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CONSTRUCTION LAW BULLETIN

SEQUEL TO ENFORCEABILITY OF ADJUDICATORS' DECISIONS

INTRODUCTION

The Bulletin last week entitled "When is an Adjudicator's Decision Unenforceable?" dealt with the decision of the Gauteng High Court in the Framatome case¹ handed down on 30 September 2020.

That decision was taken on appeal to the Supreme Court of Appeal in Bloemfontein (SCA) which has just handed down judgment.²

This Bulletin is a follow on from last week's Bulletin and provides the latest word on the subject. For ease of assimilation and for the benefit of those who have not yet read last week's Bulletin, the content of that Bulletin is reproduced and the SCA decision dealt with at the end.

BACKGROUND

Adjudication is a dispute resolution process created by contract in many modern standard form construction contracts.

A common feature of adjudication clauses is that an adjudicator's decision is binding on the parties, albeit not final, unless neither party gives a notice of dissatisfaction in relation to the decision within a stipulated time limit.

¹ Framatome v Eskom Holdings SOC Ltd, Case No 43535/2019.

² Framatome v Eskom Holdings SOC Ltd 2021 ZASCA 132.

Adjudication was born out of the necessity in a construction contract setting to have a means of resolving disputes speedily without the expeditious execution of the contract being unduly retarded.

Where a losing party fails or refuses to comply with an adjudicator's decision, the successful party's remedy is to apply to court for a court order directing compliance on the part of the loser.

There is a long line of cases in our jurisprudence in which adjudicators' decisions have been enforced despite all manner of ingenious arguments raised by the losing party as to why the adjudicator's decision should not be enforced.

In the nature of adjudication, it is a means of dispensing fairly rough-and-ready justice within what can be considered tight timeframes compared to the timeframes in normal dispute resolution processes.

It is therefore accepted that, whether or not an adjudicator gets it wrong with reference to the facts or the applicable law, his decision is binding and enforceable more so as it is open to the loser to take the dispute forward for final determination usually by arbitration or by the decision of a court.

This also means that an adjudicator's decision is not amenable to being reviewed and set aside by a court. There has been more than one recent unsuccessful attempt by a losing party to have a court set an adjudicator's decision aside on review.

A review in this sense is not an appeal but an attack on the procedural propriety of the process. In one case the loser complained that the principles of natural justice had not been observed because it had not been given an adequate opportunity to present its case although the specific procedural steps provided for in the adjudication clause had been properly observed.

First of all the court held that the principles of natural justice do not apply in adjudication and secondly that any review of an adjudication decision was inappropriate vis-à-vis the losing party's right and entitlement to have the adjudicator's decision set aside in arbitration proceedings.

JURISDICTION

One of the very few grounds for avoiding compliance with an adjudicator's decision arises if the adjudicator has rendered a decision which manifestly falls outside of the scope of what he has been called upon to decide.

This very question arose in a recent case in the Johannesburg High Court.³

The relevant facts in the Framatome case were that:

- Eskom contracted with Framatome ("the Contractor") on an NEC3 (June 2005) contract to *inter alia* design and deliver steam generators for the Koeberg Power Station.
- The works were divided into three sections, each with their own Key Date for completion, with the overall contract completion date being fixed as 31 August 2019.
- On 29 May 2017 the Project Manager notified the Contractor of a redefinition of the Key Dates for the three sections comprising the works.

³ Framatome v Eskom Holdings SOC Ltd, Case No 43535/2019.

- The Contractor considered the notification to amount to a compensation event under the Contract, namely an event entitling it to compensation in the form of money and/or time, with which viewpoint the Project Manager took issue.
- This dispute was referred for determination by adjudication in what was described as Referral 7.
- The adjudicator decided that the event was indeed a compensation event but that the financial and other consequences of the event required to be assessed, and he issued a directive that the Project Manager proceed to assess the compensation event concerned.
- The adjudicator, despite being urged to do so by the Contractor, declined to rule that the Contractor's assessment of the compensation event should be adopted.
- Subsequently, a dispute arose between the Contractor and the Project Manager as to whether or not the Project Manager had, as required in terms of the adjudicator's decision, properly assessed the compensation event. This dispute was referred to adjudication as Referral 11.
- The adjudicator decided in relation to Referral 11 that the Project Manager had not properly and timeously assessed the compensation event and therefore, as provided for in the Contract, the Contractor's assessment (quotation) in relation to it was deemed to be accepted. Note that the compensation event regime in the NEC provides for the Project Manager to assess a compensation event and, if he fails to do so despite a warning notice, the Contractor's assessment or quotation of the compensation event is deemed to be binding.
- The notice of dispute in relation to Referral 11 described the issue as follows:

“... the Contractor notifies the Project Manager of a dispute regarding the Project Manager's assessment of March 26 2019 of changed Key Dates 2, 14 and 24 which is incorrect ...”
- In his decision on Referral 11, the adjudicator framed the question as being whether the Project Manager had failed to make the assessment of the compensation event in due time and if not what the consequences of that were.
- The adjudicator went on to conclude that, because the Project Manager had not made a full assessment timeously, the Contractor's quotation was deemed to have been accepted.

GAUTENG COURT'S DECISION

Eskom argued that the adjudicator had given a decision in respect of a dispute which had not been referred to him and as such his decision, holding that the Contractor's quotation was deemed to be accepted, was a nullity and without any legal force or effect. The Contractor argued that to adopt such a standpoint in relation to adjudications would undermine the rationale of adjudication.

Although Eskom's argument in this regard was based on the principles applicable in arbitrations, it also referred to English cases dealing with jurisdictional challenges in relation to adjudicators' decisions.

The sense of the English cases is that:

- If an adjudicator had no jurisdiction to decide a dispute, the court may refuse to enforce the adjudicator's decision. This does not amount to a review and setting aside of the decision but simply a refusal by a court to enforce the decision. The review and setting aside is left to the arbitration tribunal.
- An adjudicator has jurisdiction to decide a dispute which is the subject of a notice of adjudication but has no jurisdiction to decide something which is not covered by the relevant notice of adjudication.
- If a respectable case has been made out for disputing an adjudicator's jurisdiction, a court will not uphold it.
- Courts will uphold adjudicators' decisions unless it is plain that the question which the adjudicator has decided was not the question referred to him.

The court adopted the view that South African law ought to follow English law in relation to the question of an adjudicator's jurisdiction. The judge said that adjudicators' decisions should be enforced as binding on the parties unless a respectable case or a clear case has been made out that the adjudicator exceeded his jurisdiction. If it is not clear, the parties must be held bound by the decision in the interim.

On the facts the judge concluded that the question which had been referred to the adjudicator for decision was whether the Project Manager's assessment was correct and not the question as to whether the Project Manager had assessed the compensation event timeously where the failure to do so might bring the deeming provisions in the Contract into play.

As such, the court concluded that the adjudicator had answered the wrong question which fell outside the scope of his jurisdiction and as such his decision that the Contractor's quotation was binding was invalid and unenforceable.

Framatome, aggrieved with this decision, sought leave to appeal which the Gauteng court refused. Leave was however subsequently granted by the SCA.

SCA'S DECISION

In its decision the SCA came out strongly in favour of party autonomy and the upholding of adjudicators' awards.

In its view the Gauteng court's decision impermissibly introduced a subjective judicial discretion into the enforcement of the adjudicator's award by concluding that Eskom had good prospects in an arbitration of successfully establishing that the adjudicator had acted outside his jurisdiction.

Apart from concluding that the High Court's finding that the adjudicator had answered the wrong question was not borne out by the facts, the court took into account the following pertinent factors in deciding the matter:

- Eskom had not placed the adjudicator's jurisdiction in question during the adjudication proceedings.

- To uphold Eskom's argument would substantially undermine the effectiveness of the scheme of adjudication.
- Provided an adjudicator acts impartially, adjudicators are permitted to take the initiative in ascertaining the facts and the law.
- An adjudication decision is provisional in nature and courts should not interrogate the merits of adjudicators' decisions.
- Read together, Referrals 7 and 11 clearly placed the compensation event and its assessment in the frame of what the adjudicator had been called on to decide.
- The minute dissection by the High Court of the language in the referral documents which created too narrow an ambit of the adjudicator's jurisdiction was to be eschewed.

In the event, the SCA reversed the Gauteng High Court's decision and upheld the decision of the adjudicator.

CONCLUSION

Despite the SCA having overruled the Gauteng High Court in this instance, the principles enunciated in the latter decision, derived from the English cases, remain valid. If an adjudicator is shown to have clearly strayed beyond his remit, his decision will be open to challenge on that basis.

Parties must accordingly take care to articulate the dispute which is to be referred for adjudication as broadly as is reasonably feasible to avoid problems down the line in relation to enforcing the adjudicator's decision.

The SCA decision sends a strong signal to our courts that, all things being equal, adjudicators' decisions are to be enforced.

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