE N.O.

First Respondent

**GVK-SIYA ZAMA BUILDING CONTRACTORS
(GAUTENG) (PTY) LTD**

Second Respondent

JUDGMENT

DU PLESSIS J

Introduction

[1] The dispute arises from a construction contract between the applicant (second respondent in the counter application, hereafter referred to as "Slim B & D") and the

second respondent (applicant in the counter application, hereafter referred to as "GVK-Siya Zama") concerning a project for the construction of a road. A disagreement emerged over an unresolved claim, leading to adjudication proceedings before the first respondent ("the adjudicator") .

[2] Initially, the adjudicator confirmed that he is compelled to deliver his decision on the merits by 12 March 2025. This prompted Slim B & D to launch urgent proceedings to interdict the adjudicator from adjudicating on the merits of the dispute, pending the finalisation of arbitration on the issue of jurisdiction.

[3] In the course of launching its urgent application, Slim B & D engaged in a series of correspondence that was effectively aimed at influencing the adjudicator to revise his position to align with their own.

[4] The sequence of events unfolded as follows: On 27 February 2025, Slim B & D addressed a letter to the adjudicator, insisting that he refrain from issuing his decision on the merits while the urgent court application remained pending. In the same letter, Slim B & D warned the adjudicator that an adverse costs order would be sought against him should he proceed with the adjudication process "pending the outcome of the application". This correspondence left little doubt that, should the adjudicator continue with his decision, Slim B & D would initiate legal steps with a cost order implication. This action would ,thereby, exert considerable pressure on the adjudicator to suspend the process.

[5] Despite this pressure, the adjudicator initially responded on 28 February 2025, affirming that the Adjudication Board Rules governed his obligations and that he lacked the authority to suspend the adjudication unless both parties consented unilaterally. Slim B & D, however, insisted that he should halt the process.

[6] Ultimately, on 1 March 2025, following the correspondence, the adjudicator reversed his initial position and issued a letter stating that he would no longer proceed with the adjudication until "the court's decision" in the urgent application. He further indicated that the court proceedings had interrupted the adjudication process, affecting the timeline for the delivery of his decision. Despite his previous statements affirming

his obligation to issue a decision by 12 March 2025, this abrupt change in stance suggests that Slim B & D's persistent legal threats and tactics played a role in his reconsideration. This inference arises from the correspondence exchanged, as the adjudicator did not file any papers in the application, likely out of concern for an adverse costs order.

[7] What is evident is that Slim B & D's actions effectively disrupted the adjudication process, delaying the resolution of the dispute and creating legal uncertainty about the enforceability of the adjudication deadlines. By strategically applying pressure on the adjudicator, Slim B & D could stall the adjudication process and get the adjudicator to make an undertaking that would not determine the merits pending "the court's decision" (effectively the relief sought in the urgent application). Slim B & D then sought the removal of their application from the urgent roll, stating that this undertaking took away the urgency.

[8] GVK-Siya Zama opposed the withdrawal, submitting that they required finality in the matter, either in the form of a withdrawal with costs or dismissal, as they say that any other order will leave the first respondent under the wrong impression that he does not have to finalise his decision on the merits by 12 March 2025, because of his indication that he will wait for the court "to make a decision". Removal of the urgent application might not be regarded as a "decision".

[9] I required time over lunch to consider the request for removal and give directions going forward. During that time, GVK-Siya Zama launched an urgent counter application, seeking a declarator that the adjudicator must hand down his decision on 12 March 2025. Again, the adjudicator did not file papers but sent a letter to state that he would abide by the court's outcome, but in light of the fact that he regarded the launching of the application to suspend his adjudication, he would need more time to finalise the adjudication.

[10] I enrolled the counter application and directed Slim B & D to file an answering affidavit to the counter application so that the issues could be ventilated properly. In the answering affidavit, Slim B & D then raised the defence of *lis pendens*. Slim B & D

stated that they were well within their rights to remove the matter for lack of urgency and re-enrol it later if they so wish.

Lis pendens

[11] The doctrine of *lis pendens* applies when litigation is pending between the same parties on the same cause of action and seeking the same relief. The rationale is to prevent parallel proceedings that may result in conflicting decisions and unnecessary duplication of judicial resources. *Lis pendens* can also be raised against a counter-application, but the court has a discretion to allow the counter-application to proceed if it introduces new or distinct issues. A court may also refuse to uphold the *lis pendens* rule if doing so would cause an injustice¹ or block access to justice.²

[12] In the present case, the main application has been removed from the roll but not withdrawn, meaning the substantive dispute remains pending before this court. Although framed differently, the counter application raises, substantially, the same issues and seeks relief that overlaps with what will ultimately be determined in the main application. The applicant wants finality due to the ambiguously framed letter from the adjudicator.

[13] This court will not condone procedural strategies that frustrate access to justice and obstruct the expeditious resolution of disputes, especially in the urgent court. It is particularly concerning when a party creates procedural hurdles by exerting pressure on the adjudicator to abide by the court's decision and not proceed with the adjudication who then writes an ambiguously worded letter, only to rely on that same ambiguity as justification for withdrawing the matter and then refusing that the other party seeks clarity. Given the pattern of conduct displayed, it is foreseeable that, should the adjudicator indicate his intention to proceed following the matter's removal (as it is a "decision"), Slim B & D Construction would seek to re-enrol the matter on an urgent basis to prevent him from doing so. Such conduct is inconsistent with the principles of fairness and procedural integrity that underpin the adjudication process.

¹ *Caxton Ltd and Others v Reeve Forman (Pty) Ltd* 1990 (3) SA 547 (A).

² *Venmop 275 (Pty) Ltd v Cleverlad Projects (Pty) Ltd* 2016 (1) SA 78 (GJ).

[14] The doctrine of lis pendens is important in preventing duplicative litigation, but it cannot be invoked as a tool to obstruct access to relief. The defence must be dismissed when a party raises lis pendens abusively to prevent another from obtaining relief. Slim B & D Construction has merely removed the matter from the roll rather than withdrawing it only to raise the issue of lis pendens. This does not constitute a legitimate basis to invoke lis pendens. Accordingly, the defence is dismissed.

Urgency

[15] Slim B & D Construction contends that the counter-application must stand or fall on its own urgency. It submits that the matter is not urgent because GVK-Siya Zama has failed to make out a case for urgency and that, in any event, GVK-Siya Zama has adequate alternative remedies available should the deadline be missed, including arbitration, further legal proceedings, or an agreed extension of time.

[16] GVK-Siya Zama, on the other hand, submits that the adjudicator must adhere to the agreed contractual framework and issue his decision by 12 March 2025. Failure to do so would compromise the adjudication process, leading to unnecessary delays, increased costs, and the frustration of the agreed dispute resolution mechanism. Adjudication is intended to provide a swift and binding interim resolution, and Slim B & D's conduct undermines this fundamental principle by transforming adjudication into a protracted and ineffective process.

[17] The urgency of the counter-application arose, ironically, from the adjudicator's letter of 1 March 2025, in which he stated that he would withhold his decision pending a "decision", creating uncertainty. Given that adjudication in terms of the construction contract is a structured process governed by strict timelines, the possibility of the adjudicator becoming functus officio if the adjudicator does not issue his decision within the prescribed period creates the urgency.

[18] However inelegantly this urgency has come about, I am of the view that the matter is sufficiently urgent to be enrolled. I will, therefore, proceed to consider whether the adjudicator was obliged to deliver his decision on the merits by 12 March 2025.

Ad merits

[19] GVK-Siya Zama states that the adjudicator was appointed under the South African Institution of Civil Engineering (SAICE) rules and ruled on 30 January 2025 that the subcontract agreement between the parties was validly concluded and that the adjudicator had jurisdiction to determine the merits. In terms of Rule 6.1 of the Adjudication Board Rules, the adjudicator must deliver his decision within 28 days of the last document being submitted unless the parties agree upon an extension.

[20] Since the last submission was made on 12 February 2025, his decision must be issued by 12 March 2025, failing which he will become *functus officio*. This was also a central issue in the main application, where Slim B & D submitted that the adjudicator may not proceed to determine the merits because they had referred the adjudicator's jurisdiction to arbitration. They contended that should his jurisdictional ruling be overturned in arbitration, his decision on the merits would be nullified.

[21] However, the adjudicator's reversal of his position has serious legal and contractual consequences. The subcontract agreement and the Adjudication Board Rules do not provide for the unilateral suspension of an adjudication decision due to pending court proceedings. The adjudicator's authority is derived from the contractual framework agreed upon by the parties, and his role is to apply the established procedural rules, not to introduce new procedural requirements. Furthermore, the Adjudication Board Rules allow the parties to agree on an extension if necessary. The key issue, therefore, is whether the adjudicator can unilaterally alter the prescribed timeframes in the absence of such an agreement.

[22] In *Group Five Construction (Pty) Ltd v Transnet SOC Limited*,³ Twala J had to determine the implications of an adjudicator who must decide within a certain time. Referring to the speedy nature of adjudication in construction contracts, the court stated⁴:

³ [2019] ZAGPJHC 328 .

⁴ At para 21.

"These clauses do not state what should happen when a party does not grant the consent to extend the period. I am of the respectful view that the intention of the parties to make the requirement of consent from the parties to afford the adjudicator more time is meant to give the parties control over the process of the adjudication. It is meant to give the parties some power to deal, should they find themselves in that situation, with a recalcitrant adjudicator. The ineluctable conclusion is therefore that, absent such consent to the extension of time, the adjudicator should publish his report on due date failing which his mandate is terminated. I am therefore unable to disagree with counsel for the respondent that, from the plain wording of these clauses, the adjudicator is not competent to proceed and act beyond the time period set by the agreement if he is unable to secure the necessary consent from both parties. No other meaning can be ascribed to these provisions for they are not at all ambiguous."

[23] A full bench in this division in *Proserve Consulting (Pty) Ltd v RMV Engineering Projects (Pty) Ltd*⁵ endorsed this approach, emphasising that time is of the essence in these types of contracts, stating that

"[...] international and academic authority [...] supports the conclusion that the court came to. The importance of speed in these type of contracts and the importance of keeping to time limits to achieve that goal, as well as the fact that the decision is not permanent and may be challenged on arbitration were pointed out. I agree with the conclusion by the Court in Group Five that absent a consent to an extension, the adjudicator's mandate is terminated."

[24] I am of the view that there is no basis for treating this case differently. The referral of the jurisdictional question to arbitration did not alter the timeframe for the adjudicator to deliver his decision on the merits. The parties agreed upon this during a meeting in October 2024, where it was confirmed that should the adjudicator find that he has jurisdiction, he would then determine the merits. At that stage, the only remaining point of contention was whether the matter would be decided on the papers or require an oral hearing.

⁵ [2024] ZAGPPHC 9.

Remedy

[25] This brings me to the remedy GVK-Siya Zama seeks: a declaration confirming that the adjudicator must issue his decision by 12 March 2025. Such an order does not compel the adjudicator to act but serves to clarify his obligations under the agreement, ensuring certainty in the adjudication process.⁶

[26] In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*,⁷ the Constitutional Court emphasised that declaratory orders are discretionary and flexible. The court stated⁸:

"It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances."

[27] In *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*⁹ the Supreme Court of Appeal confirmed that an application for a declaratory order follows a two-stage approach. First, the court must be satisfied that the applicant has an interest in an existing, future, or contingent right or obligation. Secondly, if such an interest exists, the court must determine whether it is appropriate to exercise its discretion to grant the declaratory relief sought. One of the key considerations in this exercise is whether granting declaratory relief will settle the question in dispute between the parties.

⁶ *Naptosa v Minister of Education, Western Cape* 2001 (2) SA 112 (C) at 125. See Erasmus: *Superior Court Practice* D-229.

⁷ [2004] ZACC 20.

⁸ At para 107.

⁹ [2005] ZASCA 50.

[28] In my view, this is such a case. GVK-Siya Zama has a clear contractual right to have the adjudicator issue a decision within the timeframes set out in the contract or as agreed between the parties.

Costs

[29] GVK-Siya Zama seeks a costs order on an attorney-and-client scale against Slim B & D, contending that its conduct throughout these proceedings has been unreasonable, obstructive, and deliberately aimed at frustrating the adjudication process. Slim B & D engaged with the adjudicator in a manner that led to reversing his initial position, thereby creating unnecessary legal uncertainty and compelling GVK-Siya Zama to seek judicial intervention. Furthermore, Slim B & D's reliance on *lis pendens* as a defence appears to be a tactical manoeuvre to delay and obstruct the adjudication process rather than a legitimate legal argument.

[30] I agree with this view insofar as the counter-application is concerned. Slim B & D's conduct has necessitated this application, and its procedural tactics have resulted in avoidable legal costs. As for removing the urgent application, Slim B & D is ordered to pay GVK-Siya Zama's wasted costs.

Order

[31] The following order is made:

1. The application is removed from the roll, with Slim B & D Construction (Pty) Ltd to pay the wasted costs.
2. The counter application is enrolled and heard on an urgent basis as contemplated in Rule 6(12) of the Uniform Rules of Court, and non-compliance with the prescribed form and time periods, is condoned.
3. It is declared that the first respondent (the adjudicator) is required to deliver his adjudication decision on or before 12 March 2025, in terms of Rule 6.1 of the Adjudication Board Rules, failing which he will become *functus officio*.
4. Slim B & D Construction (Pty) Ltd is to pay the costs of the counter-application on an attorney-client scale.



WJ du Plessis

Judge of the High Court
Gauteng Division, Johannesburg

Heard on: 5 & 7 March 2025

Decided on: 8 March 2025

For Slim B & D Construction (Pty) Ltd: Z Cornelissen instructed by Martini-Patlansky Attorneys

For the respondents R Bekker MDA Construction & Technology attorneys