IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 5831/2020P

In the matter between:

UMGUNGUNDLOVU DISTRICT MUNICIPALITY **APPLICANT**

and

MLO, NEW BOSS & ZAMISANANI JV **FIRST RESPONDENT**

BRYAN WESTCOTT **SECOND RESPONDENT**

ORDER

The following order is issued:

1. It is declared that the adjudication process as set out in clause 10 of the General Conditions of Contract for Construction Works (2010) 2 ed edition (the GCC 2010 contract), as amended by the Contract Data, in respect of the contract for the upgrading of the Nkanyezini Water Supply Scheme, is unenforceable due to non-compliance with clause 10.5.1 of the GCC 2010 contract, and any proceedings conducted in terms thereof, shall be null and void.
2. The first respondent is directed to pay the costs of the application, including those costs reserved on 8 September 2020.
3. The counter-application brought by the first respondent is dismissed with costs.

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for the handing down of the judgment is deemed to be 11 August 2021.

JUDGMENT

Delivered electronically on 11 August 2021

Bezuidenhout AJ

[1] This matter was initially brought as an urgent application by the applicant, the Umgungundlovu District Municipality, on 8 September 2020 against MLO, New Boss and Zamisanani JV as the first respondent, and Mr Bryan Westcott as the second respondent. In part A of the notice of motion, the applicant sought an order that pending the determination of the declaratory relief in part B of the application, the respondents are interdicted and prohibited from participating or proceeding with any adjudication proceedings conducted in terms of clause 10 the General Conditions of Contract for Construction Works (2010) 2 ed (the GCC 2010 contract), as amended by the Contract Data, in respect of the contract for the upgrading of the Nkanyezini Water Supply Scheme, without the participation of the applicant.

[2] On the same day, Balton J granted an order which inter alia contained at para 5 a recordal in terms of which the first respondent undertook 'to suspend pursuing the adjudication forming the subject matter of the present proceedings', pending the final outcome of the application.

[3] In part B of the notice of motion, the applicant seeks an order in the following terms:

'1. It is declared that the adjudication process as set out in clause 10 of the GCC 2010 2nd edition, as amended by the Contract Data in respect of the contract for the upgrading of the Nkanyezini Water Supply Scheme, is invalid alternatively unenforceable, and that any proceedings conducted in terms thereof shall be null and void.'

It also seeks costs from the first respondent and only from the second respondent if he opposes the application, and the usual order for ‘further and/or alternative relief’.

[4] The first respondent has filed a counter-application in which it seeks the following relief:

‘1. To declare that the appointment of Bryan Westcott as adjudicator is valid and binding and that disputes raised are to be adjudicated before him;
2. In the alternative to prayer 1 above, to provide for the parties to appoint a member of the Adjudication Board within 1 week from the date of the order;
3. In the further alternative to prayers 1 and 2 above, that the dispute is referred to arbitration;
4. The applicant is to pay the costs;
5. Further and/or alternative relief.'

The second respondent has played no role in these proceedings.

[5] The first respondent is a joint venture or a partnership with whom the applicant concluded a written contract for the upgrading of the Nkanyezini Water Supply Scheme on 17 October 2016. The contract price was R96 916 329. The contract incorporated the general terms and conditions as set out in the GCC 2010 contract with certain amendments, referred to as contract specific data, which were set out in the Contract Data.

[6] A dispute has arisen regarding the validity and interpretation of the dispute resolution clauses of the GCC 2010 contract, which are found in clause 10 of the GCC 2010 contract.

[7] Clause 10.1 sets out the provisions applicable when the contractor, the first respondent, needs to claim for an extension of time for the completion of the permanent works.

[8] Clause 10.2 deals with dissatisfaction claims. In terms of clause 10.2.1:

‘In respect of any matter arising out of or in connection with the Contract, which is not required to be dealt with in terms of Clause 10.1, the Contractor or the Employer shall have the right to deliver

a written dissatisfaction claim to the Engineer. This written claim shall be supported by particulars and substantiated.'

Clause 10.2.3 grants the engineer 28 days within which to give his written and 'adequately reasoned ruling' on the dissatisfaction claim.

[9] Clause 10.3 deals with dispute notices in terms of which the contractor or the employer (the applicant) may deliver a written notice to the other party, regarding any dispute arising out of the contract, provided that the dispute arises from an unresolved claim. The dispute notice 'shall clearly state the nature of the dispute and the extent of the redress sought'. The dispute notice has to be delivered within 28 days of the event giving rise to the dispute. Clause 10.3.2 provides that if either party gives the requisite notice, the dispute shall be referred 'immediately' for adjudication, unless amicable settlement is contemplated.

[10] Clause 10.4 provides the parties with the option to agree to settle any claim or dispute amicably with the help of an impartial third party, failing which, adjudication would follow.

[11] Clause 10.5 deals with adjudication. Clauses 10.5.1 to 10.5.3 are relevant to the present matter and read as follows:

'10.5.1 If the Contract Data provides for dispute resolution by a standing Adjudication Board, the Employer, together with the Contractor, shall, within 56 days of the Commencement Date, appoint the member or members of the Adjudication Board.

10.5.2 If the Contract Data does not provide for dispute resolution by a standing Adjudication Board, the dispute shall be referred to ad-hoc adjudication.

10.5.3 The Adjudication Board shall consist of the number of the members stated in the Contract Data. It shall be effected and its proceedings conducted in accordance with the Adjudication Board Rules.'

[12] In terms of clause 10.6, in the event of a disagreement with the adjudication board's decision, 'either party shall have the right to disagree with [such] decision . . . and refer the matter to arbitration or to court proceedings, whichever is applicable in terms of

the Contract'. A party can however not dispute the validity or correctness of the decision before 28 days or after 56 days from receipt of the decision, and the decision remained binding on both parties unless revised by an arbitration award or court judgment.

[13] Clause 10.7 deals with arbitration, with clause 10.7.1 being of particular importance. It reads as follows:

'If the Contract Data provides for determination of disputes by arbitration and a dispute is still unresolved, the matter shall be referred to a single arbitrator. Any such reference shall be deemed to be a submission to the arbitration of a single arbitrator in terms of the Arbitration Act (Act No. 42 of 1965, as amended), or any legislation passed in substitution therefor.'

[14] In terms of clause 10.8, a dispute shall be determined by court proceedings if the Contract Data does not provide for the settlement of disputes by arbitration and if a dispute is still unresolved.

[15] Clause 10.9.1 deals with the appointment of the dispute resolving person and reads as follows:

'The dispute resolving person or persons shall be appointed by agreement of the parties. Failing agreement within seven days of either party delivering a request in writing to agree to such appointment, the person or persons shall be nominated, on the application of either party, by the President or his nominee of the South African Institution of Civil Engineering.'

[16] The GCC 2010 contract also contains a section referred to as the 'Adjudication Board Rules'. Rule 1 contains various definitions. In terms of these definitions, standing adjudication is defined as relating to 'an Adjudication Board which is appointed at the outset and for the duration of the Contract'. Rule 2, which deals with the scope of the rules, refers to standing adjudication as 'a flexible procedure available to parties from the outset of the Contract for its full duration, to assist them in reducing conflict, preventing claims becoming disputes and resolving any dispute that may arise'.

[17] Rule 3 of the Adjudication Board Rules deals with the appointment and establishment of the Adjudication Board. Rule 3.1 indicates that the standing Adjudication

Board ‘shall be established in accordance with GCC 2010, Clauses 10.5.1 and 10.9.1’. In terms of rule 3.3, in respect of a standing Adjudication Board, ‘the parties shall at the outset of the Contract, jointly select either one or three persons, as allowed for in the Contract Data, from the panel of standing adjudication members of SAICE’.

[18] Rule 4 deals with ad hoc adjudication procedure, whilst rule 5 deals with the standing adjudication procedure. Rule 5.1 deals with meetings and site visits for standing adjudication, the purpose being ‘to avert claims and dissatisfactions, to observe and stay informed with regard to the progress of the Works’. It also deals with the set up of regular site visits at intervals of between 75 and 140 days.

[19] Rule 5.2 deals with the duties of the contractor and employer for standing adjudication, ensuring that the adjudication board member or members is or are supplied with contract documents ‘at the outset of the proceedings’.

[20] Rule 6 deals with the conditions of conduct during adjudication. In terms of rule 6.3, the Adjudication Board ‘shall not be required to observe any rule of evidence, procedure or otherwise, of any court, except the rules of natural justice. . .’. In terms of rule 6.4, the Adjudication Board has the power to inter alia obtain legal or other technical advice, having first notified the parties of its intention to do so.

[21] Rule 8 deals with representation, in terms of which ‘the Parties may be represented and/or assisted by persons of their choice, provided that formal legal representation of one party has the written consent of the other party’.

[22] The document referred to as the Contract Data, contains numerous clauses of the GCC 2010 contract, referred to as ‘contract specific data’ which are listed as compulsory data. Clause 10.5.3 is listed, with the heading ‘Adjudication’ and reads: ‘The number of Adjudication Board members to be appointed is one (1)’. Clause 10.7.1 is also listed with the heading ‘Arbitration’ and reads: ‘The determination of disputes shall be by arbitration’.

Clause 10.5.1 is listed right at the end, also with the heading ‘Adjudication’ and reads: ‘Dispute resolution shall be by standing adjudication.’

[23] I do not deem it necessary to deal with the facts of the matter in much detail save to say that it is the applicant’s case that the first respondent failed to perform in terms of an undertaking given to re-establish the site on 18 November 2019. The alleged failure to comply with the undertaking and the failure to return to the site and recommence work, constituted a repudiation by the first respondent of its obligations under the GCC 2010 contract. On 22 May 2020, the applicant notified the first respondent in writing that its conduct implied that it had repudiated its obligations, and that the applicant had accepted the repudiation. The applicant accordingly cancelled the contract and reserved its rights to claim damages suffered as a consequence of the repudiation.

[24] The first respondent disputed the validity of the cancellation and claimed inter alia that it was unable to recruit labour and that the applicant was obliged to give it notice of its breach. On 18 June 2020, the first respondent gave a notice of a dissatisfaction claim in terms of clause 10.2 of the GCC 2010 contract to the engineer and the applicant, and placed the applicant on terms to withdraw the letter of cancellation by 23 June 2020, failing which it would consider the applicant to be in ‘persistent repudiation’. It also requested a ruling from the engineer within 28 days.

[25] On 13 July 2020, the first respondent sent a letter to the applicant and the engineer stating that as a result of the applicant’s failure to withdraw the termination notice, the first respondent is now giving notice of its termination of the contract. It also enclosed its final termination account for an amount of R26 215 145.

[26] On 15 July 2020 the engineer, Mr R Pillay, sent an e-mail to the first respondent , which read as follows:

‘Please note your appointment is by the client. As such the repudiation is between yourselves and the client’.

It is presumed that the reference to 'the client' is in fact to the applicant. The email appears to indicate that the engineer did not want to become involved in the issue of the repudiation between the applicant and the first respondent.

[27] On 23 July 2020, the first respondent sent a letter to the applicant wherein it inter alia objected to the engineer's e-mail of 15 July 2020, stating that it 'does not qualify as an adequate reasoned ruling'. It also noted that its dissatisfaction claim remained unresolved and that it was therefore delivering a dispute notice. The nature of the dispute and the redress sought were set out as follows:

'6.1 This dispute concerns the Employer's unlawful actions in purporting to terminate the Contract based on the allegations that an Engineer's determination was subject to preconditions and that such preconditions were not satisfied by the contractor.

6.2 The dispute further concerns the Employer's failure not to comply with the provisions of clause 9.2 of the Contract. The clause specifically requires that the Employer afford the contractor with no less than 14 days written notice, to enable it to rectify any alleged breach of the Contract. The Employer failed to comply with this obligation.

6.3 The Employer's actions in purporting to terminate the Contract when it had no legitimate basis to do so constitute a repudiation.

6.4 The Contractor will request the Adjudicator to make a finding that the Employer repudiated the Contract.'

The letter also stated that an amicable settlement was not feasible and 'the Contractor shall refer the matter directly to adjudication in terms of clause 10.5'.

[28] On 24 July 2020, the first respondent sent another letter to the applicant and the engineer, setting out the details of the dispute and nominating three persons to act as adjudicator, '[i]n accordance with rule 4.1.1.3 of the Adjudication Board Rules'. The applicant was requested to confirm the appointment of one of the persons. The second respondent, Mr Bryan Westcott, appeared on this list.

[29] It is interesting to note at this stage that rule 4.1.1.3 referred to in the letter, does not appear in the section dealing with the standing adjudication procedure but rather in the section dealing with ad hoc adjudication procedures.

[30] It appears from the papers, and the correspondence attached, that the first respondent approached the second respondent to proceed with the adjudication, whereafter the second respondent communicated with the applicant and its attorney of record. The applicant's attorney informed the second respondent on 19 August 2020 that the dispute notice and notice of dissatisfaction, written and submitted by the first respondent were a nullity, that the applicant did not agree to adjudication and that it was intending to institute an action for damages.

[31] The second respondent replied on 19 August 2020 and inter alia indicated that the adjudication process could proceed on an ex parte basis.

[32] On 28 August 2020, the applicant's attorney wrote to the first respondent's attorney, informing him that there was no contractual basis for the adjudication to proceed and that the first respondent's attempt to appoint an ad hoc adjudicator was ultra vires the contract. The only way to resolve the dispute was to approach the high court. He said the following:

'3. In terms of the Contract Data, the parties made the election contemplated in clause 10.5.1, namely that dispute resolution should be conducted by a standing Adjudication Board. However, the parties failed to appoint the member of the standing Adjudication Board within 56 days of the commencement date as is expressly stipulated in clause 10.5.1.

4. No request was lodged by either party, during the aforesaid 56-day period, for the appointment of a standing Adjudication Board. No referral was made as contemplated in clause 10.9.1 during that period.

5. The joint venture's attempt to rely on clause 10.9.1 to make an appointment outside of the 56 day period is simply not competent.

6. Clause 10.5.2 provides that a dispute shall be referred to ad-hoc adjudication if the

Contract Data does not provide for a standing Adjudication Board. However, that is not the case. The Contract Data specifies a standing Adjudication Board and thus rules out any possibility of appointing an ad-hoc adjudicator.

7. In the premises, the Adjudication process provided for in clause 10 was not implemented. Furthermore, by virtue of the parties' failure to implement an Adjudication process, there is no basis for proceeding to the subsequent stages of the dispute resolution procedure.'

[33] On 29 August 2020, the second respondent sent an e-mail to the applicant's attorney, confirming that neither party had signed the adjudication agreement confirming his nomination and appointment. He stated that the contractor 'has indicated that he intends proceeding on an ex parte basis should the Employer decide not to participate'.

[34] On 4 September 2020, the first respondent's attorney responded to the applicant's attorney's letter by stating that the applicant's view that the non-implementation of clause 10.5.1 nullified the dispute resolution provisions was not competent and that the first respondent was entitled to refer the dispute to adjudication. It was also made clear that the first respondent would be proceeding with the adjudication process.

[35] On the same day, the second respondent sent an e-mail to the applicant's attorney, advising him that the first respondent wanted to proceed with the adjudication. He placed the applicant on terms to respond by 8 September 2020, failing which he would proceed on an ex parte basis.

[36] The applicant issued the application papers on 7 September 2020 for the urgent application to be heard on 8 September 2020, as mentioned above.

[37] The first respondent has raised a point in limine in its answering affidavit that this court does not have jurisdiction to hear or make a ruling on the matter pending the final resolution of the dispute via arbitration, in light of the parties election of arbitration as the selected method of finally resolving disputes. The point in limine was not pursued in

argument before me, quite rightly so as it is settled law that this court has the requisite jurisdiction.[1]

[38] It is common cause that the applicant and the first respondent failed to appoint the member of the Adjudication Board within 56 days of the commencement date as required by clause 10.5.1 of the GCC 2020 contract, or at all for that matter. The contract data only provides for dispute resolution by standing adjudication.

[39] Counsel for the applicant, Mr Harpur SC, submitted that there can be no adjudication process if a member to the Adjudication Board had not been selected and as a result of that, the matter can also not proceed to arbitration. He also submitted that although the first respondent conceded that the parties had failed to appoint a member to the Adjudication Board within 56 days, it nonetheless proceeded to appoint an adjudicator on what amounted to be an ad hoc basis, which the contract does not provide for.

[40] I was referred to *Laws v Rutherfurd,*[2] where Innes CJ held that a court 'cannot make new contracts for parties'. See also in this regard what was held by Wallis JA in *Natal Joint Municipal Fund v Endumeni Municipality*[3] that '. . . in a contractual context it is to make a contract for the parties other than the one they in fact made'.

[41] Counsel for the applicant also submitted that the dispute between the parties concerns a question of law, and that a court of law should determine which party was entitled to cancel the contract. This would have a bearing on what basis the final account will be prepared or how damages are determined, namely: termination due to contractor's fault, termination due to employer's fault or no-fault termination.

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[1] *Foize Africa (Pty) Ltd v Foize Beheer BV and others* 2013 (3) SA 91 (SCA) para 21.
[2] *Laws v Rutherfurd* 1924 AD 261 at 264.
[3] *Natal Joint Municipal Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

[42] I was also referred to the Adjudication Board Rules, and it was submitted that the standing Adjudication Board is supposed to deal with technical issues relating to ongoing works, and not disputes about who is entitled to repudiate or cancel the contract.

[43] It is in my view clear, upon reading the clauses in the Adjudication Board Rules referred to above, that the establishment of the Adjudication Board and standing adjudication is aimed at becoming involved and being implemented right from the outset of the contract to assist the parties in resolving issues and disputes relating to the works being done. It is quite telling that the engineer, Mr Pillay, spontaneously responded to the first respondent's notice by saying that the repudiation of the contract is a matter between the parties.

[44] Counsel for the applicant also submitted that because the adjudication process fell away, so to speak, the arbitration process should similarly fall away. This submission is based on the wording of clause 10.7.1, which refers to a dispute being referred for arbitration if it 'is still unresolved'.

[45] Bearing in mind the sequence of the dispute resolution processes set out in clause 10, namely commencing with a dissatisfaction claim, then a dispute notice, then adjudication followed by arbitration and court proceedings, if provided for, it is clear in my view that arbitration would only follow if the dispute remains unresolved after the parties had followed the processes preceding that. Accordingly, if there was no adjudication, then arbitration could not follow.

[46] In PA Ramsden *McKenzie's Law of Building and Engineering Contracts and Arbitration* 7 ed (2014) at 234, the author deals with arbitration clauses in building contracts and states that before a matter is referred for arbitration, '. . .the preliminary steps must be taken. . .'. Reliance for this statement is placed on *Richtown Construction Co (Pty) Ltd v Witbank Town Council and another*.[4] The facts in *Richtown* are briefly that the contract required disputes firstly to be referred to the engineer, if the engineer should

[4] *Richtown Construction Co (Pty) Ltd v Witbank Town Council and another* 1983 (2) SA 409 (T).

fail to give a decision or if any of the parties were dissatisfied, the dispute would be referred for mediation. If either party was dissatisfied with the mediation, the matter 'shall' be referred for arbitration but only upon completion of the works. The parties did not follow the prescribed procedures and the applicant in the matter attempted to obtain an immediate arbitration prior to the works being completed. Le Roux J[5] found that no effort was made to comply with the requirements of clauses 69(1) or (2), which provided for the referral to the engineer and then to mediation. He said the following:

'It is quite clear that subclauses (1) and (2) are intimately interlinked with the whole procedure of settlement of disputes, the final step being subclause (3). There can be no question that unless the parties waive their rights in terms of these clauses, or expressly vary the contract in this respect, the clause as a whole must be taken to be operative, and it cannot be truncated . . . Therefore, the next question which arises is whether it can be said that there has been a compliance with the conditions preceding the right to go to arbitration. I have already expressed the view that there has not been compliance or waiver of these provisions.'[6]

[47] Counsel for the first respondent, Ms B Brammer, submitted that although the parties had failed to comply with clause 10.5.1, they could still agree to an Adjudication Board, if that is what was envisioned when they concluded the contract. It was also submitted that as the dispute remained unresolved, the matter could still proceed to arbitration, despite the fact that adjudication had not taken place.

[48] Counsel for the first respondent, in her heads of argument, dealt with the issue of waiver, submitting that the applicant had failed to prove that the first respondent had waived its rights to settle disputes by adjudication due to the failure to appoint the Adjudication Board member within the prescribed time period. I agree with the applicant's response to this argument, namely that the first respondent has perhaps mischaracterised the applicant's case concerning the inoperability of the dispute resolution clause as being an allegation of waiver. The issue of waiver is in my view of no consequence to the issues before me, unless referred to in the context as in *Richtown supra* which has not been done.

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[5] Ibid at 413H.
[6] Ibid at 414H-415B.

[49] The first respondent's counsel further submitted that adjudication is a common feature of construction contracts, and is supposed to be a quick way to resolve disputes, and by including it in the GCC 2010 contract and the Contract Data, the parties clearly intended it to be part of the dispute resolution process. It was also submitted that it does not seem fair to invalidate an entire process because of non-compliance with clause 10.5.1.

[50] It is in my view clear that the applicant is not agreeable to an ad hoc arbitration, and it is furthermore clear that the process embarked upon by the first respondent is not provided for in the contract. The first respondent is clearly attempting to force adjudication upon the applicant, whereas it is very clear that the parties have failed to comply with the requirements of clause 10.5.1. To ask me to direct that adjudication should in fact proceed is doing exactly what Innes CJ[7] and Wallis JA[8] referred to when they held that a court cannot make new contracts for parties. It would have been an entirely different issue if both parties realised that they had failed to comply with the requirements of clause 10.5.1, entered into an addendum in terms of which they agreed to vary the contract and to make provision for adjudication. This is not what has happened and I certainly cannot force the applicant to take such a step when the GCC contract does not allow for it.

[51] The applicant is seeking a declarator that the adjudication process set out in clause 10 of the GCC 2010 contract is invalid, alternatively unenforceable and that any proceedings conducted in terms thereof shall be null and void. I had certain misgivings about the way in which the relief was being framed and at the hearing counsel for the applicant suggested replacing the word "invalid" with "inoperative" in para 1 of Part B. Be that as it may, it is quite clear to me that the current position is simply that the parties cannot proceed with adjudication as they have failed to comply with clause 10.5.1. As a result of their non-compliance with clause 10.5.1 and the inability to resolve the dispute via adjudication, they cannot proceed to have the matter decided via arbitration. This

[7] *Laws v Rutherfurd* fn 2.
[8] *Natal Joint Municipal Fund v Endumeni Municipality* fn 3.

matter clearly can only be resolved in one way and that is through litigation in the high court. The matter is clearly a legal issue and even if it was not, the fact of the matter remains that the dispute resolution process as set out in the GCC 2010 contract and the Contract Data cannot be followed as a result of non-compliance with clause 10.7.1.

[52] For the same reasons, and with reference to the counter-application, the appointment of the second respondent as adjudicator cannot be valid. It would also not be competent to now make an order that a member of the Adjudication Board be appointed as prayed for by the first respondent, or to refer the matter for arbitration. The motivation for the institution of the counter application is also unclear, especially in light of the applicant's municipal manager's undertaking in his founding affidavit that the applicant tenders to participate in the adjudication if the court finds the dispute resolution process to be in force.

[53] I was referred to section 3(2)*(c)* of the Arbitration Act 42 of 1965, in terms of which a court may, on application of any party to an arbitration agreement, on good cause shown, 'order that the arbitration agreement shall cease to have effect with reference to any dispute referred'. I was also referred by both counsels to various cases relating to what amounts to good cause and whether a point of law justifies a refusal to refer the matter for arbitration. In *Sera v De Wet*[9] the following was said:

'In my view, a Court of law is far better equipped to adjudicate upon the matters raised by the applicant. The outcome of the action proposed to be instituted by the applicant will hinge mainly upon the issue as to whether the contract was properly cancelled by the architect or not. The main ground for cancellation, as I have pointed out, was the alleged failure on the part of the applicant to proceed with the work diligently and expeditiously. On this issue the respondent will necessarily have to rely to a large extent on the evidence of the architect. Mr. *Roux*, for the respondent, has suggested that it is not certain that the architect will be called by the respondent if this matter goes to arbitration. I fail, however, to see how the respondent can do without the architect. The hearing, whether it be before an arbitrator or a Court, will not largely, if at all, involve expert evidence on technical matters peculiar to the building trade.'

[9] *Sera v De Wet* 1974 (2) SA 645 (T) at 653G-H.

[54] I do not deem it necessary to deal with this aspect in detail because of what I have found regarding the non-compliance with clause 10.5.1. But in the event that I am wrong in that regard, I am in any event of the view that due to the nature of the dispute and the facts surrounding the dispute as mentioned above, the matter should not be dealt with by way of arbitration, and is clearly best suited to be resolved by court proceedings.

[55] As far as the question of costs are concerned counsel for the first respondent submitted that the urgent application was brought on four hours' notice to the respondents and that there was no justification for the application or for the relief sought. Counsel for the applicant submitted that the respondents made it clear that they wanted to proceed with adjudication and a deadline had been set by the second respondent for the applicant to respond by.

[56] It was also submitted by applicant's counsel that the court was persuaded that the matter was indeed urgent or else it would not have heard the application. My attention was drawn to the fact that the costs were reserved as is clear from the order granted by Balton J on 8 September 2020. It was submitted that the reserved costs should follow the result.

[57] In my view there is no reason to deviate from the general rule that costs should follow the event.

[58] I accordingly make the following order:

1. It is declared that the adjudication process as set out in clause 10 of the General Conditions of Contract for Construction Works (2010) 2 ed edition (the GCC 2010 contract), as amended by the Contract Data, in respect of the contract for the upgrading of the Nkanyezini Water Supply Scheme, is unenforceable due to non-compliance with clause 10.5.1 of the GCC 2010 contract, and any proceedings conducted in terms thereof, shall be null and void.

2. The first respondent is directed to pay the costs of the application, including those costs reserved on 8 September 2020.
3. The counter-application brought by the first respondent is dismissed with costs.

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BEZUIDENHOUT AJ

Appearances

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Instructed by:	
Date of Hearing:	7 May 2021
Date of Judgment:	11 August 2021