



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED:

CASE NO: A95/2022

15/1/2024

DATE



SIGNATURE

In the matter between:

PROSERVE CONSULTING (PTY) LTD

Appellant

And

RMV ENGINEERING PROJECTS (PTY) LTD

Respondent

JUDGMENT

TOLMAY J

## INTRODUCTION

1. This is an appeal with the leave of the court a quo. The respondent (RMV) sought the enforcement of an adjudication determination (the determination) made by an adjudicator. The appellant (ProServe) disputed the enforcement application on the basis that the adjudicator's determination was late and no reasons were provided and the adjudicator therefore exceeded his mandate. ProServe has since abandoned the argument that no reasons were provided. The court a quo found in favour of RMV and enforced the determination by the adjudicator.

## BACKGROUND

2. The parties entered into an NEC3 Engineering and Construction Contract (the contract). ProServe was appointed as the lead contractor by the Gauteng Department of Infrastructure Development (the GDID) for the construction of a primary school (the project). ProServe appointed RMV as the contractor. GDID was not a party to the contract. A dispute arose between ProServe and RMV regarding two payment certificates. This dispute was referred to the adjudicator for resolution. The adjudicator found in favour of RMV and ProServe was ordered to pay R2 531 720.48 (two million five hundred and thirty-one thousand seven hundred and twenty rand forty eight cents) pertaining to the two disputed certificates.
3. The NEC3 contract is a standard contract used in the constructing industry, it emanates from the United Kingdom, and is like other contracts in the construction

industry intended to introduce uniformity of contract in the construction industry domestically and internationally. Clause W1.3(8) provides that the adjudicator decides the dispute and notifies the parties and the project manager of his decision and reasons within four weeks of the end of the period for receiving information. It also provides that the four-week period may be extended if the parties agree. It reads as follows:

*"The Adjudicator decides the dispute and notifies the Parties and the Project Manager of his decision and his reasons within four weeks of the end of the period for receiving information. This four-week period may be extended if the Parties agree."*

This clause states clearly that the adjudicator is empowered to decide the dispute within a specified time, unless the parties agree on an extension.

4. Clause 1.4(3) provides that if the adjudicator does not provide his decision within the time provided by the contract a party may notify the other party that he intends to refer the dispute to the tribunal. It also provides that a party may not refer a dispute to the tribunal unless this notification is given within four weeks of the date by which the adjudicator should have notified his decision. It reads as follows:

*"If the Adjudicator does not notify his decision within the time provided by this contract, a Party may notify the other Party that he intends to refer the dispute to a tribunal. A Party may not refer a dispute to the tribunal unless this notification is given within four weeks of the date by which the Adjudicator should have notified his decision".*

## THE ISSUE TO BE DECIDED

5. The remaining issue to be determined is whether the adjudicator was mandated to deliver his determination after the agreed date.
6. The adjudicator was given the date of 20 July 2020, or 28 days after the last date of submissions. On 21 July 2020, after not receiving the adjudicator's decision, ProServe informed the adjudicator that his mandate had expired, and he was therefore functus officio. The adjudicator responded and apologized that he made a mistake in the calculation of the date on which his determination was due, and offered to repay the deposit that was paid to him. ProServe indicated that he could keep the deposit. This is a clear indication that the adjudicator initially accepted that his mandate had lapsed. RMV, however demanded that he nonetheless render a decision. The adjudicator capitulated and rendered a decision on 27 July 2020. ProServe refused to accept the decision and argued that the determination was not valid due to the fact that the adjudicator's mandate had lapsed.

## THE APPLICABLE LEGAL PRINCIPLES

7. The determination of the dispute between the parties requires the interpretation of the contract. The approach that should be followed in the interpretation of contracts have been set out in *Natal Joint Municipal Pension Fund v Endumeni*<sup>1</sup> (Endumeni).

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<sup>1</sup> 2012 (4) SA 593 (SCA) at para 18: "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the

8. Although *Endumeni* referred to context, it might be interpreted to refer to a more limited understanding of what would constitute context as relating to the provisions of a contract only. In *University of Johannesburg v Auckland Park Seminary and Another*<sup>2</sup> (University of Johannesburg) it was clarified that context must be considered when interpreting any contract and from the outset "...as part of the unitary exercise of interpretation".
9. In *Capitec Bank Holdings (Pty) Ltd and Another v Coral Lagoon Investments*<sup>3</sup> it was eloquently explained as follows:

*"Endumeni simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most*

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*language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*

<sup>2</sup> (2021) 50503 JOL (CC) at para 69.

<sup>3</sup> (2021) JOL 50742 (SCA) at para 50-51.

*compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result. Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text."*

10. This more expansive approach must then also relate to inter alia the nature, scope, purpose and origin of the contract. This approach, in my view, will take cognisance of the fact that the contract forms part of a specific industry which may require a specific approach when interpreting it.
11. The correct approach then seems to be to allow context and purpose to "elucidate the text". In the context of the matter before us, the matter was decided on papers and as a result the question of extrinsic evidence did not arise. The terms of the contract are quite clear and do not require any special consideration. The context, namely the fact that this is a construction contract is however relevant when interpreting the terms of the contract. It must also be emphasised that these contracts require speedy resolutions of disputes and that the appointment of an

adjudicator and time limits for his decision are included in the contract to address this need.

12. The court was referred to three decisions that deal with the adjudicators mandate in NEC3 contracts. The first is *Freeman NO v Eskom Holdings*<sup>4</sup> (Freeman). In this matter the court heard a summary judgment application and found that none of the defences raised would result in success and granted the summary judgment. The court found that in the absence of a clause that makes time of the essence, failure by an adjudicator to deliver the award in the time stipulated in the contract, cannot be rendered as binding on the parties or of any force and effect. The court found support for this conclusion in clause 93.1 of that contract which provided for a procedure to be followed if an adjudicator fails to notify the parties of the decision or fail to do so within the time provided by the contract.<sup>5</sup>
13. The second decision referred to is the matter of *Group Five Construction (Pty) Ltd v Transnet(Pty) Ltd*<sup>6</sup> (Group Five). In that matter the adjudicator requested an extension of the time period. The respondent refused to grant the extension and on the same day the respondent gave notice to the applicant to refer the dispute to the tribunal. Despite this, the adjudicator continued to communicate and receive information from the applicant and published his decision out of time. The court held that the adjudicator's mandate terminates in a NEC3 contract at the end of the time

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<sup>4</sup> (2010) JOL 25357 (GSJ).

<sup>5</sup> Ibid at para 22 – 25.

<sup>6</sup> (2019) JOL 45795 (GJ).

period set by the agreement and that time is of the essence in these types of contracts.<sup>7</sup>

14. In Group Five reference was made to international and academic authority that supports the conclusion that the court came to.<sup>8</sup> The importance of speed in these type of contracts and the importance of keeping to time limits to achieve that goal, as well as the fact that the decision is not permanent and may be challenged on arbitration were pointed out. I agree with the conclusion by the court in Group Five that absent a consent to an extension, the adjudicator's mandate is terminated.<sup>9</sup>
15. The third judgment referred to is the matter of *Sasol South Africa (Pty) Ltd v Murray and Roberts*.<sup>10</sup> The court however in that matter found that the adjudicator had not exceeded the time limit. The adjudicator requested further information as he was entitled to do. The parties proceeded to an oral hearing which was regarded as evidence gathering process. Consequently, the period had been extended by consent and the decision was rendered within the extended period.
16. The contract in the present matter makes specific provision for the eventuality that the decision is not communicated in the allocated time limit. In this matter, the contract provides that the time period may be extended by agreement between the parties. This can only be interpreted to mean that absent such an agreement the

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<sup>7</sup> Ibid at para 21.

<sup>8</sup> Ibid at para 17 – 20.

<sup>9</sup> Ibid at para 21.

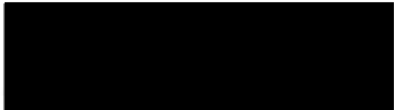
<sup>10</sup> (2021) JOL 50626 (SCA).

period may not be extended. This approach is enforced by the need for fair, rapid and inexpensive decisions in construction contracts.

17. Clause W.1.4(3) provides for the occasion where the adjudicator does not notify his decision within the time provided by the contract. Under those circumstances a party may notify the other party that he intends to refer the dispute to the tribunal. This clause furthermore provides that a party may not refer a dispute to the tribunal unless notification is given within four weeks of the date by which the adjudicator should have notified his decision. It is therefore clear that the contract itself provides for the process that should be followed in the event of a failure of the adjudicator to notify the parties timeously of his decision and the parties are bound by the terms of the agreement.
18. Taking into consideration the context and purpose of construction contracts, the need for a speedy adjudication process and the terms of the agreement, the adjudicator's mandate was limited to a specific moment in time and once that expired, he was not mandated to make an adjudication and therefore the adjudication cannot be enforced.
19. As a result, the court a quo misdirected itself when it was concluded that the application should succeed, therefore the appeal should be upheld.

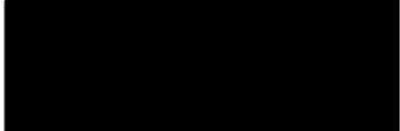
The following order is made:

1. The appeal is upheld.
2. The court a quo's order is set aside and substituted with the following:
  - a) The application is dismissed.
  - b) The respondent is ordered to pay the costs, including the costs of the appeal.



R G TOLMAY

JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA



D MAKHOB

JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA



L COETZEE

ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

Appearances:

For Appellant: Adv HWS Martin  
Instructed by Cliffe Dekker Hofmeyer

For Respondent: Adv P Bellin  
Instructed by E Taylor Attorneys

Date of Hearing: 4 October 2023

Date of Judgment: 15 January 2024