Should the application and practice of construction adjudication be underpinned by legislative intervention in the South African construction industry?

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Abstract

Adjudication has, through various initiatives of the South African government, the Construction Industry Development Board and the increased use of international standard form construction contracts, become relatively commonplace among both the public and private sectors, as the first tier for dispute resolution on construction projects across the South African construction industry.

This paper shall consider these initiatives and developments to confirm whether adjudication practice in the South African construction industry should be underpinned by legislative intervention and if so, then consider what key legislative measures could (and should) be incorporated into such legislation to effectively regulate the application and practice of adjudication in the South African construction industry.

Keywords: South Africa, **ADR**, **construction adjudication**, **legislative intervention**

1. Introduction

We do not intend that adjudication should be used simply to postpone resolving disputes. We have had enough of disputes within the construction industry. Government, the industry and its clients want to see an end to them; they are expensive and damaging to the industry's productivity and reputation[3].

It certainly seems that construction contracts go wrong; everybody knows that. It is one of the problems of construction. The problems have intrigued, one might say obsessed, the industry and government for 50 years[4]. Since 1995 the post-apartheid South African government have similarly obsessed in the pursuit of procurement reform, especially in

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[3] Robert Jones, Minister for Construction Planning and Energy Efficiency, Hansard, 7.5.96 column 54. Quoted in Coulson Peter (Sir), Construction Adjudication, Second Edition, Oxford University Press, 2011 at page 13.
[4] Fenn. P, *Why construction contracts go wrong (or an aetiological approach to construction disputes,* a paper given at a meeting of the Society of Construction Law in Derbyshire on the 5th of March 2002, (2002), at page 1, downloadable on www.scl.org.uk.

introducing appropriate methods for effective dispute resolution into the construction industry.

Recognising the entrenchment of alternative dispute resolution (ADR) procedures for resolving labour disputes in the Labour Relations Act No. 66 of 1995[5] and successful application of ADR procedures in the private sector, the White Paper on *Creating an Environment for Reconstruction Growth and Development in the Construction Industry*[6] commits the public sector to promoting the application of ADR procedures, in particular adjudication, in the South African construction industry[7].

In promoting adoption of adjudication into the South African construction industry the White Paper confirms that *recommendations adapted largely from the Latham report will be introduced to the construction industry, specifically for public-sector contracts*[8]. Latham[9]among other things *recommended that a system of adjudication should be introduced within all the Standard Forms of Contract (except where comparable arrangements already exist for mediation or conciliation) and that this should be underpinned by legislation...* [10].

2. South African government driven initiatives since 1995: putting adjudication into practice.

Through a series of interventions since 1995 the South African government has, particularly in public sector construction activities, ensured the general implementation of …*an accelerated and cost 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 litigation...* that *...is not arbitration or litigation*...[11]. The South African government's interventions have unfortunately stopped short of implementing Latham's principal recommendation that the system of adjudication introduced should be underpinned by legislation, typically referred as security of payments or construction contracts legislation.

The Inter-Ministerial Task Team on Construction Industry Development, Focus Group 5[12] published the *ADR Guidelines for Public Sector Contracts, Working Document Draft 5*, largely adopting Latham's recommendations[13] in twelve principles recommended for underpinning the application of adjudication in the South African construction industry. These

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5 The Labour Relations Act No. 66 of 1995 was enacted to, inter alia, provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent ADR services accredited for that purpose.

6 The "White Paper on Creating an Enabling Environment for Reconstruction, Growth and Development in the Construction Industry", published under Notice 89 in Government Gazette No 18615, Volume 391 on 14 January 1998.

7 Refer to note 4 above under paragraph 4.1.5.3 [ADR].

8 Refer to note 4 above.

9 Latham, M. (1993) *Trust and Money*. Interim Report of the Joint Government / Industry Review of the Procurement and Contractual Arrangements in the United Kingdom Construction Industry, London: HMSO. Latham, M. (1994) *Constructing the Team*. Final Report of the Government/Industry Review of the Procurement and Contractual Arrangements in the United Kingdom Construction Industry, London: HMSO.

10 Refer to note 7 above, *Constructing the Team*, at paragraph 9.14.

11 Best Practice Guideline Number #C3: *Adjudication,* September 2005, Second Edition of CIDB document 1011, downloadable on www.cidb.org.za

12 Inter-Ministerial Task Team on Construction Industry Development; Proposed ADR Guidelines for Public Sector Contracts, Working Document Draft 5, Pretoria, Nov 1999.

13 Refer to note 7 above.

principles were subsequently incorporated into the South African National Standards Authority Standard for construction procurement processes, methods and procedures, edition one, 2004 (SANS 294: 2004)[14], which requires that …*[A]djudication shall be applied to all categories of construction contracts (viz. engineering and construction works services and supplies), at both prime and subcontract level, and shall be a mandatory requirement for the settlement of disputes before the completion of a contract*...[15].

Section 2 [*Establishment of CIDB*] of the Construction Industry Development Board Act 38 of 2000[16] established the Construction Industry Development Board (CIDB) as a schedule 3A public entity and juristic person with legislated authority to realise the objectives detailed in section 4 [*Objects of CIDB*] and perform the functions prescribed in section 5 [*Powers, Functions and Duties of CIDB*] of the CIDB Act 38 of 2000. The CIDB was formerly launched by the then Deputy President, Mr. Jacob Zuma, on 24 April 2001.

The CIDB's mandate is to ...*exercise leadership and foster the co–operation of industry stakeholders to pursue development objectives, improved industry practices and procedures – which will enhance delivery, performance and value for money, profitability and the industry's long term survival in an increasingly global arena*...[17]. In realising procurement reform and implementation of adjudication the CIDB issued two pivotal best practice guidelines during 2005.

Although the CIDB's best practice guidelines do not carry the force of law (as do CIDB notices published in the Government Gazette) each one is a critical component of the CIDB's uniform standards, which (together with the ethical standards) pursuant to Section 4 (f) and section 5 (4) of the CIDB Act 38 of 2000 …*regulate the actions, practices and procedures of parties engaged in construction contracts*... Through CIDB Notice 86 of 2010 titled "Standard for Uniformity in Construction Procurement" in Government Gazette No. 29138 of 18 August 2006 these uniform standards (incorporating the obligation to comply with and implement) the best practice guidelines when engaging in construction activities have become firmly entrenched in South African construction practice.

In March 2004 the CIDB issued its own adjudication procedure[18] specifically requiring that …*adjudication shall be conducted in accordance with the edition of the CIDB Adjudication Procedure which is current at the date of issue of a notice in writing of intention to refer the dispute to adjudication*...[19]. This adjudication procedure is based on the adjudication procedure developed by the Institution of Civil Engineers detailed in the Institution of Civil Engineers Adjudication Procedure[20], with minor changes made to incorporate South African requirements and to remove inapplicable references to the Housing Grants, Construction and Regeneration Act, 1996 (HGCRA) and the institute itself.

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14 South African National Standard 294, published by Standards South Africa, 2004 downloadable on www.stansa.co.za
15 Refer note 12 above at page 85.
16 Published in Government Gazette No 121755, Volume 425 on 17 November 2000.
17 Refer note 4 above, item 8.4.1 [*Aims*] at page 54.
18 Construction Industry Adjudication Procedure, March 2004, First Edition of CIDB document 1014, downloadable at www.cidb.org.za.
19 Refer to note 16 above, paragraph 2.1 on page 1.
20 The Institution of Civil Engineers Adjudication Procedure, published by Thomas Telford, December 1998.

Best Practice Guideline #C2: *Choosing an appropriate form of contract for engineering and construction works*[21] requires that ...*[I]n order to make procurement reform effective in the manner intended, employers in the engineering and construction industry need, amongst others, to revisit the standard forms of contract which are in use. The current approach of having, probably, as many standard forms of contract as there are disciplines in the industry, together with a considerable number of in-house forms of contract, neither makes for efficiency nor does it enable a focussed approach to skills training necessary for development and growth. This applies to both private and public sector work*...[22].

The standard form construction contract[23] is negotiated at industry level through an inclusive consultative process with various industry stakeholders and specifically designed to reflect current industry norms and practices. The product is a set of documents representing industry norms and practices as they are perceived and experienced at a particular point in time by a constituent representative group.

Best Practice Guideline #C2[24] requires public sector employers to employ either the Fédération Internationale des Ingenieurs – Conseils 1999 first editions of four standard form construction contracts (FIDIC, First Edition, 1999), the General Conditions of Contract for Construction Works, First Edition (GCC 2004)[25], the Joint Building Contracts Committee Series 2000 (JBCC 2000) and the New Engineering Contract Third Edition (June 2005) family of standard contracts (NEC 3) (with limited variations) to regulate construction activities.

Implementation of Best Practice Guideline #C2[26] has resulted in the practical introduction of multi tiered dispute resolution processes …*spanning the area between the adjudicatory dispute resolution systems (including litigation, arbitration, adjudication, and expert determination) and simple negotiation … as an alternative or precursor to arbitration or litigation*...[27] as a norm in South African construction industry dispute resolution practice.

Best Practice Guideline #C3: *Adjudication*[28] issued during September 2005 reconfirms the applicability of the principles underpinning adjudication practice (as specified in SANS 294: 2004). The guideline requires that adjudication …*be introduced as a means of dispute resolution in all the CIDB recommended forms of contracts (supplies, services and*

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[21] Best Practice Guideline #C2: *Choosing an appropriate form of contract for engineering and construction works,* Second edition of CIDB document 1010, September 2005 downloadable on www.cidb.org.za, sets out in Annexure 1 at page 15, the essential and desirable criteria, as well as the rationale for such criteria, for acceptable forms of engineering and construction works contracts in South Africa.

[22] Refer to note 19 above at page 1.

[23] The South African courts have consistently interpreted industry standard form construction contracts as typical contracts created by the parties before them, falling squarely within the parameters of the general principles of the law of contract with little (if any) regard for the fact that industry standard form construction contracts are industry specific, drafted after extensive input from stakeholders in every facet of the industry with the benefit of cross industry bargaining and consultation. This approach is typified in the judgement of McEwan J in *Smith v Mouton* 1977 (3) SA 9 (W) at paragraph 12.

[24] Refer to note 19 above at page 1.

[25] The South African Institute of Consulting Engineers (referred to as "SAICE") sixth edition General Conditions of Contract for Civil Engineering Works standard form construction contract was replaced in 2004 with the General Conditions of Contract for Construction Works, First Edition (GCC 2004) "... *to satisfy the Construction Industry Development Board's requirements for standard conditions of contract*..." (at page (iii)).

[26] Refer to note 19 above at page 1.

[27] Capper, P. Robert Hunter R, *Choice of Dispute Resolution Procedure* (extract from a note), Lovells at page 8.

[28] Best Practice Guideline Number # 3:*Adjudication,* September 2005, Second Edition of CIDB document 1011, downloadable on www.cidb.org.za

engineering and construction works) identified in Best Practice Guideline #C1, Preparing procurement documents, and in all the forms of subcontract identified in Best Practice Guideline #D1, Subcontracting arrangements…[29]. The principle that adjudication ...*shall be a mandatory requirement for the settlement of disputes before the completion of a contract*...[30] is unequivocally reinforced.

3. South African construction industry participation: adjudication in practice

In addition to the South African government's interventions in ensuring the adoption of an *ad hoc* adjudication into the South African construction practice, the industry itself has largely embraced procedure ...*whereby the parties agree to confer jurisdiction on an adjudicator to decide the particular dispute that has arisen between them*…[31] as a means ...*to find some sensible resolution of their problem and then get back to their real business*…[32].

Bvumbwe and Thwala (2011) conducted a study to determine which of the spectrum of ADR procedures (including specifically mediation and adjudication) are most frequently deployed through the South African construction industry in resolving construction disputes. They concluded that although …*mediation is the most frequently used method in resolving disputes in the construction industry ... the majority of respondents would prefer the inclusion of adjudication as the priority in resolving dispute before arbitration*...[33].

Van der Merwe (2009) conducted a comparative study of the application of both mediation and adjudication across the South African construction industry to determine which of the two dispute resolution methods is better suited to resolve construction disputes in the South African construction industry. In concluding that adjudication is preferable van der Merwe concludes …*that both mediation and adjudication are effective alternative methods of dispute resolution as to litigation and arbitration. Although adjudication has a weakness in the enforceability of the decision of the Adjudicator, it still has an advantage over mediation*...[34].

Maritz (2007) overviews the development of adjudication in the South Africa construction industry, considering its effectiveness in resolving construction disputes, the extent to which adjudication has been utilised since its introduction into the South African construction industry and concludes that ...*[E]xperience in other countries who have introduced adjudication has shown that adjudication without the statutory force is not likely to be effective. Enforcement of the adjudicator's decision is critical to the success of adjudication and before South Africa introduces an Act similar to Acts such as the Housing Grants, Construction and Regeneration Act 1996 (UK), the Construction Contracts Act 2002 (NZ) or*

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29 Refer to note 26 above under paragraph 4.1 [*General*] at page 4.
30 Refer note 26 above.
31 Coulson Peter (Sir), *Construction Adjudication*, second edition, Oxford University Press, 2011 at page 185.
32 Mr. Justice Jackson, *The Tower of Babel: What happens when a building contract goes wrong*, The 2006 Denning Lecture given in Gray's Inn, London on 28th November 2006, downloadable from www.scl.org.uk.
33 Refer to page 35.
34 Refer to page 50.

Building and Construction Industry Security of Payment Act 2004 (Singapore) adjudication will remain largely ineffective and, therefore, underutilised in the South African context…[35].

Gaitskil (2007), echoing Maritz's observations, argues that …*[I]n order for adjudication to have any real impact it had to be compulsory so that powerful employers or main contractors could not simply strike such clauses out of contracts they made. This meant that there had to be legislation which simply imposed adjudication on all parties in the construction industry*...[36].

Following an investigation into the implementation of *ad hoc* adjudication in the South African construction industry Maiketso and Maritz (2009) concluded …*that adjudication has found acceptance in the SA construction industry. However, it still has some way to go before its potential can be realised in full. Certain challenges need to be overcome to enable this to happen, which range from the contractual, institutional and legislative framework, to matters of skills and training*...[37].

4. Finding the appropriate legislative framework to underpin adjudication practice

Statutory adjudication was first introduced into the United Kingdom through enactment of Part II of the HGCRA which came into force in May 1998. The Local Democracy Economic Development Act, 2009 subsequently effected changes to the adjudication and payment provisions contained in the HGCRA. Three years after enactment of the HGCRA the state of New South Wales (NSW) enacted the Building and Construction Industry Security of Payment Act, 1999 (the NSW Act), modelled on the HGCRA. The NSW Act served as the model upon which most other Australian jurisdictions, to varying degrees, based their construction contracts legislation, culminating in the Tasmanian Act which received Royal Assent on 17 December 2009.

Other states and territories across Australia including Victoria[38], Queensland[39], Northern Territory[40], Western Australia[41], Australian Capital Territory[42], South Australia[43] and Tasmania[44] have each enacted similar legislation. The Western Australia and Northern Territory models differ significantly from the other Australian legislation in respect of the underlying conceptual framework and content. An examination of each act not only exposes differences between the West Coast and East Cost models but also significant disparities between the acts within each division revealing the ...*law as a multi-headed hydra rather than a guardian angel*....

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35 Refer to page 9.
36 Refer to page 777.
37 Refer to page 1566.
38 The Victoria Building and Construction Industry Security of Payment Act 2002 (amended in 2006).
39 The Queensland Building and Construction Industry Payments Act 2004.
40 The Northern Territory Construction Contracts Act 2004.
41 The Western Australia Construction Contracts Act 2004.
42 The Australian Capital Territory Building and Construction Industry (Security of Payment) Act 2009.
43 The South Australia Building and Construction Industry Security Of Payment Act 2009.
44 The Tasmanian Building and Construction Industry Security of Payment Act 2009.

The CIDB has made a concerted effort to overcome the challenges referred to by Maiketso and Maritz (2009) by initiating the procedure stipulated in section 33 [*Regulations*] of the CIDB Act 38 of 2000 to put in place the legislative framework necessary to underpin adjudication practice in the South African construction industry.

During September 2012 the CIDB finally approved draft regulations consisting of Part IV C titled "Prompt Payment" and Part IV D titled "Adjudication" (the "draft regulations"[45]) including a Standard for Adjudication ("the Standard") which have been submitted to the Minister of Public Works[46], advising that the draft regulations be promulgated by the Minister of Public Works as regulations under and in terms of section 33(1)[47] of the CIDB Act 38 of 2000[48].

4.1 Key features of the proposed legislative framework

Certain key features of the proposed legislative framework shall be considered in light of similar provisions in the HGRCA Act and the NSW Act.

Section 1 [*Application]* of Part IV C of the draft regulations make the regulations applicable across both public and private sectors where contracting parties have concluded either in writing or orally any contract regulating execution of ...*construction works...* or *...construction works related contract...*[49] (collectively referred to as the "construction contract") despite the provisions of any of those contracts. The regulations will specifically not apply to a home building contract as contemplated in the National Home Building Regulatory Council Act[50].

Unlike under the NSW Act, which restricts access to the adjudication procedure, under sub clause (1) of regulation 26 P [*Right to refer disputes to adjudication*] either party to the construction contract will acquire the statutory right to refer a dispute arising under the construction contract to adjudication.

What would constitute a dispute is specifically defined in sub clause (2) of regulation 26 P [*Right to refer disputes to adjudication*] as including …*any difference between the parties in relation to the contract*...[51]. The broad definition of a dispute arising under a construction contract defined in sub clause (iii) of Part 1: The Adjudicator [*General Principles*] accords with the general approach adopted in section 108 (1) of the HGCRA which provides that …*a*

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[45] A copy of the draft regulations dated 20 August 2012 shall be made available during the presentation of the paper.

[46] Section 8 of the Construction Industry Development Board Act 38 of 2000 provides that the Board " .. *may advise the Minister on policy and legislation impacting on the construction industry or propose amendments to this Act to the Minister*..".

[47] Section 33 (1) of the Construction Industry Development Board Act 38 of 2000 provides that "…*The Minister may, by notice in the Gazette, make regulations not inconsistent with this Act with regard to any matter that is required or permitted to be prescribed. In terms of this Act and any other matter for the better execution of this Act or in relation to any power granted or function or duty imposed by this Act*..."

[48] Refer to note 14 above.

[49] "*Construction works*" are defined under sub paragraph (j) of section 1 [*Definitions*] of the Construction Industry Development Board Act 38 of 2000 as "*..the provision of a combination of goods and services arranged for the development, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling or demolition of a fixed asset including building and engineering infrastructure* ..". The regulations supplement this definition by including a *"...construction works related contract..."* which defined under section 2 [*Amendment of Regulation I of the Regulations].*

[50] Within the regulatory framework of the South African construction industry homebuilding does not fall under the auspice of the Construction Industry Development Board Act 38 of 2000, but is regulated under the National Home Building Regulatory Council Act. Amendments are being introduced into the National Home Building Regulatory Council Act which will mirror these Regulations.

party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section. For this purpose, dispute includes any difference.... The HGCRA allows all types of disputes to be referred to adjudication and enables a contractual adjudication regime to run in parallel with statutory adjudication system. The NSW Act is purely statutory allowing only progress payment related disputes to be adjudicated.

Sub clause (1) of regulation 26 P [*Right to refer disputes to adjudication*] creates a statutory obligation on the parties to a construction contract to provide for an adjudication procedure to resolve disputes arising under the construction contract in the express terms of each construction contract.

Part 1: [*The Adjudicator*] of the Standard defines "adjudication" as the process contemplated in Part IV D, which procedure …*shall be neither arbitration nor an expert determination*...[52]. The characterization of the proposed statutory adjudication procedure as not being an arbitration accords squarely with the position taken by Katheree – Setiloane AJ in *Freeman, August Wilhelm N.O, Mathebula N.O, Trihani Sitos N.O v Eskom Holdings Limited*[53] that the adjudication process ...*is not an arbitration and it is therefore not subject to the common law, or section 3 of the Arbitration Act 42 of 1965...*[54]*.*

The adjudication procedure provided for must …*substantially comply*... with Part IV D. Failing which the provisions of Part IV D read together with the Standard shall by default apply in each instance. In order to …*substantially comply*... with Part IV D the adjudication procedure provided for must be constructed around six fundamental requirements specified in sub clause (4) of regulation 26P [*Right to refer disputes to adjudication*][55]. Should the adjudication procedure not incorporate all six requirements the adjudication procedure will by default be implemented in accordance with the provisions of Part IV D and, more particularly, the Standard.

Sub clause 1(a) of regulation 26 V [*Period within which adjudicator must make decision*] provides that the adjudicator must reach his decision …*28 days after receipt of the referral notice contemplated in 26P...*. The twenty eight day time frame within which an adjudicator must reach a decision accords with the approach implemented under the HGCRA[56]. The NSW Act provides a ten business day period from the date of the adjudicators notification of appointment[57] for the adjudicator to reach the decision.

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53 *Freeman, August Wilhelm N.O, Mathebula, Trihani Sitos de Sitos NO v Eskom Holdings Limited* (unreported judgment of the South Gauteng High Court dated 23 April 2010).

54 Refer to note 51 above at paragraph 23

55 The six fundamental requirements which must be incorporated into the adjudication procedure provided for in each construction contract must " …*(a) enable a party to give notice at any time of his or her intention to refer a dispute to adjudication; (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him or her within seven days of such notice; (c) require the adjudicator to reach a decision within 28 days of referral; (d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred; (e) impose a duty on the adjudicator to act impartially; and (f)enable the adjudicator to take the initiative in ascertaining the facts and the law* ...".

56 Section 108(2)(c) of the HGRCA and paragraph 19(1)(a) of the Scheme.

57 Section 21(3) of the NSW Act.

As Maritz (2007) correctly observes …[*E*]*nforcement of the adjudicator's decision is critical to the success of adjudication...*[58]*.* Neither the HGCRA, nor the Scheme for Construction Contracts (the Scheme) entrenches a procedure for enforcing adjudicator's decisions. The HGCRA simply provides that adjudicator's decisions are binding unless and until overturned by agreement, arbitration or litigation[59]. Paragraph 23 (2) of the Scheme similarly provides that the decision is binding pending final resolution by agreement, arbitration or litigation. The absence of an enforcement mechanism entrenched in the legislation was initially perceived as a critical flaw in the legislation. Fortunately the English courts have consistently adopted a robust approach in the enforcement of adjudicator's decisions[60] ensuring that Parliaments intention in introducing the legislation was not thwarted. In contrast the NSW Act entrenches a procedure for enforcing adjudicator's decisions in the legislation allowing the aggrieved party to recover an unpaid progress payment or an adjudicated amount as a statutory debt in court. These procedures provide certainty as to how the unpaid amount will be recovered.

The NSW decision in *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport & Anor*[61] has been relied upon by Australian courts as authority for refusing to interfere in erroneous adjudication decisions under the legislation. Favouring a policy shift towards a regime with minimum opportunity for court involvement in the statutory adjudication process *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport & Anor* substantially limited the basis upon which adjudicator's decisions were open to challenge to instances where there is shown to be some non-satisfaction of a basic and essential requirement(s)[62] which the NSW Act prescribes for the existence of an adjudicator's determination. The NSW Court of Appeal in *Chase Oyster Bar v Hamo Industries*[63] overturned *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport & Anor* significantly, widening the scope for challenging adjudicators' determinations by holding that adjudicators' determinations are open to judicial review by the courts on jurisdictional grounds.

Sub clause 1 of regulation 26 X [*Effect of adjudicator's decision*] of Part IV D specifically obliges the parties to give effect to the adjudicator's decision within ten days of the decision being notified to the parties irrespective of whether not the decision will be challenged. This approach has been upheld in *Basil Read (Pty) v Regent Devco (Pty) Ltd*[64] with Mokgoatlheng J holding that where ...*the contract and Adjudicator's Rules state that the parties are bound to act in accordance with the adjudicator's determination until such time as it is set aside by an arbitrator. Declaring a dispute in relation thereto does not relieve the respondent of its contractual obligation*...

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58 Refer to page 1566.

59 Section 108(3) of the HGRCA.

60 See for example *Balfour Beatty Construction Ltd v the Mayor & Burgess of the London Borough of Lambeth* [2002] EWHC 597.

61 *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394.

62 The essential basic requirements are summarised by Hodgson JA at paragraph 53 of *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport & Anor* [2004] NSWCA 394.

63 *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190.

64 *Basil Read (Pty) v Regent Devco (Pty) Ltd* (an unreported decision of the South Gauteng High Court handed down on 09 March 2010).

Sub clause 2 of regulation 26 X [*Effect of adjudicator's decision*] of Part IV D provides that …*the decision of an adjudicator constitutes a liquid document or in the case where it orders the payment of an amount of money, a liquidated amount as contemplated in rule 32(1) of the High Court rules*... This provision goes further than the HGCRA and the Scheme providing mechanisms to recover unpaid amounts by effectively enabling the claimant to institute either provisional sentence proceedings[65] or summary judgement proceedings[66] on the adjudicator's decision itself as a liquid document evidencing a liquidated amount due, owing and payable.

In addition to the immediate opportunity to institute provisional sentence proceedings afforded by section 2 of regulation 26 X [*Effect of adjudicator's decision*] of Part IV D the High Court of South Africa has by both summary judgment proceedings and motion proceedings[67] for specific performance[68] enforced adjudicator's decisions. There is a clear willingness exhibited through both *Basil Read (Pty) Ltd v Regent Devco (Pty) Ltd* [69] and *Freeman, August Wilhelm N.O, Mathebula N.O, Trihani Sitos N.O vs Eskom Holdings Limited* [70] by the High Court of South Africa to take a robust approach to enforcement of adjudicator's decisions by application of entrenched South African civil proceedings.

5. Conclusion

A form of statutory adjudication has already found a seat in South African legislation through Part F [*Companies Tribunal adjudication procedures*] of the Companies Act[71] which provides opportunity to parties (as opposed to a statutory obligation[72]) to refer disputes arising under or in connection with the application of Companies Act to a public authority known as the Companies Tribunal for resolution. The Companies Tribunal is specifically prescribed when adjudicating referred disputes to …*conduct its adjudication proceedings contemplated in this Act expeditiously in accordance with the principles of natural justice...*[73] and *may conduct those proceedings informally*...[74].

Statutory adjudication is, consequent on the enactment of Part F [*Companies Tribunal adjudication procedures*] of the Companies Act[75], no longer entirely foreign to South African jurisprudence, both the South African government and construction industry have recognised the proven effectiveness of such systems internationally and the South African courts have exhibited a definite willingness to enforce an adjudicator's decision. Therefore, there is every compelling reason for the CIDB's draft regulations to now immediately be given the force of law by the Minister of Public Works.

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65 Provisional sentence proceedings in the High Court of South Africa are regulated under rule 8 [*Provisional Sentence*] of the Uniform Rules of Court.

66 Summary judgment proceedings in the High Court of South Africa are regulated under rule 32 [*Summary Judgment*] of the Uniform Rules of Court.

67 Motion proceedings in the High Court of South Africa are regulated under rule 6 [*Applications*] of the Uniform Rules of Court.

68 Refer to *Farmers' Co-op Society (Reg) v Berry* 1912 AD 343.

69 Refer note 62 above.

70 Refer to note 51 above.

71 The Companies Act No.71 of 2008 , has completely overhauled the South African company law legislative framework.

72 Section 181 [*Right to participate in hearing*] of the Companies Act No.71 of 2008.

73 Refer to note 69 above at Section 180 [*Adjudication hearings before Tribunal*] (1) (a).

74 Refer to note 69 above at Section 180 [*Adjudication hearings before Tribunal*] (1) (b).

75 Refer to note 69 above.

The legislative framework proposed will (once implemented) solidify a desperately needed …*speedy mechanism for settling disputes in construction contracts on a provisional interim basis and requiring the decision of the adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement*...[76] into South African jurisprudence and construction practice significantly enhancing …*delivery, performance and value for money, profitability and the industry's long term survival in an increasingly global arena*...[77].

References

Bvumbwe C, Thwala D.W., (2011).*An exploratory study of dispute resolution methods in the South African construction industry*, IPEDR Vol. 21, IACSIT Press, Singapore.

Che Munaaim M.E., (2010). *Key features of an effective adjudication regime*, King's College London and University of Malaysia*.*

Coggins, J., Fenwick Elliott. R. Bell, M. (2010).*Towards harmonisation of construction Industry payment legislation: a consideration of the success afforded by the East and West coast models in Australia – plus addendum*. Australasian Journal of Construction Economics and Building, Vol. 10 (3).

Cole, T.R.H. (2003). *Final Report of the Royal Commission into the Building and Construction Industry*. Australia: Commonwealth of Australia.

Coulson R (Sir), *Construction Adjudication*. (2007) (1st ed). Oxford: Oxford University Press.

Coulson P (Sir), *Construction Adjudication*. (2011) (2nd ed). Oxford: Oxford University Press.

Davenport, P. (2010). *Security of payment now Australia wide*. Australian Construction Law Newsletter. Vol. 131.

Fenn. P. (2002). *Why construction contracts go wrong (or an aetiological approach to construction disputes),* A paper given at a meeting of the Society of Construction Law in Derbyshire. www.scl.org.uk

Gaitskell, R. (2007). *International statutory adjudication: its development and impact*.

Construction Management and Economics. Vol. 25, July 25. (p777).

Jackson, R. (2006). *The Tower of Babel: What happens when a building contract goes wrong*? The 2006 Denning Lecture given in Gray's Inn. London. Downloadable from www.scl.org.uk.

[76] Mr.Justice Dyason in the landmark United Kingdom case of *Macob Civil Engineering Limited vs Morris Construction Limited* [1999] BLR 93,TCC at page 97

[77] Refer to note 16 above.

Maiketso, N. C., Maritz, M. J., (2009). *What are the requirements for the South African construction industry to fully utilise adjudication?* London: Royal Institute of Chartered Surveyors. Royal Institute of Chartered Surveyors, 12 Great George Street, London, SWIP 3 AD, United Kingdom, September 2009.

Maritz, M.J. (2007). *An Investigation into the Adjudication of Disputes in the South African*

Construction Industry. London: Royal Institute of Chartered Surveyors 12 Great George Street, London, SW1P 3AD, United Kingdom.

Uher, T. E., and Brand, M.C. (2007). *The evolution of adjudication law in the construction industry in New South Wales*. In CIB World Building Congress '*Construction for Development*', 14 May 2007 - 17 May 2007: In house publishing.

Van der Merwe, C.J. (2009). *Is adjudication a better procedure for construction dispute resolution than mediation?* Pretoria: University of Pretoria, Faculty of Engineering.