

Frivolous litigation to frustrate the ends of justice

Ekurhuleni West College v Segal and Another (1287/2018) [2020] ZASCA 32 (2 April 2020)

1. This analysis deals with the judgment of the Supreme Court of Appeal (**SCA**) in an appeal from the Gauteng Division of the High Court, Pretoria (**the court of first instance**). The judgment of the SCA (**SCA's judgment**) in the matter concerns the enforcement of an adjudicator's decision, as well as the principles that apply when a party seeks to review and have the adjudicator's decision set aside. An application was launched in the court of first instance for the review and setting aside of an adjudicator's decision.¹ In a counterapplication, the opposing party sought an order for the enforcement of such decision.
2. A written JBCC construction contract (**the JBCC contract**)² had been concluded between Ekurhuleni West College (**the College**) and Trencon Construction (Pty) Ltd (**Trencon**). In terms of the JBCC contract, the College employed Trencon as its contractor to build a conference centre on its property. Close to practical completion of the conference centre, numerous disputes arose between the parties that were referred to the first respondent (**the adjudicator**) for determination in terms of the provisions of the JBCC contract.³
3. The parties were contractually bound to resolve their disputes in accordance with the express provisions of the JBCC contract, which prescribed the procedure to be followed for the settlement of disputes in accordance with the JBCC Adjudication Rules (**the Rules**). As a starting point, in terms of the Rules, adjudication is defined to be an accelerated form of dispute resolution in which a neutral person, i.e. the adjudicator, determines the dispute as an expert and not as an arbitrator.⁴ The JBCC contract expressly provides that the adjudicator's determination is binding on the parties unless and until it is varied or overturned by an arbitration award.
4. The Rules permit three sets of documents to be exchanged between the parties, *viz.*, a statement of claim, a statement of defence and a replication. The Rules also vest the adjudicator with a discretion as to whether or not to request further information from either or both of the parties and whether or not he/she is required to conduct a hearing for purposes of the determination he/she is to make.

¹ *Ekurhuleni West College v Segal and Another* (26624/2017) [2018] ZAGPPHC 662 (29 August 2018).

² The contract in question is self-evidently the principal building agreement of the Joint Building Contracts Committee (**JBCC**).

³ SCA's judgement: Para [2], pp. 2 and 3, where the relevant provisions of Clause 40 of the JBCC contract are set out.

⁴ *Ibid.*, para [3], p. 4.

5. Trencon filed its statement of claim, the College filed its statement of defence, and Trencon filed its replication thereafter. Despite the fact that the Rules did not provide for the exchange of any further submissions, the College submitted a further response – a rejoinder. Trencon objected to this. The adjudicator informed the parties that he would not consider the rejoinder.⁵ Thereafter, the adjudicator requested additional information from Trencon only. He also decided that it was unnecessary to conduct a hearing.⁶ He ultimately found in favour of Trencon and directed the College to make payment of certain amounts to Trencon.⁷
6. The College filed a notice of dissatisfaction in terms of the JBCC contract, referring the matter to arbitration.⁸ In addition, it launched an application for the review and setting aside of the adjudicator’s determination. However, these actions by the College did not absolve it from making payment to Trencon as per the adjudicator’s determination in terms of the JBCC contract. The College did not do so.
7. The grounds of review relied upon by the College were twofold:
 - 7.1 *First*, that the adjudicator failed to comply with the rules of natural justice as he –
 - (i) refused to have regard to the College’s rejoinder;⁹
 - (ii) had requested information from Trencon only – and not also from the College;¹⁰ and
 - (iii) by deciding not to conduct a hearing.¹¹
 - 7.2 *Second*, the determination was challenged on the substantive merits of the claims that had been allowed by the adjudicator.¹²
8. The court of first instance dismissed the College’s application with a punitive costs order and granted judgment in favour of Trencon’s counterapplication for the enforcement of the adjudicator’s decision.¹³
9. Pursuant to leave having been granted, the matter came before the SCA. The SCA upheld the court of first instance’s judgment. The SCA’s judgment further reinforces and

⁵ *Ibid.*, para [7], p. 5.

⁶ *Id.*

⁷ *Ibid.*, para [8], p. 5.

⁸ *Ibid.*, para [9], p. 5.

⁹ *Ibid.*, para [10], pp. 5 and 6.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Ibid.*, para [11], p. 6.

delineates the principles to be applied to the enforceability of an adjudicator's determination in South Africa. Moreover, it was called upon to pronounce on the suitability or otherwise of the initiation of review proceedings in circumstances where the disputes between the parties had, post the adjudicator's determination, been referred to arbitration in terms of the JBCC contract.

10. The most pertinent and fundamental principles derived from this matter are the following:
 - 10.1 The very nature of an adjudication process is *sui generis* in the sense that it is governed by contract and, as such, is not regulated by any statutory provision or the common law;¹⁴
 - 10.2 An adjudicator's determination is binding on the parties and enforceable in court proceedings as a contractual obligation, unless and until the determination has been overturned or varied in arbitration proceedings;¹⁵
 - 10.3 Once a party issues a notice of dissatisfaction of an adjudicator's decision and refers the matter to arbitration, the adjudicator's decision will accordingly be revisited during a further step in the agreed contractual procedure for the settlement of the parties' disputes. To this end, the adjudicator's determination will be subsequently reconsidered. The launching of an application to review in such circumstances, will inevitably require of the court to review ongoing and incomplete proceedings;¹⁶
 - 10.4 Other than in exceptional instances, such as where an adjudicator lacks jurisdiction or where he/she has committed a gross procedural error and grave and irreparable harm might follow,¹⁷ an adjudicator's determination is immediately binding and enforceable, irrespective as to the correctness of the merits thereof.¹⁸ As such, judicial review is only concerned with the fairness and regularity of the procedure by which the decision was reached;¹⁹
 - 10.5 In the case of a tribunal created by contract (such as the adjudicator in this instance), the obligation to observe the basic and rudimentary principles of natural justice derives from the agreed or implied terms of the contract between the

¹⁴ *Ibid.*, paras [13] to [15], pp. 6 and 7.

¹⁵ *Id.*

¹⁶ *Ibid.*, para [18], p. 8.

¹⁷ *Ibid.*, paras [19] and [20], p. 8, where, among other authorities, the erstwhile Appellate Division's well-known judgment in **Wahlhaus and Others v Additional Magistrate, Johannesburg and Another** 1959 (3) SA 113 (A) at 119H-120B, is referred to.

¹⁸ *Ibid.*, para [22], p. 9.

¹⁹ *Ibid.*, para [16], p. 7.]

parties. The test is whether such principles are to be implied as tacitly included in the contract between the parties, subject always to the expressed terms stated therein, as it is those contractual provisions that regulate the process. If these express contractual provisions are not directly challenged as being contrary to public policy, there can be no tacit importation of any rule of natural justice into the contract between the parties;²⁰

- 10.6 Bearing in mind that judicial review is not concerned with the correctness or otherwise of an adjudicator's decision on the merits, but only with proven unfairness and irregularity in procedure, a court should not engage in the substantive merits of the parties' dispute;²¹
- 10.7 The nature and purpose of an adjudication process in terms of a building contract, such as that ordained in the JBCC contract, was designed for the summary and interim resolution of disputes. When an adjudicator is given wide and inquisitorial powers to resolve disputes as inexpensively and expeditiously as possible, and the parties agree to be bound by his/her determination, the parties must be held to their contract and the remedies provided therein;²²
- 10.8 Notwithstanding the fact that an adjudication is not subject to the common law, it does not necessarily follow that the rules of natural justice will not apply. While a court has the power to restrain illegalities, such power is sparingly exercised and only '*in rare cases where grave injustice might otherwise result or where justice might not by other means be attained*';²³ and
- 10.9 If a party does not honour its/his/her contractual obligations, but seeks, instead, to avoid enforcement of an adjudicator's determination by the launching of frivolous litigation in order to frustrate the process, same will amount to an abuse of the process of court and such party likely risks an adverse order for costs being granted against him/her/it.²⁴

Adv K Bailey, SC FAArb (SA)
Member of the Johannesburg Bar

²⁰ *Ibid.*, paras [13] to [15], pp. 6 and 7.

²¹ *Ibid.*, para [16], p. 7.

²² *Ibid.*, paras [21] and [22], pp. 8 and 9.

²³ *Ibid.*, para [19], p. 8.

²⁴ *Ibid.*, para [23], p. 9.