THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1287/2018

In the matter between:

EKURHULENI WEST COLLEGE **APPELLANT**

and

STANLEY HAROLD SEGAL **FIRST RESPONDENT**

TRENCON CONSTRUCTION (PTY) LTD **SECOND RESPONDENT**

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

Coram: PONNAN, VAN DER MERWE, MOLEMELA, DLODLO and NICHOLLS JJA

Heard: 17 February 2020

Delivered: 2 April 2020

Summary: Review – adjudicator's determination under a building contract susceptible to revision in pending arbitration – proceedings uncompleted – review generally entertained only to prevent grave injustice – no such circumstance shown – high court correctly dismissed review application.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (De Vos J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Van der Merwe JA (Ponnan, Molemela, Dlodlo and Nicholls JJA concurring)

[1] The appellant, the Ekurhuleni West College (the College), is a public college established as a juristic person in terms of s 3 of the Continuous Education and Training Act 16 of 2006. In terms of a written building contract, the College employed the second respondent, Trencon Construction (Pty) Ltd (Trencon), to build a conference centre on its premises. By the time that the construction came to be 'practically completed' within the meaning of the building contract, various disputes arose between the parties. Trencon referred these disputes to the first respondent, Mr Stanley Harold Segal (the adjudicator) for adjudication. Aggrieved by the adjudicator's determination, the College approached the Gauteng Division of the High Court, Pretoria for the review and setting aside thereof. Trencon opposed the application and filed a counter-application for the enforcement of the determination. De Vos J dismissed the application with costs and granted the counter-application with costs on the attorney and client scale, in both instances including those of two counsel, but granted leave to the College to appeal to this Court.

[2] Clause 40 of the building contract dealt with the settlement of disputes. The relevant provisions thereof were as follows:

'40.0 **SETTLEMENT OF DISPUTES**

40.1 Should any disagreement arise between the **employer**, including his **principal agent** or **agents**, and the **contractor** arising out of or concerning this **agreement** or its termination, either **party** may give notice to the other to resolve such disagreement.

40.2 Where such disagreement is not resolved within ten (10) **working days** of receipt of such notice it shall be deemed to be a dispute and shall be referred by the party which gave such notice to either:

40.2.1 Adjudication [40.3] where the adjudication shall be conducted in terms of the edition of the **JBCC** Rules for Adjudication current at the time when the dispute was declared or,

40.2.2 Arbitration [40.4] where the arbitrator is to be appointed by the body selected by the parties [41.3] whose rules shall apply. Where no body is stated or where the stated body is unable or unwilling to act, the appointment shall be made by the chairman for the time being of the Association of Arbitrators (Southern Africa). The appropriate rules current at the time when the dispute is declared shall apply.

40.3 Where a dispute is referred to adjudication the following shall apply:

40.3.1 The **adjudicator** shall be appointed in terms of the Rules [40.2.1]

40.3.2 The **adjudicator** shall not be eligible for subsequent appointment as the **arbitrator**

40.3.3 The **adjudicator's** decision shall be binding on the **parties** who shall give effect to it without delay unless and until it is subsequently revised by an **arbitrator** [40.4]

40.3.4 Should either **party** be dissatisfied with the decision given by the **adjudicator**, or should no decision be given within the period set in the Rules, such **party** may give notice of dissatisfaction to the other **party** and to the **adjudicator** within ten (10) **working days** of receipt of the decision or, should no decision be given, within ten (10) **working days** of expiry of the date by which the decision was required to be given the dissatisfied party shall refer the dispute to arbitration.

40.4 Where a dispute is referred to arbitration the following shall apply:

40.4.1 The **arbitrator** shall be appointed at the request of either **party** by the body stated in 40.2.2

40.4.2 The arbitration shall be conducted by the **arbitrator** in accordance with the rules of the body stated in the **contract data**

40.4.3 The **arbitrator** shall have the power to open or revise any certificate, opinion, decision, requisition, or notice relating to the dispute as if no such certificate, opinion, decision, requisition or notice had been issued or given

40.4.4 The **arbitrator's** decision shall be binding on the **parties** who shall give effect to it without delay.'

[3] It is common cause that the rules referred to in clause 40.2.1 of the building contract were the JBCC Adjudication Rules (published: October 2014) (the rules). Under the heading INTERPRETATION, rule 1.1 provided:

'Adjudication is an accelerated form of dispute resolution in which a neutral person determines the dispute as an expert and not as an arbitrator and whose determination is binding unless and until varied or overturned by an arbitration award.'

The rules contained detailed provisions regulating the procedure to be followed by the adjudicator. Rule 5.1 to 5.3 provided for only three sets of submissions, namely a statement of claim, a statement of defence and a replication. In terms of rule 5.7.7, the adjudicator was empowered to require a party, within a period determined by him, to submit any further information, documents or evidence which he might reasonably require to make a determination. Rule 5.5 provided that the adjudicator might conduct a hearing but was not obliged to do so. And, in terms of rule 5.4.1, the adjudicator had to act as an expert and not as an arbitrator in determining the disputes.

[4] Rule 6.1.2 provided that the adjudicator's written determination of a dispute shall include the reasons for his decisions. In line with clause 40.3 of the building contract, rule 6.1.4 provided that the adjudicator's written determination shall be binding on the parties unless and until such determination of the dispute is overturned or varied in whole or in part by an arbitration in terms of the dispute resolution clause of the building contract. Rule 6.2 provided either party with the right to request the adjudicator to correct a patent clerical or arithmetical error or to clarify an ambiguity in the determination and to apply to the high court for the enforcement of the determination.

[5] In compliance with rule 5.1, Trencon submitted a detailed statement of claim with supporting documents, consisting of a total of some 250 pages. In terms thereof Trencon submitted 13 claims for determination by the adjudicator. The College submitted a statement of defence and this was followed by Trencon's replication in terms of rule 5.3.1.

[6] Notwithstanding the absence of any provision therefor in the rules, the College submitted a written response to Trencon's replication (the rejoinder). Trencon objected, which prompted the College to submit a 'letter of appeal'. This essentially contained an appeal to the adjudicator to accept the rejoinder. Matters threatened to get out of hand

when Trencon submitted separate written responses to the rejoinder and the 'letter of appeal'.

[7] Sanity prevailed, however, when the adjudicator informed the parties on 5 February 2017 that the rejoinder would not be considered for purposes of the adjudication. This of course also applied to the submissions made in response to the rejoinder. In a further email dated 14 February 2017, directed to both the College and Trencon, the adjudicator, acting in terms of rule 5.7.7, requested further specified information from Trencon. In the same email the adjudicator informed the parties as follows:

'At this juncture and based on the information requested, I doubt whether it will be necessary to conduct a hearing in order to arrive at my determination.'

Trencon submitted the additional information to the adjudicator and the College on 21 February 2017. Neither the adjudicator's email nor Trencon's additional information elicited any response from the College. In the event, the adjudicator decided that it was unnecessary to conduct a hearing.

[8] On 14 March 2017, the adjudicator made his written determination available. It contained extensive reasons for his conclusions. He only allowed five of Trencon's claims and determined the total amount payable by the College. At the behest of Trencon, the adjudicator corrected a patent error of calculation and made a revised written determination available on 19 March 2017. In terms thereof the amount of R3 253 484,41 was payable by the College to Trencon.

[9] On 28 March 2017 the College gave notice of dissatisfaction in terms of clause 40.3.4 of the building contract and thus referred the disputes to arbitration. This did not, of course, relieve the College of the obligation in terms of clause 40.3.3 to make payment to Trencon without delay. However, the College neglected to do so. Instead, on 13 April 2017, it issued an application to review and set aside the determination.

[10] The grounds for review relied upon in the application were firstly that the adjudicator failed to comply with the rules of natural justice by: refusing to have regard to the rejoinder; not affording the College an opportunity to submit a response to the further information submitted by Trencon at the request of the adjudicator; and not

conducting a hearing. Secondly, the College attacked the determination on the substantive merits of the claims that had been allowed by the adjudicator.

[11] The court a quo dismissed the review application on three independent grounds. These were:
(a) that the notice of dissatisfaction and pending arbitration, on its own, precluded the review application;
(b) that the rules of natural justice were not applicable to the matter and, even so, were not shown to have been breached;
(c) that the adjudicator correctly determined the substantive merits of the claims in question.

[12] As I shall elaborate below, in my view ground (a) is dispositive of the matter. In the result it is not necessary to finally determine grounds (b) or (c). However, for the benefit of the parties, I shall say something about of each of grounds (b) and (c).

[13] In respect of ground (b), the court a quo agreed with the *dictum* in *Sasol Chemical Industries Limited v Odell and Another* [2014] ZAFSHC 11 para 18 that an adjudication of this nature is not subject to the common law. This led the court a quo to conclude that the rules of natural justice did not find application to the matter.

[14] The legal position is, however, more nuanced than this. It was lucidly set out by Botha JA in *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at 645H-646B:
'In the case of a statutory tribunal its obligation to observe the elementary principles of justice derives from the expressed or implied terms of the relevant enactment, while in the case of a tribunal created by contract, the obligation derives from the expressed or implied terms of the agreement between the persons affected. (*Maclean v. Workers' Union*, (1929) 1 Ch.D. 602 at p. 623). The test for determining whether the fundamental principles of justice are to be implied as tacitly included in the agreement between the parties is the usual test for implying a term in a contract as stated in *Mullin (Pty.) Ltd. v. Benade Ltd.*, 1952 (1) S.A. 211 (A.D.) at pp. 214-5, and the authorities there cited. The test is, of course, always subject to the expressed terms of the agreement by which any or all of the fundamental principles of justice may be excluded or modified. (*Marlin's* case, *supra* at pp. 125-130).'
It is clear from the context that this passage dealt with tacit terms of a contract (the unexpressed intention of the parties) and not with implied terms (imported into contracts

by law). See *Ashcor Secunda (Pty) Ltd v Sasol Synthetic Fuels (Pty) Ltd* [2011] ZASCA 158 paras 10-11 and authorities cited there. See also *Marlin v Durban Turf Club and Others* 1942 AD 112 at 127; *Jockey Club of South Africa and Others v Feldman* 1942 AD 340 at 350-351 and *Lamprecht and Another v McNeillie* 1994 (3) SA 665 (A) at 668C-I.

[15] These principles impact on the present matter in the following manner. The adjudicator operated as a tribunal created by contract. Express contractual provisions regulated the procedure that he had to follow. The College did not challenge any of these provisions as being contrary to public policy. It follows that there was no room for the tacit importation of any rule of natural justice into the agreement of the parties. See *Robin v Guarantee Life Assurance Co Ltd* 1984 (4) SA 558 (A) at 567B-F. The College therefore had to show that the express contractual provisions had been breached. Taking into account the nature and purpose of the adjudication, the adjudicator conducted it strictly in terms of these contractual provisions. Therefore there appears to be no merit in the College's reliance on procedural unfairness.

[16] As to ground (c), it is trite that a judicial review is not concerned with the correctness of the result on the substantive merits of the decision in question, but with the fairness and regularity of the procedure by which the decision was reached. Consequently the court a quo erred in entering into and determining the substantive merits of the claims in question. The dismissal of the review application could not properly have been based on ground (c).

[17] I now turn to ground (a). The question is whether the court a quo correctly held that the pending arbitration, by itself, justified the dismissal of the review application. The court a quo reasoned that by referring the disputes to arbitration, the College elected to enforce one of two mutually exclusive remedies, resulting in the waiver of the right to take the adjudicator's determination on judicial review. I do not think that in the circumstances the remedies of arbitration and review were necessarily mutually exclusive. The review was inter alia based on alleged procedural unfairness, whereas the arbitration will entail a rehearing of the merits of Trencon's claims in terms of the building contract.

[18] But ground (a) is based on a different but very firm foundation, one which Trencon was entitled to invoke in support of the order of the court a quo. In terms of clause 40.4.3 of the building contract, the arbitrator will revise the adjudicator's determination as if it had not been issued or given. Thus, the determination will be revisited during a further step in the agreed procedure for the settlement of disputes. It follows that the College required the court a quo to review unterminated proceedings.

[19] In *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A) at 119H-120B, this court held that by virtue of its inherent power to restrain illegalities in inferior courts, the high court may, in a proper case, grant relief by way of review, interdict or *mandamus* against the decision of a magistrates' court given before conviction. This power, said Ogilvie Thompson JA for the court, must be sparingly exercised. The court said that it was impractical to attempt any precise definition of the ambit of this power, for each case must depend on its on circumstances. The court, however, laid down the general rule that the power should be exercised only 'in rare cases where grave injustice might otherwise result or where justice might not by other means be attained'.

[20] These principles have been approved and followed on countless occasions. Their purpose is to limit piecemeal litigation in the interests of justice. They are not limited to criminal proceedings. See *Anglo American Corporation of SA Ltd v Sierzputowski* 1973 (3) SA 709 (T) at 714C-H and *Magistrate, Stutterheim v Mashiya* 2004 (5) SA 209 (SCA) paras 13-14. They have been applied to the proceedings of statutory and non-statutory tribunals. See, for instance, *Brock v SA Medical and Dental Council* 1961 (1) SA 319 (C) at 324B-E and *Laggar v Shell Auto Care (Pty) Ltd and Another* 2001 (2) SA 136 para 14. In my view, the principles laid down in *Wahlhaus* are equally applicable to the present matter.

[21] Did the College place its case for the review of the adjudicator's determination within the ambit of these principles? I think not. Central to the answer to this question is the nature and purpose of the adjudication in terms of the building contract and the rules. It was designed for the summary and interim resolution of disputes. The adjudicator was given wide inquisitorial powers to resolve the disputes as expeditiously and inexpensively as possible. But the adjudicator's determination was not exhaustive

of the disputes, as it may be overturned during the final stage of the dispute resolution process. See, in respect of similar provisions, *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd and Another* [2013] ZASCA 83; 2013 (6) SA 345 (SCA) paras 7-9.

[22] The College agreed to be bound by the adjudicator's determination. Its remedy was to refer the matter to arbitration. It invoked that remedy and could have pursued it expeditiously. In these circumstances holding the College to its contract would not cause grave injustice nor irreparable harm.

[23] It follows that the review application had to fail and the counter-application for enforcement of the determination was correctly allowed. The College complained, however, about the attorney and client costs order on the counter-application and pointed out that the court a quo gave no reasons for a punitive costs order. The absence of reasons for a costs order may indicate that the court did not exercise its discretion judicially. I shall assume in favour of the College that this is the case here and that this court should reconsider the costs of the counter application. In my view the review application amounted to an abuse of process. Instead of forthwith making payment in terms of the interim determination as it was obliged to do and despite having expeditiously invoked the remedy of arbitration, the College went to court with an application that was bound to fail. Thus it intentionally frustrated the rights that Trencon's counter-application aimed to enforce. For these reasons costs on the attorney and client scale was justified.

[24] In the result the appeal is dismissed with costs, including the costs of two counsel.

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C H G VAN DER MERWE

JUDGE OF APPEAL

APPEARANCES

For Appellant:	P Ellis SC, P Ellis (Jnr)
Instructed by:	Roelf Nel Inc., Pretoria
	Honey Attorneys, Bloemfontein
For 1st Respondent:	No appearance
Instructed by:	Gildenhuys Malatji Inc., Pretoria
For 2nd Respondent:	M D Cochrane SC, C de Witt
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