



THE EMPLOYER MUST PAY!

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Freeman, August Wilhelm, N.O. and Mathebula, Tirhani Sitos de Sitos, N.O. (collectively the "Applicants") brought an application for summary judgment in 2 claims against Eskom Holdings Limited ("Eskom"). The Applicants were cited in their capacities as joint final liquidators of Transdeco GTMH (Proprietary) Limited ("Transdeco").

The claims were for monies owing in terms of the adjudicator's decisions under an engineering and construction contract entered into between Eskom and Transdeco (the "Contract").

The first claim was in relation to the payment of retention monies, certified by a payment certificate issued by Eskom and signed by Eskom's Project Manager and Project Co-ordinator. This was referred to adjudication, and the adjudicator made a finding that the supervisor (under the Contract) was required to issue Transdeco with the Defects Certificate referred to in the Contract and release the corresponding retention monies ("the first decision").

The second claim was in relation to a disputed claim for payment made by Transdeco which was also referred to adjudication. The adjudicator made a finding in favour of Transdeco ("the second decision") (collectively the "decisions").

Eskom raised 4 defences to the Applicants' application for summary judgment:

- the first decision did not order Eskom to pay Transdeco the retention monies;
- the decisions had been referred to arbitration;

- the adjudicator's decisions are only binding if given timeously; and
- Eskom had submitted a counterclaim to the adjudicator for decision.

Eskom's defence to the first decision was that the adjudicator's decision required the supervisor to issue a Defects Certificate, which had not been done, and that Eskom was not the supervisor in terms of the Contract. It was common cause that neither a Defects Certificate, nor a statement that there were no defects, had been issued by the supervisor.

The court found that there was no merit in Eskom's contention that it was not the supervisor in terms of the contract and was not required, in terms of the first decision, to issue a certificate of defects. It was common cause that the supervisor was Eskom's project manager and that he was appointed by Eskom, thus making him a representative of Eskom. The court found that the Applicants were entitled, in the circumstances, to payment by Eskom of the retention monies without deductions.

Eskom argued that it had already notified Transdeco that it intended to refer the decisions to arbitration and that the arbitration of the disputes was pending. The contract stated that an adjudicator's decision is final and binding unless and until revised by a tribunal. The court found that the adjudicator's decision remains binding and enforceable until revised in the final determination by an arbitrator.

A quote from *Bouygues (UK) Limited v Dahl Jensen (UK) Limited* [2000] BLR 49 [TCC] at 55, para. 35 is noteworthy:

"the purpose of the scheme is to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement, whether those decisions are wrong in point of law and fact. It is inherent in the scheme that injustices will occur, because from time to time, adjudicators will make mistakes. Sometimes these mistakes will be glaringly obvious and disastrous in their consequences for the losing party. The victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation, and possibly even by a subsequent arbitration."

Eskom argued that the contract stated that any decision by an adjudicator must be given within four weeks and that the decisions were not binding as they were not given timeously. The court found that the contract did not contain a clause stating that a late decision by an adjudicator is invalid nor did it contain a clause applying "time is of the essence" to the adjudicator's decision. The court also held that there was no basis in law for treating the adjudicator's delayed award as invalid.

Eskom argued that it had submitted a counterclaim to the adjudicator for damages allegedly suffered as a result of Transdeco's defective performance. Transdeco conceded that the counterclaim was referred to the adjudicator but argued that the adjudicator had rejected the counter-claim and that the adjudicator's decision had not been referred to arbitration by Eskom.

The court held that Eskom did not have a bona fide defence to the Applicants' claims that was good in law and summary judgment was granted

A pessimist sees the difficulty in every opportunity; an optimist sees the opportunity in every difficulty. - Winston Churchill