



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

Case no:16571/2024

In the matter between:

THE MINISTER OF PUBLIC WORKS AND INFRASTRUCTURE

Applicant

and

TEMPANI CONSTRUCTION (PTY) LTD

Respondent

Heard: 30 October 2025

Delivered: 24 November 2025

Summary: Leave to appeal – a party is not permitted to adopt a contradictory position in a subsequent proceeding, such as the application for leave to appeal.

ORDER

Application for leave to appeal is dismissed.

JUDGMENT DELIVERED ELECTRONICALLY

NZIWENI, J

Introduction

[1] This is an application for leave to appeal against the whole judgment and order that this Court handed down on 15 September 2025. The applicant is seeking to appeal the court order that upheld the relief that was sought by the respondent [in the main application] and, additionally, resulted in the dismissal of the applicant's own counterclaim.

[2] In this application, I propose to refer to the parties simply as the applicant and the respondent. At times, I may also refer to the respondent as "the Minister" for clarity.

[3] In essence, the applicant is challenging this total defeat on both issues, hoping an appeal court will overturn the decision regarding the respondent's claim in the main application and reverse the dismissal of their own counterclaim. The application is resisted by the respondent.

[4] The grounds upon which the leave to appeal are sought primarily rest on two strands: first, that there are reasonable prospects of success, and second, that there are compelling reasons why the appeal should be heard. I will merge some of the grounds presented in the application for leave to appeal into single points for clarity and efficiency.

Reasonable prospects of success

[5] The applicant contends that there are reasonable prospects of success that a court of appeal would come to a different conclusion, and the following points are the specific reasons provided to support this claim.

Two - tiered dispute mechanism is the default position

Adjudication on its own is never meant to be final.

[6] This, of course, may be true as a general proposition, but the question is whether it applies to the facts of this matter. As this ground of appeal was developed before me, the proposition came to be that adjudication and arbitration are terms of art in the construction industry. So the argument continued, by agreeing to the adjudication process, the parties on a proper construction of their agreement, in light of the surrounding circumstances, the purpose thereof and the text, and applying the principles in *Plascon Evans*, quite clearly did not exclude the possibility of commencing arbitration proceedings if either party chose not to accept the result of the adjudication process.

[7] As I interpret the submissions presented on behalf of the applicant, their argument posits that arbitration proceedings axiomatically follow the adjudication process in all instances when a party is dissatisfied with the adjudicator's finding.

[8] The basic rules of contract interpretation are well known and are laid out in *Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012). During the main application, this Court had a duty to get the intention of the parties; and not general propositions. And in the present case, the intent seems to be unambiguous.

[9] The principle as enunciated in *Plascon Evans* had nothing to do in construing the intent of the parties. For all intents and purposes, *Plascon Evans* does not deal with interpretation of contract. Instead, the *Plascon-Evans* rule provides the legal principle for how courts should handle disputes of fact that arise in application proceedings.

[10] It is the duty of the court to construe every provision of a written instrument as to give force and effect. Not a single canon of contract interpretation, includes the application of *Plascon Evans* rule. *Plascon Evans* is a procedural guideline for resolving factual disputes. The Adjudication Agreement that I found to be binding between the parties, did not include a provision that would allow them [the parties] to proceed to arbitration if they were dissatisfied with the adjudicator's decision.

[11] The applicant contended that the respondent's argument during the main application was focused solely on denying the existence of an arbitration agreement, and that the respondent never argued the adjudication itself was intended to be final. In the main application, the applicant vigorously challenged the existence of an agreement to arbitrate, claiming that they only consented to an expedited dispute resolution mechanism. Additionally, as the main judgment established, the Adjudication Agreement is silent on the matter of subsequent arbitration.

[12] The respondent, in the founding affidavit, stated that the main application is to have the determination published by the adjudicator made an order of this Court. In the answering affidavit, the applicant contended that at the insistence of the applicant [in the main application], the respondent [in the main application] agreed to amend the agreement [the original agreement] to allow for both adjudication and arbitration. The applicant [in this application] further asserted in the answering affidavit that pursuant to the matter being referred to adjudication, the adjudicator did not address their defences. It is further stated in the answering affidavit that the applicant now, opportunistically, seeks an order from this Court for payment of those monies. The applicant further contended in the answering affidavit [in the main application] that the respondent seeks a payment of the monies, notwithstanding being aware that the parties had agreed to both adjudication and arbitration.

[13] Based on the Minister's own version of facts, it is evident [on the version of the Minister] that the respondent seeks payment of monies despite the parties having agreed to a two-tiered dispute resolution process.

[14] It appears that a central, consistent theme throughout the Minister's papers is the accusation that the respondent is acting in bad faith by disputing that the parties amended the original contract to include both adjudication and arbitration as valid dispute resolution methods.

[15] In the main application, I summarised the respondent's case [applicant in the main application] as follows in the first paragraph: "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."

[16] These facts, in and of themselves, tend to support and confirm that the applicant in its case, postulated a position that the parties agreed exclusively to adjudication as their method of dispute resolution, thereby ruling out arbitration.

[17] Furthermore, in the replying affidavit, it is the respondent's contention that the Minister's assertion that the applicant knew full well that the parties had agreed to both adjudication and arbitration is manifestly false. It is further stated in the replying affidavit that the respondent refused to sign the arbitration addendum.

[18] It is so that the communique that was written by the respondent's legal representatives "SP10", it states, amongst other things, that:

"... the standard adjudication, arbitration and dissatisfaction clauses have all been removed from the contract and the state provision (clause 40.2.2) provides for litigation in the stead of adjudication / arbitration.

This is the reason why the parties had to specifically agree to adjudication as the contract made no provision for adjudication. In the premises, it appears that the contract affords your client **no right to be dissatisfied with the determination of the Adjudicator, nor for it to refer the matter to arbitration.**

Our client does not agree to arbitration.

This matter can be resolved by a Court of law." Emphasis added

[19] Interestingly, it is stated on behalf of the Minister in the answering affidavit that: "The original agreement between the parties only made provision for litigation. At the insistence of the applicant, the respondent agreed to amend the agreement, to allow for **both adjudication and arbitration.**"

[20] Viewed in the light of the above considerations, I thus do not understand the Minister's contention to say that it was never the respondent's case that adjudication was ever meant to be final. If the respondent had genuinely argued the adjudication was not meant to be final, it would indicate the respondent did not fully understand the relief it was seeking from this Court. In my view that is not the case.

[21] In the present case, of course, as the applicant [Minister] has been at pains to point out, it is actually the Minister's consistent version that adjudication was never meant to be final. But I think this version of the Minister properly understood, demonstrates that the respondent [applicant in the main application] sought to treat the adjudication process as being final. This point represented the strongest aspect of the Minister's argument in the main application. Consequently, the Minister went to significant lengths in his submitted documents to emphasise that the adjudication was not intended to be a final determination. Thus, during the main application, the Minister's highwater mark argument emphasised that the adjudication was not a final and definitive resolution of the agreement, [in so arguing] seeking to counter the respondent's view that it was the absolute and complete conclusion.

[22] The Minister is not permitted to adopt a contradictory position in a subsequent proceeding, such as the application for leave to appeal. The finality of the adjudication was determined by the parties' agreement, not by any decision of the court itself. The decision of this Court merely acknowledged the existence of that agreement, which was demonstrated by the evidence presented.

[23] It is worth noting that to counter the Minister's suggestion that this Court's decision made the adjudication final, the respondent presented the signed Adjudication Agreement as the best evidence during the main application, which clearly established the understanding between both parties. The best evidence was the signed contract, which clearly showed the agreement between both parties.

[24] Therefore, I do not understand the assertion that this Court encountered at the very least a dissensus or lack of consensus between the parties. When applying the

established principles and various aids for interpreting a contract, it is clear that no such disagreement existed.

[25] The argument that there was a lack of consensus, or absence of a meeting of the minds between the parties, was never presented during the main application before this Court. The core issue, as stated in paragraph 65 of the main judgment, was to determine the actual agreement between the parties, or, more simply put, whether the Adjudication Agreement constituted the complete understanding. The case never revolved around issues of mutual mistake or the absence of a genuine meeting of the minds. Even in the Minister's heads of argument issue was defined as follows:

"The Court is called to decide what the parties' agreement was / what the parties' agreements were with regard to the alternative dispute resolution mechanism which they adopted."

[26] Therefore, I do not understand the assertion that this Court encountered a disagreement or lack of consensus between the parties. When applying the established principles for interpreting a contract, it is clear that no such disagreement existed. This case did not present a scenario that postulated two possible constructions. This Court simply applied the intention of the parties as reflected by the evidence.

[27] Three documents were presented as evidence, and all terms used within them were considered to determine their intended meaning. The evidence revealed that there was clear consensus regarding the Adjudication Agreement relied upon by the respondent, but this was not the case with the Arbitration Addendum. Consequently, the Adjudication Agreement took precedence.

[28] Nothing in the three documents indicated that the parties agreed to a two-tiered dispute resolution process. The contract [the Arbitration Addendum] concerning arbitration was not signed as required by the JBCC. The Arbitration Addendum was the instrument that failed to show consensus between the parties.

[29] Neither the Adjudication Agreement nor the JBCC contained a clause stipulating that the adjudication decision would be binding "unless and until it is revised by an

arbitration award or court judgment." No evidence was provided to suggest that the parties effectively expressed their intention to challenge the adjudicator's decision by referring the matter to arbitration. Since the Arbitration Addendum that aimed to create a pathway to appeal through arbitration was never signed, no such course exists to grant an arbitrator the authority to reconsider an adjudicator's decision.

[30] No burden of proof was assigned to the Minister in this case. Instead, the matter involved determining which version of events or contractual interpretation was more persuasive, and one version ultimately took precedence over the other based on the evidence presented. The conclusion reached was justified because the evidence provided by the respondent was sufficient to establish that outcome, and no contrary evidence was presented that could weaken the respondent's case. Ultimately, the Minister's arguments regarding contract interpretation were found to be flawed and were unsuccessful.

[31] The terms of both the JBCC Contract and the Adjudication Agreement are clear and precise. It is important to emphasise that no arguments were made in this case suggesting that linguistic errors had occurred. As noted in the main judgment, the evidence indicates that the respondent declined to sign the Arbitration Addendum. It is also an undisputed fact in this case that the JBCC Contract contains an integration clause.

[32] As is well known, contract law is governed by the explicit and implied terms within an agreement and their correct interpretation, not by reliance on subjective or imagined expectations. Such expectations have no legal bearing. The law is concerned only with the actual, mutually agreed-upon terms and the objective interpretation of the contract itself. This principle supports the concept of freedom of contract and helps foster certainty and predictability in legal agreements.

[33] The question that arises is: if a two - tiered system is the standard or default position, why did the applicant maintain during the main application that the parties intended the Arbitration Addendum to be part of their agreement? If the default legal position always applies, then it would not have been necessary to draft the Arbitration Addendum in the first place.

[34] In this case, the concept of a default position cannot apply because, according to the respondent's [the applicant in the main application] accepted version of events, the parties explicitly addressed the issue of the Arbitration Addendum. As previously stated, the respondent rejected that Arbitration Addendum. Therefore, this situation does not involve filling contractual gaps. As mentioned before, a party cannot rely on presumed expectations that contradict the written agreement or the evidence presented in court.

Failure to consider the counter application

[35] I fully agree with the view that there is no merit to the argument that I failed to consider the counter-application. The validity and potential success of the counterclaim were entirely dependent on the outcome of the main application. In this specific case, because the main application succeeded, the counterclaim necessarily failed.

[36] It is settled now that the courts will only interfere with an adjudicator's findings in very limited and exceptional circumstances. Moreover, no argument was even presented that warranted interfering with the adjudicator's finding.

[37] Furthermore, the respondent in the main application primarily sought to enforce the adjudicator's finding, as contemplated by the parties' agreement.

Other compelling reasons

[38] The assertion that this Court altered the default two - tiered system of dispute resolution by making the adjudication award final is factually incorrect. The finality of the award was determined by the parties' specific agreement as revealed by the evidence, not by a change in the general default position.

[39] All of the above considered, I am satisfied that the respondent's assertion that determining the main application required interpreting a case - specific agreement, rather than a standard contract, is quite correct. The main judgment simply applied

established existing legal principles to the specific facts of the case, such as the objective interpretation of the parties' contractual terms. The main judgment did not introduce any major change in legal principles, legal mechanisms, or established precedents.

[40] On top of that or perhaps more importantly, the applicant is simply attempting to manufacture compelling reasons to suit its own agenda, rather than relying on valid legal grounds or facts presented in the case. They are trying to create justification where none exists inherently within the evidence or established law.

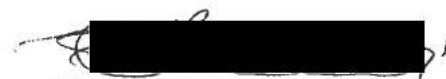
Conclusion

[41] It follows from all these considerations that I am not satisfied that the appeal has a reasonable prospect of success, nor have any compelling reasons been provided that would justify granting leave to appeal in this matter.

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

42.1 Leave to appeal is refused.

42.2 The applicant to pay costs of this application on Scale B.



NZIWENI, J
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Appellant : Advocate Stelzner SC
Advocate Nacerodien

Instructed by : The State Attorney
Ms A Hoosain

Counsel for the Respondent : Advocate Vivier SC

Instructed by : Enderstein Malumbete Inc.
Mr S Pienaar