



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

Not Reportable
Case no: 13414/24

In the matters between:

The Rule 30 Application:

**UPTOWN TRADING 803 (PTY) LTD t.a.
WATERLOO PLUMBING**

Applicant

and

ZININGI PROPERTIES (PTY) LTD

Respondent

In re:

The Rule 30 Application:

ZININGI PROPERTIES (PTY) LTD

Applicant

and

**UPTOWN TRADING 803 (PTY) LTD t.a.
WATERLOO PLUMBING**

Respondent

In re:

Enforcement application:

**UPTOWN TRADING 803 (PTY) LTD t.a.
WATERLOO PLUMBING**

Applicant

and

ZININGI PROPERTIES (PTY) LTD

Respondent

Coram: **JONKER AJ**

Heard: **28 July 2025**

Delivered: **7 August 2025**

JUDGMENT

JONKER AJ:

INTRODUCTION

[1] This is an opposed application to enforce an adjudication award issued in November 2023 by a duly appointed adjudicator in terms of the Joint Building Contracts Committee (JBCC) agreement. The parties had entered into the JBCC agreement in respect of construction services to be rendered by the applicant, Waterloo, to the respondent, a property developer, Ziningi.

[2] It is common cause that the principal contractor, NMC (Pty) Ltd, was initially appointed to execute the works, but was subsequently liquidated. Following that liquidation, Waterloo entered into a separate agreement with Ziningi to complete

certain works and confirmed by a letter of appointment dated 23 August 2019. Disputes arose between the parties. By agreement, Mr Theunis van Zyl was appointed as adjudicator and both parties participated in the adjudication process, filing submissions.

[3] The adjudicator carried out his mandate and issued an award in favour of Waterloo. On 14 March 2024, Ziningi, represented by indicated its intention to request clarity on the award. The parties agreed to extend the time for filing this request to 3 April 2024. On that date, Ziningi filed its request for clarity, indicating that, if not upheld, the request would serve as a notice of dissatisfaction. The adjudicator confirmed that no clarification would be provided. Ziningi considered the matter to have been referred to arbitration, whereas Waterloo did not share this view.

[4] On 14 June 2024, Waterloo launched this enforcement application. Ziningi opposed the application and contended that: (i) the adjudicator's findings were in dispute; and (ii) by virtue of the notice of dissatisfaction, the matter had been referred to arbitration.

[5] After Waterloo filed its replying affidavit, Ziningi brought an application in terms of Rule 30 to set that affidavit aside for non-compliance with the Uniform Rules of Court. On 13 December 2024, Goliath AJP (as she then was) postponed the matter to 15 May 2025 for hearing together with the enforcement application, issuing a timetable for the filing of heads of argument.

[6] On 27 February 2025, Ziningi instituted review proceedings seeking to: (i) review and set aside the adjudication award; (ii) declare that the disputes had been referred to arbitration; and (iii) direct that the matter be resolved through arbitration. In the alternative, Ziningi sought a declarator that the matter had been referred to arbitration and that the enforcement application be stayed pending finalisation of the arbitration. Waterloo opposed the review in March 2025. The adjudicator filed the record, and Ziningi filed an amended notice of motion on 28 March 2025.

[7] On 15 May 2025, before Francis J, an order was taken by agreement postponing:

“The matters (being the application for the enforcement of the Adjudicator’s determination, the Rule 30 application and the application for a postponement, etc.) to 28 July 2025, with costs standing over.”

[8] On 13 June 2025, Ziningi set the review down for hearing on 28 July 2025, although no answering affidavit had yet been filed.

[9] On 23 June 2025, Waterloo filed a Rule 30 notice objecting to the set down on the basis that the matter was not ripe for hearing. Ziningi did not remove the cause of complaint.

[10] Waterloo only filed its answering affidavit in the review on 3 July 2025, and Ziningi replied on 17 July 2025. The practice note was filed on 18 July 2025 and heads of argument on 21 July 2025. Waterloo had not filed heads of argument in the review by the time of the present hearing.

[11] The matter was duly allocated the file in accordance with the plaintiff’s practice note, notwithstanding the state of disarray in the file.

[12] It was common cause that the enforcement application and Ziningi’s Rule 30 application were before this Court. The Court was also required to deal with Waterloo’s Rule 30 application regarding the set down of the review application and, failing that, the review itself.

ZININGI’S RULE 30 APPLICATION

[13] Ziningi’s Rule 30 application is premised on the contention that Waterloo’s replying affidavit failed to comply with Rule 18(5), which requires a “clear and concise statement of the material facts relied upon” made with “sufficient particularity to enable the opposite party to reply”.

[14] The essence of Ziningi’s objection was that: (i) the affidavit was incorrectly labelled an “answering affidavit”; and (ii) it did not comply with Rule 18. Specifically, it

failed to address the allegations in Ziningi's answering affidavit succinctly, referred to incorrect paragraphs, and contained numerous errors. Ziningi submitted that the document was so defective that the interests of justice and the standards of the Court demanded that it be struck from the record.

[15] Ziningi argued that, should this Court uphold its objection, its answering affidavit would stand as the only version before this Court and should be accepted as correct in terms of the well-established *Plascon-Evans* principle¹.

[16] In the alternative, Ziningi contended that, even if Rule 18 did not apply, the Court retained an inherent jurisdiction to regulate its process and to strike out improper affidavits that might prejudice the opposing party.

[17] Ziningi maintained that Waterloo's answering affidavit in the Rule 30 application did not cure the defect. Waterloo had been invited to withdraw and replace its affidavit but declined to do so. Ziningi submitted that the errors could not be corrected simply by an answering affidavit in the Rule 30 proceedings.

[18] These submissions were modelled on arguments advanced in *Hlophe*.² The Full Court in that matter found that Rule 18, which is framed for pleadings in action proceedings, is not applicable to affidavits in motion proceedings. I agree with that reasoning. Rule 18 cannot serve as a foundation for the present Rule 30 application.

[19] As the Full Court noted in *Hlophe*, a court's inherent jurisdiction cannot be exercised in a manner that contradicts the law. Its purpose is to fill procedural gaps in order to avoid injustice, not to import rules designed for actions into motion proceedings unnecessarily. In motion proceedings, affidavits serve the dual purpose of placing evidence before the Court and defining the issues between the parties — as emphasised in *Swissborough*³.

¹ *Plascon-Evans Paints (TVL) Ltd. v Van Riebeeck Paints (Pty) Ltd.* (53/84) [1984] ZASCA 51;

² *Hlophe v Freedom Under Law In re: Freedom Under Law v Hlophe; Moseneke and Others v Hlophe In re: Hlophe v Judicial Services Commission and Others* (2021/43482) [2021] ZAGPJHC 743; [2022] 1 All SA 721 (GJ); 2022 (2) SA 523 (GJ)

³ *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 323G–324C

“the scope to exercise inherent jurisdiction does not extend to contradicting a law. What inherent jurisdiction caters for is the elimination of a lacuna in order to prevent an injustice. It is trite that a court must enjoy dominion over its own procedure to achieve that outcome. It seems to me that the courts’ inherent jurisdiction to separate an issue or to allow additional time to file opposition did not require an application of either rule. That the exercise of that inherent jurisdiction may have been inspired by an awareness of the rules is a distinct matter. The notion therefore of an application to motion proceedings of rules framed to deal with actions is misconceived and unnecessary to achieve the objectives of orderly litigation or avoid an injustice.

It is trite law that in motion proceedings the affidavits serve not only to place evidence before the court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits. In *Hart v Pinetown Drive-Inn Cinema (Pty) Ltd* **1972 (1) SA 464** (D) it was stated at 469C--E that 'where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound.

An applicant must accordingly raise the issues upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof.”

(my underlining)

[20] Although Waterloo's replying affidavit may not have been perfectly drafted, the respondent ultimately received clarification through Waterloo's answering affidavit in the Rule 30 application.

[21] These later affidavits, made under oath, remedied the earlier defects. There is no legal basis to disregard them, and nothing in Rule 6 prevents a court from considering affidavits filed in interlocutory proceedings when deciding the merits. As Ziningi quite correctly point out, it has the benefit of the well-established *Plascon-Evans* principle in that, in motion proceedings, a party is entitled to have disputes of fact determined on the basis of the facts alleged by the respondent, together with those facts admitted by the respondent, thereby providing a clear and predictable method for resolving factual disputes without the need for oral evidence. Furthermore, as highlighted in the quote from *Hlophe*: "*a party must make out its case in the founding affidavit.*" The impact on Ziningi's ability to prepare could not have been substantial.

[22] The Rule 30 application must therefore be dismissed. However, Waterloo is to bear the costs of the application, as the necessary clarity was only provided belatedly.

WATERLOO'S RULE 30 APPLICATION

[23] In its interlocutory application, Waterloo seeks: (i) a declaration that Ziningi's review application was irregularly set down for hearing; (ii) an order striking the review from the roll on 28 July 2025; (iii) costs on an attorney-and-client scale; and (iv) a direction that the enforcement application, Ziningi's Rule 30 application, and the reserved costs on the consolidation application proceed on the allocated hearing date.

[24] Waterloo's grounds are that: On 15 May 2025, Francis J did not postpone the review application, as it was not before the Court; there was non-compliance with Rule 53, preventing Waterloo from filing heads of argument; Ziningi failed to remove the cause of Waterloo's objection and improperly insisted that the review was set down; Ziningi had neither leave from the registrar nor the Court to enrol the matter;

and the improper inclusion of the review prejudices Waterloo by delaying enforcement and impacting its financial stability, whereas Ziningi would suffer no prejudice from pursuing the review in the ordinary course.

[25] Ziningi contends that the use of “*etc.*” in Francis J’s order of 15 May 2025 encompassed the review application. It argues that the review was properly enrolled by virtue of that order and, alternatively, that its consolidation application would have had the effect of enrolling both matters. Ziningi maintains that its notice of set down was filed only out of caution.

[26] I am unable to agree with Ziningi’s submissions. As at 15 May 2025, the review was not ripe for hearing: no answering affidavit had been filed and *litis contestatio* had not been reached. At that stage, Ziningi’s proper course was to compel Waterloo to file its answering affidavit, rather than unilaterally enrolling the matter. Such conduct is at odds with the established practice of this division, particularly Practice Direction 44(2), which mandates compliance with Practice Note 39 before a date may be secured from the registrar for the opposed motion roll.

[27] Ziningi’s unilateral enrolment of the review in June 2025, before pleadings had closed and without compliance with the practice directions, is irregular. Allowing parties to proceed in this manner would disrupt the orderly functioning of the Court.

[28] The review was therefore neither before Francis J nor properly enrolled for hearing with the enforcement application. No consolidation order had been granted. What is properly before this Court is the enforcement application. Waterloo’s Rule 30 application is accordingly granted, and the review application is struck from the roll with costs.

THE RELIEF SOUGHT BY ZININGI

[29] In argument, Ziningi indicated that it seeks an order dismissing the enforcement application, alternatively, that the Court review and set aside the adjudicator’s award, alternatively, if the Court is of the view that the review is not

properly before it, that the matters be consolidated and then postponed for hearing with the review application.

[30] Given my finding that the review application is struck from the roll, the review is not before me for adjudication. The only matters then before me, for determination is the consolidation and postponement of the enforcement application, failing which the Court can adjudicate the enforcement application, and if only granted, the stay application must then be considered.

CONSOLIDATION AND POSTPONEMENT OF THE ENFORCEMENT APPLICATION

[31] In the review, Ziningi seeks an order consolidating the enforcement application with the review proceedings and postponing the former *sine die* to be heard together with the latter. Ziningi relied on the unreported judgment of Opperman J in *Van den Berg*⁴, which summarises the law applicable to consolidation applications. It contends that it would be convenient and in the interests of justice for the matters to be consolidated and heard together.

[32] The enforcement application is a discrete proceeding, seeking to give effect to an existing order that has not been suspended. Its determination does not depend upon, nor is it contingent upon, the outcome of the review. The issues in the enforcement application are narrow, procedural, and largely factual, whereas the review involves an assessment of the legality and reasonableness of the impugned award.

[33] The test for consolidation, as set out in Rule 11 of the Uniform Rules of Court⁵ and the applicable case law, is whether the matters are so closely connected in fact or law that it is convenient to dispose of them together. Convenience, in this context,

⁴ *Van Den Berg N.O and Others v Suidwes Landbou (Pty) Ltd and Others; The Land and Agricultural Development Bank of South Africa and Another v Van Den Berg and Others; Suidwes Landbou (Pty) Ltd v Steyn Attorneys and Others* (1240/2020; 1955/2016; 765/2019) [2021] ZAFSHC 53 (10 March 2021)

⁵ *Erasmus Superior Court Practice, Volume 2*, at D1-133.

is a judicial convenience — not the convenience of one party — and must be weighed against the potential for delay, prejudice, or procedural complexity.

[34] In *City*⁶, the SCA held as follows regarding the test to be applied in consolidation applications:

“The [Rule 11] procedure is aimed at facilitating the convenience and expeditious disposal of litigation. The word ‘convenient’ within the context of the sub-rule conveys not only the notion of facility of ease or expedience, but also the notion of appropriateness and fairness. It is not the convenience of any one of the parties or of the court, but the convenience of all concerned that must be taken into consideration.”

[35] Consolidation here would serve only to defer the enforcement of an existing order pending the review, thereby frustrating the rights of the successful party in the enforcement application. It would also unnecessarily prolong the resolution of a matter capable of prompt determination on its own papers.

[36] A *sine die* postponement would have the practical effect of granting, by procedural manoeuvre, a de facto stay of execution which I do deal with later in this judgment.

[37] The interests of justice favour the prompt and separate determination of the enforcement application. The two matters raise different legal issues, rely on different evidentiary material, and stand at different procedural stages. To conflate them would not advance efficiency; rather, it would import the delays inherent in the review into a matter that is otherwise ripe for hearing.

[38] In these circumstances, the application for consolidation and the *sine die* postponement is dismissed, with costs. I turn, then, to the merits of the enforcement application.

⁶ *City of Tshwane v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) at para 50

ENFORCEMENT OF THE ADJUDICATOR'S AWARD

[39] Waterloo argues that neither a pending review nor a referral to arbitration suspends compliance with an adjudicator's award. It is trite that adjudication awards are binding and enforceable on the "pay now, argue later" principle, pending any arbitration or review.⁷ Ziningi concedes the general correctness of this proposition but submits that the adjudicator lacked jurisdiction, rendering his award unenforceable. It relies on *Framatome*⁸ in support:

*"It is trite that, if upon application for enforcement of an adjudication decision, it is found that the adjudicator did not have the requisite jurisdiction, his decision will not be binding or enforceable."*⁹

[40] Ziningi's case is that the adjudication was conducted under a contract that did not exist. It contends that the adjudicator derived jurisdiction from a non-existent contract and that the award is therefore invalid and unenforceable.

[41] Waterloo disputes this, arguing that none of Ziningi's defences displaces the general principle of enforceability.

[42] Ziningi's main defence is that the wrong contract was placed before the adjudicator — namely, the JBCC N/S Subcontract — whereas the letter of appointment referred to the JBCC Minor Works Contract. It says the use of the wrong agreement led to incorrect findings on completion dates, snag lists, and other contractual milestones, and that the entire adjudication was thus jurisdictionally flawed.

[43] It further alleges that the claim before the adjudicator had prescribed, and that Waterloo, by instituting separate High Court proceedings in August 2020 for payment of R346 495.58, waived its right to adjudication. These factors, says Ziningi, meant the adjudicator exceeded his jurisdiction.

⁷ *Framatome v Eskom Holdings SOC Ltd* 2022 (2) SA 395 (SCA) at para 22.

⁸ *Supra*.

⁹ *Supra* Page 405, para 25,

[44] Ziningi maintains it has an “unassailable” case to set aside the award. That may or may not be so, but that is a matter for the review court.

[45] Whilst it is so that Ziningi is of the view that the disputes were referred to arbitration, that still does not relieve a party from the obligation to give prompt effect to the adjudication award until the award is revised in arbitration.

THE LEGAL POSITION WITH REGARDS TO ENFORCEMENT OF AWARDS

[46] Adjudication exists to ensure continuity of construction work and prevent cash-flow disruption to contractors or subcontractors, thereby avoiding delays and commercial harm.

[47] In *Framatome*, the Supreme Court of Appeal reaffirmed that adjudicators’ decisions are binding and enforceable unless and until set aside, and that the process is intended to be a speedy, interim dispute-resolution mechanism. Mathopo JA held:

“[23] If the interpretation contended for by Eskom is correct, it will substantially undermine the effectiveness of the scheme of adjudication. It is plain that the purpose of adjudication was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration. As far as the procedure is concerned, adjudicators are given a fairly free hand. They are required to act impartially and permitted to take the initiative in ascertaining the facts and the law. Sight should not be lost of the fact that adjudication is merely an intervening, provisional stage in the dispute resolution process. Parties still have a right of recourse to litigation and arbitration. Only a tribunal may revise an adjudicator’s decision. As that decision has not been revised, it remains binding and enforceable...”

[48] The court considered Eskom’s contention that the adjudicator had exceeded his jurisdiction and that the proper contractual procedure had not been observed. It

held that, even on this basis, Eskom was not entitled to disregard the adjudicator's award. The adjudicator had formulated the dispute with a clear understanding and appreciation of what the parties had contemplated. It is well established that, where it is found in enforcement proceedings that an adjudicator lacked the necessary jurisdiction, such a decision will not be binding or enforceable. As Mathopo JA stated:

“A determination of whether or not Framatome’s quotation was valid under the Contract, and whether the process for the deemed acceptance of that quotation was correctly followed, entails an analysis of the facts. This is a matter which the arbitrator will determine in due course. That said, it is evident that the decision of the adjudicator is binding and enforceable.”

[49] Moreover in paragraph [29] the SCA held as follows:

‘In the final analysis, the question to be asked is whether the adjudicator’s determination is binding on the parties. The answer to that question turns on whether the adjudicator confined himself to a determination of the issues that were put before him by the parties. If he did so, then the parties are bound by his determination, notwithstanding that he may have fallen into an error....The adjudicator formulated the dispute as it was referred to him. At no stage did he depart from the real dispute between the parties. He decided the dispute in accordance with that what the parties had contemplated and appreciated.’

[50] The SCA held that even if procedural or jurisdictional challenges are raised, they must be pursued in arbitration or review — parties are not entitled to ignore an award in the meantime.¹⁰

[51] Turning to the present matter, the question is therefore whether the adjudicator confined himself to determining the issues submitted by the parties. If he did, his decision is binding, even if he erred.

¹⁰ *Framatome*, para 23.

[52] Here, both parties conducted the adjudication on the basis of the JBCC N/S Subcontract Agreement, concluded in 2016, and the related subcontract data. The adjudicator addressed the contractual identity issue and the contradictions in the letter of appointment. The parties themselves conferred jurisdiction on the adjudicator to act under that contract. Having participated fully on that basis, Ziningi cannot now claim he acted outside his jurisdiction.

[53] As for prescription and waiver, these are merits-based defences that fall within the adjudicator's mandate to decide. Even if wrongly decided or overlooked, they do not vitiate jurisdiction.

[54] It is not this Court's task to review the award but rather to decide whether it is binding, pending such review.

[55] Ziningi has chosen not to comply with the award and instead to resist enforcement. Yet nothing prevents it from pursuing arbitration or review after payment.

[56] Therefore, there is no merit in the opposition and the enforcement application must be granted.

APPLICATION FOR STAY OF EXECUTION OF ORDER

[57] Ziningi seeks an order, in the event that the enforcement application is granted, the execution be stayed pending the outcome of the review application.

[58] Rule 45A of the Uniform Rules empowers the Court to suspend execution where justice so requires. The principles are well established: (i) a stay will be granted where real and substantial justice requires it, or injustice would otherwise result; (ii) the test is akin to that for interim interdicts; (iii) the applicant must show a well-grounded apprehension of irreparable harm from execution; (iv) irreparable harm generally exists where the causa for execution may later be removed.

[59] As stated in *Stoffberg N.O.*¹¹, this rule is a restatement of the Courts' common law discretionary power to regulate its own process. The guiding principle is that execution will be suspended where real and substantial justice requires it.

[60] The Court's discretion to order a stay is also grounded in its inherent jurisdiction, as recognised in *Van Rensburg NO*¹²:

“[51] Apart from the provisions of Uniform rule 45A a court has inherent jurisdiction, in appropriate circumstances, to order a stay of execution or to suspend an order. It might, for example, stay a sale in execution or suspend an ejectment order. Such discretion must be exercised judicially. As a general rule, a court will only do so where injustice will otherwise ensue.”

[61] Ziningi's only claimed prejudice is the financial burden of compliance and a risk of non-recovery if the award is overturned. However, it has provided no evidence of Waterloo's financial incapacity to refund the payment if required.

[62] If Ziningi wished to advance this argument seriously, it could have adduced audited financial statements, expert affidavits, or other objective proof of Waterloo's alleged inability to repay. Had it done so, it might well have indicated that irreparable harm exists where the causa for execution — namely, the award — may be reviewed and set aside. Without such evidence, the argument is speculative and insufficient to justify a stay of the execution of the order.

CONCLUSION

[63] In summary, Ziningi's attempt to strike out Waterloo's replying affidavit under Rule 30 fails, as Rule 18 has no application to affidavits in motion proceedings, and any initial deficiencies were remedied in subsequent affidavits, with Waterloo to pay the costs thereof.

¹¹ *Stoffberg N.O and Another v Capital Harvest (Pty) Ltd (2130/2021) [2021] ZAWCHC 37*

¹² *Van Rensburg NO v Naidoo NO (155/09); Naidoo NO v Van Rensburg NO (455/09) [2010] ZASCA 68*

[64] Conversely, the Waterloo's Rule 30 application succeeds, as Ziningi's unilateral set down of the review application before *litis contestatio* and in contravention of the practice directives was irregular. The review was therefore not properly before the Court and is struck from the roll, with Ziningi to pay the costs thereof.

[65] The application for consolidation of the enforcement application with the review application and a postponement thereof *sine die*, is refused, with Ziningi to pay the costs thereof.

[66] On the merits of the enforcement application, the adjudicator's award remains binding and enforceable pending any competent review or arbitration, and Ziningi's jurisdictional and merits-based objections do not justify non-compliance.

[67] The request for a stay of execution is refused for want of evidentiary foundation that real and substantial justice requires it, or injustice would otherwise result. The overall outcome is that the enforcement application succeeds, Ziningi is directed to comply with the adjudicator's award, and must bear the costs of the application.

COSTS

[68] Having regard to the complexity of the matter, the importance of the issues in dispute, the volume of work undertaken by the legal representatives, and the nature of the relief sought, it is appropriate that the costs, where awarded, shall be on the High Court scale C.

ORDER

1. The respondent's Rule 30 application is dismissed, with applicant to pay the costs occasioned thereby on the High Court scale C.
2. The applicant's Rule 30 application is granted and the review application is struck from the roll, with costs on the High Court scale C.

3. The application for consolidation of the enforcement application and the review application together with a request for a postponement thereof *sine die*, is dismissed, with respondent to pay the costs thereof, on the High Court scale C.
4. The adjudicator's award dated 11 March 2024 is made an order of court.
5. The respondent is directed to comply with the said award within 14 (fourteen) days of the date of this order.
6. The respondent's application to stay enforcement of the award is dismissed.
7. The respondent is ordered to pay the costs of this application, on the High Court scale C.

E JONKER
Acting Judge of the High Court

Appearances:

Applicant's counsel: Adv P Tredoux

Respondent's counsel: Adv J Tredoux