**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE DIVISION, CAPE TOWN)**

**CASE NO: 5201/23**

In the matter between:

**ESKOM HOLDINGS SOC LIMITED** Applicant

and

**FRAMATOME** First Respondent

**PETER RAMSDEN** Second Respondent

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**JUDGMENT DELIVERED ELECTRONICALLY ON 17 JULY 2025**

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**WILLIAMS, AJ:**

**Introduction**

[1] The applicant and the first respondent are parties to a construction contract. For ease of reference, the applicant is also referred to as "*Eskom*" or "*the employer*" and the first respondent as "*Framatome*" or "the *contractor*".

[2] Two disputes arose which the first respondent referred to the second respondent ("*the adjudicator*") for determination.

[3] The adjudicator issued two decisions in the matter, the first on 15 December 2022 and the second on 18 March 2023. He also issued instructions and further instructions. The applicant contends that the decisions and instructions are invalid in the respects delineated below. It accordingly seeks four declarators to remedy the situation.

[4] The first declarator relates to paragraphs 24.4 to 24.7.1 of the adjudicator's decision given on 15 December 2022 (also referred to as "*the merits decision*") which the applicant contends are invalid on the following five grounds:

4.1. It was beyond his jurisdiction[1];
4.2. He failed to apply the rules of natural justice;
4.3. He failed to take into account the applicant's submissions;
4.4. He failed to issue a reasoned decision; and/or
4.5. He failed to decide the issues that he was required to decide.

[5] The second declarator flows from the adjudicator's instructions and further instructions respectively issued on 16 February 2023 and 7 March 2023 which the applicant submits are invalid since they exceeded his jurisdiction.

[6] The third declarator arises from the adjudicator's decision delivered on 18 March 2023 ("*the quantum decision*") which the applicant submits is invalid on seven grounds, viz:

6.1. It was beyond his jurisdiction;
6.2. He failed to apply the rules of natural justice;
6.3. He failed to receive and take into account the applicant's response to the first respondent's amended claim;
6.4. He failed to take into account the applicant's submissions;

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[1] This is analogous to the arguments raised in *Framatome v Eskom Holdings SOC LTD* 2022 (2) SA 395 (SCA) where it was also alleged that the adjudicator exceeded his powers.

6.5. He accepted the amounts in the first respondent's amended claim without having enquired into the supporting documents or the details of the claim;

6.6. He failed to issue a reasoned decision; and/or

6.7. He failed to follow the procedure laid down by himself.

[7] The final declarator is that the above decisions are unenforceable as contractual obligations and need not be complied with by the applicant or the project manager.

[8] The first respondent has opposed the application and asks that it be dismissed with costs, including the costs attendant upon the employment of two counsel, with scale C to apply from 12 April 2024.

[9] The first respondent has also filed a counter application for payment in accordance with the adjudicator's decision in which it seeks the following relief:

9.1. That the applicant is directed to make payment to the first respondent of the following amounts:

9.1.1. €35,288,582.00, exclusive of value-added tax and subject to the price adjustment for inflation pursuant to secondary option clause X1 of the contract, and pursuant to clauses 51.3 and 51.4 of the contract, interest thereon calculated at the LIBOR rate applicable at the time for amounts due in other currencies; and

9.1.2. ZAR 256,631,358.00, exclusive of value-added tax and subject to the price adjustment for inflation pursuant to secondary option clause X1 of the contract, and pursuant to clauses 51.3 and 51.4 of the contract, interest thereon;

9.2. That the applicant pays the costs of the counter application, including the costs of the first respondent's[2] France-based attorneys and the costs occasioned by the employment of senior and junior counsel.

[10] It was conceded by the applicant's counsel that if the main application fails, then the relief sought in the counter application should be granted.

[11] I now turn to address the issues arising in the matter and do so under the following headings:

11.1. The background to the dispute;
11.2. The nature and purpose of adjudication proceedings;
11.3. The dispute resolution procedure agreed upon;
11.4. The adjudicator's decisions, instructions and further instructions;
11.5. The powers of the adjudicator and the issuing of instructions;
11.6. The timing of the quantum instructions and further instructions;
11.7. Whether the rules of natural justice apply and, if they do, whether a breach thereof has been shown to exist;
11.8. The assessment of the monetary claims by the adjudicator;
11.9. The adjudicator's alleged failure to give a reasoned decision.

**The background to the dispute**

[12] The facts in this matter are largely common cause and do not require adumbration, suffice it to state the following.

[13] On 5 September 2014 Eskom concluded a written NEC3 Engineering and Construction Contract (third edition June 2005 which was reprinted with three amendments in June 2006) with Areva NP for the replacement of the steam generators at Koeberg ("*the contract*"). On 1 January 2018 Areva NP ceded and assigned all of its rights and obligations under the contract to Framatome.

[2] The reference to the applicant's France-based attorneys in paragraph 2 of the notice of counter application is clearly incorrect and should be a reference to Framatome's France based attorneys, consistent with paragraph 2.3 on p. 521 of the record.

[14] The contract is a standard one used in the construction industry where the employer and the contractor amongst other things select the clauses which govern their contractual rights and obligations.

[15] The contact consists of four parts: The agreements and contract data are regulated in Part C1; pricing date in Part C2; scope of works in Part C3 and information in Part C4. The parties selected as the conditions of contract the core clauses and the clauses for option A (Priced Contract with activity schedule); the dispute resolution option W1; certain secondary options (x-clauses) and certain additional clauses (z-clauses). The term "*core clauses*" refers to the conditions of contract that apply to all the various options under the contract.

[16] The work under the contract included the supply and installation of two sets of three replacement steam generators, one set to be installed in each of the reactor buildings at units 1 and 2 at Koeberg during separate planned outages of these units. The replacement of the steam generators can only be performed during a maintenance and refuelling outage when the power station is offline. These outages are planned in advance and around the employer's operational requirements. Planned outages are denoted by a 3-digit number where the first digit signifies the unit and the second and third digits refer to the number of the outage.

[17] Eskom scheduled the outage dates and planned to replace the steam generators in Unit 2 in outage 223 but then postponed it to outage 225. The start date of outage 225 was initially planned for 3 January 2022, but was subsequently postponed to 18 January 2022 when the outage commenced.

[18] On 3 March 2022 Eskom informed Framatome that it would not be continuing with the steam generator replacement ("*SGR*") work during outage 225. On 31 March 2022 Framatome notified Eskom of an event that it considered to be a compensation event after the latter decided to postpone the steam generator replacement works relayed in the employer's communication ("*E/C*") 15383

and the project manager's subsequent instruction to stop work conveyed in E/C 15411.

[19] The project manager acknowledged that Eskom's decision to postpone the SGR work constituted a compensation event which was designated as compensation event CN-CE-334.

[20] The designation of this compensation event gave rise to the two disputes which were referred to the adjudicator for determination. Dispute 118 concerned the project manager's assessment of compensation event CN-CE-334 and dispute 119 related to certain assumptions made by the project manager when instructing Framatome to submit its quotation in respect of compensation event CN-CE-334. The parties are in agreement the adjudicator's decision in respect of dispute 119 is not relevant to these proceedings and nothing further is said thereanent.

[21] On 9 September 2022 the project manager assessed the contractor's quotation for compensation event CE-CN-334 as nil with no changes to the key, sectional completion and completion dates. This is expressed as follows in his letter:

> *"Notwithstanding the Contractor's improved co-operation in relation to providing further information in support of the cost build-up for CE334, which the Project Manager appreciates, the cost substantiation remains outside that which is required by the SSCC vis-a-vis the definition of Defined Cost.*
>
> *Further, while the Parties have sensibly progressed the interrogation of the Contractor's costs there is still much work to do in terms of the delay analysis which will inform the periods of compensable delay to which these costs may or may not attach.*
>
> *In order to facilitate a reasonable assessment of entitlement, i.e. to avoid a zero-based assessment, the Project Manager has requested from the Contractor an extension to complete its assessment, which was regrettably declined by the Contractor.*

*The Contractor's rejection of said request for extension places the Employer at risk vis-à-vis the treated as accepted provisions under the contract. Under the current circumstances, the Project Manager therefore has no alternative but to assess the extension of time as well as the quantum component of the compensation event at zero.*

*Accordingly, under the provisions of clause 64 [The Project Manager's assessments] the Project Manager's own assessment of CE334 is as follows:*

1. *The Prices are not to be changed; and*
2. *The Completion Dates and Key Dates remain unchanged."*

[22] Aggrieved by the project manager's decision, Framatome issued dispute notices to Eskom and the project manager in which it disputed the project manager's assessment.

[23] The matter was thereupon referred to the adjudicator where the primary issues for determination were the following:

23.1. Whether the delays that resulted in the removal of the steam generator replacement ("*SGR*") work during outage 225 arose due to the fault of (i) the employer, (ii) the contractor, or both;

23.2. Whether the five assumptions provided by the project manager on 13 April 2022 under E/C 15567 in terms of ECC3 clause 61.6 were valid assumptions in that they were both reasonable and relevant;

23.3. Whether the contractor was entitled to compensation and if so, how much the contractor must be compensated.

[24] The time period within which disputes are to be determined is regulated in the contract. The parties extended this period by agreement and the adjudicator issued his decision timeously on 15 December 2022.

[25] The adjudicator's decision in respect of dispute 118 is set out in paragraph 24 where he found that the employer's decision to postpone the SGR from outage 225 and the project manager's subsequent instruction to stop works

constituted a compensation event under clause 60.1, including core clauses 60.1(2) and 60.1(4) (paragraph 24.1) and that the key, sectional completion and completion dates had to be changed in accordance with the impacted Rev 86 submitted by the contractor and the annexures that accompanied its referral (paragraph 24.2).

[26] The project manager who is appointed by Eskom fulfils an important role in the context of the contact. This was described as follows in *Framatome*:[3]

> "*The project manager's role is to manage the contact 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 to make and decisions required of them*."

[27] The finding that the decision to postpone the SGR from outage 225 and the project manager's subsequent instruction to stop work which is an acknowledged compensation event is consonant with the SCA's description of such an event in *Framatome*:[4]

> "*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*

[3] At p. 339 C, paragraph [4]. The extracts of the contract appended to the first respondent's answering affidavit as "AA1" also set out the role and responsibilities of the project manager. This is also addressed in the guidance note at p. 621 of annexure "AA1"

[4] At p. 399 F-H, paragraph [6].

*or deemed to be approved if there is inaction on the part of the project manager.*"

[28] Reverting to the merits award, the adjudicator found in paragraph 24.3 that the amounts claimed by the contractor "*are based on its quotation and are not a reliable forecast of the compensation that the Contractor is entitled to receive, and are rejected".* The adjudicator accordingly held:

> "*24.4. The Project Manager must, before 15 February 2023, make a new assessment of the Contractor's quotation for compensation costs due to the Contractor for "Compensation Event CE-CN-334-Employer's decision to postpone Outage 225 and instruction to stop work, communicated in E/C 16190", on the following basis:*
>
> *24.5. The Contractor must be compensated through a change to the prices for the costs of the following activities:*
>
> *24.5.1. costs incurred for mobilisation and implementation activities undertaken since mobilisation in September 2021 up until the decision date of 3 March 2022 that are sunken costs, in that these activities are wasted or need to be redone;*
>
> *24.5.2. costs incurred for SGR reversal activities incurred after 3 March 2022;*
>
> *24.5.3. costs incurred for maintenance, storage and preservation activities beyond 3 March 2022 up until the commencement of mobilisation for the next Outage;*
>
> *24.5.4. where comparable, a breakdown of contracted amounts should be used to determine the compensation amounts;*
>
> *24.6. Compensation already awarded to the Contractor by another adjudicator or tribunal, or previously assessed by the Project Manager, and implemented, for any of the above activities, must be deducted.*

*24.7. If the Project Manager has not made an assessment before 15 February 2023, or if either Party is dissatisfied with the amount assessed by the Project Manager, then that party shall express his dissatisfaction within two weeks of the Project Manager's assessment, or 15 February 2023, in which case:*

*24.7.1. Representatives of both Parties, the Project Manager and the Adjudicator will meet in Cape Town or at another venue agreed by the Parties within a period of three weeks after a Party had expressed his dissatisfaction, for the Project Manager and Contractor to present their calculations and the Adjudicator shall settle the quantum as the Adjudicator's decision on the quantum of this dispute."*

[29] Eskom gave notice that it was dissatisfied with the adjudicator's decision of 15 December 2023, thereby triggering the arbitration proceedings agreed upon between the parties. Notwithstanding the filing of the notice of dissatisfaction with the decision, the parties proceeded with the implementation of paragraphs 24.4 to 24.7.1 of the 15 December 2022 decision. On 20 December 2022 a meeting took place between representatives of Eskom and Framatome during which Eskom informed Framatome that it would forward an official request for information in order to carry out the assessment. This request was not forthcoming however.

[30] On 14 February 2023 the project manager addressed correspondence to Framatome in which he, amongst other things, referred to paragraphs 21.18 and 21.19 of the Adjudicator's decision which provide:

"*21.18. Contracted amounts should be used rather than estimates or actual costs to determine the costs of wasted mobilisation, wasted implementation and restoration work where these activities/costs are comparable. To facilitate this comparison*

*a breakdown of contracted amounts for Unit 2 is required to be provided by the Contractor.*

*21.19. Either tendered amounts or actual provable costs supported by evidence should be used as far as possible where comparable contracted costs are not available, because, in the adjudicator's opinion, the forecasts made by the Contractor are not reliable.*"

[31] The project manager contended that since Framatome had not complied with paragraphs 21.18 and 21.19, he was unable to comply with paragraph 24.2 of the adjudicator's decision and instructions on quantum and that he would only be able to comply with paragraph 24.2 when Framatome provided him with the required information.

[32] Framatome thereupon addressed correspondence to the adjudicator on 15 February 2023 informing him of the project manager's letter and his failure to have complied with the adjudicator's instructions.

[33] On 16 February 2023 the adjudicator issued further instructions which are reproduced below in material part:

*"3.2. In simple terms, the Adjudicator had, on 15 December 2022, provided the Employer, through its Project Manager, an opportunity to make its own assessment of the quantum by 15 February 2023.*

*3.3. The opportunity was given to the Employer and its Project Manager without conditions. No further performance was required by the Contractor."*

[34] The adjudicator concluded that because the project manager had not made an assessment by the due date of 15 February 2023 and no extension had been sought, nor granted, this triggered paragraph 24.7.1 of his decision of 15 December 2022. The adjudicator directed in paragraph 5.1 of the further instructions that the parties had to agree a date and venue within three weeks

of 16 February 2023 for both parties, the project manager and the adjudicator to meet, and for the contractor to present its calculations.

[35] The above instructions attracted further correspondence from Eskom to the adjudicator dated 17 February 2023 in which it advised *inter alia*:

35.1. That it stood by the conduct of and correspondence sent by the project manager to the contractor on 14 February 2023;

35.2. The above notwithstanding, it would avail itself for and, to the extent possible, participate in the proposed meeting with the adjudicator, but does so under protest and with the full reservation of its rights "*on the basis that the employer considers the adjudicator's decision as not enforceable as a contractual obligation or at all and need not be complied with by the employer and the project manager.*"

35.3. Eskom also referred to clause W1.3(8) of the contract and explained why it considered the adjudicator to be *functus officio*, that he was "*acting beyond the jurisdiction afforded to the Adjudicator and any determination flowing therefrom is, accordingly, not a decision contemplated in the contract and therefore a nullity that need not be complied with.*"

[36] A further exchange of correspondence ensued between the parties and the adjudicator. The adjudicator informed the parties in an email dated 23 February 2023 that the most important information that he required was the costs in the Activity Schedule for the Steam Generator Replacement in the unit that is done first, including pre-outage establishment and work done during the outage and post-outage. He noted Eskom's reservations but pointed out amongst other things that adjudication is an informal process where the object was to try and reach an informal decision and to avoid wasteful and lengthy litigation.

[37] Eskom responded to the adjudicator on 24 February 2023 and pointed out *inter alia* that actual defined costs were to be used for the work already done and forecast defined costs in respect of work not yet done, together with the

resulting fees. The material portions of this letter relating to costs and procedure are reproduced hereunder:

> "*3.3. In the Contractor's referral the Adjudicator was called upon to assess and determine, amongst other things, the additional costs (if any) to which the Contractor was entitled pursuant to a compensation event. In terms of clause W1.3(7), if the Adjudicator's decision includes, or is to include, an assessment of additional costs, the assessment is to be done in the way provided for in Clause 63 in that actual Defined Costs is to be used for the assessment in respect of work already done and forecast Defined Cost of the work not yet done is to be used, together with the resulting fees on the aforesaid costs.*
>
> *3.4. The Adjudicator was therefore not empowered to issue a decision directing the Project Manager to do an assessment on a basis not contemplated in clause 63.*
>
> *3.5. In terms of clause W1.3(8), the Adjudicator decides the dispute and notifies the parties of his decision and the reasons therefore within four weeks of the period for receiving information. Thereafter, the Adjudicator is functus officio with regard to that dispute and he may only correct any clerical mistake or ambiguity within two weeks of giving his decision. The parties may then issue notices of dissatisfaction with the decision and refer it to the tribunal.*
>
> *3.6. The Adjudicator was therefore not empowered to defer his final decision to a date to be arranged should a party notify a disagreement with the Project Manager's assessment which the Adjudicator ordered the Project Manager to make. The contract simply did not empower the Adjudicator to design and introduce his own procedure for dealing with disputes.*"

[38] Eskom also advised in its aforementioned letter that if Framatome produced any new information not in the possession of the project manager prior to or during the meeting of 27/28 February resulting in it or the project manager not

having been afforded sufficient opportunity to consider such information, then it reserved its rights, including its right to request a postponement of the meeting. The letter concluded by confirming its agreement to the meeting dates of 27 and 28 February 2023, but pointed out that this did not "*in any way constitute an acceptance or admission of the validity and/or enforceability of the Adjudicator's decision, in terms of which the Project Manager and the Employer's rights remain strictly and expressly reserved".*

[39] The meeting took place on 27 and 28 February 2023 and Framatome provided calculations for its revised quotation using actual hours and actual disbursements for the period ending 31 August 2022 and forecast hours for the period 14 April until 30 September 2023. Eskom disputed this in reply but this is not relevant to the dispute as the monetary amounts will be finally determined in the arbitration proceedings. The adjudicator's assessment of the quantum is also more fully addressed in response to Eskom's argument that he allegedly failed to give a reasoned decision.

[40] On 2 March 2023 Eskom addressed correspondence to the adjudicator and Framatome in which it recorded that it would consider waiving its rights to dispute the decision of 15 December 2022 subject to certain conditions being met. Eskom clarified its position in correspondence dated 3 March 2023. On the same date Framatome rejected the conditions. On 6 March 2023 Framatome provided further calculations to the adjudicator, Eskom and the project manager.

[41] In Eskom's letter to Framatome dated 6 March 2023 it contended *inter alia* that Framatome had distanced itself from its agreement to the contractual assessment of its real costs and was attempting to force the adjudicator to use historic rates for past compensation event assessments which were not currently before the adjudicator and were not agreed between the parties. Eskom also pointed out that in the event that the adjudicator elected to rely on the information provided at the meeting held on 27 and 28 February, then Eskom requested an opportunity to respond to the information.

[42] On 7 March 2023 the adjudicator issued further instructions in which Eskom was afforded an opportunity until 20 March 2023 to review Framatome's files and any additional information, and to respond to Framatome's provision of rates that the project manager and Eskom had previously considered to be valid benchmark rates. Thereafter, the adjudicator would determine whether a hearing was necessary to give Eskom an opportunity to present its response and Framatome an opportunity to rebut it. The adjudicator's instructions in paragraphs 21.18 and 21.19 of the decision of 15 December 2022 were withdrawn with the agreement of the parties that the contractual provision for assessing compensation events relating to prolongation would apply.

[43] Instead of availing itself of the opportunity to respond substantively to the adjudicator's second set of instructions, Eskom addressed correspondence to the adjudicator and Framatome dated 17 March 2023 in which it set out the background to the matter and recorded its objections. It also gave notice that it intended applying to the high court for declaratory relief "*that the Adjudicator's Decision, his continuing issuing of instructions, his intention to reconsider his decision and issue further decisions relating thereto are beyond his jurisdiction, are not enforceable and need not be complied with by the Employer or the Project Manager*."

[44] Eskom also made it clear that it had no intention of providing the adjudicator with any further information or participating any further in the adjudication process. This is manifest from the concluding paragraph of the letter which states:

> "*13. Effectively any decision made outside of the contractually prescribed time-period, is of no force and effect to the Parties as the Adjudicator is functus officio. Given the foregoing and pursuant to the contractual provisions, the Adjudicator is required to immediately discontinue his involvement in respect of Dispute 118 and 119 and issue the Parties with his final invoice as at today in this regard. In the event that the*

*Adjudicator does not do so his continued involvement will be at the Adjudicator's own risk.*"

[45] The adjudicator issued the quantum decision on 18 March 2023. On 29 March 2023 Eskom launched this application and on 13 April 2023 filed a notice of dissatisfaction with the quantum decision.

**The nature and purpose of adjudication proceedings**

[46] Adjudication is an accelerated mechanism to resolve disputes on an interim basis. In *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd & Another*[5] the Supreme Court of Appeal ("*the SCA*") quoted with approval from *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93 (CA) at 97 which is cited in Keating on *Building Contracts* (9th ed), paragraph 18-018, where adjudication was described as:[6]

"*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 abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process.*"

[47] Three features of the adjudicatory process bear emphasis. First, it is an interim provisional process, second, it "*is regarded as essentially a cash flow measure …to avoid delays in payment pending determination of litigation*"[7] and third, awards are binding on the parties and payable immediately.[8]

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5 2013 (6) SA 345 (SCA).
6 At 348 B-C, paragraph [4].
7 *Id* 348 D, paragraph [5].
8 *Stefanutti Stocks (Pty) Ltd v S8 Property (Pty) Ltd* (20088/2013) [2013] ZAGPJHC 249 (23 October 2013) where the court gave a synopsis of the adjudication procedure at paragraphs [5]-[9] and referred to *Carillion Construction Ltd v Devonport Royal Dock* Yard [2005] EWHC 778 (TCC); *Framatome* 405 F, paragraph [25].

[48] The SCA recognised that an adjudicator "*is given wide inquisitorial powers that enable disputes to be resolved summarily and expeditiously*".[9] The powers of the adjudicator include determining a matter on the basis of documents submitted by the parties, or an inspection of the works, or his own specialist knowledge. He is empowered to review any determination, certificate or valuation related to the dispute and generally may adopt the most cost- and time-effective procedures consistent with fairness to determine the dispute.[10]

[49] An adjudicator's award although interim in nature is binding on the parties who are obliged to comply therewith pending final determination of the dispute by arbitration, litigation or settlement.[11] Errors of procedure, fact or law by the adjudicator do not constitute defences to the enforcement of the adjudicator's decision.[12]

[50] The enforceability of the award arises from the contact concluded between the parties where their obligations are spelled out, and not as an arbitral award.[13] This is manifest from the dispute resolution option agreed upon between the parties which I address below.

[51] The dismissal of a review came before the SCA in *Ekurhuleni West College v Segal and Another*.[14] The court *a quo* had dismissed the review on three grounds: (a) that the notice of dissatisfaction and pending arbitration, on its own, precluded the review application; (b) that the rules of natural justice were not applicable to the matter and even so, were not shown to have been breached; and (c) that the adjudicator correctly determined the substantive merits of the claims in question. Although the SCA considered ground (a) to be dispositive of the matter, it nonetheless expressed the following views on grounds (b) and (c):

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9 *Radon* at 349 E, paragraph [7].
10 *Radon* at 349 E-F, paragraph [7]; *Framatome* at 404 I-405 A, paragraph [23].
11 *Framatome* at 404 E-G, paragraph [22]; 405 D, paragraph [24].
12 *Stefanutti* at paragraph [6] where the court referred to paragraph 80 of *Carillion* with approval.
13 *Freeman N.O. & Another v Eskom Holdings Limited* (43346/09) [2010] ZAGPJHC 29 (23 April 2010); [2010] JOL 25357 (GSJ), paragraph [25].
14 (1287/2018) [2020] ZASCA 32 (2 April 2020).

*"[13] In respect of ground (b), the court a quo agreed with the dictum in Sasol Chemical Industries Limited v Odell and Another [2014] ZAFSHC 11 para 18 that an adjudication of this nature is not subject to the common law. This led the court a quo to conclude that the rules of natural justice did not find application to the matter.*

*[14] The legal position is, however, more nuanced than this. It was lucidly set out by Botha JA in Turner v Jockey Club of South Africa 1974 (3) SA 633 (A) at 645H-646B: 'In the case of a statutory tribunal its obligation to observe the elementary principles of justice derives from the expressed or implied terms of the relevant enactment, while in the case of a tribunal created by contract, the obligation derives from the expressed or implied terms of the agreement between the persons affected. (Maclean v. Workers' Union, (1929) 1 Ch.D. 602 at p. 623). The test for determining whether the fundamental principles of justice are to be implied as tacitly included in the agreement between the parties is the usual test for implying a term in a contract as stated in Mullin (Pty.) Ltd. v. Benade Ltd., 1952 (1) S.A. 211 (A.D.) at pp. 214-5, and the authorities there cited. The test is, of course, always subject to the expressed terms of the agreement by which any or all of the fundamental principles of justice may be excluded or modified. (Marlin's case, supra at pp. 125-130).'*

*It is clear from the context that this passage dealt with tacit terms of a contract (the unexpressed intention of the parties) and not with implied terms (imported into contracts by law). See Ashcor Secunda (Pty) Ltd v Sasol Synthetic Fuels (Pty) Ltd [2011] ZASCA 158 paras 10-11 and authorities cited there. See also Marlin v Durban Turf Club and Others 1942 AD 112 at 127; Jockey Club of South Africa and Others v Feldman 1942 AD 340 at 350-351 and Lamprecht and Another v McNeillie [1994] ZASCA 45; 1994 (3) SA 665 (A) at 668C-I.*

*[15] These principles impact on the present matter in the following manner. The adjudicator operated as a tribunal created by contract. Express contractual provisions regulated the procedure that he had to follow. The College did not challenge any of these provisions as being*

*contrary to public policy. It follows that there was no room for the tacit importation of any rule of natural justice into the agreement of the parties. See Robin v Guarantee Life Assurance Co Ltd [1984] ZASCA 72; 1984 (4) SA 558 (A) at 567B-F. The College therefore had to show that the express contractual provisions had been breached. Taking into account the nature and purpose of the adjudication, the adjudicator conducted it strictly in terms of these contractual provisions. Therefore there appears to be no merit in the College's reliance on procedural unfairness.*

*[16] As to ground (c), it is trite that a judicial review is not concerned with the correctness of the result on the substantive merits of the decision in question, but with the fairness and regularity of the procedure by which the decision was reached. Consequently the court a quo erred in entering into and determining the substantive merits of the claims in question. The dismissal of the review application could not properly have been based on ground (c).*

[52] Since adjudication is a contractual mechanism, it is not subject to the common law[15] or any statutory prescripts. A late decision is not necessarily visited with being a nullity and unenforceable.[16] Key to the matter is the interpretation of the relevant clauses and the enforceability of the two decisions issued by the adjudicator.

[53] While a party who is dissatisfied with an adjudicator's award may approach a court for relief, the circumstances in which a court will intervene are rare. Arguments such as an adjudicator having exceeded his jurisdiction and that the proper procedure was not followed were roundly rejected by the SCA in *Framatome*.[17]

[54] The SCA made it clear that the provision that payment must be made even before arbitration was a strong indication of the ousting of the court's

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[15] *Freeman N.O. v Eskom Holdings Limited* [2010] JOL 25357 (GSJ), paragraph [25].
[16] *Freeman N.O.* at paragraphs [25]-[27].
[17] At 405 E, paragraph [25].

jurisdiction to review the award. The court also quoted with approval from *Hudson's Building and Engineering Contracts*:[18]

> '*It should only be in rare circumstances that the court 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.*".'

[55] I now deal with the relevant terms of the contract relating to dispute resolution.

**The dispute resolution procedure agreed upon**

[56] The parties selected option W1 as their dispute resolution procedure. In terms of clause W1.1, a dispute arising out of and in connection with the contract is referred to and decided by the adjudicator. Disputes are notified and referred to the adjudicator in accordance with the adjudication table. Clause W1.3(3) provides that the party referring the dispute to the arbitrator includes with the referral information to be considered by the adjudicator. Any more information from a party to be considered by the adjudicator is provided within four weeks of the referral. This period may be extended if the adjudicator and the parties agree.

[57] The powers of the adjudicator are set forth in clause W1.3(5):

> *"(5) The Adjudicator may*
>
> - *review and revise any action or inaction of the Project Manager or Supervisor related to the dispute and alter a quotation which has been treated as having been accepted,*
> - *take the initiative in ascertaining the facts and the law related to the dispute,*

[18] *Framatome* at 407 C-D, paragraph [30].

- *instruct a Party to provide further information related to the dispute within a stated time and*
- *instruct a Party to take any other action which he considers necessary to reach his decision and to do so within a stated time."*

[58] In terms of clause W1.3(7) if the adjudicator's decision includes an assessment of additional cost or delay caused to the contractor, he makes his assessment in the same way as a compensation event is assessed.

[59] Clause W1.3(8) provides that the adjudicator decides the dispute and notifies the parties and the project manager of his decision and his reasons within four weeks of the end of the period for receiving information. This four week period may be extended if the parties agree.

[60] In terms of clause W1.3(10) the decision of the adjudicator is binding on the parties unless and until revised by the Tribunal and is enforceable as a matter of contractual obligation between the 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 in the contract that he is dissatisfied with a decision of the adjudicator and intends to refer the matter to the Tribunal.

[61] Clause W1.3(11) provides that the adjudicator may, within two weeks of giving his decision to the parties, correct any clerical mistake or ambiguity.

[62] I now turn to consider the grounds upon which Eskom has challenged the adjudication process and Framatome's response.

**The adjudicator's decisions, instructions and further instructions**

[63] The merits decision only addressed a portion of the dispute and the monetary aspects were dealt with finally in the quantum decision on 18 March 2023. The adjudicator gave instructions on quantum in the merits decision which are

set out in paragraphs 24.4 to 24.7.1 thereof. He thereafter issued instructions and further instructions on 16 February 2023 and 7 March 2023 respectively.

[64] The merits decision was challenged on five grounds in the application.[19] The following grounds were advanced in argument:

64.1. The adjudicator failed to decide the dispute within four weeks from the end of the date for receiving information;
64.2. He had no authority to:
64.2.1. Issue instructions to the project manager;
64.2.2. Defer part of the dispute beyond the period prescribed in clause W1.3(8) of the contact;
64.2.3. Introduce "*the extra contractual procedure*"; and
64.2.4. Direct that Framatome's monetary claims were to be assessed on a basis other than that prescribed in the contract.
64.3. He breached the principles of natural justice by not inviting submissions from the parties on his intention to issue an instruction that compensation is to be based on "*contracted amounts*".

[65] The quantum decision was challenged on seven grounds in the application[20] but proceeded on the following grounds in argument:

65.1. The adjudicator was *functus officio* after notifying the 15 December 2022 decision;
65.2. His authority lapsed at latest on 16 December 2022;
65.3. He breached the principles of natural justice in reaching his decision;
65.4. He failed to give a reasoned decision.

[66] Eskom's argument is summarised below:

66.1. The adjudicator had the power to decide on the value of Framatome's claim for compensation and had to do so before 16 December 2022.

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[19] These are set out in paragraph 4 above.
[20] See paragraph 6 above.

He failed to do so and was not permitted to defer the decision on part of the dispute or to refer the matter to the project manager with instructions to make a new or different assessment before 15 February 2023, failing which, or if either party was dissatisfied therewith, the parties could approach the adjudicator to settle the quantum in the manner stated in paragraph 24.7.1 of the merits award. That part of his decision of 15 December 2022 was therefore invalid and void;

66.2. The adjudicator was not empowered, through issuing further instructions, to amend the contract "*by unliterally extending the timeframe within which he was to issue his decision beyond the four-week period agreed upon by the parties in clause W.1.3(8)*";

66.3. The period in clause W.1.3(8) can only be extended by agreement between the parties;

66.4. The project manager was not a party to the contract and did not act as Eskom's agent in making assessments. An adjudicator who is appointed to determine a dispute between two parties does not have any powers or authority to issue orders compelling third parties to do or perform something. This is not authorised in terms of clause W1.3(5). The term "*parties*" used in clauses W.1.1 to W.1.3 is defined in clause 11.2.(11) and this is a reference to the employer and contractor, not the project manager;

66.5. Framatome asked the adjudicator to make an assessment, not to issue such an instruction to the project manager;

66.6. Framatome's interpretation of the relevant clause in the dispute option selected fell to be rejected for several reasons, including:

66.6.1. Clause W.1.3(8) does not allow the adjudicator to issue instructions;

66.6.2. The adjudicator did not instruct a party to take an action "*which he considered necessary to reach his decision*";

66.6.3. The information provided by Framatome was not information which had been requested or invited by the adjudicator;

66.6.4. Framatome's interpretation of clauses W.1.3(3), W.1.3(5) and W.1.3(8) is incorrect and ignores the express wording of

clause W.1.3(3) which provides that the period may only be extended if the parties agree;

66.6.5. The interpretation which Framatome has placed on the above clauses "*leads to an unbusinesslike result which undermines the very purpose of the dispute resolution provisions*";

66.6.6. The only sensible and businesslike interpretation is that after the adjudicator has received the referral, he can ask any party to provide additional information within a stipulated time which must be within the four week period, unless the parties agree to extend the period for additional information. Thereafter the adjudicator must issue his decision within four weeks of the end of the period for receiving information unless the parties agree to extend this period;

66.6.7. This was the only interpretation which would avoid the adjudicator unilaterally extending "*the period within which his decision is to be notified, by requesting additional information under clause W.1.3(5) beyond the periods contemplated in clauses W.1.3(3) and W.1.3(8). The first respondent's proposed interpretation makes nonsense of the provision in Clause W.1.3(3) and W.1.3(8) which determines the duration of the adjudication process and allows it to be extended only if the parties agree to do so*";

66.6.8. Eskom relied on the authorities referenced in its heads of argument in support of the above interpretation.[21]

66.7. In terms of clause W1.4(2), if after the adjudicator notifies his decision and a party is dissatisfied, he may notify the other party that he intends to refer it to the tribunal. A party may not refer a dispute to the tribunal unless this notification is given within four weeks of notification of the

[21] See paragraph 41.9 and ff of Eskom's heads of argument. These cases are *Cubitt Building & Interiors Ltd v Fleetgate Ltd* [2006] EWHC 3413 (TCC), *Ritchie Brothers (PWC) Ltd v David Philp (Commercials) Ltd* [2005] 1 BLR 384, Epping Electrical Company Ltd v Briggs and Forrester (Plumbing Services) [2007] EWHC 4 (TCC) and *Group Five Construction (Pty) Ltd v Transnet SOC Limited* [2019] ZAGPJHC 328. Eskom pointed out that the SCA did not find in *Sasol South Africa v Murray & Roberts Limited* [2021] ZASCA 416 that the judgment in *Group Five* was incorrect. Eskom submitted that the SCA in effect approved the judgment by distinguishing the *Sasol* matter.

adjudicator's decision. Clause W1.4(3) provides that if the adjudicator does not notify his decision within the time provided by the contract, a party may notify the other party that he intends to refer the dispute to the tribunal. A party may not refer a dispute to the tribunal unless this notification is given within four weeks of the date by which the adjudicator should have notified his decision. After the adjudicator gave his merits decision Eskom issued a notice of dissatisfaction on 22 December 2022, and therefore, on the basis of clauses W1.4(2) and W1.4(3), Eskom submits that the adjudicator was not entitled to proceed with the adjudication process;

66.8. The adjudicator did not decide the first respondent's monetary claim within the time period for issuing a decision, and only issued a "*purported decision*" on the value of the claim in March 2023. He did so after Eskom had notified him that he was acting outside the scope of his powers. After receipt of this notice the adjudicator "*suddenly, without warning and on a Saturday, issued his purported decision. He did so prior to the applicant having addressed him on the additional information which had been submitted by the first respondent*";

66.9. The adjudicator found that Framatome's quotation was not reliable and stated the categories of costs for which it should be compensated. He instructed that contracted amounts should be used rather than estimates or actual costs to determine the costs of wasted mobilisation, wasted implementation and restoration work, and that either tendered amounts or actual provable costs supported by evidence should be used where comparable "*contracted costs*" were not available;

66.10. In issuing the instructions in paragraphs 21.18 and 21.19 of the merits decision, the adjudicator unilaterally decided that compensation should be based on contracted amounts when Framatome did not claim compensation based on contracted amounts and Eskom did not submit that it should do so. The adjudicator did not request the parties to make submissions in relation thereto;

66.11. The adjudicator later withdrew the instruction relating to contracted amounts at a stage when he was already *functus officio* or had no power to revise his decision or any part thereof;

66.12. Clause W.1.3(8) requires the adjudicator to provide his decision and his reasons within four weeks of the end of the period for receiving information. Eskom submits that in the purported decision of 18 March 2023 the adjudicator provided no reasons why he considered the amounts claimed by Framatome to be justified, "*other than to baldly state that he was satisfied that the revised calculation was a "fair reflection" of the actual and forecast compensation required. He even stated that the applicant's alternative calculations would have been valuable to him…As indicated, he was still expecting the applicant's response to the claim when he suddenly and in haste issued his decision*.";

66.13. The failure to have complied with clause W.1.3(8) renders the adjudicator's decision invalid and unenforceable.

[67] Framatome disputes that the adjudicator exceeded his powers, that he was *functus officio* after giving the merits decision, that he was precluded from issuing instructions on quantum, that there was anything improper with the timing thereof, that the quantum decision was not issued timeously, that the rules of natural justice apply and, if so, that there was a breach thereof. Framatome submitted that the quantum instructions formed part of the process with which the adjudicator was seized. The adjudication process was in accordance with the terms agreed upon and Eskom had misinterpreted the contract and failed to apply the facts correctly. Framatome also joined issue with Eskom's assertions about the manner in which the monetary claims were to be assessed and the adjudicator's alleged failure to give reasons.

[68] The following issues are in dispute:

68.1. The powers of the adjudicator and the issuing of instructions;

68.2. The timing of the quantum instructions and further instructions;

68.3. Whether the rules of natural justice apply and, if they do, whether a breach thereof has been shown to exist;

68.4. The assessment of the monetary claims by the adjudicator; and

68.5. The adjudicator's alleged failure to give a reasoned decision.

[69] These disputes are addressed below.

**The powers of the adjudicator and the issuing of instructions**

[70] The adjudicator's role is to resolve disputes in accordance with the relevant clauses in the contract. The adjudication process is procedurally regulated in the contract and comprises of the following steps:

70.1. First, the referral - the referring party, Framatome in *casu*, refers the dispute to the adjudicator and includes in the referral the information which the adjudicator is required to consider;[22]

70.2. Second, the furnishing of further information - both parties are entitled to unilaterally furnish further information to the adjudicator within a period of four weeks from the date of the referral;[23]

70.3. Third, the steps which the adjudicator is empowered to take - these are wide-ranging and include: (1) reviewing and revising any action or inaction of the project manager or the supervisor related to the dispute;[24] (2) altering a quotation which has been treated as having been accepted;[25] (3) taking the initiative in ascertaining the facts and the law related to the dispute;[26] (4) instructing a party to provide further information within a stated time;[27] and (5) taking any other action which he considers necessary to reach his decision and to do so within a stated time.[28]

[71] Fourth, the adjudicator's decision - the adjudicator decides the dispute and notifies the parties and the project manager of his decision and his reasons

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[22] Clause W1.3(3).
[23] Clause W1.3(3).
[24] Clause W1.3(5), first bullet.
[25] Clause W1.3(5), first bullet.
[26] Clause W1.3(5), second bullet.
[27] Clause W1.3(5), third bullet.
[28] Clause W1.3(5), fourth bullet.

within four weeks of the end of the period for receiving information. The four week period may be extended by agreement between the parties.[29]

[72] Eskom submits that the adjudicator could not issue the instructions on quantum because they do not fall within the powers conferred upon him in terms of clause W1.3(5).

[73] The use of the word "*any*" in the first and fourth bullet points in clause W1.3(5) connotes the conferral of wide powers on the adjudicator and is inimical to a restrictive interpretation. This is consonant with the "*wide inquisitorial powers*" adverted to by the SCA in *Radon* which facilitate disputes being resolved summarily and expeditiously.[30] How those disputes are to be resolved has been left to the discretion of the adjudicator. He is empowered to take any one or more of the steps in clause W1.3(5). The final bullet point is a catch-all provision which allows him to take any other action that he considers necessary to reach his decision and to do so within a stated time.

[74] The instructions on quantum contained in paragraph 24.4. of the merits award is clearly conduct which falls squarely within the remit of the adjudicator's powers as contained in clause W1.3(5). There is no room to contend in the circumstances that the adjudicator exceeded his powers in issuing instructions on quantum.

[75] The same considerations would apply to the deferral of part of the decision. There is nothing in the contractual provisions that compelled him to determine the merits and quantum simultaneously and to issue one decision. Again, the wide powers conferred upon the adjudicator support his methodology in determining the merits and deferring the decision on the quantum.

[76] The project manager had acknowledged that Eskom's decision to postpone the SGR constituted a compensation event. The dispute arose in consequence of the project manager's assessment of that compensation

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[29] Clause W1.3(8).
[30] *Radon* at 349 E, paragraph [7].

event as nil with no alteration to the key, sectional completion and completion dates.

[77] The adjudicator's difficulty with the quotation provided by Framatome is addressed in paragraph 24.3 of the merits award. Within days of the award being notified, the parties met on 20 December 2022 and Eskom informed Framatome that it would forward an official request for information in order to carry out the assessment. This was a clear acceptance of the adjudicator's instructions on quantum. The only assessment which had been made at that stage was that of the project manager on 9 September 2022.

[78] The engagement and interaction between the parties and the adjudicator after the merits decision are clear indicators that further information was required in order to carry out the assessment.

[79] The adjudicator also specified that the action had to be taken by 15 February 2023. This accords with clause W1.3(5).

[80] It was the function of the project manager to do the assessment. Eskom's complaint that the adjudicator did not have the power to issue instructions to the project manager because he was not a party to the contract is aptly described by Framatome as being "*an incorrect literal and overly narrow interpretation of the relevant clause*" and was raised by Eskom for the first time in reply. The project manager is an employee of Eskom and integral to performance in terms of the contract. The core clauses in the contract are replete with references to the project manager where his role and responsibilities are outlined. The guidance notes to the contract are also relevant since they provide context to the contractual landscape.[31] The first and fourth paragraphs of the guidance notes are reproduced below:

> "*The Project Manager is appointed by the Employer, either from his own staff or from outside. His role within the ECC is to manage the*

[31] The relevant extract of the guidance note appears from p. 621 of annexure "AA1" to the answering affidavit.

*contract for the Employer with the intention of achieving the Employer's objectives for the completed project.*

*…*

*The ECC places considerable authority in the hands of the Project Manager. It assumes that he has the Employer's authority to carry out the actions and make the decisions required of him. If his contract with the Employer constrains him in any way, as for example in the case of a limit on the amount which the Project Manager may authorise as a compensation event assessment, it is the responsibility of the Project Manager to ensure that all the approvals are given in time to enable him to comply with the time periods set out in the ECC. If such approvals by the Employer are not given, the Contractor has the right to raise the matter with the Adjudicator. It is not advisable to state limits on the Project Manager's authority in the additional conditions of contract as this will make settlement of disputes difficult*."

[81] To my mind the word "*party*" in the third bullet point of clause W1.3(5) would of necessity include a reference to the project manager if the circumstances so require. This is supported by clause W1.3(5) which expressly empowers the adjudicator to review and revise any action or inaction on the part of the project manager and is in line with the project manager's responsibility to carry out assessments.

[82] The project manager's assessment on 9 September 2022 triggered the dispute and he was clearly best placed to make a new assessment on the basis specified in paragraphs 24.5 and 24.6 of the merits decision.

[83] The instructions to the project manager accord with the contract and fell within the adjudicator's powers.

**The timing of the quantum instructions and further instructions**

[84] Eskom submits that the adjudicator did not have the right to "*defer*" his decision on any part of the dispute beyond the four week period prescribed in

clause W1.3(8). According to Eskom, the adjudicator was *functus officio* and no longer empowered to issue any further decisions on the referred dispute after 16 December 2022.

[85] Whether Eskom is correct depends upon when the four week period contemplated in clause W1.3(8) starts to run.

[86] Eskom contends that the four week period starts to run four weeks after the referral is made. The correct approach to the interpretation of written documents is set out by the SCA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:[32]

> "*[18] … The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a*

[32] 2012 (4) SA 593 (SCA). See also *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) at paragraphs [64] to [66] and *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) at paragraph [25].

*statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.*"

[87] The SCA held In *Endumeni* that a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. The interpretation which Eskom seeks to place on the clause does not accord with the actual words used therein and gives rise to an illogical and unbusinesslike interpretation which is to be avoided.

[88] On Eskom's argument the end of the four week period in clause W1.3(3) must be the same as "*the end of the period for receiving information*" referred in in clause W1.3(8).

[89] Clause W1.3(3) deals with the period within which the parties may provide information. Had the parties intended the start of the four week period in clause W1.3(8) to be the same as the end of the four week period in clause W1.3(3) the sentence would have stated "*providing information*" not "*receiving information*". The intentional use of different terminology is a clear indicator that the end of the four week period in clause W1.3(3) differs from the end of the period for receiving information referred in in clause W1.3(8).

[90] Framatome correctly points out that Eskom's interpretation gives rise to the absurdity that a party could wait until the very last day of the four week period to provide information and then deprive the adjudicator of the opportunity to request any further information and/or issue any instructions. The four week period afforded to him under clause W1.3(8) is to evaluate all the information before him. Moreover, an adjudicator would also not know whether a party will be providing information until the end of the initial four week period. Signally, the information provided potentially on the last day of the four week period

may well give rise to the need for further information to be provided or further enquiries to be made. Eskom fails to address how the adjudicator is to perform his function if he is precluded from taking the steps in clause W1.3(5) after the initial four week period.

[91] It would make the process unwieldy and result in an absurdity if the adjudicator were to take the steps enumerated in clause W1.3(5) during the initial four week period envisaged in clause W1.3(3). His conduct would be premature and precipitous. By way of example, he could hardly review and revise any action or inaction during the initial four week period since information relevant thereto may only be forthcoming on the last day thereof or not at all. If it is not forthcoming, then he is expressly authorised to ascertain information.

[92] Interpreting clause W1.3(5) to mean that the adjudicator must exercise his powers within the initial four week period is wholly inconsistent with the purpose, context and clear wording of the provision. If a party fails to submit information in the initial four week period and the adjudicator cannot exercise his powers in terms of clause W1.3(5), it is unclear how exactly the adjudicator is meant to make a determination without the relevant facts.

[93] The four week period in clause W1.3(3) is clearly not the same as the four week period in clause W1.3(8). I agree with Framatome's assertion that it contemplates a four week window period for the adjudicator to come to grips with the information and to decide the dispute.

[94] If the adjudicatory process is unduly delayed or protracted by the adjudicator then the parties have remedies, including seeking a mandamus alternatively referring the dispute to arbitration in terms of clause W1.4(3).

[95] Eskom relies on the judgment of Twala J in *Group Five Construction (Pty) Ltd v Transnet Soc Limited*[33] which concerned the enforcement of an adjudication

[33] [2019] ZAGPJHC 328 (28 June 2019).

award issued in terms of option W1. The following features of that case are highlighted:

95.1. Group Five was the contractor and Transnet was the employer in terms of a contract that also incorporated the conditions of the NEC3 (third edition 2005), option D and option W1.

95.2. The referral of the dispute was made on 4 May 2018. Transnet filed a response on 30 May 2018 and on 19 June 2018 the adjudicator afforded Group Five an opportunity to respond thereto by no later than 29 June 2018.

95.3. On 19 July 2018 the adjudicator requested further information from Group Five in the form of an electronic copy of the settlement agreement and it was provided to him on the same day. This had also been provided at the time of the referral.

95.4. On the 30 July 2018 the adjudicator requested that both parties allow him an additional seven calendar days to finalise his request for further information where after he should be in a position to finalise his award within four weeks.

95.5. On the 31 July 2018 Transnet refused to grant the adjudicator the extension and on the same date it gave notice to Group Five to refer the dispute to the tribunal.

95.6. The adjudicator issued his decision on 18 September 2018.

95.7. Transnet subsequently argued that the adjudicator failed to publish his decision within four weeks by 29 July 2018, this being the end of the four week period after the information was provided on 29 June 2018.

95.8. Contrary to Eskom's argument in the present matter, both Group Five and Transnet accepted that the four week period within which the adjudicator had to give his decision was not the same as the four week period in clause W1.3(3). This is apparent from paragraph [4] of the judgment where Group Five stated that due to the further response being required to be submitted by 29 June 2019, "*the adjudicator's decision was therefore due four weeks hence*." Counsel for Transnet made a similar submission that "*the adjudicator failed to publish his*

*decision within four weeks which period was from the 29th of June 2018 to the 29th of July 2018*".[34]

95.9. Contrary to the above common cause fact, Twala J held that in terms of the contract the adjudicator had to publish his decision within 4 weeks from the date of the last submission unless he obtained consent from the parties to extend that period.[35]

95.10. In paragraph [21] of the judgment Twala J held:

> "*In terms of clauses W1.3.3 and W1.3.8 of the agreement between the parties the time period for the publication of the adjudicator's decision is 4 weeks from the date when he receives the last submission from the parties.*"

95.11. The adjudicator's mandate in the *Group Five* case was terminated by Transnet on 31 July 2018 when Transnet refused to consent to the extension of time as requested by the adjudicator and this was accepted by Twala J.[36]

[96] The *Group Five* case does not support Eskom for a number of reasons, including:

96.1. The facts in the present matter differ *toto caelo*;

96.2. It is not clear from the judgment in *Group Five* why the court deviated from a common cause fact that the decision had to be given on 29 July 2018. This was not the same date as the end of the four week period contemplated in W1.3(3);

96.3. The judgment does not address why the four week period in clauses W1.3(3) and W1.3(8) were conflated;

96.4. The adjudicator in *Group Five* did not give his decision timeously and his mandate was terminated;

96.5. After the merits decision was given in the present matter, the parties met within days with a view to implementing the decision;

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[34] At paragraph [14].
[35] At paragraph [17].
[36] At paragraph [25].

96.6. In the present matter both the merits and the quantum decision were given timeously.

[97] The case of *Murray & Roberts Limited v Sasol South Africa (Pty) Ltd*[37] also concerned an adjudicator's decision issued under option W1 where the terms were the same as in the present matter. The adjudicator's contract in *Murray and Roberts* contained an additional clause, *viz*:

> "*Additional condition 2.5: 'The adjudicator may ask for any additional information from the Parties to enable him to carry out his work. The parties provide the additional information within two weeks of the adjudicator's request.'*" [38]

[98] A dispute arose between Murray & Roberts and Sasol as to the manner in which the period in clause W1.3(8) had to be calculated. Weiner J held:[39]

> "*M&R submitted, correctly in my view, that the period provided in clause 2.5 would commence after the period stipulated in clause W1.3(3), that is, after Sasol had filed its opposing information in relation to D16. M&R contended that that is the period being regulated in clause W1.3(3), as opposed to the period of four weeks after which the adjudicator has the right afforded to him in terms of clause 2.5 read with clause W1.3(5).*"

[99] The matter was taken on appeal to the SCA[40] where clauses W1.3(3), (5) and (8) were considered. The SCA per Zondi JA held as follows:

> "*[33] It was submitted by Murray & Roberts that this clause allows both parties to provide further information or to reply to further information until the last day of the four-week period. Only after that day, would the adjudicator be in a final position to consider*

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37 2020 JDR 2233 (GJ).
38 See paragraph 14 read with fn 5.
39 At paragraph [43].
40 *Sasol South Africa (Pty) Ltd v Murray & Roberts Limited* 2021 JDR 1328 (SCA).

*whether, based on the information already received, additional information would... enable him to carry out his work …I agree with this submission.*

*[34] Clause W1.3(5), third and fourth bullet points of the conditions of contract states:*

*'The Adjudicator may...*

- *instruct a Party to provide further information related to the dispute within a stated time and*
- *instruct a Party to take any other action which he considers necessary to reach his decision and to do so within a stated time.*

*[35] The provision of 'further information' necessarily applies to information after the four-week period in clause W1.3(3) and places no limitation on the extent of the 'stated time.*"

[100] The above interpretation is correct and applies equally to the facts of this case. There is no basis to suggest that the adjudicator exceeded his powers in taking any of the steps that he did in this matter.

[101] His decisions were also issued timeously.

**Whether the rules of natural justice apply and, if they do, whether a breach thereof has been shown to exist**

[102] Eskom submits that the rules of natural justice find application and that this was breached by the adjudicator. As Framatome correctly points out however, this is ironic in light of Eskom's refusal to engage and provide information on invitation from the adjudicator during the quantum phase of the adjudication. Although this conduct is wholly inimical to a party asserting *audi*, I will nonetheless deal with Eskom's contentions in this regard. Eskom relies on the judgment of Twala J in *Group Five Construction (Pty) Ltd v Transnet SOC Limited* where it was held that the adjudicator flagrantly disregarded the *audi alteram partem* principle. By implication, this principle applies to adjudications.

[103] As outlined above, the facts of *Group Five* differ from the present matter. In that case the adjudicator failed to deliver his decision within the four week period, namely on 29 July 2018. An extension of this period was not agreed to and it was common cause that the decision of the adjudicator was issued late. His mandate was terminated by Transnet and he thereafter engaged with one party. This is not only undesirable but inherently unfair.

[104] Eskom's submission that it was precluded from participating in the adjudication process is wholly inconsistent with paragraph 13 of its letter of 17 March 2023[41] where it indicated unequivocally that it would no longer be participating in the adjudication process.

[105] Its prevarication on this issue is to be deprecated. Eskom's assertions on oath as regards its continued participation in the adjudication process are also of concern. It stated the following in paragraph 104 of the founding affidavit:

> "*It needs to be emphasised that the Applicant did not say that it will not take part in the process or that it refused to respond to the issues which it was instructed to respond to in the Second Further Instructions. The Applicant was in the process of preparing its response when it issued the letter on 17 March 2023 and it intended to issue such response on 20 March 2023. It therefore made it clear in paragraph 12 of the letter that it would respond to the aforesaid issues to protect its rights and to ensure that the Second Respondent will not only have the First Respondent's calculations and submissions before him, should he issue a further decision.*"

[107] Paragraph 12 of the letter of 17 March 2023 does not contain any indication that submissions would be forthcoming by Eskom on 20 March 2023. It simply records:

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[41] Reproduced in paragraph 44 above.

"*The Employer's continued participation is solely to ensure that the information and submissions before the Adjudicator are not only those furnished by the contractor. To the extent that the Adjudicator purports to make and issue any further decision in respect of Disputes 118 and 119 the Employer places on record that any such decision would be beyond the Adjudicator's jurisdiction.*"

[106] The version on oath is not reconcilable with paragraphs 12 and 13 of Eskom's aforementioned letter. In any event, and on my reading of the relevant contractual provisions, I am not persuaded that the rules of natural justice find application. This accords with the SCA's findings in paragraph 15 of *Ekurhuleni* West "*that there was no room for the tacit importation of any rule of natural justice into the agreement of the parties.*"

[107] Even if the rules of natural justice did apply, Eskom has failed to show any breach thereof.

**The assessment of the monetary claims by the adjudicator**

[108] Eskom submits that the reference to contracted costs in paragraph 21.19 of the merits decision renders the extra contractual procedure void and unenforceable.

[109] Nothing turns on this for two reasons. Firstly, there is no challenge to paragraph 21.19 in the notice of motion and secondly, the adjudicator withdrew the instruction on costs.

**The adjudicator's alleged failure to give a reasoned decision**

[110] The quantum decision[42] comprises 23 pages and sets out amongst other things the relevant clauses in the contact and the assessment of compensation as well as the applicable rates. Framatome relied on clause

[42] Appended to the founding affidavit as FA20.

63.14 of the contract which provides that if the project manager and the contractor agree, rates and lumpsums may be used to assess a compensation event instead of a defined cost. Framatome's submission was supported by letters from the project manager, one dated 10 August 2022 and another dated 9 March 2018. The rates in the latter letter applied to contract 4600055123 and the fee percentages included in part 2 of the contract data were to be used. These rates had been proposed by the project manager as a compromise. Eskom's response was that the person who was performing the function of project manager at the time that the rates compromise was made had been suspended. Quite how this impacts on the validity of the compromise reached between the project manager and the contractor is not entirely clear.

[111] The adjudicator found that he was not empowered to reverse agreements reached between the contractor and the previous project manager and which were still valid at the time of the claim giving rise to the dispute.[43] The adjudicator understood that that the compromise rates were not approved for a specific compensation event but would apply "*on this contract for all future compensation events*."[44]

[112] Eskom's challenge to the reasons provided in the quantum decision is singularly lacking in merit. The purpose of inviting Eskom's participation in the adjudication process was to facilitate the assessment of the compensation. The adjudicator did not merely state that Framatome's revised calculation was a "*fair reflection*" of the actual and forecast compensation required. He gave a detailed narrative on the issue of compensation and pointed out that *"[u]nusually and for whatever reason, the Employer has decided throughout the process not to submit its own version of the quantum although having been given three opportunities to do so*".[45] He also stated that he would have valued the employer's alternative calculations.[46]

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43 Paragraph 6.14 of the quantum decision.
44 *Id* paragraph 6.15.
45 At paragraph 8.12 of the quantum decision.
46 *Ibid.*

[113] Framatome relied on *Gillies Ramsay Diamond & Others v PJW Enterprises Limited*[47] and *Carillion*[48] on the adequacy of reasons furnished with which I agree. Eskom's challenge to the reasons provided by the adjudicator is clearly a distortion of the quantum decision and a stratagem to avoid having to comply with the adjudicator's decision. Its submissions are contrived and unconvincing and fall to be rejected.

**Conclusion**

[114] There is no basis to set aside the decisions of the adjudicator which are valid and binding. In terms of the parties' contract Eskom was obliged to comply therewith. The bringing of this application and the pending arbitration does not relieve Eskom from complying with its contractual obligations.

[115] It follows that the relief sought in the counter application should be granted.

[116] In the result I make the following order:

116.1. The applicant's application is dismissed with costs including the costs attendant upon the employment of two counsel, with scale C to apply from 12 April 2024.

116.2. The applicant is directed to make payment to the first respondent of the following amounts:

116.2.1. €35,288,582.00, exclusive of value-added tax and subject to the price adjustment for inflation pursuant to secondary option clause X1 of the contract, and pursuant to clauses 51.3 and 51.4 of the contract, interest thereon calculated at the LIBOR rate applicable at the time for amounts due in other currencies; and

116.2.2. ZAR 256,631,358.00, exclusive of value-added tax and subject to the price adjustment for inflation pursuant to

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[47] [2004] BLR 131, paragraph 31.
[48] At paragraph [84].

secondary option clause X1 of the contract, and pursuant to clauses 51.3 and 51.4 of the contract, interest thereon.

116.3. The applicant is ordered to pay the costs of the counter application, including the costs of the first respondent's[49] France-based attorneys and the costs occasioned by the employment of senior and junior counsel, with scale C to apply from 12 April 2024.

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**R T WILLIAMS AJ**

[49] The reference to the applicant's France-based attorneys in paragraph 2 of the notice of counter application is clearly incorrect and should be a reference to Framatome's France based attorneys consistent with paragraph 2.3 on p. 521 of the record.