

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Appeal Case Number: A286/2025

In the Full Court Appeal between:

SUPERWAY CONSTRUCTION (PTY) LTD

Appellant

(First respondent *a quo*)

and

CAPE METAL WINDOWS SERVICING CC

First respondent

(Applicant *a quo*)

MARK WYNDAM ILBURY

Second respondent

(Second respondent *a quo*)

Coram: Wille *et* Mangcu - Lockwood, JJ *et* Adams, AJ

Heard: 22 July 2026

Delivered: 13 August 2026

Mediation: - The appellant appeals against the court a quo's findings that the appellant must abide by the determination of the second respondent (the adjudicator) and that the appellant is liable to make payment to the first respondent of certain sums of money – Mediation the agreed contractual method – Appeal upheld – Agreement to mediate upheld.

JUDGMENT

WILLE, J (unanimous):

INTRODUCTION

[1] This appeal concerns the enforceability of an adjudicator's determination where the parties' subcontract required mediation as the first step in their dispute-resolution process. Most of the material facts are common cause. The appellant was the main contractor for the refurbishment of a hospital.¹

[2] The appellant appointed the first respondent as a subcontractor to supply and install aluminium windows, doors and shopfronts. Their subcontract provided, among other things, that, as a first step, any dispute was to be resolved by mediation.

*'...Dispute resolution is to be by means of mediation...'*²

[3] Thus, this appeal turns on two questions:

(a) Whether mediation was a mandatory precondition to any second-stage dispute-resolution process, and

¹ At 2 Military Hospital in Wynberg, Cape Town.

² This appeal is about the interpretation of Clause 25.4 of the subcontract which required mediation.

(b) Whether the adjudicator could acquire jurisdiction when no mediation occurred and the appellant did not agree to dispense with it.³

[4] If those questions are answered in the appellant's favour, the remaining issues concerning incorporation of another discrete standard-form agreement (by way of rectification) and the alleged adequacy of the adjudicator's reasons do not arise for determination.⁴

RELEVANT BACKGROUND

[5] A dispute arose between the appellant and the first respondent about alleged outstanding payments in terms of their subcontract, and the Association of Arbitrators purportedly appointed the second respondent to adjudicate this dispute.⁵

[6] The appellant did not accept that appointment of the adjudicator. The adjudicator initially advised that, unless the appellant accepted his terms, the matter could not proceed.

*'...I shall take it the matter cannot proceed...'*⁶

[7] The first respondent then requested that the appellant be afforded a further opportunity to raise any objection to the appointment of the adjudicator. Without first hearing the appellant, the adjudicator reversed his earlier position and directed that the adjudication proceed without delay.⁷

[8] This was done despite communication from the appellant that the subcontract required mediation first and that referral to the adjudicator was incompetent.⁸

[9] The appellant also stated in terms that it would not participate in the adjudication and provided no less than three alternative dates for the proposed mediation to take place.⁹

³ The appellant in this case called for mediation.

⁴ The standard form JBCC contract or indeed another discrete standard form construction contract.

⁵ The primary subcontract did not make provision for this appointment.

⁶ The adjudicator then had a change of heart.

⁷ This was unexplained on the papers.

⁸ The appellant suggested alternative dates for the mediation.

[10] After that, the second respondent emailed the parties, and he communicated that he had decided that mediation was not:

‘...a prerequisite to proceeding to adjudication...’¹⁰

[11] The appellant again replied, reiterating its position that mediation had been contractually agreed and had to precede any adjudication process of dispute resolution.¹¹

[12] The adjudicator continued the process without the appellant's participation, advised that his determination was complete, and shortly thereafter delivered it.¹²

[13] The determination amounted to nothing more than a rubberstamping of the first respondent's claims. Understandably, the appellant refused to adhere to this determination. Thereafter, the first respondent applied to have the determination enforced, which ultimately resulted in the judgment of the court of first instance, and now finds us in a full court appeal.¹³

CONSIDERATION

JURISDICTION

[14] The first respondent contends that among the issues to be decided by the second respondent himself, one of them was whether he had jurisdiction to determine the dispute between the parties. Put another way, it is submitted that the second respondent had the power to decide to abandon the contractual agreement to mediate as the first step.¹⁴

⁹ The adjudicator proceeded notwithstanding this communication.

¹⁰ There was no explanation for this stance.

¹¹ It was conceded that this occurred.

¹² This despite the objections in writing to adjudication.

¹³ The appellant refused to be bound by the unilateral adjudication.

¹⁴ The appellant disputed this power.

[15] The argument is that the second respondent considered these issues before him and resolved them. Thus, it is suggested that because of this, the appellant is not permitted to resist the enforcement of the second respondent's decision.¹⁵

[16] In developing this argument further, the first respondent argues that - whether or not - the second respondent is vested with jurisdiction depends on whether the second respondent confines himself to the issues put before him. That the second respondent may wrongly answer the question put to him by the parties is immaterial. The parties are still bound by his decision.¹⁶

[17] I disagree. I say this because the genesis of the second respondent's jurisdiction is in the written instrument (the subcontract) between the appellant and the first respondent. As a matter of pure logic, the source of the second respondent's jurisdiction cannot be determined by the issues before him. This would be putting the cart before the horse. It must be so that the source of the second respondent's jurisdiction is the subcontract between the appellant and the first respondent.¹⁷

[18] To determine the issue of jurisdiction in this case, the second respondent was obliged to consider what the parties agreed to as to how the decision maker would acquire jurisdiction and thereafter what the extent of this jurisdiction would be.¹⁸

[19] It must be so that the only legal and commercial interpretation is that the appellant and the first respondent agreed that before any second-stage dispute resolution process could take place there had to be mediation. It was common cause that the appellant called for mediation and that no mediation took place.¹⁹

[20] It also seems to me to be common cause between the parties that a lack of jurisdiction would vitiate the decision and determination made by the second respondent. Alternatively,

¹⁵ This is challenging to understand.

¹⁶ Again this is not legally sustainable given the agreed mediation clause in the subcontract.

¹⁷ This must be so because of the agreement to mediate.

¹⁸ The subcontract set this out in terms.

¹⁹ This is not disputed.

the first respondent did not vigorously engage with the fact that a lack of jurisdiction would *per se* vitiate the decision and determination made by the second respondent.²⁰

MEDIATION AND THE CONSTITUTION

[21] On 27 January 2025, the 'Law Reform Commission' published a discussion paper, and a draft 'Mediation Bill' was attached to this discussion paper, which was open for comment until 30 April 2025. The draft bill contains the following interesting provisions:

'...The provisions of the Mediation Act will only apply to mediations required by any other law to the extent that the provisions of the Act are not inconsistent with that other law or with the regulations or procedure authorised or recognised by that other law...'

*'...The disputes referred to in section 30 (1) are insurance disputes, medical negligence disputes, professional negligence claims, defended loan default disputes, construction contracts disputes, personal injury claims arising from motor vehicle accident claims and defamation disputes...'*²¹

[22] The draft bill also contains a provision to the effect that parties are not compelled to submit to mediation if a court determines that participation is not in the best interests of the parties, including, but not limited to, urgency and potential hardship.²²

[23] It must be so that when the appellant and the first respondent signed the subcontract containing the agreement to mediate, they confirmed their informed consent to mediate.²³

[23] Section (1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law.²⁴

²⁰ This was not materially engaged with by the first respondent.

²¹ Draft "Mediation Bill", page 01- 114 and page 01 – 130.

²² These issues were not engaged with by the first respondent.

²³ It has not been suggested otherwise,

²⁴ The Constitution of the Republic of South Africa, 1996.

[24] Section 9 (2) provides that equality includes the full and equal enjoyment of all rights and freedoms. The Constitutional Court has held that all persons in a similar position must be afforded the same right to access the courts and to the same fair and just procedures regarding such access.²⁵

[26] It may well be so that to subject all disputants to compulsory mediation will offend the right of equal protection and benefit of the law. But this is not so in this case as the appellant and the first respondent agreed to mediation as the first step in the dispute resolution process. Thus, the appellant is entitled to the right of equal protection and benefit of the law in that the appellant has the agreed contractual right to mediate.²⁶

[27] Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum. Thus, the appellant is entitled to the right to have the dispute with the first respondent resolved, where appropriate, in another forum. Thus, the appellant has the right to mediate.²⁷

[28] Some litigants may have no desire to mediate. Those who do have the desire (especially where it is contractually agreed) cannot be deprived of this right to mediate.²⁸

[29] The question of compulsory mediation does not arise on these facts because the parties expressly agreed that mediation would be the first step in their dispute-resolution process.²⁹

[30] It is so, as pointed out by the first respondent, that the question of compulsory mediation was considered by the England and Wales Court of Appeal in the *Halsey v Milton Keynes General NHS Trust* case.³⁰

²⁵ Van der Walt v Metcash Trading Limited 2002 (4) SA 317 CC at para [24]

²⁶ The appellant cannot be summarily stripped of this right.

²⁷ Again, the appellant cannot be summarily stripped of this right.

²⁸ It is this case it was contractually agreed.

²⁹ There is no unilateral compulsion in view of the agreement.

[31] This court of appeal held, *inter alia*, that:

‘...The right of access to court may be waived, for example by an arbitration agreement, but such a waiver should be subjected to particular careful review to ensure that the claimant is not subject to constraint...’

‘...The hallmark of alternative dispute resolution procedures, and perhaps the key to their effectiveness in individual cases, is that these processes are voluntarily entered into by the parties in the disputes with outcomes, if the parties so wish, which are non-binding. Consequently, a court cannot direct that such methods be used but may merely encourage and facilitate...’

*‘...The role of the court is to encourage, not to compel...’*³¹

[32] Our apex court has warned that judges should be mindful that the primary engine of law reform is the legislature and not the judiciary.³²

[33] With this I agree. This case is a very different one because compulsory mediation was agreed to voluntarily and contractually. It is common cause that there has been no mediation, even though appellant expressly called for it. This notwithstanding, the court of first instance found in favour of the first respondent. Thus, what is at the heart of this appeal is whether the determination by the second respondent is enforceable by the first respondent against the appellant, absent mediation first.³³

THE AGREEMENTS

³⁰ 2004 1 WLR 3002.

³¹ Paragraphs 9 to 11.

³² This informs the doctrine of the separation of powers.

³³ I say mediation was a prerequisite in this case.

[34] The first agreement that regulates the parties is the subcontract, which requires mediation first. The second agreement is the agreement relied on by both the respondents to suggest that mediation was optional, not compulsory.³⁴

[35] The subcontract is the principal instrument, and its terms, as far as consent to mediation is concerned, must override (as a matter of law) the standard terms of the second agreement. Significantly, the second agreement also records an entitlement to resolve a dispute by means of mediation.³⁵

[36] There is a dispute on the papers about whether the first agreement incorporated (by reference) the dispute resolution procedures stipulated in the second agreement or similar procedures in another discrete agreement. This is of no moment because these other agreements regulate the second-stage dispute resolution process, which has nothing to do with the agreed mediation process.³⁶

[37] I say this because the contractual relationship between the appellant and the first respondent establishes a hierarchy with reference to the agreements. First in the hierarchy is undoubtedly the subcontract, which contains manuscript insertions and deletions.³⁷

[38] The appellant and the first respondent signed this agreement. It exhibits and sets out in the clearest manner the terms of the contract to which the parties agreed. It also references other standard-form documents which the parties agreed would apply insofar as necessary, and consistent with the subcontract. Most importantly, in the clearest of terms, it stipulated that mediation was the first step in the dispute resolution process.³⁸

[39] Put another way, the subcontract itself contemplated a resolution process by way of adjudication, but this was struck out with a pen stroke by agreement between the parties.³⁹

³⁴ The JBCC Principal Building Agreement.

³⁵ Clause 40.6 of the JBCC Principal Building Agreement.

³⁶ For the purposes of this appeal, it does not matter which agreement was incorporated by reference.

³⁷ This was the principal instrument governing the relationship between the appellant and the first respondent.

³⁸ This could not be disputed.

³⁹ This was disputed by the first respondent, but no rectification was sought.

[40] Moreover, the subcontract does not itself set out what the second stage of dispute resolution would be, after mediation. Because of this, the first respondent says its failure to respond to the invitation to mediate by the appellant is because it was not obliged to mediate.⁴⁰

[41] The argument on this point is developed by the suggestion that because the appellant terminated the subcontract, the compulsory mediation term in the subcontract was euthanised.⁴¹

[42] This is challenging to accept as the correct legal interpretation. I say this because mediation is a dispute resolution mechanism and the very purpose of a dispute resolution clause is to provide for a mechanism for the settlement of disputes arising out of or in relation to the contract.⁴²

[43] It also does not matter whether the terms of the second agreement or the other discrete agreement were intended to be incorporated by reference, as these agreements have similar adjudication dispute resolution processes and both record an entitlement to mediation at any time.⁴³

[44] In my view, it matters not (for the purposes of determining the crisp issue in this appeal) whether the terms of the second agreement or the third agreement were incorporated into the subcontract by reference, as the crisp point for determination in this appeal is whether the first stage of the dispute resolution process is mediation, alternatively adjudication.⁴⁴

CONCLUSION

⁴⁰ It is not clear how this argument assists the first respondent.

⁴¹ This argument is challenging to understand.

⁴² Twenty-Third Century Systems (Pty) Ltd v SAP Africa Region (Pty) Ltd 2025 (6) SA 247 (SAC) para 17.

⁴³ As a second stage procedure.

⁴⁴ For the reasons set out the first stage was contractually agreed to be mediation.

[45] The subcontract records that dispute resolution is to be by mediation. The language itself supports the argument that mediation was mandatory rather than optional. There is also a strong factual foundation in favour of the appellant as it is common cause that no mediation occurred in circumstances where the appellant expressly requested mediation and proposed dates for the mediation. The subcontract makes mediation an indispensable jurisdictional gateway that must be followed. Thus, the jurisdictional argument has a concrete, objectively verifiable basis in that it persuasively distinguishes between an adjudicator deciding a matter incorrectly within jurisdiction and acting without jurisdiction at all. If mediation was a condition precedent, the determination would be unenforceable, supporting the proposition that an adjudicator's ruling on jurisdiction is not conclusive and may be reconsidered on enforcement.⁴⁵

[46] The appellant consistently objected to adjudication, refused to accept the adjudicator's appointment, and sought mediation. This does not support any suggestion of a waiver, acquiescence or tactical silence which is yet another argument chartered by the first respondent which does not commend itself to me for the purposes of this appeal.⁴⁶

ORDER

[47] In the circumstances, the following order is granted:

1. The appeal is upheld.
2. The order *a quo* is set aside and substituted with the following order:

'...The application is dismissed with costs, including the costs of two counsel on Scale C...'

3. The first respondent is to pay the appellant's costs, including the costs of the application for leave to appeal and the costs of two counsel on Scale C.

⁴⁵ *Vidavsky v Body Corporate of Sunninghill Villas* 2005 (5) SA 2000 (SCA) at para 14.

⁴⁶ The decision to abandon must be conveyed for it to become effective.

WILLE, J

We agree:

MANGCU - LOCKWOOD, J

ADAMS, AJ

APPEARANCES

FOR THE APPELLANT

ADV R PATRICK SC

ADV Z CORNELISSEN

FOR THE FIRST RESPONDENT

ADV D MELUNSKY SC