IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

Date heard: 11/02/2021

Date Delivered: 11/05/2021

In the matter between:

ZINGWAZI CONTRACTORS CC

(REG. NO: 2007/005553/23) **APPLICANT**

and

EASTERN CAPE DEPARTMENT OF

HUMAN SETTLEMENTS **FIRST RESPONDENT**

THE HONOURABLE Ms NONKQUBELA N.

PIETERS, N.O., MEC FOR THE EASTERN CAPE

DEPARTMENT OF HUMAN SETTLEMENTS **SECOND RESPONDENT**

TABISA POSWA, HEAD OF DEPARTMENT,

EASTERN CAPE DEPARTMENT OF HUMAN

SETTLEMENTS **THIRD RESPONDENT**

MS E G DUITLWILENG, CHIEF FINANCIAL OFFICER,

EASTERN CAPE DEPARTMENT OF

HUMAN SETTLEMENTS **FOURTH RESPONDENT**

SURESH TIMOTHY GALAHITIYAWA,

CHIEF DIRECTOR, EASTERN CAPE DEPARTMENT

OF HUMAN SETTLEMENTS **FIFTH RESPONDENT**

EDMOND VENN, CHIEF DIRECTOR, EASTERN

CAPE DEPARTMENT OF HUMAN SETTLEMENTS **SIXTH RESPONDENT**

SAKHIWE MBIZA HEAD OF LEGAL SERVICES

EASTERN CAPE DEPARTMENT OF HUMAN

SETTLEMENTS	**SEVENTH RESPONDENT**
THE JOINT BUILDING CONTRACTS COMMITTEE	**EIGHTH RESPONDENT**
ADVOCATE ANTHONIE TROSKIE SC	**NINTH RESPONDENT**
PETER ODELL	**TENTH RESPONDENT**

JUDGMENT

ROBERSON J

Introduction

[1] On 19 December 2014 the applicant and the first respondent concluded a principal building contract (the contract). The contract document was edition 6.1 of the Joint Building Contracts Committee, the eighth respondent (the JBCC). The applicant was to provide a Multi-Purpose Community Centre at Ntsongeni in the Eastern Cape, and the contract value, as increased by a variation order, was R24 802 383.00.

[2] Provision was made in the contract for dispute resolution, by way of settlement, adjudication, arbitration and mediation. With regard to adjudication, clause 30.6.1 provides:

> "The adjudicator shall be appointed in accordance with JBCC Rules for Adjudication current at the time when the dispute was declared and the adjudication shall be conducted in terms of such rules."

Clause 30.6.3 provides:

> "A determination given by the adjudicator shall be immediately binding upon, and implemented by the parties."

Clause 30.6.4 provides:

> "Where the adjudicator has given a determination, either party may give notice of dissatisfaction to the other party and to the adjudicator within ten (10) working days

of receipt of the determination, or an extended time period provided in the JBCC Rules for Adjudication, wherein such dispute is referred to arbitration."

Clause 30.7.1 provides:

> "Where the dispute is referred to arbitration the arbitration shall not be construed as a review or appeal from any adjudicator's determination and that any such determination by the adjudicator shall remain in force and continue to be implemented until overturned by an arbitration award."

Rule 6.1.4 of the JBCC Rules of Adjudication provides:

> "The adjudicator's written determination of the dispute 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 agreement."

[3] In this matter a dispute arose between the parties and the appointed adjudicator, the tenth respondent, made a determination in favour of the applicant, for payment by the first respondent to the applicant of the sum of R12 657 815.80. The first respondent indicated it was dissatisfied with the adjudicator's determination and elected to refer the matter to arbitration. It did not pay in terms of the adjudicator's determination. The ninth respondent was the appointed arbitrator.

[4] The applicant instituted urgent motion proceedings against the first to seventh respondents for an order directing them to prosecute the arbitration proceedings to finality and to pay in terms of the adjudicator's determination. In the event of the first to seventh respondents failing to comply with such orders, an order was sought declaring the arbitration proceedings to have been terminated at the instance of the first respondent, and for judgment against the first respondent for payment in compliance with the adjudicator's determination. On 30 October 2020 an order was made by agreement in

terms of which the applicant's relief was granted, but was suspended pending the determination and finalisation of the second respondent's counter-application. If the counter-application was dismissed, the suspension was to terminate within two days of such dismissal.

Counter-application

[5] It is the counter-application which I am required to decide. The second respondent seeks an order declaring clauses 30.6.3 and 30.7.1 of the contract, and rule 6.1.4 of the JBCC Rules (the impugned provisions), to be unconstitutional and invalid. The counter-application was opposed by the applicant and the JBCC. The JBCC and the ninth and tenth respondents were not parties in the main application and were not parties to the consent order.

[6] The second respondent complied with the provisions of Uniform Rule 16A, namely giving notice to the Registrar of the raising of a constitutional issue.

[7] The founding affidavit in the counter-application was deposed to by the seventh respondent, Mr Sakhiwe Mbiza, who is employed as a legal officer in the second respondent's department. His affidavit consisted mostly of legal argument. He raised two fundamental rights which were allegedly infringed by the impugned provisions: the right to a fair public hearing in terms of s 34 of the Constitution, and the right not to be deprived of property in terms of s 25 of the Constitution.

[8] Mr Mbiza mentioned a number of grounds in support of the s 34 argument, with reference in part to other JBCC Rules of Adjudication besides Rule 6.1.4: the impugned provisions are in conflict with the rule that a judgment is usually suspended pending an appeal or review; the adjudication process does not adhere to the principles of natural justice in that the

adjudicator shall meet in his sole discretion jointly with the parties (rule 5.4.4); the adjudicator may adopt an inquisitorial procedure and shall observe procedural fairness but shall not be obliged to comply with the rules of evidence (rule 5.5.4); the parties are not entitled at such a hearing to be represented by lawyers (5.5.4); the adjudicator may conduct a hearing but is not obliged to do so (rule 5.5.1); an adjudicator's determination may destroy a party even if that party is eventually successful in the arbitration; there is no guarantee that the adjudicator's decision is correct; there is no provision in the Adjudication Rules for security to be provided; and a party who is obliged to pay in terms of an adjudicator's determination may struggle to recover monies which were not due or were overpaid. Mr Mbiza gave three examples of such instances, citing the parties and case numbers and the amounts involved. In a supplementary affidavit Mr Mbiza said that the impugned provisions are against public policy and run counter to economic expedience.

[9] Mr Mbiza acknowledged that for the purposes of the counter-application the merits of the adjudicator's determination were not relevant, but nevertheless proceeded to list various alleged errors on the part of the adjudicator.

[10] The applicant delivered an answering affidavit, deposed to by its sole member, Mr Zothani Magwaza, in which he joined issue with the constitutional challenges.

[11] The answering affidavit of the JBCC was deposed to by Professor Marthinus Maritz. He is an emeritus professor and a former Head of the Department of Construction Economics in the Faculty of Engineering at the University of Pretoria. He is currently the Chief Executive Officer of the JBCC

and has been involved in the development and drafting of the JBCC suite of contracts since 1997.

[12] Professor Maritz explained the role of the JBCC, which was registered in 1997 as a non-profit company. The JBCC is representative of building owners and developers, professional consultants and general and specialist contractors, who contribute their knowledge and experience to the compilation of the JBCC documents. These documents portray the consensus view of the constituent members, are published in the interests of standardisation and good practice, contain an equitable distribution of contractual risk and are for use throughout Africa and elsewhere. The JBCC has a standing Technical Committee consisting of two representatives of each of the constituents. This committee deals with the drafting of new contracts and the updating of existing contracts. Periodic revisions of the contracts are carried out in order to ensure that they remain current.

[13] Prior to 1994 the JBCC contracts did not include adjudication as a dispute resolution process. In 2004 the JBCC contracts introduced the two stage dispute resolution process, providing for adjudication followed by arbitration, with an option for the parties to agree to mediation. In March 2014 Edition 6.1 was issued, the edition which was used in the present case. It substantially redrafted previous editions in order to accommodate legislation such as the Consumer Protection Act 68 of 2008, and to simplify the English used in the contract.

[14] Professor Maritz said that all JBCC documents have been approved by the Construction Industry Development Board (the CIDB) for use by national, provincial and local authorities in South Africa. The CIDB was established in terms of the Construction Industry Development Board Act 38 of 2000 (the

CIDB Act) to lead construction industry stakeholders in construction development. In terms of schedule 3 of the Public Finance Management Act 1 of 1999, the CIDB is a public entity which exercises a public power and performs a public function in terms of the CIDB Act and in terms of s 239 of the Constitution it is an organ of state. Professor Maritz referred to certain sections of the CIDB Act. Section 4 (f) provides that one of the objects of the CIDB is to promote, establish or endorse uniform standards and ethical standards which regulate the actions, practices and procedures of parties engaged in construction contracts. Section 5 (3) (c) provides that the CIDB must promote the standardisation of the procurement process in the construction industry. Section 5 (4) (b) provides that in order to promote uniform and ethical standards in the construction industry the CIDB may initiate, promote and implement national programmes and projects aimed at the standardisation of procurement documentation, practices and procedures.

[15] The CIDB publishes a Standard of Uniformity in the Government Gazette which makes it mandatory for public sector clients to use one of four stated standard form construction contracts, amongst which is the JBCC contract. All four contracts utilise the two-tier dispute resolution system and provide for immediate compliance with an adjudicator's decision pending arbitration, if a party elects to proceed to arbitration. On 1 July 2020 the CIDB approved and endorsed the JBCC contract edition 6.2. Although the CIDB has not specifically endorsed edition 6.1, the dispute resolution provisions in both editions are materially the same. The CIDB has also published Best Practice Guidelines which provide, inter alia, that adjudication should be introduced as a means of dispute resolution in all CIDB recommended contracts, that adjudication shall be applied to all categories of construction contracts, and that the decision of

the adjudicator shall be implemented immediately, whether or not the dispute is referred to arbitration or litigation.

[16] Professor Maritz said that over the last thirteen months, since January 2020, the JBCC has sold an average of 277 hard copies of its contracts per month and 190 electronic copies per month. All the contracts contain the same dispute resolution provisions as in the present case and all incorporate the Adjudication Rules. Were the dispute resolution provisions to be declared unconstitutional, so Professor Maritz stated, the purchasers of the JBCC contracts would be adversely affected.

[17] Professor Maritz explained the reasoning and purpose behind the two-tier dispute resolution system. He said that it is of paramount importance in the construction industry that construction projects be completed on time or with as little delay as possible. Delay is costly for employers who require their projects to be completed for their intended use and delay is costly for contractors who incur unplanned costs. It is accepted in the industry that it is important to keep contracts moving and not to hold up construction works pending lengthy resolution of disputes. Professor Maritz described the adjudication process as essentially a cash-flow measure which is intrinsically linked to the requirements of the construction process and grants interim protection to the interests of both parties to the contract. He said that serious harm would occur if parties were deprived of the option to agree to dispute resolution in the form of adjudication. In the event of a dispute, contractors might suspend works until the dispute is resolved, which would result in delays for the employer and other contractors on the project and involve severe financial implications for the employer. Similarly, while a dispute was pending, an employer might withhold payment which would result in serious cash-flow implications for the contractor. Further, the adversarial nature of arbitration

or court litigation could have a detrimental effect on the parties' relationship and negatively affect their future working relationship.

[18] Professor Maritz said that the adjudication process is internationally recognised and applied and that international confidence in South African construction contracts would be undermined should clauses in contracts providing for adjudication be found to be unconstitutional. In this regard Professor Maritz referred to the United Kingdom Housing Grants, Construction and Regeneration Act of 1996, s 108 of which provides for the right to refer disputes to adjudication and includes, inter alia, that a contract shall provide in writing that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration) or by agreement.

[19] Much of Professor Maritz's affidavit consisted further of legal argument, and reference to case law, with which I shall deal more fully later in this judgment. Briefly, he maintained that there is nothing in the adjudication procedure that offends the constitutional requirement of fair procedure. He referred to a number of the Adjudication Rules, including Rules not referred to by the second respondent, which I believe are important to mention. Rules 2.1 and 2.2 provide that the adjudicator is appointed either by mutual agreement, alternatively, if agreement cannot be reached, either party may request the Chairman of the Association of Arbitrators to appoint an adjudicator. Rules 5.1, 5.2 and 5.3 entitle both parties to submit written details of their cases to the adjudicator and oblige them to submit such details to the other party. Rule 5.4.1 provides that the adjudicator shall act as an expert and not as an arbitrator in determining the dispute. Professor Maritz said that the parties normally appoint an adjudicator with expert knowledge of practical construction, or construction law, or both. Rule 5.4.2 requires the adjudicator

to act with fairness and impartiality to both parties. Rule 5.4.3 obliges the adjudicator to ensure that each party is furnished with a copy of any written communication sent to or received from either party. Should the adjudicator decide to conduct a hearing, which he or she is not obliged to do, Rule 5.5.4 obliges him or her to give notice of the hearing to all the parties and to observe procedural fairness during the hearing. In terms of Rule 5.5.7 the adjudicator has a discretion to require a party within a stipulated time to submit further information, document or evidence which the adjudicator may reasonably require.

[20] Professor Maritz expressed the view that it is accepted that when parties submit to contractual dispute resolution, they submit to a process they intend should be fair. Should an agreement contain provisions which are contrary to public policy, it will be null and void. Merely because adjudication is a quicker and less costly form of dispute resolution does not mean that the rules of natural justice are not applied. In the case of arbitration or adjudication, the parties are free to set their own procedures and the proceedings may be adversarial or inquisitorial, provided that the *audi alteram partem* principle is observed. Similarly, the principle of the requirement of a fair and unbiased hearing will be observed where the parties are free to appoint any decision maker. Should that decision maker display bias, the parties have a remedy but it does not mean that the underlying dispute resolution provision is inherently flawed.

Discussion

[21] In the present matter the second respondent has not persisted in relying on an infringement of s 25 of the Constitution and rests on an infringement of s 34 of the Constitution.

[22] It was submitted on behalf of the second respondent that s 34 of the Constitution is of direct application to the adjudication process, alternatively it is of indirect application.

[23] The matter of *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) concerned the application of s 34 of the Constitution to arbitrations held in terms of the Arbitration Act 42 of 1965. In the majority judgment the following was stated at paragraphs [199] and [200] (footnotes omitted):

> "[199] The first question that arises then is whether section 34 of the Constitution applies to private arbitration. Section 34 provides that:
>
> > "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."
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> In *Chief Lesapo v North West Agricultural Bank and Another*, Mokgoro J on behalf of a unanimous Court reflected on section 34 as follows:
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> > "An important purpose of section 34 is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law."
>
> [200] This comment makes clear that the primary purpose of section 34 is to ensure that the state provides courts or, where appropriate, other tribunals, to determine disputes that arise between citizens. A similar understanding of the section was expressed by Langa CJ in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* where he reasoned:
>
> > "The first aspect that flows from the rule of law is the obligation of the State to provide the necessary mechanisms for citizens to resolve disputes that arise between them. This obligation has its corollary in the right or entitlement of every person to have access to courts or other independent forums *provided by the State* for the settlement of such disputes. Thus section 34 of the Constitution provides as follows . . . ." (My emphasis.)"

[24] Further at paragraph [213] O'Regan ADCJ, writing for the majority, stated (footnote omitted):

> "In considering whether private arbitration fits into the framework of section 34, we have to acknowledge that private arbitration, as conventionally understood, is ordinarily not held in public. It is, as its name implies, a private process. Nor can it ordinarily be said that arbitrators have to be independent in the full sense that courts and tribunals must be. As the *Suovaniemi* case suggests, parties can knowingly consent to an arbitrator who may not be entirely independent. Accordingly, it is not clear that arbitrators can accurately be described as "independent . . . tribunals". As private arbitration proceedings do not, and, if international practice is to be accepted, should not require public hearings, and similarly if private arbitrators need not, as long as parties knowingly accept this, always be "independent", then the language of section 34 does not seem to fit our conception of private arbitration."

[25] And at paragraph [217] the learned judge stated:

> "Despite the choice not to proceed before a court or statutory tribunal, the arbitration proceedings will still be regulated by law and, as I shall discuss in a moment, by the Constitution. Those proceedings, however, will differ from proceedings before a court, statutory tribunal or forum. The first difference is that the process must be consensual – no party may be compelled into private arbitration. The second is that the proceedings need not be in public at all. The third is that the identity of the arbitrator and the manner of the proceedings will ordinarily be determined by agreement between the parties. The party who opts for arbitration will have chosen these consequences."

[26] It was submitted on behalf of the second respondent that arbitration was distinguishable from adjudication, in that arbitration proceedings (i) are more sophisticated and fairer than adjudication proceedings, and (ii) that an arbitration agreement contemplates that the arbitrator will proceed impartially and make a decision after fairly receiving and considering evidence, and submissions from the parties. In my view, and as was submitted on behalf

of the JBCC, adjudication is, like arbitration, consensual and private dispute resolution which feature, together with the feature that the parties ordinarily agree on the identity of the arbitrator or adjudicator, and following *Lufuno*, removes it from the direct application of s 34. I accordingly am of the view that s 34 of the Constitution does not apply directly to the adjudication process, as provided for in the JBCC contract in question and the Adjudication Rules.

[27] Having decided that s 34 does not apply directly to private arbitration, in *Lufuno* O'Regan ADCJ proceeded to consider the relevance of the Constitution to the terms of arbitration agreements. At paragraphs [220] to [222] she stated (footnotes omitted):

> "[220] However, as with other contracts, should the arbitration agreement contain a provision that is contrary to public policy in the light of the values of the Constitution, the arbitration agreement will be null and void to that extent (and whether any valid provisions remain will depend on the question of severability). In determining whether a provision is *contra bonos mores*, the spirit, purport and objects of the Bill of Rights will be of importance. As stated above, it is not necessary to determine what role section 34 might play in this analysis.
>
> [221] At Roman-Dutch law, it was always accepted that a submission to arbitration was subject to an implied condition that the arbitrator should proceed fairly or, as it is sometimes described, according to law and justice. The recognition of such an implied condition fits snugly with modern constitutional values. In interpreting an arbitration agreement, it should ordinarily be accepted that when parties submit to arbitration, they submit to a process they intend should be fair. Fairness is one of the core values of our constitutional order: the requirement of fairness is imposed on administrative decision-makers by section 33 of the Constitution; on courts by sections 34 and 35 of the Constitution; in respect of labour practices by section 23 of the Constitution; and in relation to discrimination by section 9 of the Constitution. The arbitration agreement should thus be interpreted, unless its terms expressly

suggest otherwise, on the basis that the parties intended the arbitration proceedings to be conducted fairly. Indeed, it may well be that an arbitration agreement that provides expressly for a procedure that is unfair will be *contra bonos mores*.

[222] The contractual obligation of fairness accords with the approach of recent legislation regulating arbitration in other jurisdictions. Most notably, perhaps, it accords with section 33 of the United Kingdom Arbitration Act, 1996 which provides that arbitrators have a general duty to act "fairly and impartially . . . giving each party a reasonable opportunity of putting his case and dealing with that of his opponent". This is a general duty that may not be varied by agreement between the parties. In a similar vein, Article 18 of the UNCITRAL Model Law provides:

> "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case".

[28] In *Barkhuizen v Napier* 2007 (5) SA 323 (CC), Ngcobo J (as he then was) stated the following at paragraph [30]:

> "In my view, the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them. It follows therefore, that the approach that was followed by the High Court is not the proper approach to adjudicating the constitutionality of contractual terms."

[29] I consider now whether or not the impugned provisions are contrary to public policy as informed by constitutional values. As in *Barkhuizen*, the constitutional challenge in the present matter relies on s 34 of the Constitution. Do the impugned provisions deny a party in the position of the first respondent, the employer in the contract, a fair hearing? The essence of the complaint is the immediate binding nature and enforceability of the adjudicator's decision. It was submitted on behalf of the second respondent

that this attribute is in conflict with the usual rule that pending an appeal or review a judgment is suspended, the purpose of which rule is to prevent irreparable damage to a party who may succeed on appeal.

[30] I cannot see how the immediate binding nature of the adjudicator's decision is in conflict with s 34 of the Constitution. As submitted on behalf of the JBCC, if the adjudicator breaches his contract of appointment and deviates from his mandate, the aggrieved party would have grounds to oppose an application for the enforcement of the adjudicator's decision and would not be denied a fair hearing to do so. The immediate enforceability of the adjudicator's decision does not prevent an aggrieved party from proceeding to arbitration where he/she/it will be afforded a fair hearing. As submitted on behalf of the JBCC, the provisional enforceability of the adjudicator's decision is similar to the enforceability of a High Court judgment pending an appeal, as provided for in s 18 (3) of the Superior Courts Act 10 of 2013. It is so that a party against whom such an order is made has an automatic right of appeal, which must be heard as a matter of urgency, but the possibility remains that the appeal might fail, in which case the order can be executed.

[31] Counsel for the JBCC referred to the judgment in *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd and Another* 2013 (6) SA 345 (SCA). This case involved a challenge to the jurisdiction of the arbitrator appointed in terms of a dispute resolution clause in a principal building agreement of the JBCC. The contract provided for adjudication where practical completion had not been achieved. In the course of his judgment at paragraphs [4], [5], [7] and [8] Nugent JA referred to and discussed the adjudication process as follows (footnotes omitted):

> "[4] It has now become common internationally — in some countries by legislation — for disputes to be resolved provisionally by adjudication. In *Macob*

Civil Engineering Ltd v Morrison Construction Ltd adjudication was described, in the context of English legislation, as —

> 'a speedy mechanism for settling disputes [under] construction contracts on a provisional interim basis, and requiring the decision of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement. . . . But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process.'

[5] The authors of *Hudson's Building and Construction Contracts* observe that under New Zealand construction legislation adjudication —

> 'is regarded as essentially a cash flow measure implementing what has been colloquially described as a quick and dirty exercise to avoid delays in payment pending definitive determination of litigation'.

[7] The adjudication rules issued by the JBCC for use with the contract describe adjudication as —

> 'an accelerated form of dispute resolution in which a neutral third party 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'.

An adjudicator is given wide inquisitorial powers that enable disputes to be resolved summarily and expeditiously. He is empowered, for example, to determine the dispute on the basis alone of the documents submitted to him by the parties, or on the basis alone of an inspection of the works. He may make use of his own specialist knowledge, he may open up and review any determination or certificate or valuation related to the dispute, and generally, he may 'adopt the most cost- and time-effective procedure consistent with fairness to determine the dispute'. A determination by the adjudicator is —

> 'binding upon the parties unless and until such determination is overturned or varied in whole or in part by arbitration in terms of clause 40.5 of the Agreement'.

> [8] When read together with the rules, I think it is plain that, in keeping with modern practice internationally, adjudication under clause 40 is designed as a measure for the summary and interim resolution of disputes, subject to their final resolution by arbitration where appropriate."

[32] It was submitted on behalf of the JBCC that in paragraph [4] of *Radon* the court implicitly approved the process of adjudication in this form and did not question its validity as informed by public policy, even though a court is entitled to raise public policy *mero motu* in appropriate circumstances.

[33] I agree with this submission. The reference in *Radon* to the English and New Zealand authorities is in my respectful view an implicit endorsement of the efficacy of the adjudication process. I bear in mind what was said by Professor Maritz about the disadvantages and prejudice that may be suffered by either party to the contract, when there is a delay caused by a lengthier process of dispute resolution. Adjudication as a form of dispute resolution is in principle of equal application to the parties, voluntarily adopted by them. It is not a case of a contractual term being unfairly weighted in favour of only one of the parties.

[34] The second respondent sought support for the proposition that the immediate enforceability of the adjudicator's decision infringed s 34 of the Constitution in the judgment in *Twee Jonge Gezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of South Africa t/a the Land Bank and Another* 2011 (3) SA 1 (CC). In that matter the common law institution of provisional sentence was the subject of a constitutional challenge. At paragraph [50] Brand JA held as follows:

> "In the light of these considerations, I hold that the provisional sentence procedure constitutes a limitation of a defendant's right to a fair hearing in terms of s 34, where:

(a) The nature of the defence raised does not allow the defendant to show a balance of success in his or her favour, without the benefit of oral evidence;

(b) the defendant is unable to satisfy the judgment debt; and

(c) outside 'special circumstances', the court has no discretion to refuse provisional sentence."

[35] In *Twee Jonge Gezellen* the applicants did not seek leave to appeal the court a quo's judgment on the merits, which was that the two defences raised by the applicants were against the probabilities. Brand JA in this regard stated as follows at paragraph [75]:

> "What this means, in short, is that this is not a case in which the probabilities are evenly balanced on the papers. This is a case where the probability of eventual success in the principal case actually favours the plaintiff. That being so, the case falls outside the ambit of the circumstances where, in the light of this judgment, the court would now have a discretion to refuse provisional sentence. As I have indicated, a prerequisite for that discretion is that there must be an even balance of prospects of success in the main case on the papers."

[36] It followed that the procedure of provisional sentence, after constitutional scrutiny, remained to some extent intact in that if on the affidavits there is a balance of probabilities in favour of a plaintiff, provisional sentence may still be granted which means that a defendant can only enter into the principal case if he pays the debt. The judgment granting provisional sentence is therefore enforceable even though in the principal case the defendant might eventually succeed, just as in this case the adjudicator's decision is enforceable, even though the first respondent might be successful in the arbitration proceedings.

[36] Uniform Rule 8 governs the procedure for obtaining provisional sentence. Rule 8 (9) provides that the plaintiff shall on demand furnish the

defendant with se7urity *de restituendo*. There is no provision for security in the adjudication process. The second respondent relied on this feature in support of the constitutional challenge. In my view the lack of a provision for the furnishing of security is not a factor which goes to the heart of the constitutional challenge. The unsuccessful party in the adjudication process still has the right to oppose the enforcement of the adjudicator's reward, and the right to proceed to arbitration and possible further litigation, all such rights involving the right to a fair hearing. The judgment in *Twee Jonge Gezellen* therefore in my view does not assist the second respondent.

[38] This leads me to the second respondent's reliance on the argument that immediate enforceability might destroy a party and that a party may have difficulty in recovering monies overpaid or not due. One of the cases given as an example, *Member of the Executive Council for the Department of Housing, Safety and Liaison: Eastern Cape v King William's Town Housing Association* [2009] ZAECGHC 10 (19 March 2009) did not involve an adjudicator's award. The applicant sought an order that an arbitration award be made an order of court. The respondent in a counter application, while not disputing the validity of the arbitration award, sought a stay of the application pending payment by the applicant to the respondent of certain sums of money. Kroon J found that the respondent's claims were frivolous, granted the application and dismissed the counter-application.

[39] Another of the cases given as an example, *Member of the Executive Council Responsible for Human Settlements of the Eastern Cape v Khumbula Property Services (Pty) Ltd*, case number ECD 1529/2012 (no further details available) was a claim by the plaintiff for repayment of a sum of money allegedly paid to the defendant in the mistaken belief that it was owed to the

defendant. This case does not illustrate the second respondent's ground of constitutional challenge.

[40] Even if there were such cases where an adjudication award was overturned in arbitration proceedings, and the successful party was not able to recover what it had paid, again I do not think that this argument goes to the heart of the constitutional challenge. It is a relative and shifting side-effect, dependent, as submitted on behalf of the JBCC, on the facts of each case and the particular contractual provisions.

[41] In the result, for the above reasons, I am of the view that the impugned provisions, namely clauses 30.6.3 and 30.7.1 of the contract, and Adjudication Rule 6.1.4, do not infringe s 34 of the Constitution and are not against public policy.

[42] It was correctly submitted on behalf of the JBCC that despite the narrow ambit of the second respondent's prayers for relief, the second respondent also impugned the adjudication process as followed in terms of the Adjudication Rules, which precedes an adjudicator's decision. This aspect was fully argued and I shall deal with it.

[43] The most fundamental criticism levelled at the procedure was that it did not adhere to the principles of natural justice, in particular the *audi alteram partem* rule was not observed.

[44] The so called twin principles of natural justice are *audi alteram partem* (hear the other side) and *nemo iudex in causa sua* (no-one should be a judge in his own cause).

[45] In my view the Adjudication Rules comprehensively comply with these principles. They provide that the adjudicator shall at all times act impartially and independently of the parties (Rule 3.1); after the claimant has submitted

details of the dispute to the adjudicator the respondent may submit a written response Rule 5.2); and the claimant may replicate (Rule 5.3). The effect of these rules alone, at its most basic, is that both parties are heard in an impartial forum. This impartial and equal process is endorsed by further rules such as Rule 5.4.2 which provides that the adjudicator shall furnish each party with a copy of any written communication sent to or received by either party. The adjudicator may conduct a hearing (Rule 5.5.1) or meet jointly with the parties (Rule 5.5.2), at which events he shall observe procedural fairness. Should he decide to conduct a hearing or to meet jointly with the parties, he is required to give notice to both parties (Rule 5.4.3). At all times the parties are required to be treated equally, impartially and fairly.

[46] The second respondent, in support of the argument of an unfair procedure, relied on various aspects of the Adjudication Rules, foreshadowed in the founding affidavit.

[47] It was submitted on behalf of the second respondent that because a hearing is dependent on the discretion of the adjudicator, where no hearing is held, as happened in the present case, the parties are denied a hearing. The same argument pertained to a joint meeting with the parties. The allowance of this discretion to the adjudicator is in my view not unconstitutional. Both parties are treated equally and their documents containing the details of their respective cases are considered by the adjudicator, who, as already mentioned, is required to be fair and impartial. Reference was made on behalf of the JBCC to *Lufuno* at paragraph [223] where O'Regan ADCJ stated as follows (footnotes omitted):

> "Of course, as this Court has said on other occasions, what constitutes fairness in any proceedings will depend firmly on context. Lawyers, in particular, have a habit of equating fairness with the proceedings provided for in the Uniform Rules of Court.

Were this approach to be adopted, the value of arbitration as a speedy and cost effective process would be undermined. It is now well recognised in jurisdictions around the world that arbitrations may be conducted according to procedures determined by the parties. *As such the proceedings may be adversarial or investigative, and may dispense with pleadings, with oral evidence, and even oral argument.*"

(My emphasis.)

[48] In my view this paragraph is of equal application to the adjudication process and answers the second respondent's complaint that the parties are denied a hearing.

[49] I am further of the view that this paragraph answers the criticism of the inquisitorial procedure. In this regard O'Regan ADCJ stated further at paragraph [236]:

"The final question that arises is what the approach of a court should be to the question of fairness. First, we must recognise that fairness in arbitration proceedings should not be equated with the process established in the Uniform Rules of Court for the conduct of proceedings before our courts. Secondly, there is no reason why an investigative procedure should not be pursued as long as it is pursued fairly. The international conventions make clear that the manner of proceeding in arbitration is to be determined by agreement between the parties and, in default of that, by the arbitrator. Thirdly, the process to be followed should be discerned in the first place from the terms of the arbitration agreement itself. Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which an arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of section 33(1), the goals of private arbitration may well be defeated."

[50] These paragraphs also in my view answer the criticism of the Adjudication Rule that the adjudicator is not obliged to comply with the rules of evidence or procedures of any court. The parties have agreed to this manner of adjudication and, adapting what O'Regan ADCJ said, if courts are too quick to find fault with an agreed procedure, the goals of private adjudication may well be defeated.

[51] On this aspect there was a further persuasive submission on behalf of the JBCC which was that the parties agreed that the adjudicator would determine the dispute as an expert and not as an arbitrator (Adjudication Rule 1.1), and that an expert in construction matters cannot be expected to be an expert in the law of evidence. I would add that the expertise of the adjudicator is to the benefit of both parties and is a major contributor to a speedy resolution of a dispute.

[52] Lastly, the second respondent took issue with the Rule that the parties were not entitled to legal representation in the adjudication procedure. As pointed out on behalf of the JBCC, hearings where the parties are not legally represented are not uncommon, for example matters heard before the Commission for Conciliation, Mediation and Arbitration and internal disciplinary hearings. In *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others* 2002 (5) SA 449 (SCA), Marais JA said the following at paragraph [5] (footnote omitted):

> "Entitlement as of right to legal representation in arenas other than courts of law has long been a bone of contention. However, as the court *a quo* correctly observed, in *Dabner v South African Railways and Harbours* 1920 AD 583 at 598 more than eighty years ago this Court categorically denied the existence of any such absolute right. South African courts have consistently accepted the correctness of that view. It is not entirely clear from the judgment in *Yates v University of Bophuthatswana and*

Others whether the court was holding otherwise or whether its recognition of a right to legal representation in that case was grounded solely upon an implication arising from the terms of the conditions of service applicable to the applicant. If the former, the decision would have to be regarded as, with respect, an aberrant one. Indeed, counsel for the appellants laid no claim to any such general and absolute entitlement and declined to submit that legal representation, whenever sought, is a *sine qua non* of any procedurally fair hearing."

It follows in my view that the lack of entitlement to legal representation in the adjudication process, particularly when it is intended to be a "fast and cost-effective resolution of disputes", does not in itself exclude procedural fairness. Procedural fairness is embodied in the Adjudication Rules.

[53] Overall, in my view what underlies the difficulties in the second respondent's various grounds for a constitutional challenge, is that if the procedure was struck down accordingly, the purpose of a speedy resolution of a dispute would be negated. The Constitutional Court in *Lufuno*, particularly at paragraph [223], has recognised this manner of dispute resolution, and has advised that "courts should be respectful of the intention of the parties in relation to procedure".

[54] I am therefore unable to find on any of the grounds raised by the second respondent, that the procedure prescribed in the Adjudication Rules is in conflict with s 34 of the Constitution.

Non-joinder

[55] I deal now with the issue of non-joinder which was raised by the second respondent. I prefer to deal with it at this stage of the judgment so that it is understood in the context of a full exposition of the respective cases. It was submitted on behalf of the second respondent that the CIDB and the Minister of Public Works (the Minister) should have been joined in the counter-

application. One would imagine that as the counter-applicant, it was for the second respondent to join these two parties but I must nevertheless deal with the point.

[56] The CIDB was referred to in the JBCC's answering affidavit and in his reply the second respondent raised the point of non-joinder of the CIDB and the Minister. After hearing argument in this matter, I reserved judgment. Subsequently the second respondent sought to introduce further material which it was submitted would assist me in deciding the point of non-joinder of the Minister. I refused the admission of such material, with reasons to follow in this judgment.

[57] Amongst the documents included in the material were draft amendment regulations to the CIDB Act, issued by the Minister for public comment, under Government Notice 482 of 2015. These regulations were subsequently withdrawn. Part IV of these draft regulations dealt with adjudication and provided, inter alia, that every construction works contract must provide for an adjudication procedure and that the decision of an adjudicator is binding and must be given effect to even if a party proceeds further to arbitration or administrative review. The draft regulations further prescribed the powers and duties of an adjudicator, including that the adjudicator must act impartially, may take the initiative in ascertaining the facts and the law necessary to determine the dispute, and must decide on the procedure to be followed in the adjudication.

[58] A further document was a journal article entitled "Adjudication in South African construction industry practice: Towards legislative intervention", authored by M J Maritz and V Hattingh. This article highlights the fact that adjudication has become commonplace as the first tier of dispute resolution in

the South African construction industry. Reference was made to an article in which the view was expressed that for adjudication to have any real impact it had to be compulsory, which meant that there had to be legislation which imposed adjudication on all parties in the construction industry.

[59] The authors referred to various judgments of South African courts where they said the courts took a robust approach to the enforcement of adjudicators' decisions. Further reference was made to draft regulations (seemingly not exactly the same draft regulations with which I have already dealt) which provided, inter alia, that every construction works or construction works-related contract must provide for an adjudication procedure. The authors commented that the proposed legislative framework once implemented would solidify a "desperately needed speedy mechanism for settling disputes in construction contracts on a provisional interim basis and requiring the decision of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement……."

[60] A further document sought to be submitted was an article emanating from MDA Consulting in which the author discussed the differences between adjudication and arbitration and, in considering whether or not adjudication was an attractive option, expressed the view that it was.

[61] The last two documents amongst the material sought to be submitted were a written reply by the Minister advising that the draft regulations had been withdrawn and explaining why, and an article under the heading "Industry News" to the effect that interested parties have until 28 July 2021 to comment on the draft regulations.

[62] In *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (CPD) at 415 E-H, Corbett J, as he then was, set out the law relating to joinder as follows:

> "It is settled law that the right of a defendant to demand the joinder of another party and the duty of the Court to order such joinder or to ensure that there is waiver of the right to be joined (and this right and this duty appear to be coextensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the Court might make (see *Amalgamated Engineering Union v Minister of Labour*, 1949 (3) SA 637 (AD); *Koch and Schmidt v Alma Modehuis (Edms.) Bpk.*, 1959 (3) SA 308 (AD). In *Henri Viljoen (Pty.) Ltd. v Awerbuch Brothers*, 1953 (2) SA 151 (O), HORWITZ, A.J.P. (with whom VAN BLERK, J., concurred) analysed the concept of such a 'direct and substantial interest' and after an exhaustive review of the authorities came to the conclusion that it connoted (see p. 169) - '... an interest in the right which is the subject-matter of the litigation and... not merely a financial interest which is only an indirect interest in such litigation'.
>
> This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions, including two in this Division (see *Brauer v Cape Liquor Licensing Board*, 1953 (3) SA 752 (C) - a Full Bench decision which is binding upon me - and *Abrahamse and Others v Cape Town City Council*, 1953 (3) SA 855 (C)), and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court (see *Henri Viljoen's* case, supra at p. 167)."

[63] What is the subject matter of this litigation? It concerns contractual rights and obligations between two contracting parties and whether or not certain terms of the contract, as well as an Adjudication Rule, are unconstitutional, in that they infringe s 34 of the Constitution. In addition to the contracting parties, the JBCC has a direct and substantial interest in the

subject matter of this litigation, in its capacity as the author of the JBCC contracts, drafted after input from its constituent members.

[64] I deal firstly with non-joinder of the Minister. At the time of this judgment the draft regulations published under Government Notice 482 of 2015 are not yet law. Their publication was in my view irrelevant to the issue of non-joinder, as was the rest of the material sought to be submitted on this point, which amounted to views on the benefits of adjudication and the need for legislation providing for adjudication to be compulsory. Such views might be persuasive to the Minister in considering whether or not to legislate for adjudication, but amount to no more than that. Whether or not the counter-application succeeded, the judgment would not prejudicially affect the Minister. It would not prevent him from exercising his power to make regulations in terms of the CIDB Act. Insofar as the Minister has published draft regulations which would make it compulsory to include adjudication in construction contracts, and insofar as the Minister has the power to make regulations, at this point in my view his interest is at best an indirect one.

[65] I deal now with non-joinder of the CIDB. The sections of the CIDB Act referred to by Professor Maritz, and other of its provisions demonstrate, in my view, that the CIDB does not have a legal interest in the subject matter of this litigation. The preamble to the CIDB Act reads as follows:

> **"Preamble**
>
> WHEREAS the construction industry plays an indispensable role in the South African economy in providing the physical infrastructure which is fundamental to the country's development;
>
> WHEREAS the construction industry experiences instability and interconnected structural problems which are associated with the declining demand in recent

decades, the volatile nature of the demand and the consequent shedding of labour;

WHEREAS the construction industry operates in a uniquely project-specific and complex environment, combining different investors, clients, contractual arrangements and consulting professions; combining different site conditions, design, materials and technologies; combining different contractors, specialist subcontractors and the workforce assembled for each project;

WHEREAS the development of the emerging sector is frustrated by its inability to access opportunity, finance and credit as well as vocational and management training;

WHEREAS investment in physical infrastructure is constrained and there is a need to promote effective public sector spending and private sector investment and to interpret investment trends;

WHEREAS the construction industry impacts directly on communities and the public at large and its improved efficiency and effectiveness will enhance quality, productivity, health, safety, environmental outcomes and value for money to South African society;

WHEREAS the specialised and risk-associated nature of construction places an onus on the public sector client to continuously improve its procurement and delivery management skill in a manner that promotes efficiency, value for money, transformation and the sustainable development of the construction industry;

WHEREAS the development of the industry requires leadership and the active promotion of best practice; and

WHEREAS Government has a vision of a construction industry development strategy that promotes stability, fosters economic growth and international competitiveness, creates sustainable employment and addresses historic imbalances as it generates new construction industry capacity; ……"

[66] Section 4 of the CIDB Act provides as follows:

"Objects of Board

The objects of the Board are to-

(a) promote the contribution of the construction industry in meeting national construction demand and in advancing-

(i) national, social and economic development objectives;

(ii) industry performance, efficiency and competitiveness; and

(iii) improved value to clients;

(b) provide strategic leadership to construction industry stakeholders to stimulate sustainable growth, reform and improvement of the construction sector;

(c) determine and establish best practice that promotes-

(i) improved industry stability;

(ii) improved industry performance, efficiency and effectiveness;

(iii) procurement and delivery management reform;

(iv) improved public sector delivery management;

(v) national social and economic objectives, including-

(aa) growth of the emerging sector;

(bb) labour absorption in the construction industry;

(cc) improved labour relations; and

(dd) positive safety, health and environmental outcomes;

(vi) human resource development in the construction industry;

(d) promote best practice through the development and implementation of appropriate programmes and measures aimed at best practice and improved performance of public and private sector clients, contractors and other participants in the construction delivery process;

(e) promote uniform application of policy with regard to the construction industry throughout all spheres of Government;

(f) promote, establish or endorse-

(i) uniform standards; and

(ii) ethical standards,

that regulate the actions, practices and procedures of parties engaged in construction contracts;

(g) promote sustainable growth of the construction industry and the participation of the emerging sector therein;

(h) promote appropriate research on any matter related to the construction industry and its development;

(i) implement policy on construction industry development;

(j) advise the Minister on policy and programmes which impact on construction industry growth and development; and

(k) promote any other related objective."

[67] The powers, functions and duties of the CIDB are provided for in s 5 of the CIDB Act. This section sets out what the CIDB must or may do to implement the objectives contained in s 4. None of these powers have any direct bearing on the drafting or content of construction contracts. The fact that the CIDB has published a standard of uniformity binding public sector clients to the use of specified construction contracts, or has endorsed JBCC edition 6.2, or has published best practice guidelines, does not in my view mean that the CIDB has a direct legal interest in the subject matter of this litigation. Whichever way the application is decided, the CIDB will not be prevented from achieving its objects or carrying out its powers, functions and duties in terms of the CIDB Act. Again, at best, the CIDB has an indirect interest in the subject matter of this litigation.

[68] The point of non-joinder therefore cannot succeed.

Further matters

[69] I reserved the costs of the application to receive further material and invited submissions on these costs. The JBCC submitted that costs should follow the result. I received no further submissions and agree that the second respondent should pay those costs. This application was integral to the counter-application as a whole.

[70] I must also rule on the costs of the JBCC 's application for condonation for the late filing of its heads of argument in the counter-application. The second respondent opposed the application for condonation. I granted condonation but did not at that stage give reasons or make a costs order.

[71] On 10 December 2020 this matter was postponed by agreement to 11 February 2021 for hearing. The JBCC's heads of argument were delivered on 9 February 2021.

[72] The founding affidavit in the condonation application was deposed to by the JBCC's attorney, Mr Vaughan Hattingh. He stated that the counter-application only came to the attention of Professor Maritz, the JBCC's CEO, on 4 December 2020, six days before the date of hearing of the counter-application which was 10 December 2020. Mr Hattingh wrote to the other parties' respective attorneys, inter alia inviting them to agree to a postponement of the counter-application to a date during the first term of 2021, preferably the last week of January or the first week of February 2021. The counter-application was duly postponed to 11 February 2021. Mr Hattingh said that by 10 December 2020 members of the JBCC's legal team were away on holiday and the JBCC's answering affidavit was delivered on 22 January 2021. The second respondent's replying affidavit was delivered on 3 February 2021. The second respondent re-served her heads of argument of 2 December

2020 on the JBCC on 4 February 2021, which was the first time they were served on the JBCC. The JBCC was not able to deliver its heads of argument until the second respondent's replying affidavit and heads of argument were delivered. Mr Hattingh pointed out that the JBCC's heads of argument dealt primarily with matters raised in Professor Maritz's affidavit.

[73] It appears to me that the chain of delivery of further papers mentioned by Mr Hattingh was set in motion by the fact that the JBCC's answering affidavit was only delivered on 22 January 2021. Although members of the JBCC's legal team were on holiday by 10 December 2020, it was the JBCC's attorney who suggested a date in late January or early February 2021. It therefore did not assist the JBCC to rely on the fact that its legal team was on holiday. Nonetheless there was merit in the statement by Mr Hattingh that much of what was contained in the heads of argument was foreshadowed in Professor Maritz's affidavit, which contained legal argument and case law. I was also of the view that the lateness of the heads of argument did not prevent me from being properly prepared to hear the application. Taking into account all these circumstances, and the fact that the JBCC was seeking an indulgence when it itself set in motion the chain of delivery of papers, I am of the view that it would be fair to order the JBCC to pay the costs of the application for condonation on an unopposed basis.

[74] The parties were in agreement that there should be no order as to the costs which were reserved on 10 December 2020, when the matter was postponed for hearing on 11 February 2021.

[75] It was submitted on behalf of the applicant that a punitive costs order should be awarded against the second respondent because of *mala fide* and dilatory conduct on the part of those who are referred to as the "main

respondents". I am unable to conclude on the evidence before me that there was such conduct and accordingly decline to make a punitive costs award.

Order

[76] The following order will issue:

[76.1] The counter-application is dismissed with costs, including the costs attendant on the application to submit further material, and in the case of the eighth respondent, the costs of two counsel.

[76.2] The eighth respondent is to pay the costs of the application for condonation for the late filing of its heads of argument on an unopposed basis.

[76.3] No order is made as to the costs which were reserved on 10 December 2020.

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J M ROBERSON

JUDGE OF THE HIGH COURT

Appearances (matter heard virtually)

Applicant: Adv S Alberts, instructed by Janice Sellick Attorneys, c/o Netteltons, Makhanda.

Second respondent/Counter-applicant: Adv B Pienaar SC with Adv V Sangoni, instructed by N N Dullabh & Co, Makhanda.

Eighth respondent: Adv A Kemack SC with Adv M Niewoudt, instructed by Hattingh Massey Bennet Inc t/a MDA Construction Attorneys, c/o Netteltons, Makhanda.