

Dealing with defaulting losers in adjudications

One of the weaknesses of the adjudication process in South Africa is the absence of an effective enforcement process. In the United Kingdom, applications for enforcement are made to the Technology and Construction Court (TCC) a division of the Queen's Bench Division (QBD).

The TCC, as the name implies, is a specialist court with specialist judges who deal with all types of construction, engineering and technology disputes both within the UK and which arise internationally. In particular the court deals with enforcement of or challenges to adjudicators' decisions arising out of the Housing Grants, Reconstruction and Regeneration Act, 1996 (HGRRA) (as amended).

As a consequence, the court has become adept in matters relating to adjudicators' decisions and the enforcement thereof or the setting aside of such decisions. It is also possible to obtain a court order handed down by the TCC within a matter of a few weeks of application which, in turn, results in the rapid enforcement of an adjudicator's decision thus lending efficacy to the entire process.

Obviously, this is only in respect of matters to which the HGRRA applies, and thus is of no application to construction disputes in South Africa.

The South African situation

Where enforcement of an adjudicator's decision becomes necessary in a construction dispute subject to the law of South Africa, it will be necessary to approach the High Court having jurisdiction, on a motion application, that is by way of notice of motion accompanied by a founding affidavit, and such application will be heard by whichever judge is allocated on the day. The probability is that the judge will have little or no experience of construction disputes and may be wholly unfamiliar with the adjudication process. What makes the court application even less attractive is that there are unlikely to be circumstances to warrant urgency and the application will thus go on to the normal motion roll and may take several months before the matter comes before the court.

It is now settled law in South Africa that an adjudicator's decision is immediately binding and save for those rare occasions when an adjudicator has given a decision for which he lacks authority, or has committed a gross procedural error, the decision should be enforced regardless of whether the decision he or she has come to is correct in law or has been made as a consequence of a misinterpretation of the facts as presented.¹

However, for the reasons I have set out above, the nett effect of this unwieldy and slow court process is that the adjudication process is rendered ineffective where the losing party elects to withhold the payment immediately due upon receipt of the adjudicator's decision.

A possible solution

I would like to suggest the following as a possible solution to the problem.

In most of the standard forms of contract currently in use in South Africa, a dissatisfied party may open the door to review by the Tribunal, which is generally by arbitration. The process is to give a Notice of Dissatisfaction within the period specified by the contract. This will not interfere with the immediately binding nature of the decision but merely open the door to having the dispute heard afresh (*de novo*) by an arbitrator. Defaulting parties will thus attempt to delay the enforcement proceedings arising from the adjudicator's decision as long as possible in the hope that they will get a more favourable result from an arbitrator before the court enforces the adjudicator's decision.

This tactic could be eliminated if a small amendment is made to the governing construction contract to the effect that, once a Notice of Dissatisfaction has been issued, no further steps

¹ *Ekurhuleni West College v Segal and Another* (1287/2018) [2020] ZASCA 32 (2 April 2020)

shall be taken to proceed to arbitration until such time as the defaulting party has made payment in full in accordance with the adjudicator's decision.

Of course, this will not prevent a defaulting party from delaying payment and simply allowing the enforcement proceedings to take place. It will however place a significant barrier in place to delay the onset of arbitration proceedings and therefore to ultimately delay the possibility of a reversal of the findings of the adjudicator by an arbitrator.

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