REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 43346/09

DATE:23/04/2010

In the matter between:

FREEMAN, AUGUST WILHELM, N.O. First Applicant

MATHEBULA, TIRHANI SITOS de SITOS, N.O. Second Applicant

and

ESKOM HOLDINGS LIMITED Respondent

J U D G M E N T

KATHREE-SETILOANE, AJ:

[1] This is an application for summary judgment. The summons which cites Eskom Holdings Limited ("Eskom") as the defendant, and the first and

second applicants as the plaintiffs, sets out two causes two causes of action which are pleaded in claims 1 and 2, and arise from the conclusion, on 14 May 2004, of a written engineering and construction contract ("the contract"), between Eskom and Transdeco GTMH (Pty) Ltd ("Transdeco"). The first and second applicants are cited in their capacities as joint final liquidators of Transdeco.

[2] The relevant terms of the contract for purposes of their claim are set out at paragraphs 4.1 to 4.13 of the particulars of claim:

> "*4.1 It is recorded that the Parties have entered into an agreement as evidenced by the Notification of Acceptance dated 28 November 2003, and confirmation to commence work dated 15 March 2004 (the Contract Date); (see Form of Agreement clause 3.1, annexure A5)*
>
> *4.2 This contract between the Parties comprises the documents entitled*
>
> - *Agreements*
> - *Contract Data*
> - *Conditions of Contract*
> - *Contract Prices*
> - *Works Information (including drawings as listed therein)*
> - *Site information*
>
> *and all the documents, or parts of documents referred to within any of those documents; (see Form of Agreement clause 4.1, annexure A5)*
>
> *4.3 The Employer undertakes to fulfil his obligations in terms of this contract and in particular to pay to the Contractor the amount due in accordance with the conditions of contract; (see Form of Agreement clause 6.1, annexure A5);*

4.4 *The assessment date is 25th day of each month (see Contract Data supplied by the Employer clause 5, annexure A16);*

4.5 The Project Manager certifies a payment within one week of each assessment date (see Core clause 51.1, annexure A47);

4.6 Each certified payment is made within three weeks of the assessment date, or if a different period is stated in the Contract Data, within the period stated (see Core clause 51.2, annexure A47);

4.7 *The period within which payments are made is five (5) weeks (see Contract Data supplied by the Employer clause 5, annexure A17);*

4.8 An adjudicator will be jointly appointed in the event of a dispute; (see Form of Agreement clause 3.2, annexure A5);

4.9 The adjudicator will be appointed in accordance with the Data provided by the Employer and in consultation with yourselves, if the need arises; (see notification of acceptance clause 6, annexure A10);

4.10 Any dispute arising under or in connection with this contract is submitted to and settled by the Adjudicator … (see NEC Engineering and Construction Contract: Core Clauses, clause 90, annexure A57);

4.11 The decision is final and binding unless and until revised by the tribunal; (see NEC Engineering and Construction Contract: Core Clauses, clause 90, annexure A57);

4.12 The Adjudicator settles the dispute as independent adjudicator and not as arbitrator. His decision is enforceable as a matter of contractual obligation between the Parties and not as arbitral award; (see NEC Engineering and Construction Contract: Core Clauses, clause 92.1, annexure A58);

4.13 *The Defects Certificate is either a list of defects that the Supervisor has notified before the defects date which the Contractor has not corrected or, if there are no such defects, a statement that there were none (see Core clause 11.2(16), annexure A39).*"

[3] At paragraph 5 of the plaintiffs' particulars of claim it is alleged that, in accordance with the terms set out in paragraphs 4.8 to 4.12 of the particulars of claim, Transdeco and Eskom appointed Adv Gerald Farber SC ("*the*

adjudicator") as the adjudicator in terms of the written adjudicator's contract between Transdeco, Eskom, and the adjudicator. A dispute between Transdeco and Eskom ("*the first dispute*") was submitted to the adjudicator, who issued a written decision ("*the first decision*") on 3 November 2006, and a second dispute between Transdeco and Eskom ("*the second dispute*") was submitted to the adjudicator, who issued a written decision ("*the second decision*") on 19 November 2006.

[3] The applicants' first claim which is set out at paragraphs 6 to 13 of its particulars of claim, is as follows:

> "*6. In terms of Core Clause 51.1 of the contract, a payment certificate and tax invoice was issued by the defendant and signed by the defendant's project manager Antonio D'Amico and Project Co-ordinator Masenthle Makhetha respectively on 28 and 30 November 2005.*
>
> *6.1 The certificate certifies retention monies due, owing and payable to Transdeco of R1 884 411,14, plus Value Added Tax thereon at 14% amounting to R263 817,56, totalling R2 148 228,70,*
>
> *6.2 A copy of the payment certificate and tax invoice is annexed marked C.*
>
> *7. The defendant failed to pay the certified sum of R2 148 228, 70.*
>
> *8. The aforesaid non-payment was the subject of the first dispute, referred to the adjudicator by means of a written dispute submission dated 4 September 2006, a copy of which is annexed marked D.*
>
> *9. The adjudicator's written decision adjudicating the first dispute ('the first decision') was issued by the adjudicator on 3 November 2006.*
>
> *9.1 A copy of the first decision is annexed marked E.*

10. The adjudicator's first decision is that 'the supervisor is required to issue the Claimant with the 'Defects Certificate' referred to in clause 11.2.(16) of the agreement and to release the corresponding retention amounts (see annexure E20);

11. In terms of Core Clauses 90 and 92.1 the adjudicator's first decision is final and binding and enforceable as a matter of contractual obligation between Transdeco and the defendant.

12. *The defendant has issued no defects certificate containing a list of defects, in terms of Core Clause 11.2(16);*
12.1 In the premises:

12.1.1 There are no defects that the Supervisor has notified before the defects date or at all, which the Contractor has not corrected;

12.1.2 *The 'corresponding retention amount' payable in terms of the first decision, is R2 148 228, 70.*

13. In the premises:

13.1 The sum of R2 148 228, 70 has been due, owing and payable by the defendant to Transdeco since 3 November 2006;

13.1.1 As a contractual obligation arising from the adjudicator's first decision;

13.1.2 Alternatively on the payment certificate rendered payable in terms of the adjudicator's first decision;

13.2 The defendant is obliged to pay interest on R2 148 229, 70 at 15, 5% per annum from 3 November 2006 to date of payment."

[4] The applicants' second claim, which is set out at paragraphs 14 to 21.2 of the particulars of claim, is as follows:

"*14. On or about 19 September 2006 Transdeco referred a disputed claim for payment by the defendant ('the second dispute'), for adjudication by the adjudicator by means of a written dispute*

submission dated 19 September 2006, a copy of which is annexed marked F.

14. The adjudicator's written decision adjudicating the second dispute ('the second decision') was issued by the adjudicator on 19 November 2006.

15.1 A copy of the second decision is annexed marked G.

16. The adjudicator's second decision states: 'It is plain that the relief sought by Transdeco, as formulated in paragraph 4 of its submissions of 19 September 2006, is well grounded. In the circumstances the relief sought in paragraphs 4.1.1.1, 4.1.1.2 and 4.1.1.3 must be acceded to.'

17. Transdeco's submissions of 19 September 2006 (annexure F) state in paragraph 4.1.1.2 thereof that Transdeco asks the adjudicator to 'Instruct Eskom to effect such payments now due and owing to us, totalling R1 992 752,08 excluding VAT as detailed in Appendix 1: Our notification of the dispute' (see annexure F8);

18. In terms of Core Clauses 90 and 92.1 the adjudicator's second decision is final and binding and enforceable as a matter of contractual obligation between Transdeco and the defendant.

19. *R1 992 752, 08 plus VAT amounting to R278 985, 29, totals R2 271 737, 37.*

20. *The defendant has failed to pay Transdeco the sum of R2 271 737, 37.*

21. In the premises:

21.1 The sum of R1 992 752, 08 plus VAT amounting to R278 985, 29, totalling R2 271 737, 37 has been due, owing and payable by the defendant to Transdeco since 19 November 2006 as a contractual obligation arising from the adjudicator's first decision;

21.2 The defendant is obliged to pay interest on R2 271 737, 30 at 15, 5% per annum from 19 November 2006 to date of payment."

[5] In support of their application for summary judgment, the applicants filed an affidavit deposed to by Cesare Di Giacomo which reads as follows:

> "*3. I was the plaintiff's managing director at the time coterminous with the relevant time of the subject matter of the plaintiff's action. As such, I was personally involved in the management of the entire project on site for the plaintiff, for which reason the facts set out in plaintiff's particulars of claim fall within my personal knowledge and experience. Accordingly I am able to swear positively to the facts verifying the causes of action pleaded in plaintiff's claims 1 and 2.*
>
> 4. *I can and do swear positively to the facts verifying the causes of action set out in the plaintiff's claims 1 and 2, and the amounts claimed in those claims, as set out in the prayers in the notice of application for summary judgment.*
>
> *5. In my opinion the defendant has no bona fide defence to the plaintiff's claims 1 and 2, and the defendant's notice of intention to defend these claims has been delivered solely for the purpose of delay.*"

[6] In its affidavit resisting summary judgment, Eskom *inter alia* sets out the following defences to the applicants' claim:

> "***AD CLAIM 1***
>
> 4. *The plaintiffs' claim 1 is for the sum of R2 148 228.70 plus interest at the rate of 15.5% per annum from 3 November 2006 to date of payment.*
>
> 5. *Claim 1 is based on 'a contractual obligation arising from the adjudicator's first decision'. In the alternative, the plaintiffs' claim is based on the payment certificate rendered payable in terms of the adjudicator's first decision.*
>
> *6. The first decision of the adjudicator requires that the Supervisor issues a Certificate of Defects. Eskom is not the Supervisor in terms of the contract.*
>
> 7. *The Supervisor has not issued a Certificate of Defects. Neither has he issued a certificate that there are no defects. It is not apparent that the plaintiffs have called on the Supervisor to issue a Certificate of Defects.*

8. *In the premises, I deny that the adjudicator's first decision requires Eskom to issue a Certificate of Defects. Neither does it require that Eskom pay to the plaintiffs the amount claimed or any amount at all.*

9. *The adjudicator's first decision does not in any way hold that the defendant is required to pay the plaintiffs the sum claimed or any amount at all. In the result, the adjudicator's first decision does not create a contractual obligation for the defendant to pay the plaintiffs as claimed or at all.*

10. *In any event, the payment certificate on which the plaintiffs rely for payment of the amount claimed does not reflect the sum claimed in the particulars of claim as the amount owing by the defendant to the plaintiffs. In the premises, the defendant is not indebted to the plaintiffs as claimed or at all*

11. *On 20 November 2006 Eskom notified Transdeco that it intended to refer the first decision of the adjudication to arbitration in terms of the contract. The arbitration of this dispute is pending.*

AD CLAIM 2

12. *On 4 December 2006 ESKOM notified Transdeco that it was dissatisfied with the second decision of the adjudicator and that it intended to refer the decision to arbitration in terms of the agreement. The arbitration of the dispute is pending.*

13. *In the premises, I deny that ESKOM is required or to comply with the first and second decisions of the adjudicator pending arbitration.*

REFERRAL OF ADJUDICATOR'S DECISIONS TO ARBITRATION

14. *Core Clause 93.1 of the contract provides that a party dissatisfied with the decision of the adjudicator may refer a dispute to the arbitrator for final determination. On 20 November 2006 and in accordance with Core Clause 93.1, Eskom notified Transdeco that it intended to refer the first decision of the adjudicator to arbitration. … On 4 December 2006, ESKOM notified Transdeco that it was not satisfied with the adjudicator's second decision and that it intended to refer the dispute to an arbitrator. …*

15. *The parties have agreed that the adjudicator's first and second decisions would be referred to former Judge Mr Rex Schalkwyk for arbitration. … The arbitration of the two disputes is pending.*

16. *Eskom has always maintained that it is not required or obliged to comply with the adjudicator's decision pending final determination of the dispute by the arbitrator. The contract does not stipulate that Eskom is required to comply with the adjudicator's decision pending arbitration. Neither does the decision of the adjudicator so stipulate...*

17. *In the premises, I deny that the defendant is indebted to the plaintiffs as claimed or at all.*

NON-BINDING DECISIONS OF THE ADJUDICATOR

18. *I am advised that the adjudicator's decisions are only binding on the parties if the contractual pre-conditions have been met. One of these was that the relevant time periods were met. The adjudicator had a period of four weeks from the end of the period for providing information, to notify his decisions (Core clause 91.1).*

19. *In the case of the first decision, the events and time periods were the following:*

    19.1 Transdeco gave notification of the first dispute on 29 June 2006.

    19.2 The adjudicator was appointed on 7 August 2006

    19.3 *Transdeco's written first dispute submission was delivered on 4 September 2006 that is four weeks after 7 August 2006.*

    19.4 *Transdeco delivered additional information on 2 October 2006 that is four weeks after the written submission.*

    19.5 The adjudicator had until 30 October 2006 to deliver his decisions, in order to comply with the provisions of the contract and to render the decision binding on the parties. He notified the first decision on 3 November 2006.

20. *The first decision is therefore not binding on the parties, and the adjudicator may decide the third dispute unfettered and untrammelled by any previous decision.*

21. *The same position pertains in the case of the second decision. The second dispute submission was delivered on 20 September 2006. Additional information was delivered timeously on 18 October 2006, and the adjudicator had until 15 November 2006*

to notify his second decision, but did so on 19 November 2006, out of time.

...

26. *In the premises, I pray that the court dismisses the application for summary judgment and the defendant is granted leave to defend the claim.*"

[7] The Eskom's affidavit resisting summary judgment was delivered, two days out of time, on 23 November 2009. It, therefore, brought an application seeking condonation for the late delivery of its affidavit resisting summary judgment. I now turn to consider this application. Generally, an application for condonation will not be granted unless it is in the interests of justice to do so. Two of the key factors relevant to the interests of justice in a condonation application will be the explanation given by the applicant for his or her delay, and the prospects of success on the merits. *(Van Wyk v Unitas Hospital 2008 (2) SA 472 (CC) at para 20; S v Mercer 2004 (2) SA 598 (CC) at para 4; Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School and Others 2003 (11) BCLR (CC) at para 11; and Brummer v Gorfil Brothers Investments (Pty) Ltd and Others 2000 (2) SA 837 (CC) at para 3).*

[8] An application for condonation must set out a full explanation for the delay, which must cover the entire period of the delay, and be reasonable. I am of the view that the explanation provided by Eskom meets these requirements. In brief Eskom's explanation is that it is a huge corporation and the nature of the plaintiff's claim required extensive consultation with various persons who were involved with, and had intimate knowledge of, the facts of

the claim, but were not readily available to give instructions. It was also necessary to consider voluminous documents that Eskom and Transdeco exchanged in the course of their dealings with each other, and in particular relating to the two decisions of the adjudicator which formed the basis of the applicants' two claims. In the circumstances, it became impossible to obtain instructions and to enable counsel to finalise the opposing affidavit, and deliver it by 20 November 2009. Eskom, however, delivered an unsigned copy of the affidavit to the applicants' attorney on 23 November 2009, with an explanation that it was attending to signature thereof and it would be served on the morning of 24 November 2009.

[9] I am satisfied that Eskom's failure to deliver its affidavit resisting summary judgment, within the prescribed time limits, was not entered solely for the purpose of delay, but was rather brought about by the various internal consultation processes, which were necessary. The delay of two days, in the circumstances, was so insignificant that the applicant did not suffer any prejudice as result of the late delivery of Eskom's affidavit resisting summary judgment.

[10] There is, however, the other factor of the prospects of success, on the the merits, which must be considered. In order to do so, I will consider each of the defences raised by Eskom in its affidavit resisting summary judgment.

DEFENCES

[11] Eskom's first defence is that the adjudicator's first decision requires the "*Supervisor to issue a Certificate of Defects*", which has not been done, and that Eskom is not the supervisor in terms of the contract. It is the applicants' contention that this defence is flawed as the adjudicator's first decision obliges Eskom to pay the retention amount of R1 884 411,14 plus R263 817,56 Value Added Tax ("VAT") totalling R2 148 228,70, certified in Eskom's payment certificate, less the amounts set out in the supervisor's defects certificate. The supervisor is the employer's representative, obliged to issue a defects certificate on behalf of and for the benefit of the employer. There is, therefore, no obligation on Transdeco to call on the supervisor to do so. Eskom, furthermore, did not issue a defects certificate containing a list of defects in terms of Core Clause 11.2(16) of the contract. The first decision of the adjudicator, accordingly, obliges Eskom, contractually, to pay the retention monies without deduction.

[12] Eskom, however, contends that the adjudicator's first decision does not require it to issue a certificate of defects, nor does it require it to pay the applicants the amount claimed or any amount at all. Ms Baloyi, appearing on behalf of Eskom, argued that the first decision of the adjudicator does not order payment in accordance with the payment certificate and tax invoice

dated, 30 November 2005, and that the retention amount cannot be determined until the certificate of defects has been issued.

[13] I will deal with these contentions in relation to the relevant contractual clauses and the first decision of the adjudicator. It is clear from a reading of the payment certificate and tax invoice, which was issued by Eskom, on 30 November 2005, that it certifies retention monies due, owing and payable to Transdeco of R1 884 411,14, plus VAT thereon at 14% amounting to R263 817,56, totalling R2 148 228,70. The defendant's failure to pay this amount was the subject of the first dispute. It was referred to the adjudicator on 4 September 2006. The adjudicator's written decision adjudicating the first dispute was issued on 3 November 2006. His decision was that "*the supervisor is required to issue the Claimant with the 'Defects Certificate' referred to in clause 11.2. (16) Of the agreement and to release the corresponding retention amounts*". Clause 11.2(16) of the contract describes a defects certificate as follows:

> "*The Defects Certificate is either a list of Defects that the Supervisor has notified before the defects date which the Contractor has not corrected or, if there are no such Defects, a statement that there are none.*"

[14] It is common cause that neither a defects certificate, nor a statement that there are none, was issued by the supervisor. The applicants are entitled, in the circumstances, to payment by Eskom of the retention amounts without deductions, which is R2 148 228.70, which Eskom failed to pay. There is accordingly no merit in Eskom's contention that the first decision of the

adjudicator does not order payment in accordance with the payment certificate and tax invoice, dated 30 November 2005, or that the retention amount cannot be calculated until the defects certificate has been issued.

[15] There is likewise, no merit in Eskom's contention that it is not the supervisor in terms of the contract, and that it is not required, in terms of the adjudicator's first decision, to issue a certificate of defects. If one has regard to page 24 of the Contract Data, which forms part of the contract, "the employer" is Eskom. It also states that "*[t]he Supervisor is to be appointed"*. It is common cause, in this regard, that the supervisor is Eskom's project manager, Antonio D'Amico, and that he was appointed by Eskom, thus making him a representative of Eskom. Core Clause 43 of the contract provides:

> "*43.1 The Contractor corrects Defects whether or not the Supervisor notifies him of them. The Contractor corrects notified Defects before the end of the defect correction period. This period begins at Completion for Defects notified before Completion and when the Defect is notified for other Defects.*
>
> *43.2 The Supervisor issues the Defects Certificate at the later of the defects date and the end of the last defect correction period.*"

Core Clause 29.1 of the contract provides:

> "*The Contractor obeys an instruction which is in accordance with this contract and is given to him by the Project Manager or the Supervisor.*"

Core Clause 14.4 of the contract provides:

> *"The Employer may replace the Project Manager or Supervisor after he has notified the Contractor of the name of the replacement."*

It is clear from these clauses of the contract that the supervisor is a representative of the defendant, and is obliged to issue a defects certificate, on behalf of and, for the benefit of Eskom, who is the employer, and that there is no obligation on Transdeco to call on the supervisor to issue a defects certificate, as contended for by the defendant. I am accordingly of the view that this defence would not constitute a *bona fide* defence that is good in law to the plaintiffs' claim.

[16] Eskom's second defence is that, on 20 November 2006 and 4 December 2006 respectively, it notified Transdeco, that it intended to refer the first and second decisions of the adjudicator to arbitration, in terms of the contract and, that the arbitration of these disputes is pending. Eskom thus denies that it is obliged to comply with the first and second decisions of the adjudicator pending arbitration. I am of the view that this would not constitute a *bona fide* defence that is good in law, as the parties expressly agreed, in terms of Core Clause 90.2 of the contract, that an adjudicator's '*decision is final and binding unless and until revised by the tribunal*".

[17] The adjudicator's decision, therefore, remains binding and enforceable until revised in the final determination by an arbitrator. Mr Kemack referred me to the United Kingdom case of Bouygues *(UK) Limited v Dahl-Jensen (UK) Limited* [2000] BLR 49 [TCC] at 55, para. 35, which bears out this conclusion. This matter, of the Queen's Bench Division, Technology and Construction Court ("TCC"), concerned a dispute arising from a sub-contract, which

provided for dispute resolution by adjudication pursuant to the Rules of the CIC Model Adjudication Procedure (2nd edition) which provided that:

> "1.*The object of adjudication is to reach a fair, rapid and inexpensive decision upon a dispute arising under the contract and this procedure shall be interpreted accordingly.*
>
> *...*
>
> *4. The Adjudicator's decision shall be binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.*
>
> *5. The parties shall implement the Adjudicator's decision without delay whether or not the dispute is to be referred to legal proceedings or arbitration.*
>
> *..."*

Having regard to these Rules, Justice Dyson held as follows:

> "*the purpose of the scheme is to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement, whether those decisions are wrong in point of law and fact. It is inherent in the scheme that injustices will occur, because from time to time, adjudicators will make mistakes. Sometimes these mistakes will be glaringly obvious and disastrous in their consequences for the*

> *losing party. The victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation, and possibly even by a subsequent arbitration." (See also: C&B Scene Concept Design v Isobars Limited* [2002] BLR (CA) 93 at 98, para. 23*)*

[18] The defendant's third defence is that the adjudicator's decisions are only binding if given in the four week time period stipulated in the contract, and that because they were late, they are not binding on the defendant. It is the applicants' contention that this defence is not valid in law as there is no common law contractual basis for declaring a late adjudication invalid, particularly where the parties have not agreed that unless the decision is made within a certain time it shall not be binding or of any effect, thereby making time of the essence of the contract.

[19] Relying on *One Nought Three Craighall Park (Pty) Ltd v Jayber (Pty) Ltd* 1994 (4) SA 320 (W) at 323A-B, the applicants submit that a court hearing the summary judgment application is in just as good a position as the trial court to consider a matter of law. Following upon the approach enunciated by Kannemeyer J in *Lovemore v White* 1978 (3) SA 254 (E), Heher J, in *One Nought Three Craighall Park (Pty) Ltd v Jayber (Pty) Ltd* at 323A-C, stated that:

> "*[T]he Judge who hears this matter on exception or at the trial will be in no better position than I am to determine the issue. The plaintiff is entitled to his judgment now if the law and the facts are in his favour. I shall therefore consider the validity of the legal contention.*"

The legal contention which Heher J was required to decide in *One Nought Three Craighall Park* concerned the question of whether *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1994 (1) SA 106 (D) was correct in stating that our law allows a tenant of leased property, which is sold during the subsistence of the lease the right, to decide whether to continue with the lease. Heher J concluded that the law is not as stated in *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* (*supra*) as a lessee of property, transferred from his lessor to a new owner, is bound to recognise and observe the terms of the lease after transfer. Heher J found that the defendant had no defence to the plaintiff's claim, and granted summary judgment for the plaintiff.

[20] However, in the matter of *Hollandia Reinsurance Co Ltd v Nedbank Ltd* 1993 (3) SA 574 (WLD) at 577G-H where Goldblatt J was asked to decide whether the unreported decision by his brother Stegmann J was correct and that, unless he was of the opinion that Stegmann J was clearly wrong, he was bound to grant summary judgment as prayed, he held that:

> "*In my view, summary judgment proceedings are inappropriate for dealing with clearly arguable questions of law which should properly be dealt with on exception (Edwards v Menezes 1973 (1) SA 299 (NC) and Shingadia v Shingadia 1966 (3) SA 24 (R)).*
>
> *In my opinion it cannot be said that the defendant's case is clearly unarguable. The reasoning of the English Courts seems to me to be both logical and in accordance with the general scheme of the Act. If Stegmann J is correct considerable difficulties would occur in practice in giving effect to s 79 of the Act where the drawer and payee of a cheque both have accounts with the same bank, either at the same or different branches thereof. It is unlikely that the Legislature intended that the protection afforded to a drawer of a crossed cheque could only be of application if the payee banked at a different bank to the bank*

> *upon which the cheque was drawn. Were it necessary for me to decide, which it is not, whether Stegmann J's interpretation of the word 'banker' in s 79 of the Act is correct, I do not think that I would agree with his decision. However, as stated above, I am not required to make a decision in this regard provided that I am satisfied that the defendant's contentions are reasonably arguable. I am so satisfied.*"

[21] However, in the present matter, I am satisfied that Eskom's legal contention, that the adjudicator's decisions are invalid because he delivered them outside of the time periods stipulated in the contract, is not reasonably arguable. Nor do I believe that a judge, who hears this matter at the trial or exception, would be in a better position than I am to decide this matter. As stated by Heher J, in *One Naught Three Craighall Park*, '*the applicants are entitled to summary judgment now if the law is in their favour'*. I accordingly proceed to determine the question of law in this application.

[22] Core Clauses 90.2 and 91 of the contract provide for an adjudicator's decision to be issued within four weeks of the end of the period for providing information, but nowhere in the contract is it stated that a late adjudicator's decision would be invalid. Core Clause 90.2 of the contract reads as follows:

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

Core Clause 91.1, entitled "***The adjudication***" reads as follows:

> "*The Party submitting the dispute to the Adjudicator includes with his submission information to be considered by the Adjudicator. Any further information from a Party to be considered by the Adjudicator is provided within four weeks from the submission. The Adjudicator notifies his decision within four weeks of the end of the period for providing information. The four week periods in this clause may be extended if requested by the Adjudicator in view of the nature of the dispute and agreed by the Parties.*"

It is clear from a reading of Core Clauses 90.2 and 91.1 of the contract that although they provide for an adjudicator's decision to be issued within four weeks of the end of the period for providing information, they do not state that a late adjudicator's decision is invalid. I have also been unable to find a clause in the contract which states that '*unless the decision is made within a certain time it shall not be binding or of any force and effect*' thereby making time of the essence of the contract.

[23] It is important to bear in mind that an adjudication is not an arbitration and it is therefore not a subject to the common law, or section 3 of the Arbitration Act 42 of 1965 which provides as follows:

> "*The arbitration tribunal shall, unless the arbitration agreement otherwise provides make its award –*
>
> *(a) in the case of an award by an arbitrator or arbitrators, within four months after the date on which such arbitrator or arbitrators entered on the reference or the date on which such arbitrator was or such arbitrators were called on to act by notice in writing from any party to the reference, whichever date be the earlier date; and*
>
> (b) *in the case of an award by an umpire, within three months after the date on which such umpire entered on the reference or the date on which such umpire was called on to act by notice in*

> *writing from any party to the reference, whichever date be the earlier date,*
>
> *or in either case on or before any later date to which the parties by any writing signed by them may from time to time extend the time for making the award: Provided that the court may, on good cause shown, from time to time extend the time for making any award, whether that time has expired or not.*"

[22] In argument, Mr Kemack referred me to Jacobs, *The Law of Arbitration in South Africa*, para 160, page 130 where he states as follows:

> "*A court should be hesitant to grant an extension of time if the application is made at a late date. The fact that the parties in the arbitration agreement have put a limit both upon the time for making the award and the extent to which this time may be enlarged does not preclude the court from ordering a further enlargement.* ***It would seem, however, that the parties may effectively agree that, unless the award is made within a certain time, it shall not be binding or of any effect, thus making time of the essence of the contract.*"**
> (own emphasis)

[23] It is clear from Core Clause 92.1 of the contract that the adjudicator settles the dispute as independent adjudicator and not as arbitrator. His decision is enforceable as a matter of contractual obligation between the Parties and not as an arbitral award. So, in the absence of a clause, which makes '*time of the essence* failure by an adjudicator, to deliver his or her award in the time stipulated in the contract, cannot be rendered as binding on the parties or of any force and effect. Unlike in arbitrations, there is no statutory or common law contractual basis for declaring the delivery of a late adjudication award invalid, particularly where there is no agreement between the parties that unless the decision is made within a certain time it shall not be

binding or of any effect. There is accordingly no basis in law for treating a delayed adjudicator's award as invalid.

[24] To the contrary, Core Clause 93.1 of the contract specifically provides for the steps to be taken by a dissatisfied party should the adjudicator fail to notify his decision within the time period stipulated in the contract. It provides:

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

[25] As is apparent from Core Clause 93.1 of the contract, the agreed remedy for a delayed adjudicator's decision is a notification by the dissatisfied party, to the other party, of its intention to refer the matter, which it disputes, to the arbitration tribunal. It is common cause that Eskom gave no notice of dissatisfaction on this basis, either before or after the issuing of the adjudicator's decisions. I accordingly agree with Mr Kemack that, in terms of Core Clauses 92.1 and 90.2 of the contract, even a belated decision of the adjudicator, i.e. one that is make after the expiry of the time provided for in the contract, is contractually binding and enforceable unless and until revised by an arbitration tribunal. I am, accordingly, of the view that this defence would not constitute a *bona fide* defence that is good in law.

[26] The last defence raised by Eskom is that it has submitted a dispute, to the adjudicator, in which it counter-claims that it has suffered damages as a result of Transdeco's defective performance on the contract ("*the third dispute*"), and the submission of this dispute, to the adjudicator, was made within the period stipulated in Core Clause 90.1 of the contract. In this dispute Eskom claims that the foundations installed by Transdeco were defective and this has resulted in the collapse of certain towers as a result of a failure of their foundations. It accordingly seeks a finding from the adjudicator that:

(1) Transdeco repudiated the contract by refusing to search for defects as instructed by the Supervisor;

(2) As a result of Transdeco's repudiation of the contract, Eskom appointed another contractor to conduct the search that Transdeco refused to conduct;

(3) As a result of Transdeco's repudiation of the contract, Eskom appointed another contractor to rectify the defective work of Transdeco; and

(4) As a result of Transdeco's defective repudiation of the contract, Eskom has suffered damages in the sum of R16 310 199, 94.

Eskom states further that:

> *"The plaintiffs are liquidators in a company which is under liquidation. Should Eskom succeed in its counter-claim, it is unlikely to recover the full amount of its counter-claim. I*

respectfully submit that in the circumstances, it would be unjust to order that Eskom pays the amount claimed by the plaintiff when it is at risk of not recovering all the monies claimed by it should it be successful with its counter-claim."

[27] Mr Kemack, on behalf of the applicant's argued that the lack of *bona fides* of Eskom's defence is evident from the contents of paragraphs 12.10 to 12.14 of applicants' answering affidavit, in the application for condonation of the late filing of the summary judgment opposing affidavit, which reads as follows:

"*12.10* *The defendant's pointing out that the applicant has referred a dispute for adjudication in which it claims an amount in excess of R16 million from Transdeco, is also incomplete. Both this allegation and the contents of paragraph 23 to 25 of the summary judgment opposing affidavit, are misleading.*

12.11 *The defendant did refer a claim for damages of R16, 310,199.94 to adjudication, based on damages arising from Transdeco's alleged repudiation and the defendant's cancellation of the engineering and construction contract.*

12.12 *The defendant has failed to disclose, however, that a decision was issued on 29 January 2008 by the appointed adjudicator, advocate Walter Klevansky SC, finding that as subsequent adjudicator his decision could not deviate from advocate Farber's previous decision that Transdeco did not repudiate the agreement, which remained of full force and effect.*

12.13 *…*

12.14 Despite notifying Transdeco of its intention to refer advocate Klevansky's decision for review by the arbitration tribunal, since January 2007 the defendant has not proceeded with such an arbitration."

[22] It is abundantly clear from a reading of Adv Klevansky SC's decision, at paragraphs A4, C2, D2-D4, and E1-E1.5 in particular, that he had rejected this counter-claim on 29 January 2008, and that it has not been referred for review to the arbitration tribunal. This defence would, therefore, not constitute a *bona fide* defence that is good in law.

[23] There being no prospect that any of Eskom's defences will result in its success in the summary judgment application, the application for condonation must be, and is, dismissed with costs.

[24] In the result, I am satisfied that Eskom does not have a *bona fide* defence that is good in law to the applicants' claims as set out in their particulars of claim. I accordingly grant summary judgment for the applicants in the terms claimed in paragraphs 1, 2 and 3 of the notice of application for summary judgment.

F KATHREE-SETILOANE
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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