

## What happens if an adjudicator does not adhere to the contractually prescribed time limits in terms of the NEC 3 engineering and construction contract?<sup>1</sup>

1. Adjudicators are always faced with strict time constraints. This is so, irrespective of which form of contract applies. The importance of adhering to the prescribed time periods, and the consequences of failure to comply with them, cannot be overemphasised sufficiently.
2. The judgment in **Group Five Construction (Pty) Ltd v Transnet SOC Ltd<sup>2</sup> (Group Five)**, is instructive and should provide guidance to adjudicators. The judgment is discussed below.
3. The relevant facts were as follows:
  - 3.1 The parties concluded a written engineering and construction contract, incorporating the NEC Engineering and Construction Contract (3<sup>rd</sup> Edition, June 2005) (**NEC 3**);<sup>3</sup>
  - 3.2 A dispute arose and an adjudicator was appointed on 21 April 2018. The adjudicator confirmed his appointment on 30 April 2018. The referral to the adjudicator was submitted on 4 May 2018 by the applicant, i.e. Group Five Construction (Pty) Ltd (**Group Five Construction**). The respondent, i.e. Transnet SOC Ltd (**Transnet**), filed its response on 30 May 2018;<sup>4</sup>
  - 3.3 The parties proceeded to exchange documents. On 25 June 2018, Group Five Construction stated that the adjudicator's determination was due within four weeks after 29 June 2018;<sup>5</sup>
  - 3.4 On 19 July 2018, the adjudicator requested an electronic copy of the NEC 3 from Group Five Construction. A written (hard) copy of the NEC 3 already had been supplied to the adjudicator with the referral. The adjudicator, on 30 July 2018, requested the parties to allow him an additional seven calendar days to finalise a request for further

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<sup>1</sup> As published by the Institute of Civil Engineers (ICE).

<sup>2</sup> (Case No. 45879/2018) [2019] ZARGPHC 328 (28 January 2019).

<sup>3</sup> **Group Five**, para [2].

<sup>4</sup> **Group Five**, para [3]

<sup>5</sup> **Group Five**, para [4].

information, after which he would finalise his determination within four weeks;<sup>6</sup>

- 3.5 On 31 July 2018, Transnet refused to grant the extension to the adjudicator as requested. It delivered a notice to refer the dispute to the tribunal on the same day. Transnet indicated, on 6 August 2018, that its notice to refer the dispute shall stand and that the adjudicator's intention to proceed with the adjudication was at his peril. This notwithstanding, the adjudicator, during August 2018, communicated with and received information from Group Five Construction without any further participation by Transnet. The adjudicator published his determination on 18 September 2018;<sup>7</sup>
- 3.6 Group Five Construction applied to the High Court for an order that the adjudicator's determination of 18 September 2018 be given effect to. It sought payment of R74 940 872.82 (excluding VAT) and interest;<sup>8</sup> and
- 3.7 Transnet resisted the application. The Court held in its favour and dismissed the application with costs.<sup>9</sup>
4. Transnet contended that the adjudicator failed to publish his decision within four weeks from 29 June 2018. According to it, the adjudicator should not have proceeded with the adjudication without the consent of both parties. Transnet's argument was that, by delivering a notice to refer the dispute to the tribunal on 31 July 2018, the adjudication process was stopped and the adjudicator was disempowered from continuing with the adjudication.<sup>10</sup>
5. Option W1 of the NEC 3 applied to the adjudication. It provides, among other things, that the adjudicator must decide the dispute and notify the parties within four weeks of the end of the period for receiving information. The four-week period could be extended if the parties consented thereto.<sup>11</sup>
6. For Group Five Construction, it was argued that the adjudicator was entitled to an extension of time for another four weeks from 19 July 2018, when the adjudicator

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<sup>6</sup> **Group Five**, para [5].

<sup>7</sup> **Group Five**, para [6].

<sup>8</sup> **Group Five**, para [1].

<sup>9</sup> **Group Five**, para [29].

<sup>10</sup> **Group Five**, para [16].

<sup>11</sup> **Group Five**, para [7].

requested an electronic version of the NEC 3. Therefore, according to Group Five Construction, it was not necessary for the adjudicator to have requested the parties for an extension of time, as he did on 30 July 2018.<sup>12</sup> On the other hand, Transnet contended that the adjudicator had no reason to request the NEC 3 in electronic format on 19 July 2018, as he already had a hard copy of it. This, according to Transnet, is why the adjudicator made the request for an extension of time on 30 July 2018, which Transnet had refused.<sup>13</sup>

7. The case for Group Five Construction was that the adjudicator's determination remains binding and enforceable, even if published long after expiry of the four week period. Group Five Construction conceded that the adjudicator's decision was late, but contended that it was not stipulated in the NEC 3 that the determination will be rendered invalid if it was published after the four week period.<sup>14</sup>
8. The Court (*per* Twala J) reviewed case law concerning the interpretation of contracts and stated that:<sup>15</sup>

'.... the Court must consider all the facts and the circumstances under which such document or contract was concluded. The starting point remains the words in the document, the background facts and the intention of the parties.'
9. The court further pointed out that clauses W1.3(3) and W1.3(8) of the NEC 3 do not provide what would happen if the parties do not agree to the extension of the four week period for the publication of the adjudicator's determination. The Court adopted the viewpoint that the requirement of the parties' consent was to give them some control over the process, should they find themselves saddled with a recalcitrant adjudicator. According to the court, the inescapable conclusion is that absent the consent of the parties to an extension of time '*... the adjudicator should publish his report on due date, failing which his mandate is terminated.*' Consequently, the adjudicator was not competent to proceed beyond the prescribed time period in the absence of consent from both parties.<sup>16</sup>
10. What is further noteworthy in the judgment, and which adjudicators ought to pay heed to, is the fact that the court found:

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<sup>12</sup> **Group Five**, para [12].

<sup>13</sup> **Group Five**, para [15].

<sup>14</sup> **Group Five**, para [11].

<sup>15</sup> **Group Five**, para [17].

<sup>16</sup> **Group Five**, para [24].

- 10.1 First, that the adjudicator did not earn himself an extension of time by making the request for further information on 19 July 2018, when such information was already in his possession;<sup>17</sup> and
- 10.2 second, that the continued communications by the adjudicator with Group Five Construction after Transnet had refused any further participation in the adjudication, amounted to a flagrant disregard of the *audi alteram partem* principle.<sup>18</sup>
11. It is also necessary to consider the relevant clauses of the NEC 3 in this case. In my view, the following two clauses are pertinent:
- 11.1 'W1.3(8) The Adjudicator decides the dispute and notifies the Parties and the Project Manager of his decision and his reasons within four weeks of the end of the period for receiving information. This four-week period may be extended if the Parties agree';<sup>19</sup> and
- 11.2 'W1.4(3) If the Adjudicator does not notify his decision within the time provided by this contract, a Party may notify the other Party that he intends to refer the dispute to the tribunal. A Party may not refer a dispute to the tribunal, unless this notification is given within four weeks of the date by which the Adjudicator should have notified his decision.'<sup>20</sup>
12. It is clear from the facts of this case that the period for publication of the adjudicator's decision ended on 27 July 2018. On 31 July 2018, Transnet invoked the provisions of clause W1.4(3) and, simultaneously, it also refused the adjudicator's request for an extension of time. This clearly brought the adjudication to a halt.
13. The question that arises is this: What would have been the case should Transnet not expressly have refused consent and invoked the provisions of clause W1.4(3)? At the heart of the court's judgment lies the absence of the parties' consent to extend the four week period for the publication of the adjudicator's determination. It appears that the mere absence of their joint consent has the effect of terminating the adjudication process when the period expires within which the adjudicator's determination is due.
14. However, it could be argued that option W1 of the NEC 3 does not expressly state that the failure by an adjudicator to comply with the time periods stipulated in clause W1.3(8) automatically has the effect of bringing the adjudication proceedings to an

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<sup>17</sup> *Group Five*, para [26].

<sup>18</sup> *Group Five*, para [27].

<sup>19</sup> *Group Five*, para [7].

<sup>20</sup> *Ibid.*

end. In this regard, the judgment in **Freeman NO and Another v Eskom Holdings Ltd**<sup>21</sup> (**Freeman**) could be of assistance.

15. In **Freeman**, the court (*per* Kathree-Setiloane AJ (as she then was)) dealt with two claims arising out of a written engineering and construction contract, concluded on 14 May 2004.<sup>22</sup> It appears that it was an earlier edition of an NEC contract.<sup>23</sup> The court referred to, among others, the following two clauses:

15.1 Core Clause 90.2, which provides:<sup>24</sup>

'The Adjudicator settles the dispute by notifying the Parties and the Project Manager of his decision, together with his reasons, within the time allocated by this contract. Unless and until there is a settlement, the Parties and the Project Manager proceed as if the action, inaction or other matter disputed, were not disputed. The decision is final and binding unless and until revised by the tribunal.'

15.2 Core Clause 93.1, which provides:<sup>25</sup>

'If after the Adjudicator notifies his decision or fails to do so within the time provided by this contract, and a Party is dissatisfied, that Party notifies the other Party of his intention to refer the matter which he disputes to the tribunal.'

16. The adjudicator's decisions were late. The defendant (i.e. Eskom Holdings) contended that they were therefore not binding.<sup>26</sup> The Court did not agree. It found that, in the absence of a clause which makes time of the essence, failure by an adjudicator to deliver his or her decision within the stipulated time does not render the adjudicator's delayed decision invalid.<sup>27</sup> The Court further pointed out that the agreed remedy for a delayed adjudicator's decision would be a notice in terms of Core Clause 93.1 of the contract. It was common cause that no such notice had been given.
17. In my view, two important features distinguish the judgment in **Freeman** from the judgment in **Group Five Construction** discussed herein. They are:

17.1 The wording of Core Clause 90.1 in **Freeman**, on the one hand, as opposed to the wording of Clause W1.3(8) in **Group Five Construction**, on the other; and

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<sup>21</sup> 43346/09 [2010] ZAGPJHC 29 (23 April 2010).

<sup>22</sup> **Freeman**, para [1].

<sup>23</sup> **Freeman**, para [2].

<sup>24</sup> **Freeman**, para [22].

<sup>25</sup> **Freeman**, para [26].

<sup>26</sup> **Freeman**, para [18].

<sup>27</sup> **Freeman**, para [25].

- 17.2 the absence of a notice in *Freeman* by the party dissatisfied with the adjudicator's failure to deliver the decision on time, in contrast to the situation in *Group Five Construction*, where such notice was given properly.
18. The effect of the judgment in *Freeman* is that a belated decision by the adjudicator remains contractually binding and enforceable, unless and until revised by a tribunal, which would be triggered by notice in terms of Core Clause 93.1.<sup>28</sup>
19. I am of the view that even if the reasoning in *Freeman* can be applied to a dispute arising out of a NEC 3, such as the one in *Group Five*, the reasoning of the judgment in the latter case is to be preferred. This is simply because an adjudicator operates as a tribunal created by contract, and express contractual provisions regulate the procedure in those instances.<sup>29</sup>
20. Therefore, if the contract stipulates that the adjudicator's determination (or decision) must be published within four weeks, it follows it will be rendered invalid if it is published outside this time period, i.e. unless such period is extendable with the parties' consent and such consent is timeously obtained. It follows that where the parties' consent is lacking, the adjudicator will be operating outside the express terms governing his or her contractual appointment where the determination is not published within the contractually ordained period.
21. This underscores the importance of observance by an adjudicator (and other professionals involved in similar dispute resolution processes) of the strict terms of the contract. Failure to comply with those terms may have serious consequences, not only for the adjudicator but also for the parties. These consequences will entail the time and costs wasted on the failed adjudication proceedings, as well as possible further lengthy and costly proceedings before a tribunal to have the dispute resolved.

**ADV. K BAILEY, SC, FAArb (SA)**

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19 January 2021

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<sup>28</sup> *Freeman*, para [27].

<sup>29</sup> *Ekurhuleni West College v Segal and Another*, (1287/2018) [2020] ZASCA 32 (2 April 2020), para [15].