

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Numbers: **2024-138173**

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED: <u>NO</u>
 SIGNATURE	
1/9/2026 DATE	

In the matter between:

CHINA COAL NO 5 CONSTRUCTION SA

Applicant

and

BAKUBUNG MINERALS (PTY) LTD

First Respondent

STANLEY LEBETHE

Second Respondent

THABO MASIBI

Third Respondent

This Judgment was handed down electronically and by circulation to the parties' legal representatives by way of email and shall be uploaded on CaseLines. The date for hand-down is deemed to be on **1 September 2026**

JUDGMENT

MALI, J

Introduction

- [1] This is an application to enforce an adjudication award of R201 039 514,18 (Two Hundred and One Million and Thirty Nine Thousand Five hundred and Fourteen Rand and 18 cents). The First Respondent opposes the application and has also launched a counter application, in which it seeks a stay of this application pending the final determination of a review application to be brought at a later stage.

The Parties

- [2] The Applicant is China Coal No 5 Construction South Africa (Pty) Limited, a private company duly incorporated and registered in accordance with the company laws of the Republic of South Africa.
- [3] The First Respondent is Bakubung Minerals (Pty) Limited, a private company duly incorporated and registered in accordance with the company laws of the Republic of South Africa.
- [4] The Second Respondent, Stanley Lebethe, is a major male, employed by the First Respondent as Project Manager. He is cited herein as the duly appointed Project Manager of the contract described more fully below.
- [5] The Third Respondent, Thabo Masibi, is a major male, employed by the First Respondent as Project Manager. Notwithstanding the Second Respondent's formal appointment, he has in practice performed the role and functions of Project Manager and is cited herein on that basis.
- [6] For ease of understanding, the Applicant and First Respondent will at times below be referred to, respectively, as the Contractor and the Employer.

The Facts

- [7] It is common cause that on 28 November 2017, the Contractor and the Employer (“the Parties”) entered into a contract (“the contract”) for the mining development, engineering, and construction of the Capital Waste Infrastructure, Ore Reserve Development, and Related Equipping (“the works”) of a platinum mine to be developed on two farms south of the Pilanesberg Complex, known as the Bakubung Platinum Mine Project (“the mine”).
- [8] The relevant clauses of the contract are Z4 and W1 of the NEC3 core clauses, which govern the appointment of the adjudicator, the procurement and enforcement of the adjudicator’s decision, dissatisfaction notices, arbitration, and related dispute resolution. Clause W1.3 (10) expressly provides that the Adjudicator’s decision is binding on the Parties unless and until revised by the Tribunal (as defined in the contract) and is enforceable as a contractual obligation between the Parties, not as an arbitral award.
- [9] Various disputes arose between the Parties at different times during performance. The addenda concluded between them resolved the disputes then extant and provided that the Parties would proceed thereafter on the amended terms from the date of each addendum. Notwithstanding these interventions, fresh disputes emerged in the latter stages of the contract period, and despite attempts to resolve them amicably, the Parties could not reach settlement.
- [10] In early 2024, the Contractor invoked the contract’s dispute resolution mechanism and referred certain disputes to Mr Francois Spies, a duly appointed adjudicator, for adjudication. The adjudicator duly considered the matters referred to him and, on 18 September 2024 completed his decision however the award was delivered on 24 October 2024 (the “award”).
- [11] The Employer refuses to comply with the Adjudicator’s award, hence this application. In turn, the Employer has launched a counter application seeking a stay of these proceedings pending the outcome of its review application of the Adjudicator’s award. Alternatively, if the Employer is ordered to comply with its contractual obligations and pay the amount awarded, it seeks an order directing

that such payment be made into an independent attorney's trust account rather than to the Contractor. This is because the Contractor may be unable to repay the amount should the Employer's review application succeed.

Issue

[12] The issue to be determined is whether the adjudication award is enforceable; if so, whether the payment should be made to the Contractor. Furthermore, whether the Employer is entitled to the relief sought in the counter application for the stay of the adjudication award pending the arbitration or review.

The Contractor's Arguments

[13] According to the Contractor, the adjudicator completed his decision within the agreed timetable on 18 September 2024 but published it only on 24 October 2024. This followed the Employer's failure and/or refusal to pay its share of the adjudicator's fee within the agreed period, and the Contractor having to pay the Employer's share of the fee to have the award released. It had been agreed with the adjudicator that he could hold a *lien* over his decision until full payment of his fees had been made.

[14] It was submitted for the Contractor that the Respondent's non-payment amounted to a repudiation of the contract, in breach of the doctrine of *pacta sunt servanda*, which requires strict adherence to agreed terms.

[15] The Contractor's argument against the counterapplication is that the Employer has been raising the issue of review since 2024 but has not taken steps to launch it.

The Employer's arguments

[16] The essence of the Employer's argument is that the Contractor is a foreign company with no other business interests in South Africa. If the Employer is successful in arbitration, it will not be able to recover its money.

[17] The Employer does not gainsay that it is liable to pay the amount certified by the adjudicator. However, it contends that the amount should be retained in the trust account pending the outcome of the arbitration proceedings, given a reasonable apprehension that the funds may be dissipated if the Employer ultimately succeeds in the arbitration. This contention is supported by the Contractor's status as a business established specifically for the project. The Contractor has no ongoing operations beyond the project in question. Although the Contractor asserted that it had approximately R30 million in its bank account, it did not submit proof. In contrast, the Employer adduced evidence of the Contractor's annual turnover from CIPC records, indicating that, as at 2025, the Contractor's turnover was less than R1 million.

[18] In this regard, the Employer makes the following averments:

"The Contractor is, to the best of my knowledge, currently a shell with no current business activities. It was incorporated in 2017 by a foreign firm that operated as an engineering contractor outside of South Africa. The project to which this matter relates was the foreign firm's first project in South Africa, which it undertook through the corporate personality of the Contractor. It was the only project undertaken by the Contractor.

The foreign firm has no other projects or business activities in South Africa and since the termination of the contract, the Contractor has wound down its operations in South Africa, retrenched all its employees and has no assets. From recent correspondence, it appears that it does not even operate a bank account in South Africa. The significance of the Contractor's status as a shell, with no assets or operations, will be dealt with later."

[19] The Employer summarily rejected the Contractor's argument regarding the apprehension of non-payment, based on the Contractor's supposed inability to repay the amount should the Contractor be unsuccessful in the ultimate arbitration proceedings. Instead, the Employer relied on that very fact as a ground for refusing to enforce the award.

[20] In response to the above, it is submitted on behalf of the Contractor that there has never been any difficulty in paying the adjudicator's fees. It was further submitted that the possibility of dissipation of the funds does not arise from, and is not provided for in, the contract. The Contractor's position is therefore that the adjudicator's award must be enforced in accordance with its terms: the Employer must pay now and pursue its remedies thereafter.

- [21] Furthermore, the Employer contends that the payment relief sought in the Notice of Motion is not made out on the papers. The adjudicator did not grant the relief sought by the Contractor in respect of low-performance damages. When regard is had to paragraph 171 of the adjudicator's award, read with the section dealing with low-performance damages at paragraphs 108 to 123, no finding is made as to the quantum of "remaining low-performance damages" referred to by the Contractor.
- [22] Accordingly, even if the award is to be enforced, as the Contractor contends in paragraph 27 of its founding affidavit, such enforcement does not require payment of the amount claimed as low-performance damages in the Notice of Motion. The payment relief sought by the Contractor does not form part of the relief granted by the adjudicator. The Contractor sought a single amount in the Notice of Motion, namely R171 million, and did not dispute that this is the only amount certified by the adjudicator.
- [23] It was further submitted on behalf of the Employer that the adjudicator acted outside the scope of his mandate. The starting point is what was referred to him. The Contractor contended that the performance levels were never clearly established, that no workable program was in place, and that the Project Manager had failed to administer the relevant contractual clause as required. Accordingly, the Contractor's case was that the Employer was not entitled to deduct the amounts claimed as low-performance damages and that those amounts ought to be repaid to the Contractor.
- [24] The Employer, on the other hand, contended that the low-performance damages were calculated monthly based on the Contractor's performance during the relevant period. According to the Employer, the amounts so calculated were retained and were to be paid once the Contractor completed the works at a future date. Because the Contractor failed to achieve the required development, the Employer maintained that the amounts deducted as low-performance damages remained due to the Employer.
- [25] The Contractor further submitted that the Employer's own conduct demonstrates that it is desirous of making payment. This is apparent from its counter

application, in which it seeks an order that the amount be retained in a trust account pending the outcome of the review and/or arbitral proceedings.

Law and Discussion

- [26] It is well established in South African law that a court should be reluctant to interfere with an adjudicator's determination, particularly where the Parties have agreed that the determination is binding pending arbitration.
- [27] Much of the Employer's argument concerning the Contractor's performance or non-performance does not arise for determination in these proceedings. The starting point is that the Employer is bound by the agreement it entered into and cannot simply seek to avoid its contractual consequences. It is accordingly obliged to honour its contractual undertaking and pay the amounts it has been directed to pay.
- [28] It is common cause that the Employer has not placed in issue the Compensation Events awarded in the adjudication, which amount to R71 819 190.07 (seventyone million eight hundred and nineteen thousand one hundred and ninety rand and seven cents). These amounts represent costs incurred and/or expended by the Contractor, which the Employer expects the Contractor to bear while the Contractor pursues review proceedings that, on the Employer's own case, do not challenge these amounts, and/or arbitral proceedings which the Employer has, to date, not pursued.
- [29] The Employer's further submission is that the Contractor's failure to join the adjudicator is fatal to its claim. That submission is unpersuasive. The failure to join an adjudicator does not extinguish or permanently bar an underlying contractual claim, provided that the applicable contractual notice and time-bar provisions have been complied with.
- [30] The approach to enforcement of adjudication: Errors of procedure, fact or law by the Adjudicator do not constitute defences to the enforcement of the Adjudicator's decision. As the learned authors of *Hudson's Building and Engineering Contracts*

(13th ed)¹ explain, in the context of judicial support in the United Kingdom for adjudication decisions under the Housing Grants, Construction and Regeneration Act, 1996:

"The phrase 'pay now, argue later' has often been used by the courts as shorthand to describe the policy of the HGCRA 1996. The Technology and Construction Court and the Court of Appeal have also said on many occasions that adjudication is a form of rough justice, in the sense that within a very short period of time (usually 28 days) the Adjudicator has to receive submissions and evidence from the parties and produce their decision. Inevitably the justice that is meted out is not always as pure and as well prepared for as cases which proceed to a full trial in court or to a substantive hearing before an Arbitrator. On the basis of this premise, the courts have been prepared to treat the issue of enforcement of adjudication decisions in a robust fashion. Thus, even if there is a challenge to the validity of an Adjudicator's decision, the decision is binding and enforceable until the challenge is finally determined [...] It has also been said by the Court of Appeal that the objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the Adjudicator's decision unless it is plain that the question which they have decided was not the question referred to them, or if the manner in which they have gone about the task is obviously unfair. It should only be in rare circumstances that the courts will interfere with the decision of an Adjudicator, and the court should give no encouragement to an approach which may aptly be described as 'simply scrabbling around to find some argument, however tenuous, to resist payment'".

[31] In *Freeman NO and Another v Eskom Holdings Limited*,² the court held:

"[17] The adjudicator's decision, therefore, remains binding and enforceable until revised in the final determination by an arbitrator. Mr Kemack referred me to the United Kingdom case of Bouygues (UK) Limited v Dahl-Jensen (UK) Limited [2000] BLR 49 [TCC] at 55, para. 35, which bears out this conclusion. Bouygues, which is a matter of the Queen's Bench Division, Technology and Construction Court ("TCC"), concerned a dispute arising from a sub-contract, which provided for dispute resolution by adjudication pursuant to the Rules of the CIC Model Adjudication Procedure (2nd edition) which provided that:

'1. The object of adjudication is to reach a fair, rapid and inexpensive decision upon a dispute arising under the contract and this procedure shall be interpreted accordingly

...

¹ Hudson's Building and Engineering Contracts (13th ed), in the context of judicial support in the United Kingdom for adjudication decisions under the Housing Grants, Construction and Regeneration Act 1996).

² [2010] ZAGPJHC 137.

4. *The Adjudicator's decision shall be binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.*

5. *The parties shall implement the Adjudicator's decision without delay whether or not the dispute is to be referred to legal proceedings or arbitration.*

...”

[32] Having regard to these Rules, Justice Dyson held as follows:

“The purpose of the scheme is to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of Adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement, whether those decisions are wrong in point of law and fact. It is inherent in the scheme that injustices will occur, because from time to time, Adjudicators will make mistakes. Sometimes these mistakes will be glaringly obvious and disastrous in their consequences for the losing party. The victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation, and possibly even by a subsequent arbitration.” (Emphasis added)

[33] In *Radon Projects (Pty) Ltd v N V Properties (Pty) Ltd and Another*, the Supreme Court of Appeal (SCA)³, interpreting the Adjudication Rules issued by the JBCC and the adjudication clause in that matter, held that adjudication under clause 40 is designed as a measure for the summary and interim resolution of disputes, subject to their final resolution by arbitration where appropriate. In reaching this conclusion, the Court approved the description of adjudication given by the English Technology and Construction Court in *Macob Civil Engineering Ltd v Morrison Construction Ltd*⁴, namely that such legislation “has not abolished arbitration and litigation of construction disputes” but “merely introduced an intervening provisional stage in the dispute resolution process.” The adjudicator’s determination remains binding unless and until it is overturned or varied by arbitration. Although concerned with clause 40 of the JBCC Principal Building Agreement, the same reasoning applies with equal force to Clause W1 of the NEC3 contract before this Court, which performs an equivalent function.

³ *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd and Another* [2013] ZASCA 83; 2013 (6) SA 345 (SCA) para 8

⁴ *Id* at para 5, quoting *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] EWHC 254 (TCC); [1999] BLR 93

[34] The position was subsequently considered directly by the SCA in *Ekurhuleni West College v Segal and Another*.⁵ The Court held that adjudication is designed for the summary and interim resolution of disputes, and that the adjudicator's determination may be overturned at the final stage of the agreed dispute resolution process. Importantly, the Court held that where the parties have agreed to arbitration as the mechanism for finally resolving their dispute, the appropriate remedy of a dissatisfied party is ordinarily to proceed to arbitration rather than institute piecemeal review proceedings (*Segal* at paras 9, 15, 18, 21-22) in the High Court. The Court stated that review proceedings in such circumstances should generally only be entertained where necessary to prevent grave injustice or where justice cannot otherwise be attained.

[35] The principle was stated even more emphatically by the SCA in *Framatome v Eskom Holdings SOC Ltd*.⁶ The Court, quoting Clause W1.3 (10) of the NEC3 contract before it, confirmed that an adjudicator's decision is binding and enforceable as a contractual obligation pending its revision by arbitration. The fact that the adjudicator may have made an error does not, without more, entitle a party to refuse compliance. The SCA expressly held that the requirement that payment be made even before arbitration is a strong indication that the parties intended to exclude judicial interference with the adjudicator's determination at that interim stage.

[36] Significantly, the SCA in *Framatome* endorsed the principle expressed in *Hudson's Building and Engineering Contracts*⁷ that:

"It should only be in rare circumstances that the courts will interfere with the decision of an Adjudicator..."

[37] The authors in *Hudson's Building and Engineering Contracts*⁸ warn further that courts should not encourage a party to engage in "simply scrabbling around to find some argument, however tenuous, to resist payment". The SCA applied that principle in holding that the merits of the adjudicator's decision fell within the

⁵ [2020] ZASCA 32 ("Segal").

⁶ [2021] ZASCA 132; 2022 (2) SA 395 (SCA) ("Framatome").

⁷ *Id* at par 30

⁸ *Id* at par 30

province of the subsequent arbitration and were not matters for the High Court to interrogate at the enforcement stage.

[38] The same approach was followed in *Murray & Roberts Limited v SASOL South Africa (Pty) Ltd*,⁹ where the High Court held that a court has no appellate jurisdiction over an adjudicator, even where the adjudicator is demonstrably mistaken.¹⁰ The Court agreed with what was stated in *Segal* that mistakes of fact, law or procedure are inherent in a rapid adjudication process and ordinarily fall to be corrected in the subsequent arbitration.¹¹ It further held that a party dissatisfied with the adjudicator's decision cannot simply refuse to comply on the basis that the decision is alleged to be wrong.

[39] More recently, in *Amanz'Abantu Services (Pty) Ltd v Coega Development Corporation (Pty) Ltd*¹² the High Court applied the above authorities of the SCA and held that an adjudicator's determination remains binding and enforceable pending arbitration. The Court applied the reasoning of the SCA in *Framatome*¹³, where the SCA had held that asking a court to revisit the substance of an adjudicator's decision was an impermissible attempt to "interrogate the merits"; a function that properly falls within the purview of arbitration. It further held that permitting a party to withhold payment pending such an examination would subvert the very object of adjudication, namely, to provide an expeditious interim remedy and a mechanism to sustain cash flow during the pendency of the dispute.

[40] Regarding the apprehension that the Contractor will not be in a position to repay the Employer, in *Ethekwini Municipality v Cooperativa Muratori & Cementisti - CMC di Ravenna Societa Cooperativa*¹⁴ it was held:

⁹ [2020] ZAGPJHC 268.

¹⁰ *Id* at para 19.

¹¹ *Id* at para 19.

¹² [2022] ZAECQBHC 20.

¹³ *Amanz'Abantu Services (Pty) Ltd v Coega Development Corporation (Pty) Ltd* [2022] ZAECQBHC 20 para 11. Quoting and applying *Framatome* above n 6.

¹⁴ [2023] ZASCA 95; 2023 (6) SA 384 (SCA) ("Ethekwini").

“[19] The second of the above additional considerations, namely that it is public funds being put at risk, is equally unhelpful to the employer’s case. The Constitutional Court had this to say in Beadica:

“[84] 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.”

[41] As already noted in paragraph [28] above, the Employer’s failure to challenge the Compensation Events awarded is significant, since those amounts represent costs, the Contractor has already incurred while awaiting proceedings the Employer has not pursued.

[42] The Employer’s concern regarding the Contractor’s status is misplaced at this stage. The Employer entered into the contract with knowledge of the material facts concerning the Contractor. Even if some of those facts were unknown to the Employer at the time, it was nevertheless incumbent upon it to act based on the trust underlying the contractual relationship, as recognised in *Beadica* quoted above.

[43] In the case of *Rodpaul Construction (Pty) Ltd t/a Rods Construction v MEC: KwaZulu-Natal Provincial Department of Public Works*,¹⁵ at paragraph 10, the Court applied the principles of *Ethekwini* above as follows:

[44] “On the other hand, in opposing the argument of the respondent, the applicant relies on *Ethekwini Municipality v Cooperativa Muratori & Cementisti-CMC Di Ravenna Societa Cooperativa*, where the SCA held that when parties enter into a contract, there is always a possibility that a party may not recover its debt, or part thereof, in terms of a contract. In the circumstances, considering public policy, the fear of non-payment of a debt cannot be used as a ground not to comply with a contract.”

¹⁵ [2023] ZAKZPHC 84.

- [45] The mere existence of a risk does not relieve the Employer of its obligation to pay the Contractor. I accordingly find that the Contractor is entitled to its payment.
- [46] The counterapplication is limited to a stay of enforcement pending the outcome of a review application. The Employer contends that such review is necessitated by the adjudicator's alleged jurisdictional overreach and procedural misconduct – allegations that, if established, would vitiate the award and disentitle the Contractor from enforcing it. However, the Employer has not joined the adjudicator in these proceedings. It is the Employer who bears the obligation to initiate a fresh review application, should it choose to do so. The relief sought in the counterapplication is accordingly interlocutory in nature. While a stay might serve to preserve the status quo, it cannot be granted where it would have the effect of prejudging the enforcement rights that flow from the adjudicator's award.
- [47] The Employer's stated intention to review the adjudicator's decision does not justify a departure from its obligation to pay. The *pay now, argue later* principle applies without exception here. The Employer entered into the contract with full knowledge that the Contractor had only a single project in this jurisdiction and cannot now rely on that fact to resist an obligation it assumed under the contract. To require the funds to be placed in a trust account would, in the circumstances of this matter, undermine the very purpose of interim payment through adjudication and effectively deprive the Contractor of the benefit of the adjudicator's determination pending the resolution of a dispute that remains to be properly ventilated.

Conclusion

- [48] As stated above, it is not for this Court to adjudicate upon the alleged overreach or procedural misconduct of the adjudicator. Those are matters to be determined in appropriate review proceedings. What is material for present purposes is that the adjudicator's determination is binding and enforceable pending any such challenge, and the Employer is accordingly obliged to comply with it. The Employer's assertion that it intends to review the adjudicator's decision cannot operate to delay or derail the Contractor's entitlement to payment. Having regard

to the pay now, argue later principle and the authorities discussed above, the counter application cannot succeed.

Costs

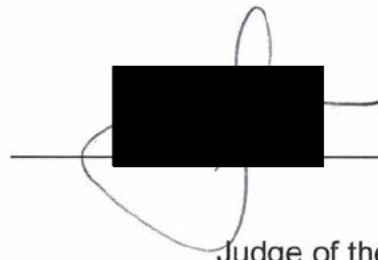
[49] In exercising my discretion on costs, I agree with the Contractor's contention. The Employer has offered no satisfactory explanation for the delay in filing its answering affidavit. Moreover, the Employer failed to pay the adjudicator's fees, which were ultimately paid by the third party. These circumstances, viewed cumulatively, demonstrate conduct that unnecessarily delayed the resolution of the matter and placed an unwarranted burden on the Contractor. I am satisfied that a punitive costs order is warranted.

[50] Having regard to the above, the following order ensues:

Order

1. The First Respondent shall forthwith and immediately give effect to the decision of the Adjudicator dated 13 September 2024 and published on 24 October 2024 ("the decision").
2. The First Respondent shall forthwith and immediately cause to be certified and thereafter pay, the amounts awarded in the decision, namely:
 - 2.1. Compensation events - R71 819 190.07 (seventy-one million eight hundred and nineteen thousand one hundred and ninety rand and seven cents);
 - 2.2. Repayment of low-performance damages of R129 041 642.79 (hundred and twenty-nine million and forty-one thousand six hundred and forty-two rand and seventy-nine cents);
 - 2.3. Interest thereon as provided for in core clauses 51.3 and 51.4 of the contract between the parties.

3. The First Respondent shall forthwith and immediately pay the Applicant the sum of R178 681.25 (one hundred and seventy-eight thousand, six hundred and eighty-one rand and twenty-five cents), as provided for in the Adjudicator's addendum decision dated 24 October 2024, together with interest thereon at the currently prevailing Prescribed Rate of Interest calculated from 24 October 2024 to date of final payment.
4. The orders in paragraphs 1, 2 and 3 *supra* shall endure until such time, if at all, that the said decision of the said Adjudicator is revised in amicable settlement or an arbitral award.
5. Costs of this application, as between attorney and client.



NP MALI
Judge of the High Court,
Johannesburg

Date of Hearing: 26 February 2026
Date of Judgment: 1 September 2026

APPEARANCES

For the Applicant: Bruce Berridge SC
Instructed by: SJ Pratt Attorneys

For the Respondent: DA Turner SC & DS Hodge
Instructed by: Le Roux Lane Inc.