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

NOT REPORTABLE

Case no: 2025-135255

In the matter between:

RUWACON (PTY) LTD Applicant

and

CHRIS HANI DISTRICT MUNICIPALITY Respondent

JUDGMENT

Govindjee J

Background

[1] The applicant ('Ruwacon') and the respondent ('the Municipality') concluded a written construction contract for the completion of the Cala wastewater treatment works. This application concerns the enforcement of an adjudication award issued under that contract on 29 May 2025. The adjudicator directed the Municipality to pay Ruwacon R930 424,78, inclusive of value-added tax, within 28 days after receipt of Ruwacon's tax invoice.

[2] Ruwacon seeks payment of that amount, together with interest at 10.5 per cent per annum, compounded monthly, from 30 June 2025 until payment, and costs. Its notice of motion also sought, in the first place, an order making paragraphs 27.1 to 27.3 of the adjudication award an order of court.

[3] The Municipality opposes the application and, by way of counter-application, seeks a stay of the implementation of the adjudicator's decision pending the finalisation of arbitration and any ensuing court proceedings. The court was informed from the bar that the arbitration is at an advanced stage. At the hearing Ruwacon accepted that the Municipality had disputed the adjudicator's decision and did not persist with the first prayer in its notice of motion. The Municipality, in turn, abandoned its contention that the adjudicator lacked jurisdiction. The remaining issues are whether Ruwacon made out a case in its founding papers for payment pending arbitration, and whether implementation of the award should nevertheless be stayed.

Contractual framework

[4] The contract was concluded on or about 25 June 2020 and incorporated the General Conditions of Contract for Construction Works, Third Edition, 2015 ('the GCC'). The contract price was R37 950 000, inclusive of value-added tax. GIBB (Pty) Ltd acted as the Municipality's employer's agent.

[5] Disputes arose concerning, among other things, Ruwacon's entitlement to an extension of time and the payment of time-related general items. The issues referred to Adv Booysen for adjudication included the validity of Ruwacon's termination of the contract.

[6] The adjudicator determined that Ruwacon was entitled to an extension of time of 29 calendar days and directed the Municipality to pay Ruwacon R930 424,78, inclusive of value-added tax, within 28 days after receipt of its tax invoice. He also determined that Ruwacon had lawfully terminated the contract on 9 January 2025.

[7] Ruwacon issued its tax invoice on 2 June 2025. Payment was accordingly due by 30 June 2025. The Municipality has not made payment and has invoked the contractual process for the final determination of its dissatisfaction with the award by arbitration.

[8] Clause 10.5.4 of the GCC provides:

"The parties shall implement the Adjudication Board's decision without delay whether or not the dispute is to be referred to arbitration or court proceedings. Payment shall be made in accordance with Clause 6.10 in the payment certificate which becomes due after the date of issue of the decision, unless otherwise directed by the Adjudication Board."

[9] Clause 10.6.1.1 provides that the adjudicator's decision is binding on both parties unless and until it is revised by an arbitration award or court judgment, whichever is applicable under the contract. Clause 9.3.2 further provides that, upon termination, the provisions of the contract continue to apply for the purposes of resolving disputes and determining amounts payable by either party to the other.[1]

Was the case for payment pending arbitration made out in the founding papers?

[10] The Municipality did not raise its pleading objection in its answering affidavit. On the contrary, it treated the facts pleaded in paragraphs 9 to 13 of the founding affidavit as common cause and later stated that it did not join issue with those allegations. It also pleaded, as a feature of contractual adjudication, that decisions are enforced pending the final determination of disputes and must be implemented without delay. Its case was that, following termination, the contractual protections against the risk of non-recovery no longer subsisted. Only in its replying affidavit in the counter-application did it contend that Ruwacon's case had always depended upon the award having become final and binding, and that clause 10.5.4 had neither been pleaded nor relied upon as a basis for payment. That point was repeated in argument.

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[1] General Conditions of Contract for Construction Works (3rd Ed) (2015).

[11] A litigant must ordinarily make out its case in the founding affidavit. The purpose of pleadings is, however, to define the issues and ensure that the opposing party knows the case it must meet. While parties are kept strictly to their pleaded cases where a departure would cause prejudice or prevent a full enquiry, the rule is not intended to result in litigation being determined by excessive formalism. Pleadings and affidavits must, moreover, be read as a whole rather than by isolating individual allegations.[2]

[12] It is so that Ruwacon's founding affidavit is not entirely clear in its formulation. It advances both the immediate enforceability of the adjudicator’s decision and, as a further basis for the payment relief sought, the contention that the decision had become final and binding. The latter proposition was incorrect once the Municipality's notice disputing the award was accepted. That does not mean that the former was absent. Under the heading “Purpose of the application”, paragraph 12 expressly alleges that clause 10.5.4 requires implementation of the adjudication award without delay whether or not the dispute is referred to arbitration or court proceedings. The affidavit then pleads the adjudicator's direction to pay within 28 days, the issue of the invoice, the due date and non-payment. Ruwacon’s express reliance on clause 10.5.4 is not displaced merely because it also advanced the broader, and ultimately untenable, contention that the award had become final and binding.

[13] It must be noted that the reference to clause 10.5.4 did not stand in isolation in the founding papers. Under the heading ‘the resolution of disputes’, Ruwacon pleaded that any dispute concerning the parties’ contractual rights or obligations, whether during the currency of the contract or after its completion, was to be referred to adjudication in terms of clause 10.5. It went on to plead the immediate referral of such disputes to adjudication, the constitution of the ad hoc adjudication board, and the right of either party to disagree with its decision, while that decision remained binding unless and until revised by an arbitration award. Read with the express allegation in paragraph 12 that the adjudicator’s decision had to be implemented without delay whether or not the dispute was referred to arbitration or court

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[2] *FirstRand Bank Ltd v Venter* [2012] ZASCA 117 para 29; *Shill v Milner* 1937 AD 101 at 105.

proceedings, these allegations formed part of the contractual basis pleaded for the payment relief, rather than merely background to a case based on finality.

[14] More significantly, Ruwacon pleaded in paragraphs 61 and 62 that, by reason of the adjudicator's direction that payment be made within 28 days after receipt of its tax invoice, it was entitled to enforce payment in accordance with the award and to approach this court for an order implementing the award by directing the Municipality to pay R930 424,78. This is reinforced by the sequence of its concluding allegations. In paragraph 63.1 it alleged that the award had been duly issued in accordance with the contractual dispute-resolution provisions, and in paragraph 63.2 that, in terms of the award, the Municipality was indebted to it in an amount that was due and payable. Only thereafter, in paragraph 63.3, did it advance the further contention that the award had become final and binding. Paragraph 63.4 again asserted its entitlement to enforce implementation of the award and receive payment. Read as a whole, finality was advanced as an additional basis for relief, rather than as an indispensable premise for the Municipality's indebtedness and Ruwacon's entitlement to payment.

[15] The allegations concerning finality were nevertheless material to the broader relief initially sought in prayer 1. That prayer would have made all three material parts of the award orders of court, including the adjudicator's determination concerning termination. Its abandonment does not extinguish the separate payment relief sought in prayers 2 and 3, for which the founding affidavit pleaded an independent contractual basis.

[16] The Municipality was also not taken by surprise. In its answering affidavit, it did not contend that the payment claim should be dismissed because Ruwacon had relied only upon the finality of the adjudicator's decision. Instead, it accepted that contractual adjudication produces an immediate, provisional outcome and that adjudication decisions are ordinarily to be implemented without delay. Its answer was that, because the contract had been terminated, mechanisms that might otherwise protect it against an overpayment were no longer available. It then brought a counter-application to stay the very contractual obligation it later contended had

not formed part of Ruwacon's founding case. That course confirms that the true basis of the payment claim was understood and fully ventilated.

[17] It follows that Ruwacon did not introduce a new cause of action in reply. It persisted with the monetary relief sought from the outset and relied upon the legal effect of a contractual provision expressly pleaded in support of that relief. The Municipality understood and fully addressed that case.[3] Its pleading objection cannot therefore be sustained

The effect of the adjudicator’s decision

[18] The contractual distinction between a decision that is binding pending revision and one that has become final is important. A valid notice of dissatisfaction preserves the Municipality's right to have the underlying dispute finally determined in arbitration. It does not suspend the obligation, expressly undertaken in clause 10.5.4, to implement the adjudicator's decision without delay.

[19] In *Framatome v Eskom Holdings SOC Ltd*, the Supreme Court of Appeal explained that adjudication is an intervening, provisional stage in the agreed dispute-resolution process.[4] Its purpose is to provide a speedy mechanism for the interim settlement of construction disputes, with the adjudicator's decision remaining binding and enforceable unless and until revised by the tribunal agreed upon by the parties. A court enforcing the decision does not interrogate its merits.

[20] The point was stated directly in *Ekurhuleni West College v Segal and Another* (*Ekurhuleni West College*).[5] A notice of dissatisfaction and referral to arbitration did not relieve the employer of its obligation to make payment under the adjudicator's determination without delay.

[21] The contractual provisions considered in *eThekwini Municipality v Cooperativa Muratori & Cementisti - CMC di Ravenna Societa Cooperativa*

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[3] *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) para 13.
[4] *Framatome v Eskom Holdings SOC Ltd* [2021] ZASCA 132 (1 October 2021); 2022 (2) SA 395 (SCA) paras 22-23.
[5] *Ekurhuleni West College v Segal and Another* (1287/2018) [2020] ZASCA 32 (2 April 2020) para 9.

(‘*eThekwini Municipality*’) were materially the same.[6] The SCA held that, because the adjudication decisions were binding from the time they were made, the contractor was ordinarily entitled to immediate payment. When the employer failed to discharge that obligation, the court asked to enforce it was relieved of the usual task of determining whether the debt existed, because that had already been established through the adjudication process chosen by the parties in the contract.

[22] Those principles are dispositive of the main application. The Municipality is entitled to pursue the arbitration to completion and seek revision of the adjudicator's decision in those proceedings. Unless and until that occurs, the payment direction remains binding and enforceable, and the Municipality cannot rely upon the advanced stage of the arbitration proceedings to withhold payment required by the contract in the interim.

The counter-application

[23] The Municipality's counter-application is founded on the risk that it may not recover the amount paid should it ultimately succeed in arbitration. It contends that termination has deprived it of protection available during the currency of the works, including deductions from later payment certificates and retention mechanisms. It also contrasts its own continuing existence as a municipality with the possibility that Ruwacon may cease trading or be liquidated.

[24] The termination argument cannot alter the contractual position. Clause 9.3.2 expressly preserves the relevant provisions of the contract for resolving disputes and determining amounts payable after termination. In *eThekwini Municipality*, the employer similarly relied upon cancellation to bolster its case concerning the risk of non-recovery. The SCA held that this ignored the import of the same contractual provision and was without merit. Termination therefore does not displace the contractual provisions governing adjudication and payment pending final determination.[7]

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[6] *eThekwini Municipality v Cooperativa Muratori & Cementisti - CMC di Ravenna Societa Cooperativa* [2023] ZASCA 95; 2023 (6) SA 384 (SCA) (*eThekwini Municipality*) paras 7-11.
[7] *eThekwini Municipality* above n 6 para 18.

[25] The suggested risk of non-recovery fares no better. In *eThekwini Municipality* the contractor was financially distressed and liquidation was a possible outcome. The Court nevertheless held that the risk of insolvency or financial distress is an ordinary commercial risk accepted when the parties conclude a standard construction contract. Public policy did not justify releasing the employer from its obligation merely because that risk might eventuate.[8]

[26] The Municipality's factual case concerning the risk of non-recovery is appreciably weaker than that advanced in *eThekwini Municipality*. Its deponent said that the Municipality did not know Ruwacon's financial position and raised the possibility that it might cease to exist or be placed in liquidation. No objective facts were offered in support of that apprehension. Ruwacon answered that it has operated since 2003, has a national footprint, is engaged in contracts worth approximately R4.3 billion and is solvent according to its financial statements. The Municipality stated that these matters lay within Ruwacon's knowledge and that it was not in a position meaningfully to gainsay them.

[27] The fact that public funds are involved does not justify affording the Municipality a privileged contractual position. *eThekwini Municipality* rejected the same contention. Affording public entities a special dispensation at the expense of private contractors would undermine confidence in public contracting and may increase the price of contracting with the State.[9]

[28] The Municipality also cannot invoke a general discretion to refuse or postpone payment in the interests of justice or to avoid hardship. *eThekwini Municipality* holds that an order for payment of a contractual money debt is not a discretionary remedy of the kind applicable to an order requiring performance of an act. A court may refuse enforcement where it would be contrary to public policy, but that is an objective enquiry based on facts placed before the court, not a broad discretion to rewrite the parties' bargain. No facts establish that enforcement in this matter would offend public policy.[10]

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[8] *eThekwini Municipality* above n 6 paras 16 and 21(e).
[9] *eThekwini Municipality* above n 6 para 19.
[10] *eThekwini Municipality* above n 6 paras 15 and 35-40.

[29] The Municipality has therefore established no contractual or public-policy basis for staying enforcement of the adjudicator's payment direction. The counter-application must accordingly be dismissed.

Interest and costs

[30] Clause 6.10.6.2 entitles Ruwacon to interest on the outstanding amount from the due date at the prime overdraft rate charged by its bank, compounded monthly. Ruwacon claims interest at 10.5 per cent per annum, a rate reflected in the letter from Standard Bank. The Municipality did not advance a separate defence to the interest claim. Interest is therefore payable from 30 June 2025 until the date of payment.

[31] Ruwacon has succeeded in obtaining the substantive payment relief and in resisting the counter-application. There is no reason to depart from the ordinary rule that costs follow the result. I consider counsel's fees on scale B to be appropriate.

Order

[32] The following order is issued:

1. The respondent is ordered to pay the applicant R930 424,78.
2. The respondent is ordered to pay interest on R930 424,78 at the rate of 10.5 per cent per annum, compounded monthly, calculated from 30 June 2025 to the date of final payment.
3. The respondent's counter-application is dismissed.
4. The respondent shall pay the costs of the main application and the counter-application, including counsel's fees on scale B.

A GOVINDJEE

JUDGE OF THE HIGH COURT

Heard: 23 July 2026

Delivered: 4 August 2026

Appearances:

For the Applicant:	W A van Aswegen
Instructed by:	Phatshoane Henney Attorneys c/o De Jager & Lordan Inc
For the Respondent:	S Sihawu
Instructed by:	Jolwana Mgidlana Inc c/o Nolte Smit Attorneys