



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 53/2013

In the matter between:

**SCHALK WILLEM PIENAAR N.O.
BEVERLEY LYNNE PIENAAR N.O.**

**1st Applicant
2nd Applicant**

and

**ROYAL SWAZILAND SUGAR CORPORATION
LIMITED**

Respondent

Neutral citation: Schalk Willem Pienaar N. O. & Another v Swaziland Royal Sugar Corporation Limited (53/2013) [2014] SZHC 194 (8th August 2014)

Coram: M. Dlamini J.

Heard: 30th July, 2014

Delivered: 8th August, 2014

Adjudicator's award – standard term of contract reading “the decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below i.e. referred to arbitration by notice of dissatisfaction filed within 28 days – interpretation thereof – where notice of dissatisfaction raises grounds on the merit of adjudicator's award only, payment must be implemented immediately in line with the parlance “pay now and argue later” – where however, notice of dissatisfaction raises natural justice or procedural fairness issues, once those grounds are established, the award

becomes a nullity and therefore the duty to implement adjudicator's award does not arise – summary judgment application – respondent raises grounds on procedural fairness – court to view same as trial issue to be ventilated on trial. Trust is an institution without legal personality – trustees as administrators of trust ought to be cited.

Summary: By summary judgment application, the applicants seek for an order against the respondents for the payment of the sum of E4,062,270.00 (US\$477,914.00). The respondent ferociously opposes the application.

Parties

[1] The parties are defined in the applicants' combined summons as:

- “1. *The 1st Plaintiff (1st applicant herein) is an adult male businessman who is cited herein in his representative capacity as trustee of the Logichem Process Equipment Trust (IT NO. 2018/91), which carries on business as a chemical engineering concern and which has its principal place of business at Wellington, Western Cape, South Africa.*
2. *The 2nd Plaintiff(2nd applicant herein) is an adult female businesswoman who is cited herein in her representative capacity as trustee of the Logichem Process Equipment Trust (IT NO. 2018/91), which carries on business as a chemical engineering concern and which has its principal place of business at Wellington, Western Cape, South Africa.*
3. *The Defendant(respondent) is the Royal Swaziland Sugar Corporation Limited, a company duly incorporated and registered in accordance with the laws of Swaziland and which has its principal place of business at Simunye in the District of Lubombo, Swaziland.”*

Background

[2] It is common cause between the parties as can be deduced from the pleadings that on 27th June 2005 the Trust and respondent concluded a contract for the construction of an ethanol distillery plant in Swaziland at the total sum of E147,363,769.00 (US\$17,336,914.00). The terms and

conditions of the contract were in accordance with the standard form of contract in the construction business. For purposes of this matter, the salient term of this contract referred to dispute resolution. It provided that where a dispute arose between the parties, it shall be referred firstly to an adjudicator. If any of the parties were dissatisfied with the decision of the adjudicator, that party shall file a notice of dissatisfaction with the international arbitration within twenty eight days of the adjudicator's award.

- [3] A dispute did arise in a form of an alleged failure to do the works defined in the contract. The dispute was referred to an adjudicator. In February 2010 the adjudicator handed down his decision. He found in favour of the Trust and made an award of US\$477,914.12. This is the sum sought in the summary judgment application.

Parties' contentions

Applicants'

- [4] The applicants aver in their founding affidavit that the respondent has no *bona fide* defence and the notice to defend has been filed solely to delay their action proceedings. They contend further in their reply:

“7.1 I wish to aver that the interpretation accorded by the Defendant to Clause 20.5 of the agreement between the Applicant and the Defendant is manifestly incorrect. The contract between the parties expressly provides that the Adjudicator's decision shall be binding on both parties who shall promptly give effect to it unless and until revised in an amicable settlement or an arbitral award in terms of Clause 20.4. This accords with the practice in the construction industry; an adjudicator's decision must be given prompt and immediate effect until set aside by an amicable settlement or an arbitration award. In other words, the agreement expressly provides that after adjudication the parties must

give effect to the Adjudication Award and then thereafter pursue their rights in an arbitration process. If no Notice of Dissatisfaction is given then the Adjudication Award becomes final. It is important to stress that the filing of a Notice of Dissatisfaction does not excuse payment of the Adjudication Award; the Notice simply indicates that the unsuccessful party intends pursuing the dispute to arbitration. Put simply, the contract reinforces the principle that an unsuccessful party intends in an adjudication process must “pay now and arbitrate later”. In summary, the Defendant has failed and/or refused to give effect to the Adjudicator’s Award and make payment despite there being no amicable settlement or arbitration awards setting aside the Adjudicator’s decision. As a consequence of this, the Applicant is entitled to claim summary judgment against the Defendant based on the written Adjudicator’s Award.

- 7.2 The Defendant filed a Notice of Dissatisfaction in March 2010 and has taken no steps in the last three years to prosecute the Notice of Dissatisfaction and/or obtain an arbitration award setting aside the Adjudicator’s decision. The Defendant has therefore failed to prosecute its Notice of Dissatisfaction. Therefore, I humbly submit that the Adjudicator’s decision, under the circumstances has become final and binding upon the parties.*
- 8. There is no need for oral evidence for the determination of this matter as adjudication was held and an Adjudicator’s award was made and has not been set aside. As a matter of law, the Adjudicator’s decision must be given effect to until it is set aside which has not happened.*
- 9. The contents of this paragraph are admitted. However I wish to submit that the Defendant as the part who filed the Notice of Dissatisfaction must quite obviously prosecute the notice within a reasonable time and as a result of its failure to do so it has waived whatever rights it may have had. Therefore, the Adjudicator’s decision must be given effect to and the Defendant is obliged to pay the amount so ordered by the Adjudicator. I respectfully submit that the Defendant only filed the Notice of Dissatisfaction to frustrate the Applicant from enjoying the fruits of the Adjudicator’s Award and never had the true intention of prosecuting the arbitration.”*

The applicants reiterate their position:

“10. I submit that the agreement signed by the parties in Clause 20.4 clearly provides that the adjudicator’s decision is binding on both parties and shall be given prompt and immediate effect, unless and until it has been revised in an amicable settlement or in arbitral award. For the reason explained previously, the filing of the Notice of Dissatisfaction does not excuse the non-payment of the Adjudicator’s Award.

15.2 I wish to also submit or bring it to the attention of the above Honourable Court that I humbly submit that the Notice of Intention to Defend has been filed solely by the Defendant to further frustrate the Applicant and delay it from the enjoyment of the fruits of the Adjudicator’s decision. Such intention of the Defendant is evidenced by the conduct of the Defendant by filing a Notice of Dissatisfaction and then taking no steps to prosecute same as it is favourable to them yet prejudicial to the Applicant. It also ought to be noted that the Defendant has failed to make any allegations pertaining to any steps that it has taken to prosecute the Notice but lives comfortably with the Notice which it filed for the purposes of frustrating and delaying the Applicant from receiving payment of the Award.”

Respondent’s

[5] The respondent denies that it has no *bona fide* defence. The respondent then asserts:

“5.1 I deny that the Defendant is liable to the Plaintiff’s or the Trust in the sum of E4 062 270.00 together with interest thereon, or for any amount at all;

5.2 The Award by the adjudicator is not final and binding and therefore capable of enforcement because in terms of Clause 20.5 of the written agreement between the Trust and Defendant, a decision of the adjudicator becomes final and binding if no Notice of Dissatisfaction has been given within the time specified in Clause 20.4. I attach the full text of the agreement between the Trust and the Defendant marked “LM1”;

- 5.3 *In casu a Notice of Dissatisfaction was given by the Defendant within the 28 days specified in Clause 20.4. The Notice of Dissatisfaction contains the grounds on which the Defendant disputes the Adjudicator's decision. The Notice raises serious factual disputes which would make it undesirable to have the matter determined without oral evidence being led. I attach a copy of the Notice of Dissatisfaction marked "LM2";*
- 5.4 *Clause 20.5 provides that where a Notice of Dissatisfaction has been given both parties shall attempt to settle the dispute amicably before the commencement of arbitration. If the dispute is not settled amicably arbitration may be commenced after the fifty sixth day on which the Notice of Dissatisfaction was given;*
- 5.5 *Clause 20.6 of the Agreement provides that unless settled amicably, any dispute in respect of the Adjudicator's decision has not become final and binding shall be finally settled by international arbitration under the rules of arbitration of the International Chamber of Commerce;*
- 5.6 *The Adjudicator's award did not become final by virtue of the fact that a Notice of Dissatisfaction was given by the Defendant within the time specified in the Agreement;*
- 5.7 *Furthermore, no agreement was reached in the attempt to settle the dispute amicably. Pursuant to the Notice of Dissatisfaction and the failure to settle the dispute amicably, the Plaintiff's attempted to commence arbitration proceedings;*
- 5.8 *The arbitration could not however commence because the Plaintiff's wanted the arbitration to be undertaken under the rules of the Arbitration Foundation of Southern Africa. The Defendant was not amenable to this for the obvious reason that the Plaintiffs are South African and wanted the arbitration to be conducted in terms of South African procedures as opposed to what the Agreement provides. As indicated, the Agreement provides for settlement of the dispute by international arbitration;*
- 5.9 *In the premises, on the facts of the present case, the Adjudicator's Award is not final and enforceable because a Notice of Dissatisfaction was given, and the dispute can now only be settled finally by arbitration. The Plaintiff's are not relying on an Award capable of enforcement. An Award only becomes capable of enforcement if it is final and binding;*

5.10 *This particular Award is not final and binding and therefore is not capable of enforcement for the reasons stated above.”*

Issue

- [6] From the foregoing parties’ contentions as supported by their *viva voce* submissions, the bone of contention is whether an adjudicator’s award is final and binding and therefore ought to be given immediate effect despite a filed notice of dissatisfaction. If the answer to this poser is yes, then it can safely be said that the respondent has no *bona fide* defence to the summary judgment application. If on the other hand the response is to the negative, it stands to follow that the applicants’ application stands to be dismissed as respondent would have raised a *bona fide* defence.

Legal principle

- [7] Before I embark on addressing the position of an adjudicator’s award where there is a notice of dissatisfaction, I pose to state briefly on summary judgment applications.

Summary judgment applications

The rule stipulates:

“Summary judgment

32 (1) Where in an action to which this rule applies and a combined summons has been served on a defendant or a declaration has been delivered to him and that defendant has delivered notice of intention to defend, the plaintiff may, on the ground that the defendant has no defence to a claim

included in the summons, or to a particular part of such a claim, apply to the court for summary judgment against that defendant.”

Rule 32 (4) reads:

“32 (4) (a) Unless on the hearing of an application under sub-rule (1) either the court dismisses the application or the defendant satisfies the court with respect to the claim, or the part of the claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.”

[8] **Ota J** (as she then was) in **Mfaniseni Lyford Mkhalihi v. Somageba Investment (Pty) Ltd (1044/11) [2012] SZHC** cited his Lordship **Rammodibedi JA** (as he then was) in **Zanele Zwane v Lewis Store (Pty) Ltd t/a Best Electric, Civil Appeal No.22/07** as follows on Rule 32 (4):

“It is well-recognised that summary judgment is an extraordinary remedy. It is a very stringent one for that matter. This is because it closes the door to the Defendant without trial. It has the potential to become a weapon of injustice unless properly handled. It is for these reasons that the courts have over the years stressed that, the remedy must be confined to the clearest of cases where the Defendant has no bona fide defence and where the appearance to defend has been made solely for the purpose of delay. The true import of the remedy lies in the fact that it is designed to provide a speedy and inexpensive enforcement of a Plaintiff claim against a defendant to which there is clearly no valid defence”

[9] The learned judge (**Ota J**) eloquently proceeds:

“[11] Now, it is to ensure that this procedure is not distorted into a weapon of injustice, that Rule 32 (5) requires a Defendant opposed to a summary judgment application to file an affidavit resisting same. In the face of such an opposing affidavit, Rule 32 (4) (a) requires of the court the duty to scrutinize such an affidavit to ascertain for itself whether “there is an

issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the claim or part thereof.”

At paragraph 12 she highlights

“[12] I am of the firm view, that for the defendant to be said to have raised triable issues that would convey him to trial, he must set out material facts demonstrating a defence, though not in an exhaustive fashion, in his affidavit. It is the judicial accord that once the Defendant sets out such material facts to enable the court to anticipate a defence at the trial, he raises triable issues, and must be allowed to proceed to trial. On the other hand, where the Defendant fails to state any material facts in his affidavit or where the facts stated are too general, sketchy or vague no triable issue is raised and summary judgment should be granted.”

[10] **Mamba J in First National Bank of Swaziland Ltd t/a Wesbank v Rodgers Mabhojane Du Pont** citing with approval **Miles v Bull [1969] 1 OB 258 [1968] ALL ER 632** pointed out on the sub-rule (4):

“...the court pointed out the words ‘that there ought for some other reason to be a trial’ of the claim or part thereof, are wider in their scope than those used in the former rule referred to above “It sometimes happens that the defendant may not be able to pin-point any precise issue or question in dispute which ought to be tried” nevertheless it is apparent that for some other reason there ought to be a trial”

[11] The learned judge in **Miles** (*supra*) proceeds to highlight those circumstances which may warrant a matter to be referred to trial in the face of respondent’s failure to “*pin-point*” a triable issue:

“Circumstances which might afford ‘some other reason for trial’ might be where e.g. the defendant is unable to get in touch with some material witness who might be able to provide him with material for a defence, or if the claim is of a highly complicated or technical nature which could only properly be understood if such evidence were given, or if the plaintiff’s case tended to show that he had acted harshly and unconscionably and it is thought desirable that if he were to get judgment at all it should be in full light of publicity.”

Guiding principles on Adjudicator's award.

[12] When is the adjudicator's award to be given effect where there is a notice of dissatisfaction? Promptly, despite dissatisfaction notice? These are the questions that need determination.

[13] An article authored by **N. C. Maiketso and M. J. Maritz** in **Journal of South African Institution of Civil Engineering Vol. 5 No.2 Midrand 2012**, shows that in the context of construction industry, adjudication as carried out by adjudicators has been defined as:

"...a form of alternative dispute resolution (ADR) available to the construction industry"

The **Journal** (*supra*) lays down the characteristics of adjudication as follows:

- *"Object is to reach a fair, rapid and inexpensive decision;*
- *Adjudicator is to act impartially and in accordance with rule of natural justice;*
- *Adjudication is neither arbitration nor expert determination but adjudicator may rely on own expertise;*
- *Adjudicator's decision is immediately binding (finality is dependent on whether it is challenged within allotted time, in which case finality may be reached through arbitration, litigation or by agreement)."*

[14] The learned authors however, highlight on the purpose for adjudication:

“...but it is a commonly held view that its primary aim was to secure timely payment having recognized that one of the most notorious inefficiencies of the construction industry is non or late payment of contractors by employers/contractors respectively. This is why adjudication is so closely associated with legislation of the form “security of payment” and why it had been characterized by the adage “pay now, argue later”.”(my emphasis)

[15] **Construction Industry Development Board (CIDB) Pretoria** wrote a paper, **“Best Practice Guideline C3”: Adjudication (2005) 2nd Edition** and highlighted as follows:

“Adjudication may be defined as an accelerated and costs effective form of dispute resolution that, unlike other means of resolving disputes involving a third party intermediary the outcome is a decision by a third party which is binding on the parties in dispute and is final unless and until reviewed by either arbitration or of litigation...”

The literature reflects further:

“Adjudication is not arbitration or litigation. Litigation is a method of resolving disputes between two or more Parties by reference to one or more persons appointed for that purpose. The decision of the Adjudicator is binding and is final unless and until later reviewed by either arbitration or court proceedings, whichever the parties selected at the time of formalising the contract. It is intended that adjudication is a condition precedent to proceedings to either arbitration or litigation.”

The paper also points out:

“Adjudication is a form of dispute resolution that meets a need for a rapid relatively inexpensive dispute resolving mechanism which provides a decision that can be implemented immediately.”(my emphasis)

This paper then draws one’s attention as follows:

“The UK Courts have enforced adjudication decisions, the only exceptions being where:

1. *The adjudicator had no jurisdiction to hear the dispute in the first instance or has not answered the question that was referred to him;*
2. *The adjudicator had breached the rules of natural justice (procedural fairness) or;*
3. *The claimant was in liquidation or insolvent. ... to achieve a balance between the inquisitorial approach and adherence to the rules of natural justice - to treat the parties fairly;*
4. *The argument against the enforcement of an adjudicator's decision is based on the notion that a paying party, which feels that they have received the wrong end of rough justice imparted by an adjudicator in favour of a party in severe financial difficulties, may not be able to recover monies wrongly paid at a later stage through litigation or arbitration."*

[16] **AMEC Capital Projects Ltd v Whitefriars City Estates Ltd [2005] 1 ALL ER 723** is authority that the court would not uphold an adjudicator's decision where the rules of natural justice have been breached. Their Lordships put it precisely by stating:

"The purpose of the scheme of the 1996 Act 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 would be undermined if allegations of breach of natural justice were not examined critically when they were raised by parties who were seeking to avoid complying with adjudicators' decisions. It was however only where a defendant had advanced a properly arguable objection based on apparent bias that he should be permitted to resist summary enforcement of the adjudicator's award on that ground."(my emphasis)

Their Lordships point out what is inherent in natural justice as follows:

"[14] The common law rules of natural justice or procedural fairness are two fold. First, the person affected has the right to prior notice and an effective opportunity to make representations before a decision is made. Secondly, the person affected has the right to an unbiased tribunal. These two requirements are conceptually distinct. It is quite possible to have a decision from an unbiased tribunal which is unfair because the losing party was denied an effective opportunity of making representations. Conversely, it is possible for a tribunal to allow the losing party an effective opportunity to make representations, but be

biased. In either event, the decision will be in breach of natural justice and be liable to be quashed if susceptible to judicial review, or (in the world of private law) to be held to be invalid and unenforceable.”

[17] It appears to me that the above English legal principles on adjudicator’s award apply with equal force in countries exercising the Roman Dutch jurisdiction. The case of **Tabular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd 2014 (1) S.A. 244** cited by learned Counsel for applicants is all on fours with the English position discussed *supra*. His Lordship **Du Plessis AJ** presiding on a similar issue as *in casu* (status of adjudicator’s award where there is notice of dissatisfaction) eloquently and with precision states:

“[5] *The essence of this dispute is the interpretation of clause 20.4 (same clause as in casu). The applicant submits that the parties are required to give prompt effect to the decision by the DAB, which is binding unless and until it is set aside by agreement or arbitration following a notice of dissatisfaction, whereas the respondent says that the mere giving of a notice of dissatisfaction undoes the effect of the decision.”*(again same as *in casu*)

[18] The Honourable judge summaries the position of the law as highlighted in the South African literature and the English case law herein and hits the nail on the head as follows:

“In terms of the respondent’s notice of dissatisfaction, it is dissatisfied with the merits of the decision. There is no suggestion that the decision is a nullity for some jurisdictional or other reason.”

Based on the preceding legal principle, the learned judge then concluded:

“[13] Thus the notice of dissatisfaction does not in any way detract from the obligation of the parties to give prompt effect to the decision until such time, if at all, it is revised in arbitration. The notice of dissatisfaction does, for these reasons, not suspend the obligation to give effect to the

decision. The party must give prompt effect to the decision once it is given.”

[19] His Lordship **Du Plessis AJ** then cites with approval **Esor Africa (Pty Ltd. V Bombela Civil JV (Pty) Ltd GSJ Case No. 2012/7442)** unreported, where the learned judge held:

“I have considered a number (of) local and foreign cases that were dealt with in argument. In my view this is a straight forward case based on the reading of the contract and the underlying rationale for requiring the immediate implementation of the DAB decision, unless the court is completely satisfied that such previous decision is wrong, and has been arrived at by some manifest oversight or misunderstanding and that a palpable mistake has been made.”

[20] In **Pordikis v Jamieson SA 2002 (6) 356** at 357 where the valuator’s award was sought to be set aside on the basis that the valuator having made his award then later altered it, the court held:

“that the fact that the valuation was said to be final and binding did not mean that it was incapable of alteration unless fraud, collusion or capriciousness was proven.”

These are the legal principles at the back of my mind as I determine the issue *in casu*.

Determination

[21] Clause 20.4 of the parties’ contract reads:

“20.4 Within 84 days after receiving such reference, or the advance payment referred to in Clause 6 of the Appendix – General Conditions of Dispute Adjudication Agreement, whichever date is later, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. However, if neither of the Parties

has paid in full the invoices submitted by each member pursuant to Clause 6 of the Appendix, the DAB shall not be obliged to give its decision until such invoices have been paid in full. The decision shall be binding on both Parties who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference or such payment, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [Failure to comply with Dispute Adjudication Board's Decision] and Sub-Clause 20.8 [Expiry of Dispute Adjudication Board's Appointment] neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with the Sub-Clause.

If the DAB has given its decision as to a matter in dispute to both Parties and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both Parties.”

[22] I have already stated that the above terms of the parties' contract are a standard contract in the construction industry. In other words, the wording of the present parties' clause 20.4 was exactly the same as that seized with the honourable **Du Plessis** in **Tabular** (supra). The applicants are of the view that this clause accords well with the practice in such industries as shown in their replying affidavit that “*pay now and arbitrate later*”. This notion also finds support from the words of the learned authors **N C Maiketso** and **M J Maritz** in the **Journal of South African Institution of**

Civil Engineering *op. Cit.* who described adjudication as “*security of payment*” and thus the parlance “*pay now and argue later*”.

[23] On the other hand, the respondent disputes this position. I must, from the onset, point out that the total reading of the respondent’s answering affidavit suggests that by the mere fact of filing a notice of dissatisfaction, this in turn suspends the adjudicator’s award. From the authorities cited above, it is clear that it does not, and I must add, *per se*. Conversely, the position by applicants that the adjudicator’s award translates into the adage “*pay now and argue later*” is not to be so *per se*.

All in all, with due respect to both Counsel for the applicants and respondent, they have both misconstrued the position of the law with regards to the reading of clause 20.4 of the parties’ contract.

[24] The position of the law was well articulated by his Lordship **Du Plessis JA** in **Tabular** case *supra* that, and for purposes of clarity, I must repeat the quote:

“[6] *In terms of the respondent’s notice of dissatisfaction it is dissatisfied with the merits of the decision. There is no suggestion that the decision is a nullity for some jurisdictional or other reasons.*”

[25] An analysis of this *dictum* reflects that a notice of dissatisfaction may be in two fold. It may raise grounds on “*merits of the adjudicator’s decision*”, or in the words of learned **Du Plessis JA** be on ‘*jurisdictional or other reasons*’.

In other words, one must resort to the notice of dissatisfaction in order to ascertain whether the adjudicator’s award is final. If the notice of

dissatisfaction raises grounds on merit of the adjudicator's decision, then the adage "*pay now and argue later*" is applicable with full force in terms of clause 20.4 of the contract by reason that the award is final but only the dispute remains pending in the face of a notice of dissatisfaction. The term "*final*" connotes that it should be given effect immediately. In other words payment must be forthcoming. The notice of dissatisfaction only means the dispute is pending to be resolved by arbitration in due course. Where for instance in such a case, arbitration rules in favour of the appellant, then an order to reverse payment which was implemented as soon as the adjudicator gave its decision becomes one of the orders by arbitration. I must, however reiterate such a position is attained only where the notice of dissatisfaction raises grounds challenging the adjudicator's award on merits. Its implementation is not dependent on the final arbitration of the aggrieved party to the decision of the adjudicator. His Lordship **Du Plessis** in **Tabular** (*supra*) outlined this position with much precision when he ruled, "*the notice of dissatisfaction does not in any way detract from the obligation of the parties to give prompt effect to the decision until such time, if at all, it is revised in arbitration. The notice of dissatisfaction for these reasons (my emphasis) does not suspend the obligation to give effect to the decision*". We know "*for these reasons*" being that the notice of dissatisfaction challenges the merits of the adjudicator's decision.

[26] Similarly where the notice of dissatisfaction raises grounds and in the words of **Du Plessis JA** *op. cit.*, "*jurisdictional or other reasons*", the adjudicator's award cannot be said to be final. In fact, the position of the law, as per **Du Plessis JA**, is that such award is a nullity and in the language of English courts, the award is void and therefore no summary effect can be given to it.

What are these “*other reasons*” other than “*jurisdictional*” as canvassed by his Lordship **Du Plessis JA**? The **CIDB, Best Practices** (*op. cit.*) lists as follows:

- “1. *The adjudicator had no jurisdiction to hear the dispute in the first instance or has not answered the question that was referred to him;*
2. *The adjudicator had breached the rules of natural justice (procedural fairness) or*
3. *The claimant was liquidated or insolvent.*”

Expanding further on procedural fairness doctrine, the CIDB stipulates:

“Each party shall be given reasonable opportunity to state his case without a hearing, that is, he shall have a reasonable opportunity of presenting his case, know what the case against him is and be in possession of all the evidence and information adduced against it [of] obtained by the adjudicator.”

[27] As pointed above, the English courts, where the concept of adjudication by adjudicators originates and has been borrowed from by South African legislatures, take the same view that “*an adjudicator who has failed to give the other party representation, or has been said to be biased, his decision will be in breach of natural justice and be liable to be quashed if susceptible to judicial review or (in the world of private law) to be held to be invalid and unenforceable.*” (as per **AMEC Capital Projects** case (*supra*))

[28] What of the present respondent’s notice of dissatisfaction? What grounds does it raise? I ask these questions well aware that Mr. P. Flynn, learned Counsel on behalf of applicants, objected strenuously on the consideration of respondent’s notice of dissatisfaction in deciding this matter. He supported his objection on the basis that whatever is raised in the notice of dissatisfaction is for the attention of the international arbitration and not this

court. I am afraid that the position cannot be so, firstly following the *dictum* by his Lordship **Du Plessis** in **Tabular** *op. cit.* who held: “*In terms of respondent’s notice of dissatisfaction....*” Secondly, the defendants in *casu* have attached the notice of dissatisfaction and therefore this notice becomes part of the pleadings. I appreciate that the reason it was attached was to prove that it was so filed from the total reading of the affidavit resisting summary judgment. Thirdly, the respondent in its heads of argument has raised and referred this court to the notice of dissatisfaction and implored the court *viva voce* to look at the grounds for its notice of dissatisfaction.

[29] The notice of dissatisfaction, that is annexure LM, reads partly:

“2. *The grounds or reasons for the Defendant’s dissatisfaction are the following:*

- 2.5 *The Adjudicator erred and misdirected himself by his failure to recuse himself when the Defendant applied for his recusal on account of the Defendant’s reasonable apprehension that the Adjudicator was no longer impartial and independent, having regard to him having travelled in the same car with the Claimant’s representative when coming to the preliminary meeting and booking in the same hotel.*
- 2.6 *At the time the Application was predicated on the apprehension that the Adjudicator may no longer bring an independent mind to bear of the issues before him because of his perceived closeness to the Claimant. The perception of bias was reasonable in the circumstances. This would be more similar to a case of a Judge who comes to a Pre-Trial Meeting driving together in one car with one of the parties to the matter he would be hearing. The other party would be entitled to apprehend that the Judge would be bias in favour of the party he was driving with the Judge. The Judge’s protestations that he did not discuss the matter with the one party would be immaterial. Put simple, it is something not done by a person who is to independently and impartially decide a dispute between two parties.*
- 2.7 *The fundamental rules governing hearing of matters in all civilized systems are the principles of natural justice, namely:*

- 2.7.1 *Nemo iudex in causa sua (which means: no man shall be a judge in his own cause, i.e. disputes must be adjudicated upon by an independent and impartial person or body);*
- 2.7.2 *Audi alterum partem (which means: no man shall be judged without being heard);*
- 2.8 *These principles are the cornerstone of all civilized systems of Law and a failure to adhere to any of them invariably taints the proceedings and renders them liable to be set aside;*
- 2.9 *In casu, the Adjudicator had placed himself in a position where he could no longer proceed with the adjudication of the dispute as the defendant reasonably apprehended that he was no longer independent and impartial and this apprehension was reasonable. As Adjudicator and the party to the adjudication travelling together to a preliminary meeting of the adjudication is bound to raise suspicions that he is no longer independent and impartial and the decent thing was for him to recuse himself when the Defendant raises an objection;*
- 2.10 *The adjudicator's comments that "adjudication proceedings are by their nature somewhat rough and ready" appear to imply that in adjudication an Adjudicator need not necessarily follow the rules of natural justice. This is indicative of what was operating in the Adjudicator's mind when he made his decision. It is also indicative of his disposition on the matter and a strong predilection towards the Claimant;*
- 2.11 *The Rules of natural justice apply by equal measure to adjudication proceedings;*
- 2.12 *In fact, the Defendant now states that it is apparent from the decision of the Adjudicator that he was biased in favour of the Claimant. That this is the case, is demonstrated by the following:*
- 2.12.1 *E-mail communications between the Adjudicator and the Claimant which suggested other communications besides the E-mails;*
- 2.12.2 *The Adjudicator's unflinching refusal to give the Defendant a hearing to explain its case despite requests both in the Reply and by E-mail;*
- 2.12.3 *Making statements in his decision which have the effect of supplementing and explaining the Claimant's case which are not in the pleadings before him. Simply put, the Adjudicator supplemented the Claimant's claim with his own facts not based on pleadings before him;*

- 2.12.4 *Accusing the Defendant of being “presumptuous and hypocritical”;*
- 2.13 *The decision of the Adjudicator is fundamentally flawed and unsustainable by reason of the Adjudicator’s failure to give the Defendant hearing. He pronounced judgments on issues where he had not heard the Defendant who cried out to be heard but was simply ignored by the Adjudicator;*
- 2.14 *It was obvious from the Defendant’s Reply that it anticipated a formal hearing. The Defendant indicated that it will provide further proof of some matters in evidence at the hearing;*
- 2.15 *It was obvious that the Defendant wanted to amplify its case at the hearing having expressly said so in the reply and in an e-mail to the Adjudicator;*
- 2.16 *The Adjudicator in his decision admits that there are disputes on the pleadings as filed by the parties. The Adjudicator chose to ignore the version of the Defendant in favour of the Claimant’s version without providing reasons for doing so;*
- 2.17 *The matter was incapable of being decided fairly without resort to a formal hearing. Disputes by nature are resolved by hearing the parties to the dispute. Pleadings are merely a framework containing the skeletal portion of a party’s case. For instance, a party cannot plead all the evidence it wishes to bring in support of its case;*
- 2.18 *A party in a dispute proves its case at a hearing not in the pleadings. It thus cannot be said that the party has not discharged the onus of proof;*
- 2.19 *The Adjudicator based his granting of the Claimant’s claim and dismissal of the Counter-claim on the fallacy that the Claimant has proved its claim and the Defendant failed to prove its Counter-claim, when there was no hearing;*
- 2.20 *The onus of proof referred to by the Adjudicator in his decision relate to the onus that a party has to discharge in a hearing in order to be said to have proved a case;*
- 2.21 *This matter could not have been decided without a hearing. The failure to give a hearing in circumstances where it was necessary to give it vitiates the proceedings;*
- 2.22 *The Defendant was judged without being heard in violation of the principles of natural justice and its constitutional right to a hearing and this renders the decision fundamental flawed;*
- 2.23 *As regards the merits, if it is accepted that the Claimant repudiated the contract and abandoned the works, which is indisputable, it follows*

that the Claimant is liable for damages arising from the repudiation and abandonment of works;

2.24 *Repudiation by its nature is a deliberate default and is reckless misconduct. In law it is defined as an intention not to continue with obligations under a contract;*

2.25 *In the circumstances, the Defendant would be entitled to claim for consequential damages.*

[30] From the said notice of dissatisfaction, it is clear that the respondent raises both procedural unfairness issues as well as questions on the merits of the adjudicator's award. I have already highlighted that where the dissatisfied party raises grounds on the rules of natural justice, the court should direct that a determination ought to be made on that before finally pronouncing on the validity or otherwise of the award. *In casu*, that determination requires a hearing. For the holding by his Lordship **Mamba J** in **First National Bank of Swaziland** case *supra* and as per Rule 32 where plaintiffs' application is based and as per sub rule (4) that where the court holds that it is apparent that "*for some other reason there ought to be a trial*", the court should decline summary judgment application. This is my view. That is, for the reason that the respondent has raised in its notice of dissatisfaction "*procedural unfairness*" issues, the question remains for determination and whether same can be established in evidence to be produced at a trial. This therefore, renders the matter to have "*trial issue*", as per **Mamba J** *op. cit.*

[31] Before I conclude this matter, it would be remiss of me not to draw a distinction between the present case and one cited by applicants in support of their application. This is the case of **Basil Read (Pty) Ltd v Rogent Devco (Pty) Ltd from South Gauteng High Court (JHB) 41108/09** where the court dismissed respondent's defence although its notice of dissatisfaction raised grounds *inter alia* of procedural fairness. At paragraph 31, the court well observed as follows:

“31. *The respondent’s contention that the applicant seeks an order the consequences whereof, is to give effect to an improperly obtained determination, which order would subvert the parties’ intention not to be bound by such an improperly obtained determination, is with respect, a misconstruction of the applicant’s cause of action.*”

It points out further at paragraph 32:

“32. *The respondent conflates two distinct and separate concepts in its response to the application. Firstly, the respondent labours under an erroneous notion that payment became due and payable upon the issue by the adjudicator of a determination and not on the issuing of the payment certificate by the principal agent.*”

At paragraph 34 it clarifies the position with much precision as follows:

“34. *The respondent’s principal agent issued an interim payment certificate at the time when the principal agent knew that the respondent disputed the adjudicator’s decision. In acting thus, the principal agent certified that the respondent is indebted to the applicant in the amount reflected in the interim payment certificate.*”

[32] In conclusion, the applicants came to court not to enforce, as *in casu*, the adjudicator’s decision but the Engineer’s certificate having been issued after the adjudicator’s award and notice of dissatisfaction. The Engineer was respondent’s agent and thus the court held that in the absence of any challenge to the Engineer’s mandate as agent for respondent, the certificate was enforceable. *In casu*, we are concerned with the adjudicator’s award or should I say the applicants’ cause of action is based on adjudicator’s award.

[33] Point in limine

Respondent's Counsel contended that the contract was between the Trust and the respondent. For that reason, the Trust and not their representative ought to have brought the proceedings before court.

In **Mariola and Others v Kaye-Eddie N.O and Others 1995 (2) SA 728** his **Lordship Labuschagne J** had the following to say about trust:

“In our law a trust is not a legal persona but a legal institution, sui generis. The assets and liabilities of a trust vest in the trustee or trustees.”

In **Siboniso Clement Dlamini N.O v Deputy Sheriff Hhohho Region and Another Case No. 30/2008** at page 6 the learned judge **Mamba J** postulates:

“The general legal position as stated by applicant regarding the locus standi of a trust to sue and be sued is correct; that the trustee and not the trust – which is a discrete institution - must be cited.”

In essence as a trust is merely an institution and not a *legal persona* as is the case with a company, it is correct to cite the trustees of a trust. They are after all the administrators of the trust. For that reason, there is no basis in law in holding that the trust ought to have been cited as correctly pointed out by learned Counsel for applicants. In fact, had the applicants cited the trust without the trustees, the court would have upheld an objection on the basis that the trust lacks legal personality.

Costs

[34] For the reason that the respondent has misconstrued the principle of the law but for the provision of Rule 32 (4) which calls upon the court to scrutinise the pleadings to ascertain whether “*there are other reasons*” to refer the matter to trial, I am inclined not to grant costs in its favour.

[35] I therefore enter the following orders:

1. The summary judgment application is hereby dismissed.
2. No order as to costs.

**M. DLAMINI
JUDGE**

For Plaintiff: Advocate P. Flynn instructed by Cloete / Henwood - Associated
For Defendant: M. Magagula for Magagula & Hlophe Attorneys