**IN THE HIGH COURT OF SOUTH AFRICA**
**(EASTERN CAPE DIVISION, MAKHANDA)**

**CASE NO: 985/2023**

In the matter between

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| **NLG CONSTRUCTION AND PLANT HIRE CC** | Applicant |
| and | |
| **EASTERN CAPE DEPARTMENT OF PUBLIC WORKS** | First Respondent |
| **THEMELANI ATTWELL NKELE** | Second Respondent |

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**JUDGMENT**

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**KRüGER AJ**

*Introduction*

[1] NLG Construction and Plant Hire CC ('NLG') and the Department of Public Works ('the Department') concluded a 'Principal Building Agreement' on 29 April 2021, following a tender process, for the former to perform construction work at the Uitenhage Museum to the value of R16 591 731.85.

[2] It is common cause that the parties concluded a written JBCC 2000 Principal Building Agreement (edition 4.1, 2005) ('the JBCC agreement' or 'the agreement')

standard form contract. The agreement provides for the substitution of certain clauses where one of the contracting parties is an organ of state.

[3] One of the substituted clauses relates to dispute resolution under the contract. It is the applicant's case that the parties agreed to a single form of dispute resolution, namely, adjudication, following the substitution of the clauses. The first respondent, the Department, disputes this. It contends that the parties agreed to adjudication as the default form of dispute resolution, but that they reincorporated the standard form arbitration clauses as a second-tier of dispute resolution. The Department further argues that it had always been the parties' intention to subject adjudication determinations to arbitration, given the nature of adjudication as a speedy, interim dispute-resolution mechanism.

[4] It is common cause that the applicant referred a dispute to adjudication on 3 July 2024 after it had earlier cancelled the agreement. It is further common cause that the second respondent, who was appointed as the adjudicator, handed down a determination on 5 October 2024, dismissing the Department's *in limine* points, and that his determination on the merits was handed down on 12 December 2024 in favour of the applicant. The determination directed the Department to make payments totalling R7 945 975.54 to the applicant. In response thereto, the Department filed its notice of dissatisfaction on 23 December 2024, seeking to submit the adjudicator's determination to arbitration. It further delivered its notice of arbitration on 31 January 2025.

[5] NLG instituted these proceedings on 12 March 2025 to make the adjudicator's determination an order of court.[1] It seeks orders directing the Department to make payments to it in accordance with the adjudicator's determination and to pay half of the adjudicator's fee, which the applicant had paid in full to secure its release on 12 December 2024. The Department opposes the application. The Department also launched a conditional counterapplication to review and set aside the adjudicator's determination if it were unsuccessful in its opposition to the applicant's claim for relief. No relief is sought against the second respondent.

[1] Based on JBCC Adjudication Rule (published January 2020) Rule 6.1.3 and 6.2.2.

[6] The Department's opposition to the main application to resist enforcement of the adjudicator's determination, and its conditional counterapplication to review and set aside the adjudicator's determination, overlap in their grounds and arguments. As this judgment deals with the main and the counterapplication, I engage with the grounds and arguments where most appropriate.

*The contractual terms*

[7] Clause 1.8 of the JBCC contract provided that the agreement constituted the entire contract between the parties and that its provisions bound the parties. Amendments or variations had to be made in writing.

[8] Clause 1.9 provided for the substitution of clauses where an organ of state was a party to the contract. Clauses marked with a hashtag (#) were substituted with the clause of the same number contained in clause 41.

[9] Clause 40 provided for dispute settlement. It read

'40.1 Should any disagreement arise between the employer or his principal agent or agents and the contractor as to any matter arising out of or concerning this agreement either party may give notice to the other to resolve such disagreement.

40.2 Where such disagreement is not resolved within ten (10) working days of receipt of such notice it shall be deemed to be a dispute and shall be submitted to:

40.2.1 # Adjudication in terms of the edition of the JBCC Rules for Adjudication current at the time when the dispute is declared. The adjudicator shall be appointed in terms of such Rules.

40.2.2 # *No clause.*

40.3 # The adjudicator's decision shall be binding on the parties who shall give effect to it without delay unless and until it is subsequently revised by an arbitrator in terms of 40.5. Should notice of dissatisfaction not be given within the period in terms of 40.4, the adjudicator's decision shall become final and binding on the parties.

40.4 # Should either party be dissatisfied with the decision given by the adjudicator, or should no decision be given within the period set out in the Rules, such party may give notice of dissatisfaction to the other party and to the adjudicator within ten (10) working days of receipt of the decision, or should no decision be given, within ten (10) working days of expiry of the date by which the decision was required to be given.

40.5 # A dispute which is the subject of a notice of dissatisfaction shall be finally resolved by the arbitrator as stated in the schedule. Where such person is unwilling or unable to act, or where no person has been stated, the arbitrator shall be chosen and appointed by mutual agreement between the parties. Where no agreement is reached within 10 (ten) working days of such notice, the arbitrator shall be the person appointed at the request of either party by the chairman, or his nominee, of the Association of Arbitrators (Southern Africa). The adjudicator appointed in terms of 40.2.1 shall not be eligible for appointment as the arbitrator.

40.6 The provisions of 40.2 to 40.5 shall not be construed as a waiver of the parties' entitlement to resolve the dispute by mediation at any time.

40.7 Where a dispute is submitted to mediation:

40.7.1 The parties shall agree on and appoint the mediator within ten (10) working days of the date on which the dispute was declared.

40.7.2 The parties shall meet the mediator to decide the procedures, representation and dates for the mediation process. Thereafter the mediator may meet the parties together or individually to help reach a settlement.

40.7.3 Where parties reach settlement of the dispute or any part thereof, the mediator shall record such agreement and on signing thereof the agreement shall be final and binding unless either party issues a notice disputing the decision within ten (10) working days.

40.8 *No clause.*

40.9 Recording of a dispute in terms of 40.1 shall not relieve the parties from liability for the due and timeous performance of their obligation.

40.10 The cancellation of the agreement shall not affect the validity of this clause 40.0'.

[10] The relevant state substitutions provided for in clause 41 read as follows:

'40.2.1 *No clause.*

40.2.2 Litigation where the employer elects so in terms of the schedule. Institution of the action shall be commenced and process served within (1) year from the date of the existence of the dispute, failing which the dispute shall lapse.

40.3 to 6 *No clause.*'

[11] The contract variables were set out in the contract's Schedule. The preamble to the Schedule directed that spaces requiring information had to be completed or marked as not applicable. Where choices were offered, the non-applicable items had to be deleted. It further provided that '[k]ey cross reference clauses are italicised in [ ] brackets as an aid to the user and cannot be relied upon exclusively as indicating all related clauses.'

[12] Under the clause headed 42.7 Dispute Resolution, clause 42.7.1 provided 'The default dispute resolution method is adjudication | ADJUDICATION |
*[40.2.1 #] (Insert arbitration only where adjudication is not to apply).'*

The word 'adjudication' was handwritten in the block provided at the time of the conclusion of the agreement. The subsequent subclauses of 42.7, referring to the selection or appointment of an adjudicator (42.7.2), arbitration (42.7.3) and mediation (42.7.4) were cancelled and marked 'not applicable'.

[13] The applicant relies on the text of the agreement, which, through substitution, deleted clauses 40.2.1 to 40.5, and which, in the Schedule, designated adjudication as the default and sole dispute-resolution procedure under the contract. The applicant further highlights that the references to any other dispute resolution processes were deliberately marked as 'not applicable'. The applicant wants the court to accept the text of the agreement as a complete and accurate reflection of

the parties' consensus, and accordingly to hold the Department thereto by enforcing the adjudicator's determination.

[14] In the first instance, the Department contends that, while state contracts ordinarily excluded clauses 40.2.1 to 40.5, the parties reincorporated the clauses, as it had always been their intention to subject adjudication determinations to revision in arbitration, or, alternatively, by specifically cross-referencing clause 40.2.1 at 42.7.1.

[15] The latter argument can easily be disposed of. It cannot be said that the parties cross-referenced clause 40.2.1 in the Schedule to reincorporate that clause or any of the subsequent arbitration clauses. To hold so would be to ignore the text completely. Clause 40.2.1 appeared on the standard form contract in printed form, in italics and square brackets, as indicated above. The parties did not add that clause to their agreement. They also did not explicitly cross-reference any subsequent clauses. The preamble to the Schedule made it clear that the references in italics and square brackets did not introduce substantive clauses into the agreement but only served as a guide. The Department's first line of argument on reincorporation of the clauses must fail.

[16] The Department also argues that, by designating adjudication as the default dispute-resolution method, the parties always intended to incorporate clause 40.2.1 and the subsequent clauses governing revision of adjudication proceedings through arbitration. In support of this argument, the Department refers to the applicant's explicit reliance on clause 40.2.1 in its notice of disagreement of 13 June 2024 and its notice of adjudication of 3 July 2024. A further argument in support of reincorporation of the clauses relates to the nature of adjudication as a speedy interim form of dispute resolution. I consider these arguments in what follows.

[17] In *University of Johannesburg v Auckland Park Theological Seminary,*[2] the Constitutional Court confirmed that the interpretation of a contract is a unitary or holistic exercise in which the text, context, and purpose must be considered.[3] It is

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[2] 2021 (6) SA 1 (CC) para 63.
[3] Para 65.

not only where the text is ambiguous or unclear[4] that regard can be had to context and purpose to ascertain the intention of the parties.[5] This means that the court 'has to, from the onset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract'.[6]

[18] In that matter, the Constitutional Court further confirmed that the parol evidence rule remains part of our law.[7] Accordingly, where an agreement has been reduced to writing, the written contract is generally regarded as the whole embodiment of the parties' agreement. The Court further adopted an expansive approach to the admissibility of extrinsic evidence to determine the context and purpose,[8] while also making it clear that a court's authority to admit extrinsic evidence is not unlimited. In line with the integration aspect of the parol evidence rule, evidence that is adduced to vary, contradict, or add to the agreement is not permitted.[9]

[19] I rejected the Department's first line of argument that the parties explicitly reincorporated the additional dispute resolution clauses by cross-referencing. I did not understand the first respondent's argument to be that the further dispute resolution clauses were in addition to, or to vary the agreement, but rather that the terms were implied or tacit to the agreement, as it was contended that it was 'always the parties' intention' to include the arbitration clauses in their agreement. As such, the extrinsic evidence supporting those contentions is admissible and could be weighed, if and where relevant, in the determination. I consider, in the first instance, whether the terms could be viewed as implied terms of the agreement.

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[4] Para 66.
[5] *Novartis v Maphil* 2016 (1) SA 518 (SCA) para 27.
[6] *University of Johannesburg* para 66.
[7] Paras 87-92.
[8] Paras 67-68.
[9] Para 92.

[20] An implied term is a *naturalium* of the contract in question; that is, a legal duty imposed by law.[10] In *South African Forestry Company Ltd v York Timbers Ltd,*[11] the Supreme Court of Appeal held that

> [u]nlike tacit terms which are based on the inferred intention of the parties, implied terms are imported into contracts by law from without. Although a number of implied terms have evolved in the course of development of our contract law, there is no *numerus clausus* of implied terms and the courts have the inherent power to develop new implied terms. Our courts' approach in deciding whether a particular term should be implied provides an illustration of the creative and informative function performed by abstract values such as good faith and fairness in our law of contract. Indeed, our courts have recognised explicitly that their powers of complementing or restricting the obligations of parties to a contract by implying terms should be exercised in accordance with the requirements of justice, reasonableness, fairness and good faith (see eg *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A) 651C-652G; *A Becker & Co (Pty) Ltd v Becker and Others* 1981 (3) SA 406 (A) 417F-420A; *Ex Parte Sapan Trading (Pty) Ltd* 1995 (1) SA 218 (W) 226I-227G). Once an implied term has been recognised, however, it is incorporated into all contracts, if it is of general application, or into contracts of a specific class, unless it is specifically excluded by the parties (see eg *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 531D-H). It follows, in my view, that <u>a term cannot be implied merely because it is reasonable or to promote fairness and justice between the parties in a particular case. It can be implied only if it is considered to be good law in general.</u> The particular parties and set of facts can serve only as catalysts in the process of legal development.' (emphasis added)

[21] It would be a bridge too far to hold, as a matter of law, that every contract that provides for adjudication as a dispute-resolution method includes an implied provision, unless explicitly excluded, subjecting the determination to revision by arbitration. Such a change would amount to the formulation of a new rule of law that goes beyond the policy considerations shaping the common law of contract.[12] It would seem that such a change requires legislative or at least regulatory intervention.[13]

[22] I also do not think the strict requirements to prove the existence of a term implied by trade usage as set in *Golden Cape Fruits (Pty) Ltd v Fotoplate (Pty) Ltd*,[14] were met in this matter. There was no evidence before the court to support an inference that role-players in the construction industry universally and uniformly observe a two-tier dispute resolution mechanism involving adjudication and arbitration.

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[10] 1974 (3) SA 506 (A) 531G-H.
[11] 2005 (3) SA 323 (SCA) para 28.
[12] *Anglo Operations Ltd v Sandhurst Estates* (Pty) Ltd 2006 (1) SA 350 (T) 374.
[13] See *Zingwazi Contractors CC v Eastern Cape Department of Human Settlements* [2021] 4 All SA 299 (ECG) para 14-15. The evidence before the court was that the Construction Industry Development Board, an organ of state, issued guidelines on the use of adjudication in the construction industry, including one to apply adjudication to all categories of construction contracts.
[14] 1973 (2) SA 642 (C) 645G.

[23] The arbitration clauses were, accordingly, not implied terms of the agreement.

[24] In the next instance, it must be considered whether the terms could be regarded as tacit terms of the agreement between the parties, i.e. terms inferred from the facts. Corbett AJA in *Alfred McAlpine & Son (Pty) Transvaal Provincial Administration*[15] explained that such a term is

> 'an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties. In this connection the concept, common intention of the parties, comprehends, it would seem, not only the actual intention but also an imputed intention. In other words, the Court implies not only terms which the parties must actually have had in mind but did not trouble to express but also terms which the parties, whether or not they actually had them in mind, would have expressed if the question, or the situation requiring the term, had been drawn to their attention'.

[25] I am thus required to determine whether the parties necessarily agreed on the application of the JBCC Rules and a second-tier dispute-resolution mechanism at the time the agreement was concluded, partly because of the nature of adjudication as an interim dispute resolution mechanism. In other words, would their answer to the officious bystander in terms of the established test have been that they 'of course' agreed to revision of adjudication determinations through arbitration at the time, given its nature. This determination requires consideration of the express terms of the agreement, its context and purpose, the surrounding circumstances, and the subsequent actions of the parties relevant to inferring their intention at the time of the agreement's conclusion.[16]

[26] NLG, in the first instance, contends that the express terms of the agreement excluded the application of the Rules and arbitration clauses. As such, it was submitted that there was no room to infer the terms as the common intention of the

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[15] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 531H-532A.

[16] *Airports Company South Africa Limited v Airport Bookshops (Pty) Ltd t/a Exclusive Books* 2016 (1) SA 473 (GJ) paras 25-33.

parties.[17] It was the applicant's view that reliance on extrinsic evidence should be limited insofar as possible.[18]

[27] The Department, on the other hand, relies on the nature of adjudication as an interim and speedy method of dispute resolution in construction agreements[19] to provide context. It was also submitted that the agreement had to be understood in light of the broader state injunction to resolve disputes through alternative dispute resolution rather than litigation.

[28] The Department also submits that the applicant's explicit references to and reliance on clause 40.2.1 and its provision for the application of the JBCC Rules in its 18 June 2024 notice of dissatisfaction and its 3 July 2024 notice of adjudication demonstrated that the parties were in agreement on a tiered dispute-resolution process, involving arbitration to review adjudication determinations.

[29] The applicant denies that the references to clause 40.2.1 constituted evidence that it agreed to a tiered dispute mechanism at the time the agreement was concluded. It submits that the communications were drafted long after the agreement was concluded and that an employee erroneously included the references. NLG also relies on the pre-adjudication agenda dated 14 August 2024 that itemised a determination of the applicable rules as a point for discussion, and the subsequent minutes of 19 August 2024 recording the parties' agreement that the JBCC Rules (published in January 2020) were applicable.

[30] It is, however, noteworthy that both communications were signed electronically by the applicant's director. More pertinently, the numbering on the

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[17] Reliance was placed on *Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) 175C.

[18] Reliance was placed on *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) para 39.

[19] The Department placed reliance on *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd* 2013 (6) SA 345 (SCA) paras 4-5; *Esor Africa (Pty) Ltd/ Franki Africa (Pty) Ltd Joint Venture v Bombela Civils Joint Venture (Pty) Ltd* (12/7442) [2013] ZAGPJHC 407 (12 February 2013) paras 8, 11-14; *Ekurhuleni West College v Segal* (1287/2018) [2020] ZASCA 32 (2 April 2020) para 21; *Zingwazi Contractors CC* supra; *Amanz'Abantu Services Pty Ltd v Coega Development Corporation Pty Ltd* (620/2022) [2022] ZAECQBHC 20 (10 August 2022) paras 8-11; *Eskom Holdings SOC Limited v Framatome* [2025] 4 All SA 131 (WCC) paras 46-47.

notice of adjudication corresponds to the JBCC Rules numbering. In fact, it appears that the notice of adjudication was provided as a template with the standard form contract, which the applicant used. The fact that the applicant used this template does not mean the clause was included as a tacit term by the parties, but at least theoretically, it could be weighed in consideration.

[31] However, there is a clear barrier to inferring these terms in this instance. Where an agreement expressly excludes a term, that same term cannot be inferred from the facts. Nugent J (as he then was) in *Kelvinator Group Services of SA (Pty) Ltd v McCulloch*[20] relied on *SA Mutual Aid Society v Cape Town Chamber of Commerce*[21] to explain that

‘[a] tacit term is not merely one that would have been reasonable, or convenient, for the parties to have included in their agreement (*Rapp and Maister v Aronovsky* 1943 WLD 68 at 74-5), but is rather a term which, by necessary implication, the parties must have intended would form part of their agreement or would have so intended if they had turned their minds to the particular issue (see for example *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 136-7). <u>It follows that there can be no room for such a term if it would be in conflict with the express provisions of the agreement</u>.’ (emphasis added)

[32] In view of my earlier finding that the express terms of the agreement excluded an agreement on the application of the JBCC Rules and a second tier of dispute resolution, it is therefore not possible to infer contrary terms. While it may seem possible to infer reincorporation of clause 40.2.1 based on the applicant’s references thereto, it is, as a matter of law, not possible.

[33] Based on the foregoing, I must inevitably conclude that the agreement did not provide for revision of the adjudicator’s decision by arbitration.

[34] I thus turn to consider the counterapplication and the remaining arguments raised in support of or in opposition to both the main and the counterapplication.

*The grounds for review*

[35] The Department’s opposed counterapplication rests on three grounds:

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[20] 1999 (4) SA 840 (W) 844A-E.

[21] 1962 (1) SA 598 (A) 615D. See also *Wilkins v Voges NO* 1994 (3) SA 130 (A) 137A-C; *Nedcor Bank Ltd v SDR Investment Holdings Co (Pty) Ltd* 2008 (3) SA 544 (SCA) para 12; *ABSA Bank Ltd v South African Commercial Catering and Allied Workers Union National Provident Fund (Under Curatorship)* 2012 (3) SA 585 (SCA) para 34; *Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC* 2020 (2) SA 419 (SCA) para 24.

I. that the adjudicators exceeded his jurisdiction by permitting the submission of the applicant's statement of claim outside the permissible timeframe set by the Rules and that he similarly delivered his determination outside the prescribed timeframe;

II. that the adjudicator failed to apply the procedure prescribed in the JBCC rules in that the adjudicator failed to have regard to the terms of the agreement and the evidence submitted, thus rendering the adjudication procedurally unfair. Enforcement of the adjudicator's determination would, according to the applicant, thus be contrary to public policy and would be squandering limited public funds, and

III. that the adjudicator failed to have regard to the prescripts regulating public procurement processes, and that he particularly denied the Department a correction of the rate applicable to the Bill of Quantities, thus increasing the contract sum beyond that which is permissible in terms of the legal framework regulating public procurement processes.

[36] It is trite that review proceedings are not concerned with the correctness of the merits of the decision under review, but rather with the fairness and the correctness of the procedure that was followed.[22]

*The grounds considered*

[37] Ground I is premised, in part, on the Department's interpretation regarding the reintroduction of clause 40.2.1 at the time of the conclusion of the agreement. I have found that interpretation to be incorrect. Clause 40.2.1 was not expressly reintroduced by cross-referencing, and it also did not find its way into the agreement as an implied or tacit term. Rather, it was expressly excluded from the agreement under the substitution clauses. Accordingly, the applicant's version that the parties agreed to the application of the JBCC Rules at the first pre-adjudication hearing on 19 August 2024, as a matter of logic, stands. At that meeting, the parties agreed to timelines for the exchange of statements and for further hearings, and at the further hearings, similar agreements to extend the timelines were made. Rule 1.2 permitted deviations from the rules by agreement. It can therefore not be said that the

[22] *Ekurhuleni West College v Segal* (1287/2018) [2020] ZASCA 32 (2 April 2020) para 16.

adjudicator exceeded his jurisdiction by acting outside the prescribed timeframes. Moreover, it is only where parties explicitly agree to the invalidity of an adjudication determination delivered outside the stipulated timeframes that the Department's argument could hold.[23] In this instance, neither the agreement nor the Rules included such a term. This ground is without merit.

[38] Ground II raised by the Department challenges, in the first instance, the adjudicator's application of the rules of procedure. A second aspect of this ground is similar to one of the grounds raised by the Department in opposition to the main application and concerns its interpretation of the final statement of account following the cancellation of the agreement. Woven through these aspects is the Department's position on the inherent nature of adjudication as an interim dispute-resolution measure. Overall, this ground rests on the view that it would be contrary to public policy, and squandering public funds, to enforce the adjudicator's determination; alternatively, that public policy considerations require the determination to be set aside on review because of the procedural unfairness.

[39] The Department contends that the adjudicator failed to consider evidence of payments made to the applicant in coming to his determination. As such, the Department argues that the process fell short of the prescribed procedure, which required the adjudicator to consider *all* the evidence placed before him. It specifically raises the adjudicator's reference to some, but not all, of the documents submitted as proof of payment for delays in his determination. As such, its position is that the adjudicator *reached an incorrect conclusion* because he failed to consider evidence of payments made for the extension of time in 2021. In my view, the phrasing of this argument also sets out the basis for its rejection. The challenge is not concerned with the procedure followed, but rather with *the conclusion* reached.

[40] The Department emphasises the interim nature of adjudication to resolve disputes in ongoing contractual relationships to ensure continued performance. To illustrate that adjudication, by its very nature, is an interim mechanism, the

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[23] *Freeman NO v Eskom Holdings Limited* (43346/09) [2010] ZAGPJHC 137 (24 April 2010) para 25.

Department place reliance on *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd*,[24] among others.[25] Nugent JA commented on the dispute resolution mechanism in the following terms:

> 'It has now become common internationally – in some countries by legislation – for disputes to be resolved provisionally by adjudication. In *Macob Civil Engineering Ltd v Morrison Construction Ltd* adjudication was described, in the context of English legislation, as
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> > "…a speedy mechanism for settling disputes [under] construction contracts on a provisional interim basis, and requiring the decision of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement. … But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process."
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> The authors of *Hudson's Building and Construction Contracts* observe that under New Zealand construction legislation adjudication "is regarded as essentially a cash flow measure implementing what has been colloquially described as a 'quick and dirty' exercise to avoid delays in payment pending definitive determination of litigation".' (Footnotes omitted.)

[41] It is common cause that the applicant had cancelled the contract prior to initiating adjudication proceedings. Therefore, the Department submits that the rationale for ordering immediate compliance with the adjudicator's determination had fallen away. The line of argument further is that adjudication was not available to the applicant at the time it delivered its notice of adjudication, as the contract provided for the preparation of the final account to determine the contract value of the work, time extension claims, and the final amounts due in the circumstances. On that basis alone, the Department is of the view that the court should refuse to enforce the adjudicator's determination on public policy grounds. For this submission, the Department relies on *Ethekwini Municipality v Cooperativa Muratori & Cementisti - CMC di Ravenna Societa Cooperativa*[26] to highlight the unenforceability of contractual terms that are contrary to public policy. In this matter, the Supreme Court of Appeal held that

> 'With specific reference to *Barkhuizen v Napier* and *Botha and Another v Rich N.O. and Others*, the majority judgment in *Beadica* explained that the perception that there is a divergence between the jurisprudence of the Constitutional Court and this Court on the subject of public policy in the contractual context is misconceived. The judgment continued, at para 80, as follows: "It emerges clearly from the discussion above that the divergence between the jurisprudence of this Court and that of the Supreme Court of Appeal is more perceived than real. Our law has always, to a greater or lesser extent, recognised the role of equity (encompassing the notions of good faith, fairness and reasonableness) as a factor in assessing the terms and the enforcement of contracts. Indeed, it is clear that these values play a profound role in our law of contract under our new constitutional dispensation. However, a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, selfstanding status as contractual requirements. Their

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[24] 2013 (6) SA 345 (SCA) paras 4-5.
[25] See footnote 19 above.
[26] 2023 (6) SA 384 (SCA) paras 13, 15.

application is mediated through the rules of contract law including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it."

The central thesis of the employer's argument is that this is a case where the principle of *pacta sunt servanda* (agreements are to be observed) should not apply. However, *pacta sunt servanda* is a central element and feature of public policy. It was put this way in *Beadica*. "This court has emphasised that the principle of *pacta sunt servanda* gives effect to the 'central constitutional values of freedom and dignity'. It has further recognised that in general public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken. *Pacta sunt servanda* is thus not a relic of our pre-constitutional common law. It continues to play a crucial role in the judicial control of contracts through the instrument of public policy, as it gives expression to central constitutional values." As pointed out in *Beadica* that does not mean to say that pacta sunt servanda is "the only, nor the most important principle informing the judicial control of contracts. The requirements of public policy are informed by a wide range of constitutional values".

The case for the employer has been presented upon the basis that *Beadica*, and the cases from which it stems, establish that, even in the case of a claim for payment of money due in terms of a contract, a court has a discretion to grant or refuse the remedy on public policy grounds. However, the enquiry is not directed at the exercise of a judicial discretion. The party resisting enforcement of such a contractual obligation on public policy grounds has a duty to place the relevant facts before the court. It is for the court to decide whether on the facts the enforcement of the obligation would be contrary to public policy. If the answer is in the affirmative, no question of a discretion arises at all. Our courts may not enforce contractual obligations when it would be contrary to public policy to do so.'

[42] The applicant, with reference to the same authority, submits that the judgment, in fact, did not support the Department's arguments regarding public policy. In the applicant's view the agreement between the parties, as confirmed by the adjudicator, was similar to that in *Ethekwini Municipality* in that it permitted the use of adjudication after the contract had been terminated.[27]

[43] In *Ethekwini Municipality,* the Supreme Court of Appeal had to consider whether enforcing the adjudication determination in that matter would be contrary to public policy.[28] The Supreme Court of Appeal held that where a party seeks to resist the enforcement of a contractual obligation on public policy grounds, it has the duty to place the relevant facts before the court to decide on the facts where the enforcement of the obligation would be contrary to public policy. Where those facts justify such a finding, the obligations will not be enforced. No question of discretion arises.[29] To engage public policy, more than the mere assertion of unreasonableness, unfairness or inequity is required.[30]

[27] Para 17-18.
[28] Para 12.
[29] Para 15.
[30] Para 21.

[44] In that matter, the municipality argued that it should not be bound by the agreement to make payments in accordance with the adjudicator's determination, as there was a risk that the contractor would be unable to repay the amount if the determination were revised under arbitration, given the contractor's financial distress, even possible insolvency. Further, and not unlike the Department in the current matter, the municipality added two considerations to its public policy argument relating to the risk, namely that the contract had already been terminated by the time adjudication took place, thus not serving the purpose of ensuring cash flow to the contractor in an ongoing contractual relationship, and secondly, that it would not be appropriate to scarce public funds to be placed at risk in the circumstances.[31]

[45] To address the first of these considerations, the SCA examined the terms of the agreement between the municipality and the contractor that governed its termination. It is therefore appropriate to examine the equivalent terms in the agreement between NLG and the Department.

[46] The JBCC standard agreement contains several clauses governing its cancellation. Clause 36 deals with cancellation by the employer (i.e. the Department) in the event of default by the contractor (i.e. NLG). Clause 37 deals with cancellation of the agreement by the employer in instances of loss or damage of the works. Clause 38 provides for the contractor's cancellation of the agreement in the event of the employer's default. Clause 38.1 sets out the circumstances in which the contractor may cancel the agreement, and clause 38.2 sets out the procedure to be followed to cancel it. Clause 38.5 outlines the procedures that follow termination of the agreement under clause 38. It provides

'38.5 Where the contractor cancels this agreement in terms of 38.0 the following shall apply:

38.5.1 Execution of the works shall cease. The contractor shall remain responsible for the works in terms of 8.1 until possession is relinquished to the employer

38.5.2 On relinquishing possession of the works, the contractor shall remove from the site his temporary buildings, plant and machinery without delay

38.5.3 The principal agent shall forthwith compile a report on the status of the portion of the works executed by the contractor and shall issue such a report to the employer and the contractor

38.5.4 The principal agent shall forthwith commence and complete the final account within ninety (90) working days of completion of such report

[31] Para 12.

38.5.5 The employer shall be liable to the contractor for the costs of materials and goods including those ordered before such cancellation where the contractor is bound to accept and my payment. The contractor shall deliver such materials and goods to the employer in good order

38.5.6 The employer shall be liable to the contractor for damages resulting from such cancellation

38.5.7 The principal agent shall continue to certify the value of the work executed by the contractor and the value of materials and goods for payment by the employer

38.5.8 The security in terms of 14.0 shall expire and shall be returned to the contractor by the principal agent

38.5.9 The latent defects liability period shall end in terms of 27.2.2

38.6 The contractor's right to cancel in terms of 38.0 may not be exercised should the contractor be in material breach of this agreement.'

[47] The Department contends that the provisions of clause 38.5 had to be implemented after the cancellation of the agreement and that a dispute about the final account had to be raised thereafter in accordance with clause 40 to avoid piecemeal dispute resolution.

[48] In the applicant's view, the Department's contention that the final account had to be rendered before the matter could be referred to adjudication amounted to the Department wanting to determine its own dispute. The applicant adds that the adjudicator rejected this argument. In the applicant's view, the Department, by raising this argument, was effectively seeking to revisit the adjudicator's determination, which was not permitted in review proceedings.

[49] The Department, in turn, relies on the provisions of the agreement that allowed for objections to the final account and for further dispute resolution processes thereafter, and on the applicant's actual objection to the final account on 4 December 2024. Thus, in its view, the applicant would not have been deprived of an opportunity to contest the final account.

[50] The adjudicator rejected the Department's submission that the applicant had prematurely referred its dispute to adjudication and that it could do so only after the final account was delivered. He held that clause 40.2 did not explicitly limit its own application and that the parties would have recorded their agreement to the contrary if that had been their intention. Accordingly, he held that any disagreement under the agreement that had escalated to a dispute could be referred to adjudication.

[51] In my view, the Department's reading of the agreement does not find support in its text, which does not limit recourse to adjudication pending preparation of the final account in any instance of cancellation. While it may be sensible to address all disputes under the contract at once, that is not what the agreement requires, as was the case with the agreement in *Ethekiwini Municipality*. Notably, clause 40.10, on which the applicant relied, provides that the cancellation of the agreement 'shall not affect the validity of this clause 40.0' (i.e., the dispute resolution clause).

[52] The Department submits that it had paid a total amount of R 17 720618.31 to the applicant for completing 85% of the work. The total amount paid further exceeded the original contract sum by R 1 100 000. If the requested relief were to be granted, the Department would have to pay an additional R 7 945 975.54 to the applicant, bringing the total payment to the applicant to roughly R 9 000 000 above the contract sum. Enforcing the determination would, according to the Department, be manifestly unfair and a waste of public funds and contrary to public policy.

[53] The applicant, in response, highlights the Supreme Court of Appeal rejection of a similar submission in *Ethekwini Municipality* as unhelpful.[32] Olsen AJA, in rejecting the municipality's request to consider the public interest in preserving public funds by denying enforcement of the high court orders giving effect to the adjudicator's determinations, placed reliance on *Beadica 231 CC v Trustees, Oregon Trust.*[33] In that matter, the Constitutional Court held

> 'Moreover, contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.' (Footnotes omitted.)

On the strength of this dictum, the learned judge continued

> 'The employer asks us to privilege public funds at the cost of private entities which contract with public ones. Whilst, given the profit motive, such an approach may not entirely disincentivise persons from contracting with public entities, it might reasonably be expected to incentivise the charging of a premium to public entities, to cover the risk inherent in contracting with a party which may be afforded

[32] *Ethekiwni Municipality* para 19.
[33] 2020 (5) SA 247 (CC) para 84.

a privileged status by the courts in the adjudication of contractual disputes. That cannot be in the public interest.'[34]

I agree. A public entity, such as the Department, cannot claim special exemption from its contractual liabilities simply because it utilises public funds. Affording such protection to organs of state will undermine rather than serve the public interest.

[54] What remains of the facts placed before the court to engage public policy is the Department's assertion that the 'quick and dirty' nature of adjudication, which, by virtue of its design as an interim dispute resolution measure, should justify its release from its obligation to make immediate payment of the adjudicator's determinations.

[55] In South Africa, adjudication as a form of dispute resolution is regulated by contract. There is no industry rule or statute that prescribes its procedures or mandates its determinations to be binding and immediately enforceable. Where those consequences follow, they result from an agreement between the parties. For me to find that enforcement of the adjudicator's determinations is contrary to public policy would be to elevate subjective views of fairness and reasonableness to self-standing requirements for enforcing contractual terms.[35] It seems to me that the Department, like the municipality in *Ethewhini Municipality*, invited the court to act on its views that the enforcement of the determinations would be unduly harsh.[36] Where parties have agreed on contractual terms with potentially harsh outcomes for one of them, that party cannot rely on the unfairness of the outcome to escape its obligations. Accordingly, the second ground for review must be rejected.

[56] The third ground of review relates to the adjudicator's failure to consider the prescripts applicable to public procurement processes. In particular, the Department took issue with the adjudicator's finding that it undervalued the work when it unilaterally changed the rate of profit and attendant fees in the applicant's bill of quantities from 8% to 4%. In the Department's view, the adjudicator failed to take

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[34] *Ethekwini Municipality* para 19
[35] *Ethekwini Municipality* para 13; see *Bredenkamp v Standard Bank of South Africa* 2010 (4) SA 468 (SCA) paras 50-51.
[36] Para 21.

into account that this finding would impermissibly increase the contract sum and thereby undermine the open, transparent and fair tender process.

[57] The applicant, correctly in my view, submits that this ground sought to question the merits of the adjudicator's determination. A court sitting in review of a decision of a contractually established tribunal is not at large to question the correctness or not of its decision. Nothing in the ground as pleaded by the Department, suggested that the adjudicator failed to apply the prescribed procedure in coming to this decision. This ground of review must thus also be dismissed.

[58] Accordingly, the counterapplication must be dismissed and the main application granted.

*Costs*

[59] The applicant seeks costs on a punitive scale against the first respondent. In its view, such an order is warranted, as the Department was aware of its agreement to be bound by adjudication yet sought to avoid payment through various stratagems, ranging from denying the substitution clauses at the outset to arguing for its reincorporation in the current proceedings. This, according to the applicant, demonstrates the absence of bona fides in conducting the litigation, which our courts have found to justify punitive costs.[37] The applicant highlighted that such an order would give 'expression of the court's censure of reprehensible conduct of the part of the costs debtor that cause the litigation or made the proceedings unduly burdensome'.[38]

[60] In my view, this is not a case that calls for such an order. In coming to this conclusion, I am mindful of the fact that an attorney-client costs order is an 'extraordinary one which should not be easily resorted to, and only when by reason of special considerations, arising either from the circumstances which gave rise to the action or from the conduct of a party'.[39] I am not convinced that the applicant

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[37] Reliance was placed on *Syfrets Mortgage Nominees Ltd v Cape St Francis Hotels (Pty) Ltd* 1991 (3) SA 276 (SE).
[38] *Aircraft Completions Centre (Pty) Ltd v Rossouw* 2004 (1) SA 123 (W).
[39] *BG Bojosinyane and Associates v Smith* [2023] JOL 62111 (SCA) para 50.

established the absence of bona fides on the part of the first respondent. The Department, like any other litigant, exercised its right to obtain a judicial decision.[40]

[61] The applicant is entitled to its costs in respect of both the main and counterapplication. In view of the complexity of the matter and the value of the claim, an award of costs on scale C, inclusive of the costs of two counsel, one of whom being senior counsel, is appropriate.

[62] The following order issues:

1 The adjudicator's determination handed down on 12 December 2024 in the adjudication proceedings between the applicant and the first respondent is made an order of court.

2 The first respondent is liable to make payment to the applicant for the sum of R 7 945 975.54 (Seven Million Nine Hundred and Forty-Five Thousand Nine Hundred and Seventy-Five Rand and Fifty-Four Cents) made up as follows:

    2.1 R 1 483 239.96 in respect of Claim 1.

    2.2 R 652 221.51 in respect of Claim 2.

    2.3 R 1 200 490.86 in respect of Claim 3.

    2.4 R 4 610 033.21 in respect of Claim 4.

3 The first respondent is liable to make payment to the applicant for the sum of R 71 045.28 (Seventy-One Thousand and Forty-Five Rand and Twenty-Eight Cents) being the first respondent's half share in the adjudicator's fees.

4 The first respondent's conditional counterapplication is dismissed.

5 The first respondent must pay the applicant's costs of both the application and the counterapplication, inclusive of costs of two counsel, one counsel being senior counsel, on scale C.

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[40] Ibid.

**R KRüGER**

**ACTING JUDGE OF THE HIGH COURT**

Date heard: 5 February 2026

Date delivered: 30 April 2026

**APPEARANCES:**

For the Applicant: Adv *J Babamia SC*

Adv *AR Whitaker*

Instructed by: Bate Chubb and Dickson Inc c/o Whitesides, Makhanda

For the First Respondent Adv *A Rawjee SC*

Adv *G Appels*

Adv *L Hesselman*

Instructed by: State Attorney, Gqeberha c/o Nettletons Attorneys, Makhanda