



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

JUDGMENT

Reportable

Case No.: A39/2026

Court a Quo Case No: 9103/2023

In the matter between:

THE CITY OF CAPE TOWN

Appellant

And

PRO KHAYA CONSTRUCTION CC

Respondent

Coram: Francis J, Holderness J et Yake AJ

Heard: 22 July 2026

Delivered: 5 August 2026

ORDER

1. The appeal is upheld with costs, including the costs of two counsel where so employed, on scale C.

2. The order of the court *a quo* is set aside and replaced with the following:

'1. It is declared that the determination of the adjudicator dated 10 March 2023, save for its provisions relating to the adjudicator's fees, upon which no order is made, is not binding on the parties and is unenforceable in its entirety.

2. The application is dismissed.

3. In the light of paragraph 1, no order is made on the counter-application.

4. The applicant is to pay the first respondent's costs of the application and of the counter-application, including the costs of two counsel where so employed. In respect of work done on or after 12 April 2024 such costs are to be taxed on scale C. In respect of work done before that date such costs are to be taxed in accordance with the rules applicable when the work was done.'

JUDGMENT

FRANCIS, J (HOLDERNESS, J et YAKE, AJ concurring):

Introduction

[1] This is an appeal against the whole of the judgment and order of Mapoma AJ, who granted an application by Pro-Khaya Construction CC ('Pro-Khaya') to enforce the

determination of an adjudicator, Advocate J G Wasserman SC, and dismissed the counter-application of the City of Cape Town ('the City') to set that determination aside. The appeal is before us with the leave of the court *a quo*.

[2] The adjudication was conducted under the Joint Building Contracts Committee Principal Building Agreement, Edition 6.1, March 2014 ('the JBCC agreement'), as amended by the contract data and the other contract documents.

[3] The issue in this matter is whether the determination binds the parties and may be enforced. The City says that it does not, because the adjudicator lacked jurisdiction, alternatively because the determination falls within one of the narrow grounds on which a contractual expert determination may be impeached. Whether the determination was correct on the merits is not before us.

Background

The contract and its termination

[4] On 12 November 2018, the City and Pro-Khaya concluded a contract for the construction of an electrical depot at Hout Bay. EBESA Architects (Pty) Ltd was the principal agent. The site was handed over on 16 January 2019. The contract period, due to expire on 12 February 2020, was extended to 30 August 2020, and the contract sum was increased by R2 733 545 excluding VAT.

[5] Pro-Khaya fell substantially behind. On 24 August 2020, a first adjudicator, Mr J C Hulme, dismissed its claims for an extension of time and for cancellation, and held it to be in material breach. On 26 August 2020, the principal agent instructed that construction be suspended from 31 August 2020.

[6] On 14 October 2020, Pro-Khaya treated the suspension as a repudiation, purported to cancel the contract, and vacated the site on 16 October 2020. It has not returned. The validity of the cancellation went to a second adjudicator, Mr D W Jamieson, who on 15 January 2021 held the cancellation to be of no force and directed Pro-Khaya to proceed. That determination was published on 18 June 2021. Pro-Khaya delivered a

notice of dissatisfaction on 26 June 2021. Under the amended clause 30.6.4 of the JBCC agreement, that notice routed the cancellation dispute to litigation. Pro-Khaya did not litigate.

[7] The principal agent never prepared or issued a final account under clause 26.10 of the JBCC agreement. That failure is common cause. Much of what followed flowed from it.

The referrals to adjudication

[8] On 13 February 2022, Pro-Khaya delivered its first notice of disagreement, directed at the termination, the failure to issue a final account, and the City's non-return of the construction guarantee. Its first notice of adjudication followed on 4 March 2022. That notice sought a determination that the principal agent issue a final account in the terms of Pro-Khaya's own account of 12 October 2021, and certification and payment of R8 654 313.43 excluding VAT.

[9] On 31 October 2022, Pro-Khaya delivered a second notice of disagreement, directed at the principal agent's rejection of extension of time claim 19 and its refusal to adjudicate claim 20. The second notice of adjudication, delivered on 18 November 2022, was confined in its terms to those two claims.

The determination

[10] Advocate Wasserman SC was appointed on 23 January 2023. Both notices of adjudication were before him and together constituted the reference. Pro-Khaya delivered a single referral submission on 6 February 2023. That submission introduced, for the first time, extension of time claims 16, 17 and 18, together with four further items in the proposed final account: COVID-19 costs of R174 385, a riot-damage insurance shortfall of R642 237.59, post-termination preliminary and general costs of R1 529 573.46, and a reversal of penalties of R150 000.

[11] Under rule 5.2 of the JBCC Adjudication Rules, the City's response fell due on 20 February 2023. It was delivered on 9 March 2023. The rule obliged the adjudicator, in

the absence of a timeous response, to assume that the City did not dispute the details submitted to him. On 10 March 2023, he handed down his determination on that default basis. He found that the contract had terminated on 30 August 2020. He allowed 130 days' extension of time, expressed to encompass claims 16 to 20, with a revised date for practical completion, a contract value adjustment of R999 528.40 and a final account of R8 095 536.22 excluding VAT. He directed the return of the construction guarantees and dealt with his own fees. The City delivered no notice of dissatisfaction.

The proceedings in the court *a quo*

[12] Pro-Khaya applied to the court *a quo* for an order enforcing the determination. Its case was a simple one. Clause 30.6.3 of the JBCC agreement makes a determination immediately binding. Clause 30.6.4 gives a dissatisfied party ten working days in which to deliver a notice of dissatisfaction, whereupon the dispute goes to litigation. The City delivered no such notice. The determination therefore became final and had to be given effect.

[13] The City opposed the application and brought a counter-application to set the determination aside. It attacked the determination on two grounds. The first was jurisdictional. The adjudicator, it said, had decided matters never referred to him, and a determination made without jurisdiction is neither binding nor enforceable, so that the court should decline to enforce it. The second was that the determination fell within the limited grounds on which the determination of an expert may be impeached, being capricious and manifestly unjust.

[14] Pro-Khaya's answer to both was that the adjudicator had acted within his mandate; that the City, having taken no jurisdictional objection during the adjudication, had acquiesced in the mandate he assumed; and that the grounds of impeachment were not made out.

[15] Mapoma AJ granted the enforcement application and dismissed the counter-application. He held that both referrals were made in accordance with clause 30 and that the complaint about the timing of the notices of disagreement was not borne out by

the facts. He held in any event that the City 'acquiesced to the adjudicator's jurisdiction' and 'cannot come at this late hour challenging jurisdiction to which it did not object throughout the stages'. He held further that the adjudicator determined as an expert and not as an arbitrator, that the grounds on which a court may interfere with such a determination are narrow, and that none of them was established. The default basis of the determination was, in his view, no defect, rule 5.2 expressly permitting it.

The parties' positions on appeal

[16] The City advances six grounds of appeal. Reduced to their essentials, they are that:

- (a) the notices of disagreement were out of time, depriving the adjudicator of jurisdiction;
- (b) the adjudicator had no power to endorse a final account prepared by the contractor;
- (c) extension of time claims 16, 17 and 18 were never referred;
- (d) the termination dispute was excluded by the earlier notice of dissatisfaction;
- (e) four specific items in the final account were never referred; and
- (f) the determination was in any event capricious and manifestly unjust.

[17] Mr Rosenberg SC, who appeared for the City with Mr Greig, asked that the appeal be upheld, that the order of the court *a quo* be set aside, that the enforcement application be dismissed, and that the determination be declared not binding and unenforceable.

[18] Mr Tredoux, for Pro-Khaya, supported the order of the court *a quo* on four grounds. First, and as a complete answer to the appeal, no notice of dissatisfaction having been given, the determination is binding, and the City may not now be heard to attack it. Second, the claims and the items said not to have been referred were constituent

elements of a single dispute about the final account, and that dispute had already been referred by the first notice of adjudication. Third, the City acquiesced in the adjudicator's mandate, alternatively waived its objection to it. Fourth, and in the alternative, if any part of the determination is bad, that part may be excised and the balance enforced.

[19] The parties' positions on the counter-application require separate mention, because they diverge less than the argument suggested. Pro-Khaya contends that the counter-application must fail with the grounds advanced against enforcement, and that it is in any event misconceived, because it seeks to review an expert determination on grounds our law does not recognise. The City does not contend that the counter-application is a necessary step. Its position is that the counter-application is a competent vehicle for the setting aside of a determination made without jurisdiction, but that no order upon it is required if the court declines to enforce the determination. I return to the point once the grounds have been decided.

[20] Grounds (c) and (e) turn on what was referred to the adjudicator. They are logically anterior and I deal with them first. Before I do so I set out the legal framework, and then dispose of Pro-Khaya's first answer, which if sound would make the rest unnecessary.

The legal framework

The nature of adjudication under the JBCC agreement

[21] Adjudication under the JBCC agreement is a mechanism for the summary and interim resolution of construction disputes. In *Radon Projects (Pty) Ltd v N V Properties (Pty) Ltd and Another* 2013 (6) SA 345 (SCA) paras [3]–[5], Nugent JA traced its origins. He cited the description in *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93 of a speedy mechanism for settling construction disputes on a provisional interim basis, and the observation of the authors of *Hudson's* that adjudication is regarded as essentially a cash-flow measure (N Denny QC et.al. *Hudson's Building and Construction Contracts* 12ed (2010)). The unsuccessful party complies first and complains later.

[22] Under the amended clause 30.6.4, a party dissatisfied with a determination must deliver a notice of dissatisfaction within ten working days, whereupon the dispute goes to litigation. Absent such a notice, the determination binds the parties and may be enforced. That is the bargain these parties struck, and a court should be slow to relieve a party of it.

Jurisdiction and the scope of review

[23] An adjudicator is a creature of the contract and only has the powers the parties gave him. If it is found, on an application to enforce a determination, that the adjudicator lacked the requisite jurisdiction, his decision is neither binding nor enforceable (*Framatome v Eskom Holdings SOC Ltd* 2022 (2) SA 395 (SCA) para [25]) (*'Framatome'*). He has no jurisdiction over a dispute which has not been notified and referred to him in accordance with the contract (*Framatome* para 9).

[24] In *Edmund Nuttall Ltd v R G Carter Ltd* [2002] EWHC 400 (TCC); [2002] BLR 312 para 25, the court recorded as common cause before it that the mandate of an adjudicator derives from the Notice of Adjudication. That passage was quoted with approval in *Framatome v Eskom Holdings SOC Ltd* 2021 (2) SA 494 (GJ) para [39]. Although that judgment was reversed on appeal, the reversal went to the application of the jurisdictional enquiry to the facts of that case and not to the principle for which the passage is cited here. The enquiry is whether the adjudicator confined himself to the issues the parties put before him. If he did, the parties are bound, even if he erred (*Framatome* para [29]).

[25] An adjudicator may investigate the extent of his own mandate, and may even rule upon it, but he cannot fix it. The scope is fixed by the terms of the reference, and he has no power to alter that scope by his own decision, in the absence of agreement to the contrary (*Radon* paras [28]–[29]). *Radon* was concerned with an arbitrator, but the principle applies with at least equal force to an adjudicator, all of whose powers are contractual.

[26] Two qualifications must be added. The first is that jurisdiction does not depend on the merits. Whether a claim is good or bad cannot determine the power to consider it. The question is only whether the claim as formulated falls within the scope of the reference (*Radon* paras [23]–[24], applying *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) paras [51]–[54]). The second is the corollary of the first. A complaint that the adjudicator erred within his mandate is not a jurisdictional complaint at all, and the contract reserves such a complaint to a notice of dissatisfaction and litigation.

Identifying the dispute referred

[27] How the dispute referred is to be identified is less settled, and the authority on which both sides relied requires qualification. In *Edmund Nuttall* (at para 36), the dispute was described as not merely the claim that has been rejected, but the whole package of arguments advanced and facts relied on by each side. That part of the judgment has not been followed in England. In *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC) para 55, Akenhead J declined to follow it and drew four propositions from *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA Civ 291; [2005] BLR 227 and *Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd* [2004] EWCA Civ 1757. A court should not adopt an over-legalistic analysis of what the dispute is. It must determine in broad terms what the disputed claim or assertion is. That claim is not necessarily defined or limited by the evidence and arguments exchanged before the referral. And the ambit of the reference may be widened by the defences raised by the party defending.

[28] I would adopt that approach. It accords with what our own law requires. In *Framatome* (para 30) the Supreme Court of Appeal held that the dispute must be looked at holistically, taking into account how the parties conducted themselves, and deprecated the isolation of particular words from the context of the main dispute. The enquiry into jurisdiction is broad, and it is not to be conducted as an exercise in pleading. But breadth has its limits. The enquiry is broad in characterising a dispute that was referred. It cannot supply a reference that was never made. Until a dispute has been notified and referred, there is nothing for a court to characterise, however generously it may be disposed to read the papers.

[29] Mr Tredoux built on that foundation an argument of principle which should be met at the outset. Adjudication, he said, is a cash-flow mechanism, and courts should give no encouragement to an approach which amounts to 'scrabbling around to find some argument, however tenuous, to resist payment' (*Framatome* para [30], citing *Hudson's*; the phrase originates with *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2006] BLR 15 (CA) para 85). I accept the premise without reservation. But the policy operates within the parties' bargain and not above it. The clause which makes a determination immediately binding is the clause which fixes what may be determined. To enforce a determination upon a claim that was never referred is not to give effect to the parties' choice of a swift remedy. It is to give the referring party a remedy for which it did not bargain, and to give the other side no opportunity to meet a case of which it was never told. Pay now and argue later assumes that what must be paid is what was referred.

The limited grounds of impeachment

[30] Beyond a want of jurisdiction, the determination of an expert may be impeached only for fraud, collusion, capriciousness or a manifestly unjust valuation (*Chelsea West (Pty) Ltd v Roodebloem Investments (Pty) Ltd* 1994 (1) SA 837 (C) at 856C–D, and *Civair Helicopters CC v Executive Turbine CC and Another* 2003 (3) SA 475 (W)). The adjudicator decided as an expert and not as an arbitrator, as rule 1.1 of the JBCC Adjudication Rules provides. His procedural obligations were those the agreement and the rules imposed on him. Where a tribunal is created by contract, the obligation to observe the elementary principles of justice derives from the express or tacit terms of the agreement and yields to its express terms (*Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 645H–646B). Applying that principle to an adjudication under the JBCC agreement, the Supreme Court of Appeal observed in *Ekurhuleni West College v Segal and Another* (1287/2018) [2020] ZASCA 32 paras [14]–[15] that where express contractual provisions regulate the procedure there is no room for the tacit importation of any rule of natural justice. The observation was made without finally determining the ground, another being dispositive of that appeal. The principle it rests upon is settled.

Onus and the approach on the papers

[31] The enforcement application and the counter-application each seek final relief, and *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E–635C governs both, in opposite directions. In the enforcement application the City has the benefit of the rule. In the counter-application Pro-Khaya does. Little turns on this, because the facts material to the jurisdictional grounds are common cause.

[32] Pro-Khaya submitted that the onus lies on the City throughout, as the party resisting enforcement and seeking a setting aside. That is not quite correct. A party who asks a court to enforce an award accepts the onus of proving that it holds an award capable of forming the subject of such an order, and it is irrelevant that its opponent has not first applied to have the award set aside (*Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA) para [17]). *Vidavsky* was decided under the Arbitration Act 42 of 1965, and adjudication under the JBCC agreement is neither statutory nor arbitral. But the reason for the rule is not peculiar to that Act, and I see no basis for a different approach where what is sought to be enforced is a contractual determination.

The absence of a notice of dissatisfaction

[33] Pro-Khaya's first answer is that the City gave no notice of dissatisfaction and that the determination is on that account binding. The contract supplies the reply. Clause 30.6.3 of the JBCC agreement makes the adjudicator's determination binding. It cannot make binding what he had no power to determine. A notice of dissatisfaction is the route by which a party disputes what an adjudicator has decided within his mandate. It is not the route by which a party complains that he has decided what was never referred to him. The second complaint may be taken in answer to an application to enforce, and the party resisting enforcement is entitled to wait for that application before taking it (*Vidavsky* para 17).

[34] The answer therefore disposes of those grounds which assert error within the mandate. It does not touch those which assert an absence of mandate. To the latter I now turn.

Extension of time claims 16, 17 and 18

[35] The second notice of adjudication was confined in its terms to claims 19 and 20. Claims 16, 17 and 18 appeared neither in the second notice of disagreement nor in the second notice of adjudication. They were introduced in the referral submission of 6 February 2023.

[36] The court *a quo* held that they came before the adjudicator by way of elaboration of the claims referred, and that any complaint about them went to the merits. I am unable to agree. Clause 30.4 of the JBCC agreement requires the notice of adjudication to define the scope of the dispute and the relief sought. Rule 5.1 requires the referral submission to furnish the full details of that dispute. The two provisions do different work. The notice fixes the boundary, and the submission fills in what lies within it. To treat the submission as capable of moving the boundary would denude clause 30.4 of content, and would leave a respondent unable to know, when the notice arrives, what case it must meet.

[37] Nor is the complaint one about the merits. Whether the claims were good was for the adjudicator to decide, if they were within the reference. Whether they were within the reference is a different question, and it is answered by reading the notices.

[38] Mr Tredoux met this argument by submitting that claims 16 to 20 were not separate disputes at all. They were, he said, constituent elements of a single dispute about the final account, and that dispute had already been referred by the first notice of adjudication, to which the contractor's final account statement of 12 October 2021 was annexed. The argument must be tested against the first notice rather than the second, and on that footing it is the strongest point in the case. It is not without support in the papers. The contractor's letter demanding a final account called on the principal agent to assess claims 16, 17, 18 and 20, and the statement of 12 October 2021 incorporated the earlier extension of time claims.

[39] The difficulty is that the first notice of adjudication sought the issue of a final account in stated terms and payment of a stated sum. It did not seek a revision of the date for practical completion. An extension of time and the money that follows from it

are distinct entitlements under this agreement, pursued through their own machinery, and the adjudicator was asked in the first notice for the money only. A notice which claims a final account in a given figure does not, without more, refer for determination each of the constituent entitlements upon which the contractor says that figure rests. Were it otherwise, a respondent served with a claim for a sum would be obliged to guess at every fact the other party might later use to support it.

[40] The submission proves too much in a second respect. If every adjustment to the contract value was already before an adjudicator by virtue of the first referral, the second notice of disagreement and the second notice of adjudication were superfluous. Pro-Khaya delivered them because the disputes over claims 19 and 20 were new, having arisen from the principal agent's decisions of 6 September 2020. The parties themselves therefore understood that an extension of time claim required its own notice. Claims 16, 17 and 18 have a different history again. Each was the subject of its own notice of disagreement in July 2020. Each rests on its own facts: a delay attributed to COVID-19, a suspension founded on the non-payment of certificate 16, and the late issue of a contract instruction. Those notices were never carried into any notice of adjudication.

[41] The broad approach described above does not rescue the claims. Taking the reference in broad terms and looking at the matter holistically, as *Framatome* requires, the disputed claims referred were the final account in the sum claimed and extension of time claims 19 and 20. Claims 16, 17 and 18 appear in no notice of adjudication at all. The widening which *Cantillon* contemplates flows from the defences raised by the defending party, not from fresh claims introduced by the referring party. And the holistic view taken in *Framatome* was of a dispute that had been notified, remained the same throughout, and in which the objecting party participated without ever contending that the notified dispute had been varied (*Framatome* paras [21] and [30]). Neither feature is present here.

[42] That is where the argument fails. A referring party may refine its arguments and may answer the defences raised against it. It may not carry into the referral a group of

claims which no notice of adjudication disclosed and which rest on their own facts. The introduction of claims 16, 17 and 18 was not elaboration. It was an enlargement of the dispute. The adjudicator had no jurisdiction over them.

The four items in the final account

[43] The City identified four items in the final account which it says were never referred. Three stand on the footing already described. The claims for COVID-19 costs, the riot-damage insurance shortfall and the reversal of penalties were never submitted to the principal agent for determination, were never the subject of a notice of disagreement, and were never mentioned in either notice of adjudication. The principal agent refused the riot-damage claim on 6 August 2020, and no disagreement was notified. The penalties were imposed in payment certificate 22 and were never disputed. Each of these items entered the adjudication in the referral submission and nowhere earlier. The adjudicator had no jurisdiction over them.

[44] The fourth item stands differently. The City's complaint about post-termination preliminary and general costs of R1 529 573.46 is that no such costs could be owing for a period after the contract had ended, and that the adjudicator's allowance of them contradicts his own finding as to the date of termination. That is an argument about the correctness of the determination. An internal tension in a determination is not a want of jurisdiction, and it does not on its own meet the threshold of capriciousness or manifest injustice. The complaint fails.

Waiver and acquiescence

[45] There remains Pro-Khaya's third answer, which was also the basis on which the court *a quo* decided the matter. That court held that the City 'acquiesced to the adjudicator's jurisdiction' and that it 'cannot come at this late hour challenging jurisdiction to which it did not object throughout the stages'.

[46] The proposition must be stated with care, because it conceals two different arguments. The first is that a party's inaction can confer a jurisdiction which the adjudicator never had. It cannot, for the reasons given in paragraph 25 above. The

second is that parties may agree to a wider reference, and that a party's conduct may evidence such an agreement. That is sound, and *Radon* recognises it in the qualification 'in the absence of agreement to the contrary'. A party which appears before an adjudicator, engages an enlarged claim on its merits and reserves nothing may well be held to have submitted to a determination of it.

[47] The second argument is not open to Pro-Khaya on these facts. The City's response was delivered out of time. Rule 5.2 then obliged the adjudicator to assume that the City did not dispute the details submitted, and the determination went by default. The late response was not considered. Conduct which the adjudicator was contractually bound to disregard, and did disregard, cannot be the vehicle by which the City agreed to enlarge his mandate. There is nothing else to point to. There was no hearing at which the City appeared, and it took no step in time in which an objection could have been recorded. This is the feature which distinguishes the case from *Framatome*, where the objecting party had participated throughout (*Framatome* para [21]).

[48] If waiver was intended, it fares no better. The onus lies on the party alleging waiver, who must show that the other, with full knowledge of the right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it (*Laws v Rutherford* 1924 AD 261 at 263). The City's silence was the silence of a litigant in default. It bears none of the marks of an election.

[49] In its judgment, the court *a quo* remarked that the City's failure to object to specific aspects of the adjudicator's jurisdiction amounted to a general acquiescence to such jurisdiction. However, as Mr Rosenberg correctly argued, on the facts, there was no form of acquiescence. The City's response was ignored, and the adjudicator proceeded on a default basis, treating the matter as undefended. The City, therefore, did not participate in any meaningful sense in the adjudication.

[50] The finding of the court *a quo* was not confined to the ground of late notice. It was expressed generally, and Pro-Khaya relied on it generally. For the reasons given, it cannot sustain the determination in respect of the claims and the items that were never referred.

Severance

[51] The City pleaded each of the four items as, on its own, a sufficient basis for setting aside the corresponding part of the determination. Mr Tredoux seized on that, and submitted that the proper course, on the City's own case, is excision rather than wholesale invalidity.

[52] Severance is not an arithmetical operation. It is not enough that a figure can be struck out and the remaining figures added up. In *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd* 2018 (5) SA 462 (SCA) paras [46]–[48], the Supreme Court of Appeal held that an award bad in part may stand for the residue where the bad part is clearly separable from the good. In doing so, it adopted the statement in *Russell on Arbitration* that the objectionable portion must be clearly separable in its nature, and that where it is inseparable from the rest, or not so clearly separable that what is sought to be upheld can be seen to be unaffected by it, the award is avoided altogether. *Palabora* concerned an award under the Arbitration Act 42 of 1965, and the power conferred by s 33(1)(b) to set such an award aside. The reasoning is not peculiar to the statute. It rests on the proposition that a court enforcing a determination gives effect to what the adjudicator decided and does not construct a determination he did not make, and it applies with equal force to a contractual expert determination.

[53] To the same effect are the principles collected, *obiter*, by Akenhead J in *Cantillon* para 65. The first step is to ascertain what dispute or disputes were referred, and whether in substance there was one dispute or more than one. Where a determination properly addresses more than one dispute, a successful jurisdictional challenge to the part dealing with one of them need not undermine the rest. But where the determination is upon a single dispute, and the adjudicator has acted materially in excess of his jurisdiction, the determination will not be enforced. And in any event, if the determination as drafted is simply not severable in practice, or if what remains is tainted by the excess, severance is not available.

[54] I begin, as those principles require, with what was referred. Reduced to its substance, it was a single dispute about what was due to the contractor upon the

termination of the contract. The first notice of adjudication sought a final account in a stated sum and payment of it. The second sought two extension of time claims which, if granted, would feed into that account. The adjudicator took the two notices together, as the reference required him to, and produced one result. This was not a reference of several discrete disputes which happened to be heard by the same adjudicator.

[55] That finding is fatal to Mr Tredoux's submission that the three final account items may simply be excised. Each carries its own figure, and their excision would leave the balance of the account arithmetically intact. Arithmetical tidiness is not the test. Where the reference was of one dispute and the adjudicator has gone materially beyond it, the determination is not saved by the circumstance that some of the offending figures can be identified and subtracted. In any event the point is academic, because the extension of time award cannot be severed and everything else turns on it.

[56] The adjudicator granted a single period of 130 days expressed to encompass claims 16 to 20. He did not apportion it among them. Mr Rosenberg pointed out, correctly, that the EVRA delay analysis on which the adjudicator relied attributes 72 days to claim 18 alone. That does not rescue the award. Claim 18 was one of the three claims never referred, so those 72 days must fall away. What remains is 58 days shared among claims 16, 17, 19 and 20, and the first two of those were not referred either. The record does not show how the 58 days are to be divided. The days attributable to the two claims properly before the adjudicator cannot be identified.

[57] The consequence is not confined to the extension of time award. The determination allowed a contract value adjustment of R999 528.40, together with preliminary and general costs in the final account, computed by reference to the extended period. Both are functions of the delay for which the contractor was held not to be answerable. Once the period cannot be identified, neither can the money that follows from it. To arrive at a lawful figure this Court would have to decide for itself how many days are attributable to claims 19 and 20 and then reassess the contract value and the preliminaries on that footing. That is the assessment the parties entrusted to their adjudicator and withheld

from the court. A final account of R8 095 536.22 resting on an unallocated 130 days cannot be reconstituted by this Court on the material before it.

[58] The excess of jurisdiction therefore goes to the heart of the reference and is not merely peripheral. What remains cannot be seen to be unaffected by what falls away, and on the principle in *Palabora* the determination is unenforceable as a whole. The direction as to the return of the construction guarantees was consequential upon the findings on the final account and cannot stand once those findings fall away.

[59] One qualification is required. The adjudicator dealt in his determination with his own fees, and a declaration expressed without limitation would extend to that part of it. He was cited as second respondent in the court *a quo* but has taken no part in the appeal, and we heard no argument upon the point. The declaration should therefore be confined to his determination of the disputes referred, and the liability of the parties for his fees left to be resolved between them and him.

The remaining grounds

[60] Because the determination is unenforceable in its entirety, the remaining grounds do not arise. They were fully argued, and I record my conclusions on them briefly, so that the parties know where they stand should the matter go further.

Endorsement of the contractor's final account

[61] The City contends that the adjudicator had no power to endorse a final account prepared by the contractor, clause 26 of the JBCC agreement reserving that task to the principal agent. The premise is correct. The conclusion, however, does not necessarily follow. The first notice of adjudication sought, in terms, a determination that the principal agent issue a final account in the terms of Pro Khaya's account of 12 October 2021, with certification and payment. That is the relief the adjudicator granted. He answered the question referred to him. Whether clause 26 permitted that answer goes to its correctness. Had the principal agent performed its obligation under clause 26.10, the question would never have arisen. It did not, and clause 30.1 makes the inaction of the principal agent a matter referable to adjudication. I would have rejected this ground.

Timing of the notices of disagreement

[62] Clause 30.1 imposes no time limit for the delivery of a notice of disagreement. The City asked us to imply a term of reasonable promptness, and then to attach to its breach a consequence the contract nowhere mentions, namely the ouster of the adjudicator's jurisdiction.

[63] The first step is difficult enough. This is a contract replete with express periods and with express consequences for missing them. Clause 30.2 allows ten working days, clause 30.3 another ten, clause 30.6.4 ten more, and clause 30.5 spells out what follows from a failure to comply with clauses 30.3 and 30.4. Silence at the first step, in a document of that kind, is more readily explained by choice than by oversight. The point is not new. Considering the equivalent provision of the fourth edition of the JBCC agreement, Nugent JA twice observed that the clause did not purport to limit the time within which the machinery might be invoked (*Radon* paras [8]–[9]).

[64] The second step is insurmountable. An implied term of reasonable promptness would not make timeous notice a jurisdictional fact. That is what distinguishes this contract from the one considered in *Framatome*, where the periods for notification and referral were expressly fixed and compliance with them expressly determined the adjudicator's power (*Framatome* para [9]). Clause 30.1 fixes no period, and nothing in the agreement says that delay in giving a notice of disagreement deprives the adjudicator of jurisdiction. At its highest, the lapse of time went to whether the notices were competent, and that was a question for the adjudicator within his mandate.

[65] There is a further difficulty of fact. The periods of eleven months and two months on which the City relied in the court below were referable to the notices of adjudication and not to the notices of disagreement, and that contention has since been abandoned. The court *a quo* can hardly be faulted for finding the complaint unsupported by the facts when the facts advanced belonged to a different complaint. I would have rejected this ground.

The termination dispute

[66] The City argued that the notice of dissatisfaction with the Jamieson determination sent the termination dispute to litigation and barred its re-adjudication. So it did, but the dispute so routed was the validity of Pro Khaya's purported cancellation of October 2020. The present adjudicator was not asked to decide, and did not decide, whether that cancellation was valid. He found that the contract had terminated on 30 August 2020, a date and a cause different from the cancellation, and he did so because he had to fix a point from which the account could be taken. That the contract has come to an end is common ground, whatever the parties' differences as to the date and the reason. Those differences bear on particular items in the final account. They do not touch the adjudicator's power to determine what was due. I would have rejected this ground.

Capriciousness, expertise and the default determination

[67] Capriciousness is not established by pointing to error. It connotes a decision proceeding from will rather than from reason, or a failure to apply the mind at all. The adjudicator engaged with the material before him and gave reasons for what he allowed. He did not simply adopt the contractor's figures. He allowed R8 095 536.22 against a claim of R8 654 313.43, a reduction of R558 777.21. Within the jurisdiction he had, he applied his mind.

[68] The complaint that the quantification called for a quantity surveyor rather than a lawyer goes to the weight of the determination and not to the competence to make it. The adjudicator was appointed by the Association of Arbitrators, and the subject matter, entitlement under a construction contract, lay within his field.

[69] The complaint about the default basis fails for a more elementary reason. The determination went by default because the City's response was seventeen days late. Rule 5.2 then obliged the adjudicator to assume that the details submitted were not disputed. A litigant cannot found a review upon the foreseeable consequence of its own default. An adjudicator who conducts the proceedings in accordance with the contract and the rules cannot be impugned for procedural unfairness, those rules being the

measure of his procedural obligations (*Ekurhuleni West College v Segal* paras [14]–[15]). I would have rejected this ground.

The counter-application and the form of the relief

[70] The counter-application was unnecessary. For the reasons given in paragraph 33 above, a determination which never acquired binding force needs no order to deprive it of one. The objection may be taken in answer to the application to enforce. It is unnecessary, in order to reach that conclusion, to import into a contractual expert determination the doctrine that want of jurisdiction in judicial or quasi-judicial proceedings has the effect of nullity, which *Vidavsky* para [14]–[15] applied to an arbitration. This adjudicator determined as an expert and not as an arbitrator. The contract supplies the answer without the analogy. Since the declaration I propose disposes of the matter, no order need be made on the counter-application.

[71] *Ekurhuleni West College v Segal* (paras [18]–[22]) does not stand in the way of that conclusion. There the dissatisfied party had invoked the contractual route, an arbitration was pending, and the Supreme Court of Appeal held that a court will interfere with the uncompleted proceedings of a tribunal created by contract only sparingly, and only where grave injustice would otherwise result. Two matters distinguish it. These proceedings are not uncompleted, no notice of dissatisfaction having been given and nothing being pending. And the question there was the regularity of a process which the adjudicator had jurisdiction to conduct, not whether he had jurisdiction at all. *Framatome* (paras 21 and 24) points the same way and, for like reasons, does not assist Pro Khaya. There the objecting party had participated, had never contended that the dispute referred lay outside the adjudicator's power, and had accepted that the decision would be reconsidered in a pending arbitration. A reluctance to intervene in a forum the parties chose does not extend to lending the authority of the court to a determination that forum had no power to make.

[72] This judgment resolves none of the underlying disputes between the parties. It remains open to Pro Khaya to pursue its claims in the ordinary way, subject to any defences available to the City.

Conclusion

[73] The adjudicator had no jurisdiction over extension of time claims 16, 17 and 18, nor over the claims for COVID-19 costs, the riot-damage insurance shortfall and the reversal of penalties. The City neither agreed to enlarge his mandate nor waived its objection to the enlargement. The excess is not severable from the rest. The determination is, accordingly, not binding on the parties and is unenforceable, and the appeal must succeed.

Costs

[74] The City has succeeded, and costs should follow the result. The matter raises questions of importance to the construction industry, the sums at stake are substantial, and the issues justified the employment of two counsel. Uniform rule 67A requires the court to indicate the scale on which counsel's fees are to be taxed. The scale is fixed by reference to the importance, value and complexity of the case, scale A being the point of departure and a higher scale warranted only where the case is unusually complex, important or valuable (*Mashavha v Enaex Africa (Pty) Ltd* [2024] ZAGPJHC 387; 2025 (1) SA 466 (GJ) paras [11] and [16]). This case answers that description and scale C is appropriate.

[75] The rule came into operation on 12 April 2024, after the application below was instituted. In *Mashavha* paras [12]–[13] it was held to operate prospectively, so that the scale it prescribes governs only work done on or after that date, work done earlier being taxed under the rules that applied when it was done. That approach has been endorsed in this Division in *Prosec Guards CC v Department of Public Works and Infrastructure and Others* (2501/23; 2502/23) [2024] ZAWCHC 139 para [74], and in the Gauteng Division in *Ndarangwa v Marivate Attorneys Incorporated* (61033/2021) [2024] ZAGPPHC 471 para [80], though in neither was a scale indicated. It was doubted, *obiter*, in *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd (Costs)* (CC 82/2017) [2025] ZAGPPHC 263 paras [48]–[73], where Spilg J took the view that the rule touches no vested right and might be applied from the inception of a matter. Neither party addressed us on the question, and the contrary view was expressed without the

benefit of argument on both sides. I would follow *Mashavha* and leave the question open for a case in which it is argued. The application below having been instituted on 6 June 2023, the costs order in that court must be qualified accordingly. The appeal calls for no such qualification.

[76] The counter-application was unnecessary for the reasons I have given, but it was not brought unreasonably. The City had to meet an application to enforce, and the point it took was a good one. Its costs should follow the result in the ordinary way.

Order

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

1. The appeal is upheld with costs, including the costs of two counsel where so employed, on scale C.
2. The order of the court *a quo* is set aside and replaced with the following:
 - '1. It is declared that the determination of the adjudicator dated 10 March 2023, save for its provisions relating to the adjudicator's fees, upon which no order is made, is not binding on the parties and is unenforceable in its entirety.
 2. The application is dismissed.
 3. In the light of paragraph 1, no order is made on the counter-application.
 4. The applicant is to pay the first respondent's costs of the application and of the counter-application, including the costs of two counsel where so employed. In respect of work done on or after 12 April 2024 such costs are to be taxed on scale C. In respect of work done before that date such costs are to be taxed in accordance with the rules applicable when the work was done.'

M FRANCIS

Judge of the High Court

M HOLDERNESS

Judge of the High Court

S YAKE

Acting Judge of the High Court

Appearances:

For Appellant: Adv Sean Rosenberg SC with Adv Mark Greig

Instructed by: Timothy and Timothy Inc

For Respondent: Adv Paul Tredoux

Instructed by:

Tiefenhaler Attorneys