



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 357/2021

In the matter between:

FRAMATOME

APPELLANT

and

ESKOM HOLDINGS SOC LIMITED

RESPONDENT

Neutral Citation: *Framatome v Eskom Holdings SOC Ltd* (357/2021) [2021] ZASCA 132 (1 October 2021)

Coram: MATHOPO, MOLEMELA, MAKGOKA, MBATHA and MOTHLE JJA

Heard: 13 September 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 1 October 2021.

Summary: Construction contract – contract providing for dispute resolution process through adjudication – adjudicator’s award final and binding on the parties until and unless set aside on review – High Court erred in not enforcing the award.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Coppin J sitting as court of first instance):

1 The appeal is upheld with costs which costs shall include the costs of two counsel.

2 The order of the high court is set aside and replaced with the following:

‘1 It is declared that Eskom is in breach of the New Engineering Contract 3: Engineering and Construction Contract (June 2005) with Option A concluded between Framatome and Eskom for the replacement of the Steam Generators at Koeberg Nuclear Power Station, Unit 1 and 2 (the Contract).

2 Eskom is directed to adhere and fully recognise and implement the decision delivered by the adjudicator on 23 July 2019.

3 It is declared that the contractual key dates 15, 16, 17, 18 and 19 relating to the replacement of the steam generators at the Koeberg Nuclear Power Station, Units 1 and 2, are:

3.1 In respect of Koeberg Power Station, Unit 1, 11 November 2018, 18 May 2019, 26 April 2020, 16 January 2020 and 14 February 2020, respectively.

3.2 In respect of Koeberg Power Station, Unit 2, 19 May 2019, 23 November 2019, 1 November 2020, 23 July 2020 and 21 August 2020, respectively.

4 It is declared that the contractual sectional completion dates for each section of the Works (as defined in the Contract) have been revised so that the sectional completion date 1 is 3 June 2020, sectional completion date 2 is 9 December 2020 and sectional completion date 3 is 22 June 2021.

5 It is declared that the contractual completion date for the whole of the Works is 22 June 2021.

6 Eskom is ordered to pay Framatome additional costs of:

- 6.1 EUR 2 706 146.00 which are subject to the price adjustment pursuant to Secondary Option Clause X1 of the Contract and pursuant to clause 51.4 of the Contract, the interest thereon calculated at the LIBOR rate being the 6 month London Interbank Offered Rate quoted under the caption "Money Rates" in The Wall Street Journal for the applicable currency or if no rate is quoted for the currency in question then the rate for United States Dollars, and if no such rate appears in The Wall Street Journal then the rate as quoted by the Reuters Monitor Money Rates Service (or such service as may replace the Reuters Monitor Money Rates Service) on the due date for the payment in question, adjusted *mutatis mutandis* every 6 months thereafter and as certified, in the event of any dispute, by any manager employed in the foreign exchange department of the Standard Bank of South Africa Limited, whose appointment it shall not be necessary to prove;
- 6.2 EUR 2 706 146.00 which is subject to the price adjustment pursuant to Secondary Option Clause X1 of the Contract and pursuant to clause 51.4 of the Contract, interest thereon calculated at the LIBOR rate (described in paragraph 6.1.1) applicable at the time for amounts due in other currencies from 17 February 2019 to date of payment (inclusive of both dates);
- 6.3 EUR 1 353 073.00 which is subject to the price adjustment pursuant to Secondary Option Clause X1 of the Contract and pursuant to clause 51.4 of the Contract, interest thereon calculated at the LIBOR rate (described in paragraph 6.1.1) applicable at the time for amounts due in other currencies from 24 September 2019 to date of payment (inclusive of both dates);
- 6.4 R 36 595 611.00 which is subject to the price adjustment pursuant to Secondary Option Clause X1 of the Contract and pursuant to clause 51.4 of the Contract, interest thereon calculated at a rate of zero percent above

publicly quoted prime rate of interest (calculated on a 365 day year) charged from time to time by Standard Bank of South Africa (as certified, in the event of any dispute, by any manager of such bank, whose appointment it shall not be necessary to prove) from 12 August 2018 to date of payment (inclusive of both dates);

6.5 R 36 595 611.00 which is subject to the price adjustment pursuant to Secondary Option Clause X1 of the Contract and pursuant to clause 51.4 of the Contract, interest thereon calculated at a rate of zero percent above the publicly quoted prime rate interest (as described in paragraph 6.1.5) applicable at the time for amounts due in other currencies from 17 February 2019 to date of payment (inclusive of both dates);

6.6 R 18 297 805.00 which is subject to the price adjustment pursuant to Secondary Option Clause X1 of the Contract and pursuant to clause 51.4 of the Contract, interest thereon calculated at a rate of zero percent above the publicly quoted prime rate interest (as described in paragraph 6.1.5) applicable at the time for amounts due in other currencies from 24 September 2019 to date of payment (inclusive of both dates) within 10 days from the date of this order;

7 The respondent is ordered to pay the costs, such costs to include the costs of two counsel.'

JUDGMENT

Mathopo JA (Molemela, Makgoka, Mbatha and Mothle JJA concurring):

[1] This appeal raises two questions: first, whether the decision (referred to as Decision 11) made by the adjudicator, Mr T Mahon (the adjudicator), in favour of the appellant, Framatome (Framatome) following an adjudication in terms of a construction contract that was entered into between the parties should be enforced. Secondly, whether as contended by the respondent, Eskom Holdings SOC Limited (Eskom), Decision 11 cannot be enforced because it is predicated on Decision 7 which, according to Eskom, is invalid since the adjudicator allegedly exceeded his powers when he made a finding in relation to Dispute 7 which was not notified or referred as per the terms of the agreement.

[2] Those questions have arisen in this way. On 5 September 2014, Eskom concluded a written NEC3 Engineering and Construction Contract (with amendments of June 2006) with Areva NP for the replacement of the steam generators at Koeberg Nuclear Power Station, Units 1 and 2, located in Cape Town. (the Contract). Areva NP later ceded the Contract to Framatome. Under the Contract, Framatome is the contractor and Eskom is the employer, represented by the Project Manager.

[3] The Contract is based on the NEC3 Engineering and Construction Contract (ECC), which is a standard contract used within the construction industry; in terms of which parties can select certain clauses which govern their rights and obligations and regulate the completion of a project.

[4] The Contract also envisages the role of a Project Manager who is appointed by the employer (ie Eskom). The Project Manager's role is to manage the contract on behalf of the employer. The Contract places substantial authority on the Project Manager and

assumes that they have the employer's authority to carry out the actions and make decisions required of them.

[5] The Contract comprises four parts: (i) Part C1 – Agreements & Contract Data; (ii) Part C2 – Pricing Data; (iii) Part C3 – Scope of Work; (iv) Part C4 – Information. Under the 'Agreements & Contract Data' clause, the parties selected as the conditions of the Contract the core clauses and the clauses for Option A (Priced Contract with activity schedule); the dispute resolution Option W1; identified secondary Options (x-clauses); and certain additional clauses (called z-clauses) of the ECC. These general conditions, as amended by the parties, are hereinafter referred to as the Conditions.

[6] The Contract makes provision for what is called 'compensation events' which allows the contractor, Framatome, in essence, to claim additional payment and extra time to do the work from the employer. Compensation events are events which, should they occur, and provided they do not arise from the contractor's fault, entitle the contractor to be compensated for any effect the event has on the prices and the contractual sectional completion date(s) or key date(s). The assessment of a compensation event is always in respect of its effect on the prices, the completion date and any key date(s) affected by the relevant compensation event in question. The Contract contains a process whereby the assessment of a compensation event is achieved by agreement between the parties, determined by the Project Manager or deemed to be approved if there is inaction on the part of the Project Manager.

[7] There was a compensation event for which Framatome provided a quotation. Sub-clause 64.1¹ of the Conditions compels the Project Manager to perform an assessment of the compensation event. Sub-clause 65.1 prescribes what is to occur when a compensation event is implemented. It envisages three possible scenarios, namely when:

¹ If the Project Manager does not assess a compensation event within the time allowed, the Contractor may notify the Project manager to this effect. If the Contractor submitted more than one quotation for the compensation event, he states in his notification which quotation he proposes is to be accepted. If the Project Manager does not reply within two weeks of this notification the notification is treated as acceptance of the Contractor's quotation by the Project Manager.

(a) the Project Manager accepts the quotation; (b) the Project Manager notifies the contractor of his own assessment or; (c) when a contractor's quotation is treated as having been accepted by the project manager (clause 64.4).

[8] On 29 May 2017, the Project Manager notified Eskom of a compensation event which had arisen as a consequence of the agreed need for the 'redefinition of Key Dates for Key Dates 2, 14 and 24'. Following the Project Manager's notification and assessment of the compensation event, a dispute arose between the parties. This was in relation to the Project Manager's decision regarding the consequences of the changed key dates mentioned above and more particularly, whether the Project Manager's aforementioned notification amounted to a compensation event.

[9] On 11 December 2018, pursuant to clause W1 of the Contract, Framatome referred the dispute to adjudication as 'Adjudication no. 7'. Included in the Framatome's referral notice was a quotation setting out Framatome's assessment of the impact of the revised key dates 2, 14 and 24 on the remaining key dates (15 to 19), sectional completion dates, the completion date and the prices. Clause W1 dictates that the adjudicator may only decide disputes which have been notified and referred to him in accordance with the provisions of the Contract. The provisions of the Contract also place specific time periods within which such disputes have to be notified and referred. Put simply, an adjudicator would have no jurisdiction to decide a dispute which: (a) has not been notified; (b) if notified, has not been notified within the prescribed time period; and (c) has not been referred to the adjudicator within the prescribed period. The adjudicator's determination is not exhaustive of the disputes, it may be taken on arbitration or overturned during the final stage of dispute resolution.

[10] The adjudicator described the dispute before him as follows:

'The first issue on which I am required to give a decision is whether the Project Manager failed to make the assessment of the Compensation Event of Changed Key Dates 2, 14 and 24 in due time as directed by the Adjudicator's decision of 26th February 2019 and if not what the consequences of this are.'

[11] In response, Framatome, in its redress, sought a decision that:

‘[The appellant] seeks a decision by the Adjudicator that: The Project Manager failed to make the full assessment of the compensation event of changed Key Dates 2, 14, 24 in due time and as directed by the Adjudicator’s decision of February 26th, 2019; as a consequence, the Contractor’s quotation contained in the Contractor’s referral of December 11th, 2018 (paragraphs 135 to 171 and appendices 6 and 7) shall be deemed accepted. . . ’

[12] On 26 February 2019, the adjudicator issued his decision as ‘Decision no. 7’ which recorded that the project manager’s instruction of 29 May 2017 was indeed a compensation event and summarised the dispute as being about ‘the manner in which [the] compensation event was implemented which needs to be evaluated’. Eskom did not give notice of its dissatisfaction with the decision in terms of sub-clause W14(2) of the Conditions read together with sub-clause W3.10. It must be emphasised that in its referral and submission in the adjudication of Dispute 7, Framatome included a section which set out its assessment and quotation of the compensation event and requested the adjudicator to direct the implementation of the compensation event in accordance with that assessment. After Decision 7 was issued, the Project Manager did not assess the compensation event. Acting in terms of sub-clause 64.4² of the Conditions, Framatome notified the Project Manager on 20 March 2019 that he had failed to assess the compensation event. Despite this notification, the Project Manager still failed to make any assessment. The consequence of such a failure is that the provisions of sub-clause 64.4 were triggered with the concomitant result that Framatome’s quotation was deemed to be acceptable.

[13] On 23 April 2019, Framatome notified the Project Manager and Eskom of a dispute regarding the Project Manager’s assessment. The dispute, referred to as ‘Dispute 11’, was referred to the adjudicator. Framatome requested the adjudicator to determine whether the Project Manager had made a full assessment of the compensation event in due time, as directed by Decision 7 and whether the Project Manager had properly assessed the impact of the change to key dates 2, 14 and 24 on the sectional completion

² See fn 1.

dates, the completion date, the prices, and whether Framatome's quotation was deemed accepted by Eskom in terms of sub-clause 16.4.

[14] In his findings, referred to as 'Decision 11', the adjudicator determined that Eskom had failed, within the Project Manager's assessment, to make a full assessment of the compensation event in due time as directed by Decision 7 and also as required by clauses 63 and 64 of the Contract. The adjudicator concluded that Framatome's quotation was deemed to have been accepted by Eskom. The effect of this decision was that the adjusted key dates, sectional completion dates, completion dates, activity schedule and payments of the quotation became contractually binding upon the parties.

[15] Aggrieved with that decision, Eskom notified the adjudicator of its dissatisfaction. Additionally, it raised various grounds for refusing to give full effect to Decision 11. This prompted Framatome to institute enforcement proceedings in the Gauteng Division of the High Court, Johannesburg (the high court).

[16] The high court dismissed Eskom's challenge to Decision 7 on the basis that the dispute fell within the jurisdiction of the adjudicator and that Eskom neither objected to that decision nor gave notice of its intention to refer the decision to arbitration. It upheld Eskom's argument on Decision 11 on the ground that the adjudicator did not decide the dispute that was referred to him under the Contract by the parties. Essentially, the high court found that there was no mention at all in the referral about whether the Project Manager *timeously* issued the assessment. It concluded that the adjudicator answered the wrong question, and held that the impugned decision was not binding on the parties and was thus unenforceable. Additionally, it held further, that Eskom had good prospects of successfully establishing at the arbitration, that the adjudicator acted outside his jurisdiction. The high court refused leave to appeal. This appeal is with the leave of this Court.

[17] Before us, Eskom argues that Decision 11 was taken by the adjudicator outside the terms of his jurisdiction as it was not a dispute that had been notified and referred to him. It submits that in Decision 11, the adjudicator sought to enforce his previous decision in Decision 7. It contends that Decision 11 can only be considered valid if Decision 7 was within the adjudicator's jurisdiction. Principally Eskom asserts that the question before the adjudicator was not whether the Project Manager had timeously issued the assessment or had an assessment at all, but rather, whether the assessment was correct or not. Drawing the link between Decisions 7 and 11, Eskom asserts that the adjudicator had no regard to the notice of dispute and the extent to which the dispute was notified. By reverting to the event of 19 May 2017, the adjudicator erred, because such an event could not have been subject of the notice of dispute in Decision 7 of 13 November 2018. Therefore, Eskom contends that the adjudicator had no power to issue a decision and consequently, such a decision was a nullity.

[18] It advances three propositions in support of its contention, first it says the decision was not in respect of the dispute notified. Secondly, the dispute in respect of the project manager's notification of the event could only have been notified and referred to the adjudicator in terms of the Contract. Thirdly, it submitted that, by deeming the quotation as being acceptable, the adjudicator purported to vary the terms of the Contract, which it did not have the power to do. It also contended that the quotation was not one contemplated in clause 64.4 of the Contract. Eskom submits that the quotation was a calculation of the relief which Framatome sought in adjudication proceedings of Dispute 7 and it was not submitted to the Project Manager in terms of clauses 62.1³ and 62.3.⁴

³ Clause 62.1 provides as follows: 'After discussing with the Contractor different ways of dealing with the compensation event which are practicable, the Project Manager may instruct the Contractor to submit alternative quotations. The Contractor submits the required quotations to the Project Manager and may submit quotations for other methods of dealing with the compensation event which he considers practicable.'

⁴ Clause 62.3 states: 'The Contractor submits quotations within three weeks of being instructed to do so by the Project Manager. The Project Manager replies within two weeks of the submission. His reply is:

- an instruction to submit a revised quotation,
- an acceptance of a quotation,
- a notification that a proposed instruction will not be given or a proposed change decision will not be made, or
- a notification that he will be making his own assessment.'

[19] Framatome contends that the judgment of the high court must be overturned and the adjudicator's award be enforced. It submits that courts have, over the years, repeatedly confirmed that an adjudicator's decision is final and binding until set aside by the tribunal. It contends that the judgment of the high court has impermissibly introduced a subjective judicial discretion into the enforcement of adjudicator's awards by concluding that 'a very good prospect of successfully establishing that an adjudicator acted outside his jurisdiction in respect of Decision 11 and that the decision is not binding upon the parties and is unenforceable.' Accordingly, it urges upon us to set the decision aside.

[20] Against this background, I turn to the issue whether the high court correctly declined the order of enforcement. The principles applicable to this issue have been set out in numerous cases. In *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd & Another*,⁵ this Court describes the process of adjudication as follows:

'[3] Construction contracts most often require disputes to be resolved by arbitration, but at the same time postpone arbitration until the works have been completed, so as to avoid interruption. Earlier contracts in common use made an exception in certain limited circumstances. That was the case in Britain under the JCT1 Standard Form of Building Agreement (1980 edition), and in this country under the General Conditions of Contract 1982 for use in connection with Works of Civil Engineering Construction (Fifth Edition). In both cases an arbitration could not be opened until after completion of the works, except on limited issues that, by their nature, demanded earlier resolution, in particular disputes concerning payment certificates.

[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

⁵ *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd & Another* [2013] ZASCA 83; [2013] 3 All SA 615 (SCA); 2013 (6) SA 345 (SCA) (31 May 2013) para 3-5.

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”.’

[21] In the forefront of his argument counsel for Eskom submitted that because Decision 11 is predicated on an invalid Decision 7, the award by the adjudicator is unenforceable and not binding. I pause to state that no attack was taken against Decision 7. The closest Eskom did was to cross-appeal that decision before the high court. During argument before us, it was conceded that the cross-appeal was abandoned. In my view, if Eskom wished to challenge the validity of Decision 7, it had an election to do so. One course open to it was to treat Decision 7 as a decision falling within the powers of the adjudicator and refer the dispute to arbitration. The respondent contends that if the adjudicator exceeds his jurisdiction no referral to arbitration should be made. The other option was to contend that it was a nullity and challenge it. In this case, at no stage did Eskom complain that Dispute 7 referred to the adjudicator was outside his jurisdiction. I am not aware of any authority that supports the proposition that a lack of jurisdiction in relation to an earlier adjudication is a recognised ground for challenging an adjudicator’s jurisdiction in a subsequent adjudication that relies on the findings of the challenged jurisdiction prior to any challenge being made good. As a matter of fact, it participated in the adjudication process.

[22] It is clear that the attack on the enforcement of Decision 11 is an attack on its merits and the merits of Decision 7 which preceded it. The argument on Decision 7 was rightly rejected by the high court and it is not open to Eskom to resuscitate it here in this appeal. Accordingly, there is no merit in us entertaining it. One answer to this submission can be found in the provisions of Clause W1.3(10), which states that:

‘The adjudicator’s decision is binding on the Parties unless and until revised by the tribunal and is enforced as a matter of contractual obligation between Parties and not as an arbitral award. The Adjudicator’s decision is final and binding if neither Party has notified the other within the

times required by this contract that he is dissatisfied with a decision of the Adjudicator and intends to refer the matter to the tribunal.'

It is clear that only the arbitration is the appropriate forum. In argument before us, Eskom conceded that the dispute has been referred to arbitration.

[23] If the interpretation contended for by Eskom is correct, it will substantially undermine the effectiveness of the scheme of adjudication. It is plain that the purpose of adjudication was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration. As far as the procedure is concerned, adjudicators are given a fairly free hand. They are required to act impartially and permitted to take the initiative in ascertaining the facts and the law. Sight should not be lost of the fact that adjudication is merely an intervening, provisional stage in the dispute resolution process. Parties still have a right of recourse to litigation and arbitration. Only a tribunal may revise an adjudicator's decision. As that decision has not been revised, it remains binding and enforceable. Eskom cannot partially comply with the award and decline to give full effect to the payment portion of the award. What Eskom is asking the Court to do is to interrogate the merits, an aspect which falls within the purview of the arbitrator.

[24] Another compelling reason which militates against the submission of Eskom is that in paragraph 13 of its answering affidavit, Eskom stated as follows:

'The whole of the Adjudicator's decision in dispute 11 therefore forms the subject of the Respondent's notice of dissatisfaction of 5 August 2019 and will be reconsidered by the arbitration tribunal. (A copy of the notice of dissatisfaction in terms of Clause W1.3(10) and W1.4(2) is attached hereto and marked "AA2").'

A reading of this paragraph makes it clear that Eskom accepted that the dispute falls within the remit of the arbitrator and had agreed to participate in the contemplated arbitration proceedings. To my mind, no justifiable reason exists for not fully giving effect to the adjudicator's award. Refusing to comply with the payment award of the adjudicator is disingenuous. I will deal with Eskom's defences shortly.

[25] The submission that the adjudicator exceeded his jurisdiction and that the proper procedure was not followed does not entitle Eskom not to comply with the adjudicator's award. The adjudicator formulated the dispute with the understanding and appreciation of what the parties contemplated. It is trite that if upon an application for enforcement of an adjudication decision, it is found that the adjudicator did not have the requisite jurisdiction, his decision will not be binding or enforceable. At no stage did Eskom contend that the dispute referred to the adjudicator was outside his jurisdiction. It cannot avail Eskom to raise issues relating to Framatome's quotation. The adjudicator dealt with this aspect in its finding in Decision 11. It is an aspect that I now turn to because it formed the cornerstone of Eskom's submission.

[26] The quotation is challenged on the basis that it does not constitute one in terms of the Contract and that the procedure provided for in clause 64.4 of the Contract by which the quotation is deemed to be acceptable was not followed. This argument has no merit. Clause 64.4 provides:

'If the Project Manager does not assess a compensation event within the time allowed, the Contractor may notify the Project Manager to this effect. If the Contractor submitted more than one quotation for the compensation event, he states in his notification which quotation he proposes is to be accepted. If the Project Manager does not reply within two weeks of this notification the notification is treated as acceptance of the Contractor's quotation by the Project Manager.'

The quotation in terms of clause 64.4 was submitted together with Framatome's submissions. To this end, Eskom did not object to Framatome's alleged quotation which was embodied in the submissions to the adjudicator in the referral notice. A determination of whether or not Framatome's quotation was valid under the Contract and whether the process for the deemed acceptance of that quotation requires an analysis of the facts. This is an issue which the arbitrator will deal with in due course. That said, it is clear that the decision of the adjudicator is binding and enforceable.

[27] Eskom resisted the payment to the applicant on three bases. First, it contended that the amounts claimed are not due and payable. Secondly, the proposal to change the

payment did not and could not form part of the quotation under the Contract. Thirdly, in deeming the contractor's quotation as acceptable, the payment provisions of the Contract were changed and this was outside the jurisdiction of the adjudicator. These arguments have no merit.

[28] In terms of Decision 11 the amounts claimed were due and payable as a result of the contractor's quotation which was deemed acceptable by the project manager. The quotation provided various payment provisions in terms of the Contract and all these payments were in line with the activity schedule. It cannot be contended that the contractor is not entitled to propose changes to the activity schedule. In my view, any change or amendment to the activity schedule is permitted under Contract. The Contract recognises that the project management and other costs will be incurred by the contractor during the course of the works and throughout the duration of the project. What has been claimed by Framatome is consistent with the contractual provisions that govern such payments. The Contract in particular envisages that interim payments must be made and are subject to a revision by the tribunal in due course.

[29] In the final analysis, the question to be asked is whether the adjudicator's determination is binding on the parties. The answer to that question turns on whether the adjudicator confined himself to a determination of the issues that were put before him by the parties. If he did so, then the parties are bound by his determination, notwithstanding that he may have fallen into an error.⁶ The finding of the high court that the adjudicator answered the wrong question is not borne out by the facts. The adjudicator formulated the dispute as it was referred to him. At no stage did he depart from the real dispute between the parties. He decided the dispute in accordance with what the parties had contemplated and appreciated. It would seem to me that the high court focused its attention on the words 'timeously or in due course' in the adjudicator's award and concluded that the adjudicator exceeded his jurisdiction. This approach is wrong.

⁶ See *Carillion Construction Limited v Devonport Royal Dockyard Ltd* [2005] EWHC 778 (TCC) para 63.

[30] It is necessary that the dispute be looked at holistically taking into account how the parties conducted themselves. What the high court did was to isolate the words 'timeously' or 'in due time' from the context of the main dispute. During adjudication proceedings, Eskom did not contend that the notified dispute has been varied. It being obvious to all the parties that the dispute remained the same and the adjudicator consequently rendered a sound decision based on the facts. Before the high court was an enforcement of a provisional or interim payment due to Framatome in terms of the Contract. The provision that payment must be made even before arbitration is a strong indication of the ousting of a court's jurisdiction to review the award. The parties knew when they contracted with each other that the disputes may arise and a temporary solution in the form of interim payments is provided to ensure the completion of the Contract within the agreed specified period. The high court erred in its conclusion that the wrong question was answered. As stated in *Hudson's Building and Engineering Contracts*:

'It should only be in rare circumstances that the courts will interfere with the decision of an Adjudicator, and the courts should give no encouragement to an approach which might aptly be described as "simply scrabbling around to find some argument, however tenuous, to resist payment".'⁷

[31] All the foregoing demonstrate that the appeal must succeed. I make the following order:

1 The appeal is upheld with costs which costs shall include the costs of two counsel.

2 The order of the high court is set aside and replaced with the following:

'1 It is declared that Eskom is in breach of the New Engineering Contract 3: Engineering and Construction Contract (June 2005) with Option A concluded between Framatome and Eskom for the replacement of the Steam Generators at Koeberg Nuclear Power Station, Unit 1 and 2 (the Contract).

⁷ R Clay and N Dennys *Hudson's Building and Engineering Contracts* 14 ed (2021) at 11-010.

2 Eskom is directed to adhere and fully recognise and implement the decision delivered by the adjudicator on 23 July 2019.

3 It is declared that the contractual key dates 15, 16, 17, 18 and 19 relating to the replacement of the steam generators at the Koeberg Nuclear Power Station, Units 1 and 2, are:

3.1 In respect of Koeberg Power Station, Unit 1, 11 November 2018, 18 May 2019, 26 April 2020, 16 January 2020 and 14 February 2020, respectively.

3.2 In respect of Koeberg Power Station, Unit 2, 19 May 2019, 23 November 2019, 1 November 2020, 23 July 2020 and 21 August 2020, respectively.

4 It is declared that the contractual sectional completion dates for each section of the Works (as defined in the Contract) have been revised so that the sectional completion date 1 is 3 June 2020, sectional completion date 2 is 9 December 2020 and sectional completion date 3 is 22 June 2021.

5 It is declared that the contractual completion date for the whole of the Works is 22 June 2021.

6 Eskom is ordered to pay Framatome additional costs of:

6.1 EUR 2 706 146.00 which are subject to the price adjustment pursuant to Secondary Option Clause X1 of the Contract and pursuant to clause 51.4 of the Contract, the interest thereon calculated at the LIBOR rate being the 6 month London Interbank Offered Rate quoted under the caption "Money Rates" in The Wall Street Journal for the applicable currency or if no rate is quoted for the currency in question then the rate for United States Dollars, and if no such rate appears in The Wall Street Journal then the rate as quoted by the Reuters Monitor Money Rates Service (or such service as may replace the Reuters Monitor Money Rates Service) on the due date for the payment in question, adjusted *mutatis mutandis* every 6 months thereafter and as certified, in the event of any dispute, by any manager

employed in the foreign exchange department of the Standard Bank of South Africa Limited, whose appointment it shall not be necessary to prove;

- 6.2 EUR 2 706 146.00 which is subject to the price adjustment pursuant to Secondary Option Clause X1 of the Contract and pursuant to clause 51.4 of the Contract, interest thereon calculated at the LIBOR rate (described in paragraph 6.1.1) applicable at the time for amounts due in other currencies from 17 February 2019 to date of payment (inclusive of both dates);
- 6.3 EUR 1 353 073.00 which is subject to the price adjustment pursuant to Secondary Option Clause X1 of the Contract and pursuant to clause 51.4 of the Contract, interest thereon calculated at the LIBOR rate (described in paragraph 6.1.1) applicable at the time for amounts due in other currencies from 24 September 2019 to date of payment (inclusive of both dates);
- 6.4 R 36 595 611.00 which is subject to the price adjustment pursuant to Secondary Option Clause X1 of the Contract and pursuant to clause 51.4 of the Contract, interest thereon calculated at a rate of zero percent above publicly quoted prime rate of interest (calculated on a 365 day year) charged from time to time by Standard Bank of South Africa (as certified, in the event of any dispute, by any manager of such bank, whose appointment it shall not be necessary to prove) from 12 August 2018 to date of payment (inclusive of both dates);
- 6.5 R 36 595 611.00 which is subject to the price adjustment pursuant to Secondary Option Clause X1 of the Contract and pursuant to clause 51.4 of the Contract, interest thereon calculated at a rate of zero percent above the publicly quoted prime rate interest (as described in paragraph 6.1.5) applicable at the time for amounts due in other currencies from 17 February 2019 to date of payment (inclusive of both dates);
- 6.6 R 18 297 805.00 which is subject to the price adjustment pursuant to Secondary Option Clause X1 of the Contract and pursuant to clause 51.4 of the Contract, interest thereon calculated at a rate of zero percent above

the publicly quoted prime rate interest (as described in paragraph 6.1.5) applicable at the time for amounts due in other currencies from 24 September 2019 to date of payment (inclusive of both dates) within 10 days from the date of this order;

7 The respondent is ordered to pay the costs, such costs to include the costs of two counsel.'

R S Mathopo
Judge of Appeal

APPEARANCES:

For appellant: B Berridge SC (with him D Van Zyl)

Instructed by: Webber Wentzel, Johannesburg.
Webbers Attorneys, Bloemfontein.

For respondent: PHJ Van Vuuren SC

Instructed by: Edward Nathan Sonnenbergs Inc., Johannesburg.
Lovius Block Inc., Bloemfontein.