



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

Case no:16571/2024

In the matter between:

TEMPANI CONSTRUCTION (PTY) LTD

Applicant

And

THE MINISTER OF PUBLIC WORKS AND INFRASTRUCTURE

Respondent

Heard: 17 March 2025

Delivered: 15 September 2025

Summary: Contract- parole evidence rule-integrated clause

ORDER

Counter claim dismissed.

Orders sought by applicants granted.

JUDGMENT DELIVERED ELECTRONICAL

Introduction

- [1] In this application, the applicant seeks to make the final award, made in its favour by the adjudicator on 28 June 2024, an order of this court. This relief is sought in terms of Rule 6.2.2 of the JBCC Adjudication Rules. The applicant also seeks the relief from this Court on the grounds that the parties had agreed [in an Adjudication Agreement entered between the parties] to resolve their disputes only by an adjudication mechanism. The relief that is sought by the applicant is directed squarely towards making the adjudicator's award final and a definite determination upon the subject between the parties.
- [2] Accordingly, the applicant asserts that the parties did not reach an agreement that created a right to 'appeal' the adjudicator's determination through the mechanism of arbitration.
- [3] On the other hand, the respondent asserts that the parties set forth a two-tiered mechanism for resolving disputes or disagreements between themselves. According to the respondent, both the mechanisms were memorialised in written contracts.
- [4] The respondent opposes this application on the basis that the parties agreed to both adjudication and arbitration mechanisms. The respondent holds the firm view that the two-tiered mechanisms were set forth in the event that any party is not satisfied with the adjudicator's determination, it would be able to take the adjudicator's finding to arbitration as envisaged in the Addendum Contract.
- [5] It is common cause between the parties that the Addendum Contract upon which the respondent relies, was only signed on behalf of the respondent.

[6] The dispute in this case centers around whether the parties agreed on adjudication and arbitration to govern their disputes arising out of the JBCC contract. And whether the integration clause in the JBCC Contract precludes proof of the Addendum Contract.

[7] The respondent has also launched a counter application. In the counter application, the respondent seeks a declaratory order declaring that the parties have agreed to both adjudication and arbitration; alternatively, the arbitrator's findings should be set aside.

[8] The reliefs that are sought in this matter by the parties are related to the factual background of the matter. It is thus critical to present a review of the background facts to frame the context relevant to decide this matter. In fact, it is necessary to sketch the events forming the background to the dispute. It is also significant to note that quite an amount of the factual background to these proceedings is not in dispute and I turn, therefore, to that factual background.

Factual background

[9] The controversy between the parties has a long history that needs to be briefly stated. The Applicant entered into a building contract with the respondent ("the Department") for the construction of a community day centre in Delft ("the Delft project"). The genesis to the present dispute between the parties is the outstanding monies for the construction of the Delft project. As mentioned previously, the adjudicator made a determination against Department. Inter alia, the adjudicator determined that the Department is to pay the applicant the sum of R10 420 365.61 (plus VAT). The date of final completion of the Delft project was in August 2017.

[10] According to the applicant, despite receiving demand, the Department has not made payment of the amount due in terms of the adjudicator's determination, and the Principal Agent has refused to amend the final account and to issue a final certificate in accordance with the determination.

[11] As I have previously observed, the order sought by the Applicant in these proceedings is pursuant to Rule 6.2.2 of the JBCC Adjudication Rules. Rule 6.2 of the Adjudication Rules states the following:

“6.2 Either party may:

6.2.1 Within five (5) days, in writing, request the adjudicator to correct any patent clerical, typographical or arithmetical error or clarify any ambiguity in the determination. Such party shall simultaneously furnish the other party with the copy of such request. The adjudicator shall comply with such request within a further five (5) working days.

6.2.2 Apply to the High Court for the enforcement of the determination. The parties shall accept the jurisdiction of such court.”

[12] This matter involves three separate instruments. The first one is the JBCC contract and the other ones are the Adjudication Agreement and the Addendum Contract.

JBCC Contract

[13] The JBCC contract has an integration clause that provides as follows:

“1.8 This agreement is the entire contract between the parties regarding the matters addressed in this agreement. No presentations, terms conditions or warranties not contained in this agreement shall be binding on the parties. No agreement or addendum varying, adding to, deleting or cancelling this agreement shall be effective unless reduced to writing and signed by the parties.” Own underlining.

[14] On 31 May 2023, the applicant’s attorneys addressed a letter, to amongst others, the Department’s attorneys, seeking changes in the process for dispute resolution. The letter read in part as follows:

“DISPUTE HAS ARISEN

4. It is evident from the content of your letter that a dispute has arisen between the parties and that such dispute stands to be resolved by way of dispute resolution mechanisms provided for in the contract.

ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

5. Our client is of the opinion that the parties will not be able to resolve this dispute by way of Mediation. In this regard, we record as follows:

5.1. Mediation is not a precondition in the contract for Adjudication / Arbitration to commence.

5.2. Mediation is unfortunately relatively unsuccessful where a public body is concerned as it is challenging to ensure that the parties at the Mediation have an adequate mandate and discretion to settle a matter.

5.3. This specific dispute is not capable of being mediated as the parties legal positions are diametrically opposed.

6. Having said that, our client is committed to the resolution of the dispute in the most expeditious, practical and cost-effective manner.

7. In order to achieve this objective, our client would like the parties to refer the matter (sic) Adjudication. However, due to the legal complexity of the dispute, Adjudication in its unadulterated form is not appropriate as it is in both parties interest that they are guided by legal professionals.

8. Kindly advise whether the DPW will agree as follows:

8.1. That the dispute is referred to Adjudication.

8.2. . . .

8.3 . . .

8.4 . . .

9. Should the DPW not be prepared to have this dispute adjudicated (on the above basis), then the matter must be resolved by way of arbitration proceedings.

10. Arbitrations are far more adversarial, lengthy and costly by nature . . .

11. In the event that the DPW insists on Arbitration, we suggest that DPW select one of the four advocates.

12. Kindly take instruction and revert within the next 10 days.

13. Should we receive no response, it is our instruction to follow the usual approach to have an arbitrator appointed by Association in terms of the contractual provision applicable”.

[15] On 09 June 2023, the Department’s attorneys replied to the applicant’s attorneys letter, pointing out the following:

“2. We herewith confirm that our client has made the following recommendations to the Department:

2.1 The dispute be referred to adjudication. Should this be unsuccessful, the matter should then go to arbitration;

2.2 . . .

2.3 That the normal rules of adjudication apply;

2.4 . . .

3. It is our instructions that our client is still awaiting the feedback from the Department regarding the above recommendation.

We trust you find the above in order and will revert as soon as confirmation is received from Department.”

[16] On 08 December 2023, the Department’s representative emailed the applicant’s representative the Addendum contract requesting the applicant to complete and to sign the Addendum contract. The Addendum contract is only signed by the Department, and it also reflects that it was signed [by the Department] on 10 November 2023.

[17] The Adjudication Agreement concluded between the parties was signed by both parties in January 2024.

[18] On 12 July 2024 the Department's legal representative wrote a detailed letter to the applicant's representative reading in part as follows:

"To this end we draw your attention to the attached letter of Schroter Attorneys, . . . addressed to yourself on 09 June 2023, in which they informed your office of the following . . .

5. On the strength of the recommendation and after consulting its internal legal advisors, the Department accordingly agreed to amend the agreement to make provision for the standard dispute resolution clauses, of adjudication and arbitration. To this end the attached amended addendum to the agreement was signed . . . and emailed to you . . . for countersigning.

6. As a result, the Department has always approached this dispute on the basis that should adjudication not be successful, the matter could be referred to arbitration, upon notice of dissatisfaction of the adjudication determination by any of the parties.

7. Considering the above . . . the above actions taken by the Department in amending the initial agreement to make provision for adjudication and arbitration reflect the true intention of the parties to resolve this dispute.

8. we note your instructions that your client does not consent to arbitration, but we do think that such instructions are not properly considered, as your client has already consented to arbitration. My own emphasis.

Clause 40 of the contract stated that any dispute between the parties that cannot be resolved inter se, the parties would refer the matter to be resolved through litigation.

[19] Pursuant to the conclusion of the JBCC [building contract], the parties entered into an Adjudication Agreement by which they decided to refer the disputes between them to adjudication. The parties also agreed that their Adjudication Agreement would be governed by the JBCC Adjudication Rules.

[20] On 28 June 2024, the adjudicator made a determination in the following terms:

6.1. The Department is to pay the Applicant the sum of R10 420 365.61 (plus VAT);

6.2. The principal agent appointed on the project by the Department Equity Studio (Pty) Ltd (“A”), was found to have been incorrect in rejecting the Claimants claims for an adjustment of the contract value.

6.3. That the amount of R10 420 365.61 (plus VAT) is to be included in the final account on the project and that a final payment certificate was to be issued.

6.4. The final payment certificate is to be issued immediately.

6.5. The Department is to pay the costs of the adjudication including the adjudicator’s costs and the Claimant’s costs on a party-and- party basis.

[21] In a letter (“letter of dissatisfaction”) to the adjudicator dated 5 July 2024, the Department advised that it was dissatisfied with the determination and that it intended to refer the dispute to arbitration.

[22] The Applicant responded to the letter of dissatisfaction by the Department, by email in which it [Applicant] stated *inter alia*:

“That the building contract did not provide for the determination to be referred to arbitration (due to the Department being dissatisfied therewith, or at all for that matter”). The Department does not enjoy a contractual right to refer the dispute to arbitration. If the Department is “*dissatisfied*” with the determination, then the dispute to be referred to litigation, unless the parties agree otherwise.

Since the Applicant is not prepared to consent to an arbitration process, the Department would need to proceed with litigation.”

[23] On 12 July 2024, the Department’s attorney sent the applicant’s attorneys an email. See paragraph 18 of this judgment for the contents of the email.

[24] The email also stated that when the parties referred the matter to Adjudication, the Department did so with an understanding that the standard dispute resolution clauses of adjudication and arbitration would apply. To buttress this contention, the Department emphasised that a written addendum to the building contract that was prepared and signed by the Department on 10 November 2023. However, the addendum was not counter signed by the Applicant.

[25] On 15 July 2024, the Applicant's attorneys sent an email to the Department's attorneys asserting, amongst others, that the applicant disputes the Department's construction of the agreement between the parties. In the email, the applicant denies the existence of an arbitration agreement (in writing or otherwise) and that there was no binding amendment to the contract to provide for arbitration. The email further states that the default position remains litigation as per the original contract between the parties.

Parties' submission

a. Applicants' submissions

[26] According to the applicant, in this case, it is common cause that the final account should have been issued in January 2016. The final account was only delivered seven years later in February 2023. The applicant avers that this was a breach of contract. Due to the late issuance, the applicant was kept out of pocket, in respect of substantial outstanding amount [several millions of rands]. To address this, in 2018, the applicant then launched an urgent application to get the outstanding amounts. After an order was granted in 2019, it took another four years for the Departments' agents to issue a final account.

[27] At the time when the final account was issued, in terms of the building contract, the procedure for the resolution of disputes was through litigation. After the issuance of the final account, disputes arose between the parties in respect of monies that the applicant alleged should have been included in the final account. The Applicant's attorneys

proposed that the parties should refer these disputes for adjudication. This led to the parties concluding an Adjudication Agreement in January 2024.

[28] An adjudicator was appointed, and an adjudication hearing was held. At the end of June, the Adjudicator delivered his determination. According to the applicant, the Department refused to comply with the determination. The applicant asserts that the Department took the position that the matter should at that stage be referred to arbitration without any legal basis for that position.

[29] The applicant drew this Court's attention to the amendment to the Standard Contract in relations to dispute resolution by means of the State Provisions. According to the applicant, the conventional procedures [Adjudication and Arbitration] were removed from the Standard Contract and replaced with litigation.

[30] The applicant is of the view that it is significant that this Court should have regard to the amendment of the Standard Provisions in relation to dispute resolution by means of the State Provisions.

[31] The applicant then asserts that the parties then amended clause 40 that stipulated that litigation was the only option. And that shortly after the issuance of final account, disputes arose [applicant contended that this is so because certain amounts it was entitled to were not included in the final account].

[32] According to the applicant, it was never the applicant's intention to refer the arising disputes for arbitration. The applicant asserts that one, if not the primary, reason behind adjudication mechanism is that it is a short, inexpensive, and relatively easy process as opposed to arbitration and litigation.

[33] The applicant further contends that the Department's assertion falls foul of the parole evidence rule. To this end, the applicant contends that the Department intends to rely on extrinsic evidence to add or alter the provisions of an agreement. It is also the

applicant's contention that it is not for the department to tell the court what the intentions of the parties were, but the court's duty.

[34] Further, it is the applicant's contention that the Department's reliance on the Addendum Contract is still born as the clause 1.8 of the JBCC Contract has a non-variation clause. The applicant contends that the respondent's reliance on the Addendum Contract is legally unsustainable as it was not signed by both parties as required by clause 1.8 of the JBCC. It is further the applicant's contention that the applicant refused to sign the Addendum Contract.

[35] It is the applicant's contention that even on the Department's case, the Addendum Contract had to be signed by both parties to have any effect, as reflected by the email dated 08 December 2023, from Grant de La Cruz. The applicant further asserts that the Addendum Contract also specifically stipulates that all pages of the Addendum Contract must be initialed in the same way as the original bid document.

[36] The applicant further argued that the fact that the Department was unsuccessful in its attempt to get the Addendum Contract signed by the applicant is important as far as context is concerned.

[37] Mr de Villiers, SC on applicant's behalf, made it very clear during his submissions that at no stage during communication between Mr Pienaar [on behalf of the applicant] and Ms Hossain on behalf of the Department] regarding finalisation of the Adjudication Agreement, did Ms Hossain refer to the Addendum Contract.

[38] Counsel for the applicant earnestly points out that the Addendum Contract was never part of the negotiations that culminated in the conclusion of the Adjudication Agreement.

[39] According to the applicant, the first relevant context in this matter is the letter dated 31 May 2023, from the applicant's attorney, advising that the parties should not refer the matter to arbitration.

[40] Mr de Vivier SC argues and stresses that the background context in this matter, provides the strongest evidence supporting the applicant's contention that the Adjudication Agreement is the binding agreement between the parties. According to the applicant's counsel, the following background context is necessary to fully understand the intentions of the parties:

- a. That the parties agreed on the dispute resolution provision in the JBCC.
- b. That the applicant communicated its preferred choice that is adjudication.
- c. That at that relevant stage, a normal underlining purpose of adjudication and arbitration no longer existed, as the building had been completed and the final account had been issued.
- d. That Mr de La Cruz's attempt to introduce the Addendum came out of the blue and he was informed that the applicant would not sign the Addendum.
- e. During the final stage of the negotiations, Ms Hoosain never referred to the Addendum.

[41] According to the applicant, the proposal was that the Adjudicator was meant to be the final arbiter of the parties' disputes.

[42] In the replying affidavit, the applicant refers to the Addendum as an abandoned attempt to amend the JBCC contract. As such, so the argument ran, the respondent cannot rely on the unsigned Addendum to elevate it to be above Adjudication Agreement.

b. The Department's submission

[43] In essence, the Department wants to prove existence of a separate Arbitration contract, as a valid and binding agreement between the parties. According to the Department's counsel, the crucial aspect which the applicant did not take the court to its confidence is the failure to reveal the existence of the Addendum in its founding papers.

[44] According to the Department, the Adjudication Agreement is only a part of the agreement between the parties. Mr R Stelzner, SC, counsel for the Department, vehemently argued that the whole of the agreement was broader and that the Adjudication Agreement was not to be the sole dispute resolution mechanism. Thus, the Department argued that from purpose and context of this matter it is clear that the Adjudication Agreement was not meant to be the sole dispute resolution mechanism.

[45] Department asserts that the Addendum contract is fundamental part of determining whether the applicant is entitled to enforcement of the adjudication award or not and that depends on the interpretation of the Adjudication Agreement.

[46] According to Mr Stelzner SC, the parole evidence rule does not prevent a party from telling the court what the whole agreement was. The Department argues that the parole evidence does kick in when only parts of the agreement are placed before the court. It is the Department's contention that the Adjudication Agreement is not the sole memorial of the parties' transaction in this suit. According to the Department, the Department is seeking to place the full picture, full content and full context before the court in order to assess what the Adjudication Agreement is. The argument continues to state that the Adjudication Agreement needs to be seen in the context of that which preceded it and for the purpose for which it was signed.

[47] It is also the Department's submission that the parties agreed to amend the JBCC contract and agreed to other dispute resolution mechanism. It was contended on behalf of the Department that JBCC Contract postulates litigation and alternatively adjudication and arbitration.

[48] According to the Department, the applicant wishes that this Court should ignore the history and the context and just look at the Adjudication Agreement. It is the Department submission that should this Court scrutinise the context too closely, the case of the applicant would collapse in its entirety.

[49] It was submitted on behalf of the Department that what it argued for the respondent is not in conflict with what is provided for in the Adjudication Agreement.

[50] The Department's counsel also relied on the email dated 08 September 2023, from Mr Botha to the applicant. He argued that the applicant cannot come and argue that there was no Addendum Contract signed by both parties but there was an Adjudication Agreement.

[51] It was contended on behalf of the respondent that what is crucial about the Addendum Contract are two things, the first one is that the dispute resolution by litigation clause was substituted by adjudication. According to the Department, the Addendum that is signed on behalf of the Department provides for a full dispute resolution mechanism.

[52] It was argued on behalf of the Department that in terms of clause 40.5# of the JBCC, should a party be dissatisfied with the decision of the adjudicator, the dispute which is a subject matter of dissatisfaction shall be finally resolved by the arbitrator.

[53] According to the Department, subsequent to the decision to have a full dispute resolution mechanism, the acting head of the legal department of the Department was presented with the Adjudication Agreement and they signed it. It is argued that the Adjudication Agreement's context is the Addendum signed on behalf of the Department previously and the purpose is to resolve the dispute first by way of adjudication if one of the parties is dissatisfied with the adjudication, then by way of 40.5# of the JBCC.

[54] It is submitted on Department's behalf that when the applicant states that it never agreed to the Addendum Contract as they never signed it, that means that there is no amendment of the JBCC Contract, as the Department made it clear that the only amendment that was mandated was one as provided for in the Addendum. According to the Department, the Addendum was sent to the applicant's attorney and the applicant's attorney signed the Adjudication Agreement. And in so doing the applicant's attorney only dealt with part of the agreement. So the argument continues, as a result, there was

a partial integration of the whole parties' agreement. It is the argument of the Department that the applicant deliberately signed part of the agreement.

[55] According to the Department, the context shows that the Addendum identified that there would be a process of adjudication and arbitration. Thereafter the parties signed the Adjudication Agreement to deal with the adjudication part. Having committed themselves to adjudication as part of adjudication and arbitration, the applicant cannot come and argue that the whole arbitration requirement falls away.

[56] According to the Department, the parties agreed to both adjudication and arbitration mechanisms. Further, the Department contends that when the parties agreed to amend the building contract, it was amended to cater for both adjudication and arbitration.

[57] The Department argues that it is opportunistic of the applicant to seek an order from this Court for payment for claims that are in excess of R10 million. It was further submitted on the Department's behalf that it was a self-serving omission on the part of the applicant not to sign the Addendum Contract and this creates a deception. It was contended that, when the Department signed the Adjudication Agreement, it was not informed that the applicant was refusing to sign the Addendum. When Mr Stelzner SC drew this Court's attention to the email from Charlton Botha to Sean Pienaar, dated 26 September 2023, he argued that the email conveys that the adjudication process meant to be part of a broader agreement that was still in the process of being vetted and needed to be mandated and sanctioned.

[58] According to the Department, the parties started to deal with a specific component of the process, the Adjudication Agreement. The Department counsel submitted that the Department thought that the addendum was signed and that is why the Department signed the Adjudication Agreement.

[59] The Department's counsel emphasised the point that the context of the whole agreement is broader. Counsel on behalf of the Department, submits that this Court is

going to find the context leading up to the two documents [Adjudication Agreement and the Addendum] in the letter sent to the applicant's attorneys from Mr Grant de La Cruz, the chief architect, on 8 December 2023. The counsel further argues that the letter highlights and emphasises the fact that the only amendment the Department is going to be prepared to agree to is the one that is mandated by the Department. The Department maintains that the only amendment that was mandated was the one provided for in the Addendum Contract.

[60] It is the Department's counsel's argument that if the applicant maintains that they never agreed to the Addendum contract, then there is no amendment of the JBCC Contract. Then the amendment contemplated by the Adjudication Agreement was not effected. The Department submits that this is the case because there was a partial integration of the old parties' agreement.

[61] Mr Stelzner SC further asserts that nowhere in the Adjudication Agreement would this Court find that it [the Adjudication Agreement] is the only method to resolve disputes.

[62] The Department submits that the adjudicator did not address the defences raised by the Department and simply ignored them or did not engage with them. As such, the award by the adjudicator was plainly erroneous.

Evaluation

[63] The Addendum Contract by its terms it was intended to provide for a process of adjudication followed by arbitration should either party be dissatisfied with the decision given by the adjudicator. And was intended to amend and supplement the original contract [JBCC].

[64] The rules for interpreting contracts are well-settled and are laid out in plethora of authorities. In this matter, this Court is expected to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable. It

is common cause between the parties that the building contract JBCC only made provision for litigation. That the Adjudication Agreement is silent on arbitration. It is also common ground that the Department unilaterally drafted and signed an Addendum Contract.

[65] The issue for determination is what the agreement was between the parties. Put differently, whether the Adjudication Agreement denotes the full agreement between the parties.

Integration

[66] The applicant asserts that the parties in the Adjudication Agreement expressly bargained for only Adjudication. On the other hand, the Department fervently contends that the Adjudication Agreement only expresses certain terms of their agreement rather than the agreement in its entirety.

[67] In this regard, this Court has to amongst others, determine as to whether:

- a. the Adjudication Agreement appears on its face to be a complete agreement;
- b. whether the Addendum contract directly contradicts the Adjudication Agreement;
and
- c. would the Addendum Contract tend to deceive this Court.

[68] It is significant to note that when the parties to an agreement express their intention that ought to be the complete expression of their agreement. And that should signify that integration had occurred. Ordinarily, the presence of an integration clause in an agreement will be quite convincing factor, if not decisive one, on the issue of integration. In essence, this denotes that the agreement concluded between the parties may not be contradicted by evidence of other agreements.

[69] In the present application, the Adjudication Agreement does not contain an integration clause. In this regard, the applicant argues that it is the integration clause in the JBCC contract that bars the proof of the Addendum Contract.

[70] During the making of a contract parties are at liberty of rejecting or accepting a bargain offered. To that end, parties are at liberty to make unjust contracts. And when an unjust contract is concluded between the parties, a party cannot expect the courts to amend the terms that prove unsatisfactory or unjust.

The parties' intention

[71] The applicant's counsel submits that the evidence the Department wants to rely on in respect of the unsigned Addendum is extrinsic evidence. The applicant says the assertion that the applicant accepted the Addendum that was signed by the Department is untrue. The applicant asserts further that the Addendum was sent to applicant's director, who refused to sign the document because that was not what the parties agreed to.

[72] It is well-established that the intention of the parties in any agreement is determined from the language used by the parties in the agreement or from their conduct in relation thereto. It is also a well-settled interpretation principle that a court cannot create a contract the parties did not intend to conclude or to insert language one or both parties now wish had been included. In fact, in the interpretation of a contract, a court is tasked with giving effect to the mutual intention of the parties at the time of the conclusion of the contract.

[73] In this case, there is no impasse about the meaning of a particular word or phrase. It is well established that if the contract's language is unambiguous, then the ordinary sense of the wording must prevail in its interpretation. No party in this matter argued that the terms of the JBCC Contract, the Adjudication Agreement and the Addendum Contract are ambiguous.

[74] And it is not in dispute that the JBCC Contract contains an integration clause. By necessary implication the integration clause in the JBCC Contract is applicable to Adjudication Agreement. When the court is faced with the duty to interpret an agreement, the interpretation has to have effect to the parties' intent. In this matter, the parties have a different take on the terms to which they agreed to. As asserted by the Department that the applicant as the party seeking to enforce the Adjudication Agreement bears the onus of proving that the contract it seeks to enforce is valid contract and its terms.

[75] The applicant did not sign the Addendum Contract and thus contends that it is not bound by it as it never assented to the terms of the Addendum Contract. The Department asserts that the Addendum Contract was executed to further modify the JBCC and constitute a valid modification of the original JBCC Contract. The Department further asserts that they would not have signed the Adjudication Agreement absent the Addendum Contract. In essence, the Department argues that the existence of the Addendum Contract demonstrates a latent ambiguity within the Adjudication Agreement.

[76] According to the Department, the Adjudication Agreement is incomplete. Thus, there is partial integration.

[77] To give effect to each part of the contract, [the terms of the agreement] the entire agreement is to be taken holistically and not in a piecemeal fashion. Or, putting it in another way, no clause is to be taken in isolation. It is also well settled that putting a contract in writing ensures clarity about what the parties' obligations are and what they are bidding themselves to. When parties reduce a contract in writing, the intention of the parties is to be ascertained from the writing alone, if possible. Hence, the written contract, in general, is said to be the sole memorial of the agreement between the parties.

[78] Thus, a clear written agreement may triumph over any negotiations or conditions related to it that preceded or accompanied the execution of the contract. Hence, the parole evidence rule entails that evidence that is intended to contradict the terms of the written agreement is not allowed. In fact, it is trite that a court cannot consider extrinsic evidence of any prior agreement or verbal agreement to vary or contradict the clear and unambiguous terms of a written, integrated contract. But to this general rule [the parole evidence rule], there are exceptions.

Exception to the parole evidence rule

[79] *AJ Kerr, in The Principles of the Law of Contract* 6 ed (2002) at 348, highlighted the point that it is better to look at the parole evidence rule as a question of the integration of parts into a whole. The learned author further states the following:

“Thus in *National Board (Pretoria) (Pty) Ltd and another v Estate Swanepoel*, Botha JA approved the following statement in *Wigmore on Evidence*: This process of embodying the terms of a jural act in a single memorial may be termed the integration of the act, ie its formation from scattered parts into an integrated documentary unit. The practical consequences of this is that its scattered parts, in their former and inchoate shape, do not have any jural effect; they are replaced by a single embodiment of the act.

In other words: When a jural act is embodied in a **single memorial**, all other utterances of the parties on that topic are legally immaterial for the purposes of determining what are the terms of their act”.

[80] The learned authors *Schwikkard & van Der Merwe 3rd Edition* 462 -463 states:

“There are several qualifications and exceptions to the general rule excluding parole evidence. Some of these are not truly exceptions, but rather instances which fall outside the scope of the rule. Where for instance, a written contract is not intended to cover the terms of the transaction all-inclusive, evidence of further oral terms is not

precluded. The rule does not apply to a document which contains a mere narration of an event, and which does not constitute a jural act; nor does the rule exclude evidence which throws light on the true nature of the transaction referred to in a written document. . . Parole evidence may for instance, be admissible of a collateral agreement and additional terms and subsequent oral variations, but not where writing is a requirement of law, and such evidence seeks to contradict the written instrument. A similar result arises where the contract contains a clause to the effect that no variation or rescission of the contract shall be valid unless it is reduced to writing. But that, of course, is not due to the operation of the parole evidence rule. Curiously, even contracts that are required by law to be in writing can be cancelled orally.”

[81] In this case, the Department seeks this Court to consider the facts and circumstances surrounding the execution of the agreements to determine as to whether the contract is fully integrated or partially integrated. On the other hand, the applicant strongly asserts that the parole evidence rule does not allow this Court to do that. Factors relevant to this consideration include the following:

a. Clause 2 of the Adjudication Agreement states the following:

“The parties agree that the disputes between them (referred to in paragraph 4 below) be resolved by adjudication in terms of this agreement.

b. Clause 4 of the Adjudication Contract states that:

“ADJUDICATION DISPUTES”

The parties confirm that the disputes to be determined in this Adjudication relate to the construction contract (JBCC) concluded between the parties in relations to the construction of the Delf Community Day Centre.”

c. Clause 5 of the Adjudication Agreement provides the following:

“RULES GOVERNING THE ARBITRATION

5.1 The JBCC Adjudication Rules January 2020 edition, published by the Association of Arbitration of Southern Africa (“the Rules”).

5.2 The parties confirm, as envisaged in clause 5.4.3 of the Rules, that they agree that both parties shall be entitled to be represented by practising attorneys (and advocates) at the Adjudication.”

[82] This court has a difficult task of deciding whether the parties had a true meeting of the minds and how to resolve the parties’ disagreement.

[83] As previously mentioned, the Adjudication Agreement does not contain a clause that states that its terms are the complete and final agreement between the parties. Thus, the question that begs is whether it is an integrated agreement. There is also no indication that the Adjudication Agreement is conditional or that the parties did not intend to be bound by its terms. The question that aptly arises is whether the Addendum Contract is a separate and unrelated contract.

[84] It is so that the JBCC Contract contains a clause that states the following:

“1.8 This agreement is the entire contract between the parties regarding the matters addressed in this agreement. No presentations, terms conditions or warranties not contained in this agreement shall be binding on the parties. No agreement or addendum varying, adding to, deleting or cancelling this agreement shall be effective unless reduced to writing and signed by the parties.”

[85] Obviously the JBCC Contract contained an integrated clause. It categorically specifies that it may be amended only by a written instrument signed by all of the parties. The Adjudication Agreement does not mention anything about arbitration and does not include any clause that alludes to an Addendum Contract.

[86] A contract is completely integrated if on its face it is plain that the parties intended the writing to be a final and total expression of their agreement. Similarly, a contract that appears to be unambiguous on its face may still contain a latent ambiguity that can only be exposed by extrinsic evidence. Hence, in order to determine whether extrinsic

evidence is admissible, the test is not whether on its face, the contract and its meaning appear to the court to be unambiguous, but whether the evidence offered is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.

[87] More importantly, it is not correct to exclude relevant extrinsic evidence that would explain the meaning of a written contract unless it is possible to determine the meaning the parties ascribed to the words from the contract alone.

[88] In this matter, the Department is arguing that the existence of the Addendum Contract exposes and demonstrates the ambiguity of the Adjudication Agreement. The counsel on behalf of the Department vehemently asserted that the Addendum Contract is merely a partial integration of the agreement that was intended by the parties. The Department's case reveals that the Adjudication Agreement and the Addendum Contract are still scattered parts of the parties' intentions. As such, so the argument continues the Adjudication Agreement cannot be regarded as integral documentary unit, as it does not set out the entire agreement between the parties. The Department's argument postulates that when this Court has made a determination that these two jural acts are embodied in a single memorial, whether apart [the Adjudication process] or both [Adjudication and Arbitration], the parole evidence rule will only be applicable then. I agree. In order to determine the intention of the parties, this court needs to have regard to both instruments and the history leading to them.

[89] According to the applicant, other aspects that are crucial to the context of this matter are the following:

- a. the response provided by the Department's attorney in response to the applicant's letter dated 31 May 2023, which stated that the dispute should be referred to adjudication and should adjudication be unsuccessful, the dispute should go for arbitration.

- b. the telephone conversation between Schröter attorneys [Department's attorneys] and Mr Pienaar [on behalf of the applicant] where the two agreed to refer the matter the matter to adjudication.
- c. A further aspect related to context is the email dated 08 September 2023, from Charlton Botha, on behalf of the Department, which indicated that it was the Department's stated position that the parties must attend to this matter by means a formal amendment signed by all the parties. The applicant submits that it is significant to note that the issue of formalities was discussed when the subject of discussion was the draft Adjudication Agreement.
- d. On 26 September 2023, an email from Mr Botha to Mr Pienaar amongst others, indicated that the Department was not yet in a position to advance with the adjudication process, as the agreement was meant to be signed by both parties.

Mutual assent

[90] This Court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to. To begin with, the court is precluded from interfering or making a contract for the parties, as parties are free to choose if they want to contract, with whom and on what terms. The court, however, will enforce a binding contract between the parties. The essence of a contract is a meeting of the minds.

[91] Accordingly, mutual assent as a material prerequisite must be manifested. For a valid contract to exist, each party needs to have a serious and deliberate intention to contract or to be legally bound by the agreement, the animus contrahendi (See *Fleet Africa (Pty) Ltd v Nijs* (JA9/15) [2017] ZALAC 8; (2017) 38 ILJ 1059 (LAC); [2017] 5 BLLR 450 (LAC) (20 January 2017) at paragraph 21 and *Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 465). The parties must also be ad idem (or have the meeting of the minds) as to the terms of the agreement. Obviously, absent the animus contrahendi between the parties or from either of them, no contractual obligations can be said to exist and be capable of legal enforcement.' See *Nijs supra*.

[92] First and foremost, in this case, there is no doubt that the JBCC Contract prescribes a method of acceptance. The JBCC contract is a standard contract that was prepared by the Department. The Department requires that this Court should turn a blind eye to the failure to comply with the prescribed method of acceptance. This is because the Department asserts that it was not meant to be bound only by the Adjudication Agreement as its validity was conditional upon the conclusion of the Arbitration Contract.

[93] In the circumstances of this case, this contention is unsound. This Court cannot ignore unambiguous contractual undertakings. To do so would be to create an act without legal significance.

[94] The parties agreed before the amendment of the JBCC Contract that writing and signatures constitute a formality. The Adjudication Agreement appears to be carefully and formally drafted. It is detailed and gives an impression that it was drafted by a person knowledgeable about the subject matter.

[95] There is no evidence in this matter to prove that the applicant induced the respondent to believe that it agreed on the two-tier dispute resolution mechanisms. Instead, the evidence reveals that the applicant refused to sign the Addendum Contract when the Department requested it to do so. There is also no evidence or a suggestion that the applicant made a tacit waiver of signing as the prescribed method of acceptance for a valid formation of the agreement.

[96] What the Department is seeking from this Court is that this Court should strain the law or the facts of this matter to find that the parties had a meeting of mind to have a two-tier dispute resolution mechanism.

[97] This then begs the question as to what constitute a written agreement? As far as the Addendum Contract is concerned, the applicant was provided with a draft that

embodied in writing all its terms. The issue with the Addendum Contract is that it was not signed by the applicant.

[98] To begin with, it is trite that not every agreement constitutes a contract. It is my firm view that the proof that a party has expressed its unconditional assent to a contract cannot only be proven by the mere existence of a written instrument. Thus, when the parties have expressed their intentions and reduced them into a written document, that does not necessarily mean that a valid contract has been concluded even if it is signed by the parties. Unconditional assent to the terms of the written agreement must be proven if required.

[99] Equally, a signed written contract is not always an indication of a valid agreement between the parties. In this matter, there is prescribed mode and formalities for acceptance of a contract. And signatures are one of them. Accordingly, the parties in terms of the JBCC contract agreed that agreements between them would be concluded only upon signature by both parties.

[100] In *Pillay v Shaik* 2009 4 SA 74 (SCA) [2012] at para 50, the following was stated:

“In my opinion it is clear from *Goldblatt v Freemantle*, supra, and the authorities cited therein that, in the absence of a statute which prescribes writing signed by the parties or their authorised representatives as an essential requisite for the creation of a contractual obligation (something that does not apply here), an agreement between parties which satisfies all the other requirements for contractual validity will be held not to have given rise to contractual obligations only if there is a pre-existing contract between the parties which prescribes compliance with a formality or formalities before a binding contract can come into existence.

That this is so is clear, for example, from C W Decker's annotation on Van Leeuwen's *Roman Dutch Law* 4.2 sec 1 (not sec 2 as Innes CJ says at 129) where he pointed out (Kotzé's translation, 2 ed, vol 2, p 12) that we no longer

uphold the distinction drawn in Roman law between real, verbal, literal and consensual contracts because all contracts with us are made with consent. With regard to written contracts he referred to an observation by Samuel Strykius (*Modern Pandect* 2.14.7) as follows:

' . . . we must regard the *written* contracts as distinct, in so far as we should bear in mind that although the writing does not constitute the essentiality of the contract, which is contained in the mutual consent of the parties, they may nevertheless agree that their verbal agreement shall be of no effect until reduced to writing, in which case the agreement cannot before signature have any binding force, although there exists mutual consent; and it cannot be said that the writing served not in perfecting the transaction, but only as proof thereof . . . , since here it is agreed that the consent should not operate without the writing, which must be observed as a legitimate condition." My own emphasis.

[101] It is evident that the circumstances in the *Shaik* matter were different to this one, hence, the doctrine of quasi assent is not applicable in this case. This becomes clear when the following is stated in the *Shaik* matter, *supra*, at para 52.

[102] Unlike in the *Shaik* matter, in the present case there were clearly no agreements between the parties that the mutual consent between them would not operate in the absence of a document embodying its terms signed by both buyer and seller.

Conclusion

[103] Even though an integration may be partial as well as complete, in this matter, when regard is had to paragraph 1.8 of the JBCC contract, the correspondence written by the applicant to the Department and the Adjudication Agreement, it becomes clear that the parties intended that the Adjudication Agreement to express their final and complete terms in the agreement in its entirety rather than certain terms. Thus, the Adjudication Agreement shows that the parties have agreed to it as a complete and final embodiment

of the terms of their agreement. Thus, the extrinsic evidence cannot be used to contradict its terms.

[104] In this case, as previously mentioned, the JBCC contract categorically states the requirements for a valid contract. And one of them is the signing by the parties. The applicant did not sign the Addendum Contract, and as such the Addendum Contract did not come into existence. Consequently, the applicant is not bound by it. Even the Department for that matter is not bound by the terms of the Addendum Contract.

[105] Having considered the above, I conclude that the Adjudication Agreement is a completely integrated document. As such, there is nothing in this case to convince this Court that the existence of the Adjudication Agreement depends on the validity of the Addendum Contract.

Parties are at liberty to conclude agreements that are good and bad. The courts in ensuring and upholding freedom of contract enforce all voluntary agreements concluded between the parties. The exception to freedom of contract is contracts that offend public policy. Accordingly, I disagree with the Department's submission that the applicant is snatching at a bargain in circumstances where it knows or should have known that it is not entitled to what that it is claiming.

[106] As far as the attack levelled against the Adjudicator's determination is concerned, this Court does not have power to interfere with the finding of the adjudicator, as the parties have agreed that their disputes would be determined by the adjudicator.

[107] Because of my findings, the counter claim of the Department cannot be sustained.

Costs

[108] In light of the facts of this matter, I am not convinced that the opposition of the Department was not warranted. Additionally, the matter warranted the employ of senior counsel.

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

- a. The respondent's counter claim is dismissed
- b. The determination of MR Howard Boetcher dated 28 June 2024 is made an order of this Court
- c. The respondent is ordered to pay the costs of suit on scale C.

CN NZIWENI
JUDGE OF THE HIGH COURT

APPEARANCES

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