

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 117612/2024

DATE: 2025-10-21

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) ~~REVISED~~

In the matter between

10

LOMASTEP PTY (LTD)

and

MECSA CONSTRUCTION PTY (LTD)

J U D G M E N T

SWANEPOEL, J:

[1] In this application, the applicant seeks an order against the respondent for payment of the sum of R44 316
20 399.17, pursuant to a determination by an adjudicator, Justice Willis, which was handed down on 27 May 2024. Interest on that amount and costs.

[2] On 29 July 2016, the party entered into a written construction agreement for the construction of a mixed-use building. The agreement contained an alternative dispute

resolution clause, the material parts of which read as follows:

“[40.1] Should any dispute arise between the employer, including his principal agent or agents, and the contractor arising out of or concerning this agreement or its termination, either party may give notice to the other to resolve such agreement.

[40.3] Where a dispute is referred to adjudication, the following shall apply:

10 [40.3.3]. The adjudicator's findings shall be binding on the party's, who shall give effect to it without delay unless and until it is subsequently revised by an arbitrator. A dispute arose as a result of the respondent allegedly failing to bring the building to practical completion, resulting in penalties being levied against the respondent in the aforementioned amount under three payment certificates.”

20 [3] The applicant first applied to this Court for a monetary order and when the respondent raised the defence that the agreement required the parties to first refer the matter to either adjudication or arbitration, the applicant conceded the point *in limine*, whereafter it referred the matter to adjudication. The dispute before the adjudicator falls

outside of the question that I have to determine, but for the sake of completeness, the respondent raised three defences, abandoning its other defences for the purposes of the adjudication:

[3.1] That the matter had not been properly referred to adjudication and that the adjudicator consequently did not have the requisite jurisdiction to hear the matter.

10 [3.2] That the respondent had provided a variable construction guarantee issued by Lombard Insurance Company Limited, that the applicant had called upon Lombard to pay in terms of the guarantee and that it had received payment, thereby extinguishing the debt arising from the penalties and resulting in the applicant being in fact indebted to the respondent.

[3.3] That the dispute between the parties was so varied that adjudication was not appropriate for the determination of the disputes.

20 [4] The adjudicator held, in the respect of first defence, that there was in fact a live dispute between the parties and that it was not necessary for a party raising the dispute to give formal notice of disagreement. The adjudicator held that he had jurisdiction to hear the matter. It bears mentioning that clause 5.4.6 of the JBCC adjudication rules provide for an adjudicator to decide on his own jurisdiction.

[5] In respect of the payment defence, the adjudicator found that there was no factual nexus between the payment in terms of the guarantee and the payment certificates under which the penalties were levied. The adjudicator held that Lombard's obligation to pay under the guarantee arose from the fulfilment of certain conditions contained in the guarantee and not from the respondent's indebtedness in respect of penalties.

[6] As for the defence that adjudication was inappropriate,
10 the adjudicator held there was nothing in the agreement that vested a discretion in the adjudicator to postpone the determination of a matter until a separate dispute had been resolved elsewhere. In fact, he found that, should the adjudicator refuse to come to a finding on a matter, that would be the antithesis of what an adjudication is about.

[7] The adjudicator consequently made the following award:

[7.1] The respondent was ordered to pay the applicant R44 316 399.17.

20 [7.2] The respondent was ordered to pay interest as follows:

[7.2.1] on the amount of R17 727 257.33 from 1 April 2019 to date of payment at the rate of 10.8 percent per annum compounded monthly.

[7.2.2] On the amount of R21 392 198.45 from 27 April 2019 to date of payment at the rate of 10.8 percent per annum compounded monthly.

[7.2.3] On the amount of R5 196 943.39 from 1 April 2019 to date of payment at the rate of 10.8 percent per annum compounded monthly.

[7.3] The respondent was ordered to pay costs on the high court scale C, including the costs attendant non the conduct of the of arbitration, and the costs of the adjudicator.

10

[8] The respondent has since given notice of its dissatisfaction with the award and I am told that the arbitration proceedings have commenced. The applicant argues that on a plain reading of clause 43.3.3 the adjudication determination must be given effect until it has been set aside by arbitration. The respondent argues that where an adjudicator acts in excess of his jurisdiction, the determination is void and cannot be enforced. The respondent also repeats his argument that the Lombard payment extinguished the penalties debt.

20

[9] In *Framatome v Eskom Holdings SOC Ltd* 2022 (2) SA 395 (SCA) the Court dealt with a dispute that had been resolved by adjudication. In the High Court Eskom had argued that the adjudicator had decided a dispute that had not been referred to him, a contention that the High Court

upheld finding that the decision of the adjudicator was therefore unenforceable. In the Supreme Court of Appeal, the court considered the process of adjudication. It pointed out with reference to Hudson's Building and Construction Contracts that adjudication had always been regarded as a quick and dirty exercise to avoid delays in payment pending definitive determination of litigation. The court said:

10 "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. Sight must not be lost of the fact that adjudication is merely an intervening provisional stage in the dispute resolution process. Parties still have recourse to litigation and
20 arbitration. Only a tribunal may revise an adjudicator's decision. As that decision has not been revised, it remains binding and enforceable. "

[10] There is no reason why the same principles should not apply in this case. The intention of clause 43.3.3 is clear:

The adjudicator's decision stands until revised and it should be given effect to.

[11] Consequently, I make the following order.

[11.1] The determination of Justice Wallace dated 27 May 2024 is hereby enforced and the respondents of forthwith give effect thereto until such time as the decision may be reviewed in arbitration in the following manner:

10 [11.1.1] The respondent shall pay the applicant R 44,316,399.17.

[11.1.2] The respondent shall pay interest as follows:

[11.1.2.1] On the amount of R17 727 257.33 from 1 April 2019 to date of payment at the rate of 10.8 percent per annum, compounded monthly.

[11.1.2.2] On the amount of R21 392 198.45 from 27 April 2019 to date of payment at the rate of 10.8 percent per annum, compounded monthly.

20 [11.1.2.3] On the amount of R5 196 943.39 from 1 April 2019 to date of payment at the rate of 10.8 percent per annum, compounded monthly.

[11.1.3] The respondent shall pay the cost of the application on the High Court Scale C, including the cost of two counsel where so employed.

117614/2024/fvs
2025-10-21

8

JUDGMENT

.....

.....
SWANEPOEL, J

JUDGE OF THE HIGH COURT

DATE:5/11/25-

TRANSCRIBER'S CERTIFICATE

LOMA STEP//MESCA CONSTRUCTION

I, the undersigned, hereby certify that **so far as it is audible to me**, the foregoing is a true and correct transcript of the proceedings recorded by means of a digital recorder in the matter between the parties stated above:

CASE NUMBER	: 117614/2024
RECORDED AT	: PRETORIA
DATE HELD	: 2025-10-21
NUMBER OF PAGES	: 8

TRANSCRIBER'S NOTES / PROBLEMS EXPERIENCED

TRANSCRIBER: MRS F VAN SCHALKWYK

DATE COMPLETED: 2025-10-31

inlexso
INNOVATIVE LEGAL SOLUTIONS

36 Alkantrant Road, Lynnwood Manor, Block B
Pretoria | 0081

+27 21 424 4424 | +27 83 500 6612

✉: andre.davids1@inlexso.co.za | Website: www.inlexso.co.za