



STELLENBOSCH

STELLENBOSCH • PNIEL • FRANSCHHOEK

MUNICIPALITY • UMASIPALA • MUNISIPALITEIT

Ref no.3/4/1/5

2017-04-03

NOTICE OF A SPECIAL MEETING OF THE COUNCIL OF STELLENBOSCH MUNICIPALITY TUESDAY, 2017-04-04 AT 15:00

TO The Speaker, Cllr DD Joubert [Chairperson]
The Executive Mayor, Ald G Van Deventer (Ms)
The Deputy Executive Mayor, Cllr N Jindela

COUNCILLORS	F Adams	MC Johnson
	DS Arends	NS Louw
	FJ Badenhorst	N Mananga-Gugushe (Ms)
	GN Bakubaku-Vos (Ms)	C Manuel
	FT Bangani-Menziwa (Ms)	LM Maqeba
	PW Biscombe	NE McOmbring (Ms)
	PR Crawley (Ms)	XL Mdemka (Ms)
	A Crombie (Ms)	RS Nalumango (Ms)
	JN De Villiers	N Olayi
	MB De Wet	MD Oliphant
	R Du Toit (Ms)	SA Peters
	A Florence	WC Petersen (Ms)
	AR Frazenburg	MM Pietersen
	E Fredericks (Ms)	WF Pietersen
	E Groenewald (Ms)	SR Schäfer
	JG Hamilton	Ald JP Serdyn (Ms)
	AJ Hanekom	N Sinkinya (Ms)
	DA Hendrickse	P Sitshoti (Ms)
	JK Hendriks	Q Smit
	LK Horsband (Ms)	E Vermeulen (Ms)

Notice is hereby given in terms of Section 29, read with Section 18(2) of the *Local Government: Municipal Structures Act, 117 of 1998*, as amended, that a **SPECIAL MEETING** of the **COUNCIL** of **STELLENBOSCH MUNICIPALITY** will be held in the **COUNCIL CHAMBER, TOWN HOUSE, PLEIN STREET, STELLENBOSCH** on **TUESDAY, 2017-04-04** at **15:00** to consider the items on the Agenda.

SPEAKER
DD JOUBERT

A G E N D A
SPECIAL MEETING OF THE COUNCIL
OF STELLENBOSCH MUNICIPALITY
2017-04-04
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3.	INFRASTRUCTURE: (PC: CLLR J DE VILLIERS)
3.1	CONTRACT NO: B/SM.03/15: CONSTRUCTION OF RESERVOIR IN KAYAMANDI/VAKALA CONSTRUCTION(PTY)LTD/ STELLENBOSCH MUNICIPALITY

1. PURPOSE OF REPORT

- 1.1 To request Council to approve the payment of the Adjudicator's award made on 6th March 2017 and to request approval that the Municipality may proceed with Arbitration proceedings;
- 1.2 To consider the appointment of an attorney and senior counsel to represent the municipality in arbitration proceedings in the report.

2. BACKGROUND

With reference to the System of Delegation, Nr 48, approved by the Council in 2015, the Executive Mayor and the MM may act as follows;

the Executive Mayor may settle any action out of court, including arbitration, mediation and/or debt collection where court actions have been instituted/defended where the settlement amount does not exceed R1m, after having considered a recommendation from the MM;

the Municipal Manager where the settlement amount does not exceed R500 000 after having considered a recommendation from the Director Strategic & Corporate Services, after consultation with CFO

- 2.1 The Contract B/SM 3/15 was awarded to *Vakala Construction (Pty) Ltd* on 11 September 2014 for the accumulated amount of R14 074 158.11 and completion in 30 working weeks. The time for achieving Practical Completion was 7 working months.
- 2.2 The conditions of contract applicable to the Agreement between the parties are the *General Conditions of Contract for Construction Works, Second Edition, 2010 (GCC 2010)* as amended by the Contract Data. Site Handover took place on 13 November 2014 and Works Commencement Date was 17 November 2014 with the original Due Completion Date being 6 August 2015.
- 2.3 During the execution of the Works, various claims were submitted by the Contractor. These Claims were evaluated by the Engineer and rulings were provided in terms of the GCC 2010. Several of the Claims were not approved by the Engineer, but there were Claims that were found to comply with the Contract and were subsequently approved by the Engineer.
- 2.4 **The Claims and subsequent settlement proposal was not approved by the Engineer and Construction Law Specialist and were rejected for various reasons including; (See Annexure E: Response to Adjudicator's Award)**
 - non-compliance with procedural requirements or conditions precedent in terms of the GCC 2010 and were accordingly time barred'

- not basing their claim or not relying on an appropriate contractual entitlement or cause of action for the alleged relevant events;
 - not proving cause and effect on the critical path as required for extension of time and/or claiming damages;
 - not substantiating damages, but using Bill of Quantity rates which is not proof of actual cost.
- 2.5 All of the Claims that were not approved by the Engineer were placed under Dispute by the Contractor and an ad-hoc adjudication process was followed as prescribed in terms of the GCC 2010.
- 2.6 In terms of the contract the adjudicator must be appointed in the event of any dispute between the parties. The Municipality, Engineer and Contractor tried to reach an amicable settlement agreement which was unsuccessful. Subsequent to this an adjudicator was appointed by the Engineering council.

3. DISCUSSION

- 3.1 Publication of Award was on 6 March 2017. (see Annexure A: Adjudication Award) The Contractor's total claims in their Statement of Claim amounted to R1,9 mil and the Adjudicator awarded the amount of R2,2 million to be paid with interest of 15,5% from 9 June 2016, the date of the Contractor's Statement of Claim;
- 3.2 The Adjudicator ruled that the above amount is payable within 14 calendar days of the publishing date, was on 20 March 2017. The standard payment period in the GCC 2010 is however 28 days from certifying payment;
- 3.3 On 15 March 2017 *Vakala Construction* was notified of our dissatisfaction with the award and our intention to issue a notice in terms of Clause 10.6.1.2 to dispute the validity, and/or the correctness of the decision (see Annexure B: Correspondence Vakala);
- 3.4 *Vakala Construction* was also invited to Amicable Settle the matter in terms of Clause 10.4 of the GCC 2010 and to make a full and final settlement offer in relation to the disputes that formed the subject matter of the above Adjudication Award. The GCC 2010 provides for a 28 day "cooling off" period in which Amicable Settlement can take place before formal notice of dispute is issued;
- 3.5 On 23 March 2017 *Vakala Construction* gave a "Notice of default and intention to terminate". (See Annexure C: Notice of default and intention to terminate). The notice again confirmed the Adjudicator's Award, demands payment in 14 days of date of demand and notifies the Employer that in terms of Clauses 9.3.1, 9.3.1.1.2 and 9.3.1.1.3 of GCC 2010, contractor is entitled to terminate contract if payment is not received by **6 April 2017**;
- 3.6 The termination grounds provided in Clause 9.3.1.1.2 are: "In the event that the Employer persists in:

9.3.1.1.2 "Failing to pay the Contractor the amount due in terms of any payment certificate issued by the Engineer, within the time of payment provided in the contract.

9.3.1.1.3. Interfering with or obstructing the issue of any certificate,”

Failing to meet the deadline is grounds for Termination and will exonerate the Contractor from completing any defects and in addition claim any outstanding Retention. Defects will also include future defects and any latent defects which could become known in future. Decision to ignore these facts will put the Employer at huge risk; and

- 3.7 Vakala Construction submitted a settlement proposal to the Municipality on 30 March 2017 for the amount of R2, 350, 000-00 including VAT. (See attached Annexure D). Accepting the settlement, is conditional on the Municipality paying out the retention amount of R621 855,45 excluding VAT. This means the Municipality will have no recourse for defects that might be picked up, at a later stage.

4. LEGAL IMPLICATIONS

The contract between Vakala and Stellenbosch municipality is subject to the General Conditions of Contract 2010.

The termination grounds provided in Clause 9.3.1.1.2 are: “In the event that the Employer persists in:

9.3.1.1.2 “Failing to pay the Contractor the amount due in terms of any payment certificate issued by the Engineer, within the time of payment provided in the contract.

9.3.1.1.3. Interfering with or obstructing the issue of any certificate,”

Failing to meet the deadline is grounds for Termination and will absolve the Contractor from completing any defects and in addition claim any outstanding Retention .The municipality will be held liable for breach of contract if it does not pay the adjudicator’s award.

5. FINANCIAL IMPLICATIONS

Provision is made on Capital Budget Vote number 5/6650/1801.

RECOMMENDED

- (a) that the Municipality do not accept the settlement offer of R2,350, 000-00 including VAT received 31 March 2017;
- (b) that the Adjudicator’s award made on 6 March 2017 to the amount of R2 806 960,69 be paid before 6 April 2017, failing which the municipality will be in breach of contract; and
- (c) that the appointment of an attorney and senior counsel, be approved to proceed with arbitration.

Meeting: Ref No:	7 th Council: 2017-03-29	Submitted by Directorate: Author: Referred from:	Community Services G Esau Mayco: 2017-03-22
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**ADJUDICATION AWARD: DISPUTE; VAKALA CONSTRUCTION (Pty)
Ltd V STELLENBOSCH MUNICIPALITY.**

**CONTRACT B/SM 3/15 FOR THE CONSTRUCTION OF A 4ML
RESERVOR IN KAYAMANDI AND ASSOCIATED WATER SUPPLY
PIPELINES.**

THE CONTRACT:

1. The Contract was awarded to Vakala Construction (Pty) Ltd on 11 September 2014 for the accumulated amount of R14 074 158.11 and completion in 30 working weeks.
2. The type of contract is what is generally known as an ad-measurement contract, which is not for a fixed amount, or lump-sum contract, but where the amount to be paid to the Contractor is to be ascertained by measurement and payment for quantities and at the rates in the Bill of Quantities when the Works are completed at the end of the contract.
3. It is common cause that the Contract was awarded to the Contractor after partaking and qualifying in a comprehensive tendering procedure stipulated by the Employer, the Stellenbosch Municipality, in compliance with its obligations as required by the South African Constitution.
4. The Contractor submitted, in terms of the Employer's tendering requirements, a list of well over 300 contracts for Works of a similar nature, successfully completed, including many reservoirs identical to the one tendered for.

5. The Site Handover date was 13 November 2014 and the Contract Works Commencement Date was 17 November 2014. ("Commencement Date")
6. The Due Completion Date was 06 August 2015. ("Completion Date")

THE DISPUTE OR DISPUTES

7. The Dispute had arisen from a number of Claims for extension of time of the Completion Date, submitted by the Contractor to the Engineer of the Contract.
8. Each and every one of the Contractor's Claims for Extension of Time and for extra Payment is challenged by the Employer on the basis that they are not competent for various reasons alleged to be supported by the Contract and Common Law.
9. The main issue in the dispute however is whether the claims are time-barred in terms of the Contract and whether the Employer is relieved from payment in terms of his contractual obligations.
10. These alleged reasons are of a legal/contractual nature and give rise to many disputes and difficulties in the Construction Industry.
11. It is therefore necessary that I deal with them first, before going individually into the Contractor's extension of time claims and for extra payment.
12. Resolution of contractual disputes has always, since the inception of modern forms of contract, which I regard as the first development of the ICE documents before the 1850's, been problematic, mostly because of the high cost of litigation to resolve contractual disputes in a court of law.

13. Early documents saw "Arbitration" i.e. "judgement by your peers" as the alternative and much less costly form of resolving disputes in the Construction Industry.
14. Mediation, where the Mediator gives an opinion as to the most appropriate resolution for the dispute; was added and were helpful in resolving many disputes before Arbitration was resorted to.
15. The promulgation of the Arbitration Act, 1965, gave legal standing and much improved enforceability to arbitration awards, but also to increase costs, as it attracted also Counsel and Senior Counsel to represent the Parties in larger and more difficult cases, and to act as Arbitrators.
16. The costs of arbitrations rose to the extent that in the USA, lawyers made more profit out of contractual disputes than the contractors and consulting engineers made, put together.
17. In a counter to these very high costs, the US engineers and contractors devised a further method of alternative dispute resolution in the Dispute Resolution Board, where contracts are monitored by senior members of the Contracting and Engineering Professions, the so-called Wise Old Men.
18. In England, a different route was taken under the leadership of Dr Martin Barnes, who developed the concept of Adjudication, as a further mechanism for Alternative Dispute Resolution in the New Engineering Contract, or NEC Document.
19. Adjudication, as an alternative mechanism of dispute Resolution has also found its way into other contract forms such as the FIDIC documents and the Blue Book, 2010 edition. It is also accepted by Statute, being incorporated in the CIDB Act.

20. The function of the Adjudicator is to do a review of a decision of the "Engineer" of the Contract who, for that purpose, is a Professional Engineer, from either the consulting or contractor fraternity, or the State.
21. Lawyers in private legal practice are excluded; lawyers are not "Engineers".
22. However, "Engineers" can also be "Lawyers" and *vice versa*.
23. It seems therefore that lawyers are not excluded, and cannot be excluded, which places an additional burden on the Adjudicator, who now also needs to be trained to interpret legal documents and law, which falls in the domain of the Lawyer.
24. All these later developments do have an impact on costs however, which is still acceptable, considering the alternative, of which the Walter Lilly case, which I come back to later, can be taken as an example.

The Status of the Engineer

25. The Employer stated in paragraph 51 of his Heads of Argument that: "*The Engineer has no authority to amend the Contract, but only powers to administer the Contract*".
26. As the function of the Adjudicator is to review the decisions of the Engineer, it is necessary first to determine whether the Engineer is in fact an Engineer or an Administrator?
27. First of all there is the interpretation problem; If it was the intention of the Contract, why did it refer to him as an "Engineer", why not an "Administrator" of the Contract, or more appropriately, a "Clerk" or a "Clerk of Works" or as in NEC, a "Project Manager"?

28. Clause 3.1, GEC 2010, defines the functions of the Engineer as to:

*"administer the contract as **agent of the Employer** in accordance with the provisions of the Contract". (Own emphasis)*

29. It seems clear from the above that the Engineer is intended to act as the Professional Agent or *alter ego* of the Employer in administering the Contract, very much as a professional Lawyer would represent the Employer in Legal matters.

30. Clause 3.1.2 stipulates:

*"Whenever the Engineer intends, in terms of the Contract, to exercise any discretion or make or issue any ruling, contract interpretation or price determination, he shall first consult with the Contractor and the Employer in an attempt to reach agreement. Failing the agreement, the Engineer shall **act impartially and make a decision** in terms of the Contract, taking into account all relevant facts and circumstances."* (own emphasis) It is clear that, if the Engineer is to act impartially, and that his discretion may differ with both the Contractor and/or the Employer.

Clause 6.3; Variations:

"if at any time before the issue of the Certificate of Completion, the Engineer shall require any variation of the form, quality or quantity of the Works or any part thereof that may be necessary or for any reason appropriate, he shall have the power to order the Contractor to do any of the following:

6.3.1.1 *Increase or decrease the quantity of any work included in the Contract etc. and*

6.3.1.5 *Execute additional work of any kind necessary for completion of the Works, and -----"*

31. It seems from the duties and functions of the Engineer as set out in above clauses of GEC 2010 that the Engineer has a wide discretion to amend the Contract and that he is not a mere "Administrator" of the Contract.
32. It follows therefore also that all of the determinations made by the Engineer, after meticulously following the procedures stipulated in the Contract, such as approval of extensions of time, issuing of instructions and variation orders, etc. was done validly and within his duties and obligations in terms of the Contract, that the Employer was at all times aware of, and part and parcel of all the Engineers determinations and decisions.
33. This means also that the Employer cannot now, in the Adjudication procedures, distance himself from the determinations and agreements and instructions made and issued by the Engineer of the Contract.
34. By doing so, the Employer is now repudiating his own previous rulings and determinations made and envisioned in terms of the Contract.

The Meaning and Import of a Time-bar or Prescription Provision

35. It is clear that the Employer's entire defence of the Contractor's claims was founded on the concept that the Contractor is Time-barred from obtaining any relief under the Contract whatsoever.
36. The Employer argues essentially, that after the attempted Amicable Settlement procedure proscribed in Clause 10.4, has failed, the Contractor has 28 days commencing on the date of the Dispute Notice in terms of Clause 10.3, to resort to Adjudication, and by failing to do so in time, he is time-barred from any further dispute resolution procedures provided for in the Contract.

37. Clause 10.4 sets no time-limit to the duration of the Amicable Procedures.
38. Clause 10.1.1.1 stipulates as follows:

“the Contractor shall within 28 days after the circumstance, event, act or omission giving rise to such a claim has arisen or occurred, deliver to the Engineer a written claim, referring to this Clause and setting out: -----”
39. If nothing is done by the Contractor to vindicate him for the late submission of the claim in accordance with Clauses 10.1.2, 10.1.3 and 10.1.4, the Contractor's Claim is Time-barred.
40. Time-barring provisions in building and engineering construction contracts, originated well before my time when I joined the then South African Railways and Harbours in 1961 as an Assistant Engineer on the construction of the new Cape Town Station.
41. Civil Claims for payment of a debt, prescribe after three years of the debt being incurred in terms of Common Law and also in terms of the Prescription Act of 1969 and its predecessors.
42. It is trite law that a debt that has prescribed in terms of common law or in terms of the Act, or has been time-barred in terms of a contract provision, can never be vitiated by the prescription, but becomes legally un-claimable for all times thereafter.
43. It means that when the time-bar provision in the Contract in dispute can and has been legally invoked by the Employer, he, the Stellenbosch Municipality, will for all times be indebted to Contractor for the amount of money, which he may be entitled in terms of the Contract.
44. The reason for a time-barring provision in civil engineering contracts at the time was that such contracts were geographically

often carried out miles away into the bundu with little or no means of communication between the Contractor and the Employer at the time, and that contractual claims had often been submitted a year or more after the Contract was completed, when the Employer had nobody on or near the Site or with any knowledge about the circumstances giving rise to the claim.

45. This put the Employer in an untenable position when he has to satisfy himself of the validity of a claim.
46. In my experience during my 33 active years as a construction engineer, the time-bar provisions in the contract has never been invoked.
47. In the Contract being the subject of this Adjudication, the Engineer had a Deputy on site full time, who should have independently recorded delays to the Works and was at all times able to verify the Contractor's claims for extension of time.
48. There can therefore be no practical reason for the Employer to invoke any of the time-bar provisions in the Contract.
49. The Amicable Settlement Provision, Clause 10.4, has no time-bar stipulation and nothing to indicate that the time-bar provision in Clause 10.3 can be revived to apply also to Clause 10.4. The notion is, with respect, absurd.
50. Amicable Settlement is part of the Dispute Resolution Procedure provided in the Contract and a claim can only be prescribed after 3 years of the commencement of legal (or contractual) proceedings.
51. In the ground-breaking judgment of *Barkhuizen v Napier* (CCT72/05) [2007] ZACC5; 2007(5)SA 323 CC; 2007 (7) BCLR 691 (CC) (4 April 2007) , the Constitutional Court dealt comprehensively, with contractual prescription clauses in

standard contract conditions, such as used by Insurance Companies, Organs of State and State Enterprises, in a Constitutional South Africa.

52. The Court dealt comprehensively with the question of Public Policy and whether a prescription clause goes beyond the bounds of reasonableness, so as to be unconscionable to the extent that it is against Public Policy and therefore in breach of the Constitution.
53. There is no doubt in my mind that a Court would find that the invoking of the time-bar provision in this Contract by the Employer, being an Organ of State, and in ruling circumstances, is untenable to the extent that it flies in the face of Public Policy.
54. There is no reason given why it should be considered acceptable for the Employer to be indebted to Contractor for ever, while not even affording him the opportunity to prove his claims in the adjudication, arbitration or a court proceeding to follow.
55. It is my respectful view that the Employer in this matter has not been well advised.

The Relevance of the Imprefed Judgment

56. The Employer argued in paragraphs 18 to about 22 of his Heads of Argument Case 1 that the Contractor "*should not*" also rely upon Clause 2.3.1 when dealing with a claim in terms of clause 10.1.1.1.2.
57. He relies on *Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A)*; stating that the Pleadings in litigation should be accurate so as not to confuse or mislead.
58. I fail to see the logic in this argument.

59. The Adjudication deals with a review of rulings of the Engineer, and there can be no reason why, the Adjudicator should not look at other provisions of the Contract or even other case law, in doing such review.
60. The Imprefed judgment can therefore have no relevance in this Matter.

The Relevance of the Walter Lilly judgment

61. The Employer relied also on the English Authority in the Walter Lilly judgment in his Heads of Argument paragraph 34 to argue that the Contractor's claim for the reimbursement of costs is not competent.
62. In *Walter Lilly: England and Wales High Court (Technology and Construction Court) Decisions: [2012] EWHC 1773 (TCC)*, it was ruled that "*claims by Contractors for delay or disruption related loss and expense must be proved as a matter of fact.*"
63. I do however not regard the Walter Lilly Case to be at all relevant as the Contractor in this matter, claims his losses and expense to be reimbursed at the applicable Scheduled Rates and Prices in the Contract Bill of Quantities and Prices.

The Allegations of Design Error v Poor/Negligent Construction

64. The Expert Witnesses of both Parties are/were essentially in agreement, that the leakage of water was not due to poor or negligent construction by the Contractor.
65. Neither was there any evidence submitted that there was in fact an error in the design by the Engineer or that the design was faulty or inadequate.

66. Yet, the reservoir did leak and the Engineer did order the Contractor to perform remedial action and do a lengthy investigation as to the causes of the leakages that went on well into 2016.
67. The conclusion of the investigation, if I understand it correctly, was that minor leakages occurred along construction joints and outlet pipes which, when combined, exceeded the acceptable standard stipulated by SANS.
68. I believe that the costs of the investigation that was ordered by the Engineer, should be borne by the Employer as an extra cost to the Contract.
69. The Contractor should not be made to pay the costs of an investigation of a scientific nature, which was inconclusive, and for the benefit of the Engineer and the Employer only.
70. We still do not know why the reservoir leaked more than what is specified by SABS.
71. We also do not know whether the excess leakages was significant and to what extent, and whether it could not have been anticipated by the Engineer.
72. We also do not know whether the leakage through the hair cracks that was not continuous would not have sealed by itself?
73. More-over, the Employer have built many similar reservoirs before, *inter alia*, the adjacent one. What happened there?
74. If a leak-proof reservoir was required, why was it not specified in the design?
75. I cannot resist the distinct feeling that the entire issue was in fact a storm in a teacup.

The Float Belongs to the Contractor

76. The Contractor, in claims 3, 4 and 5, of the Contract made no claims for payment of Time-related P&G costs on account of the delays not being on the Critical Construction Path as they occurred during the Contractor's float time.
77. The question of whether Float was contemplated in the Contract served in the Supreme Court in *OVCON (Pty) Ltd v Administrator of Natal 1991(4) SA71 (D&C)*, where it was essentially found that when Float was not contemplated in the Contract, i.e it was not specified in the Contract, but allowed by the Contractor for his own purposes, such Float is the property of the Contractor.
78. There is therefore no reason why the Contractor should not claim payment of his Time-related P&G costs at scheduled rates, nor is there any reason why the Employer should not be held liable for such payments.

Summary of Awarded Claims

Case 1:

Claim 3

79. Cause: Theft of cabling of telemetry system for adjacent existing reservoir causing overflow and damage to contract works.

Award:

Time allowed: **5 days;**

P&Gs allowed: 5 x R12 281.64 = **R61 408.20**

Additional Costs: R37 476 76 + R13 161.18 = **R50 637.94**

Claim 4

80. Cause: Instruction to install 110mm duct;

Award:

Time allowed: **2 days;**

P&Gs allowed: 2 x R12 281.64 = **R24 563.28**

Additional Costs: R14 178.59 + R4 386.72 = **R18 565.31**

Claim 5

81. Cause: Instruction to install further 440m x 110mm duct;

Award:

Time allowed: **4 days;**

P&Gs allowed: 4 x R12 281.64 = **R49 126.56**

Additional Costs: R1320.00 + R6 664.63 = **R7 984.63**

Claim 6

82. Cause: Instruction to schedule cutting-in connections:

Award:

Time allowed: **39 days;**

P&Gs allowed: 39 x R9 650.00 (reduced) = **R376 350.00**

Additional costs: **R221 687.97**

Variation Orders for reduced P&Gs rates due to work carried out in dry season is deemed to be approved.

Claim 9

83. Cause: Delays due to delay in giving go-ahead for reservoir to be emptied to check for defects;

Award:

Claim rejected: Contractor is not entitled to claim additional time and money to check for its own possible defects.

Claim 10

84. Cause: Additional work due to instruction to replace 300mm socket-valve with a flanged valve;

Award:

Time allowed; **5 Days**

Additional P&Gs = 5 x R12 281.64 = **R61 408.20**

Claim 12

85. Cause: Public Holiday during extended time period; (due completion date was 6 August 2015)

Award:

Additional time allowed: **1 day**

Additional P&Gs: 1 day = **R12 281.64**

Additional costs: **No additional payment allowed.**

Case 2**Claim 13**

86. Cause: Delays due to instructions to search for defects causing water leaks in excess of specification: (leaks not due to construction defects)

Award:

Time allowed: **43 days**

Additional P&Gs: 43 days x R9 650.00 (reduced) = **R414 950.00**

Additional costs: **R218 755.31**

Reversal of Penalties: **R179 755.31**

The reason for the Contractor's damages claim in the alternative is that a claim for damages in lieu of payment in terms of the Contract is a claim in terms of the law of *delict*, which is not competent where there is a contract governing how payment is to be made.

Backdating date of Practical Completion: 20 days x R9650.00 =

R193 000.00.

Case 3**Claim 30**

87. Cause of Claim: Additional road surfaces and unskilled labourers ordered by the Engineer, not measured in the Final Payment Certificate.

Award:

Additional road Surface = **R140 598.99**

Additional unskilled labour = **R130 118.72**

Reason:

Employer's rejection of claim based upon alleged incorrect contractual basis and time-bar not competent.

Summary of Award

88. Total Amount of Award = **R2 161 192.00**

Additional Time Awarded = **99 days**

Payment of the Award

89. **Payment** of the amount awarded shall be made within 14 (fourteen) calendar days of the date of publication of the award.

Interest calculated at the Legal Rate of Interest, i.e. 15.5%, from the date of service of the Contractor's Claim Submission on 09 June 2016, to the date of publication.

Refund of costs of mr Kruger, appointed to investigate costs of leaks in excess of SABS specification.

Signed and Published in Mossel Bay on this 6th day of March 2017.



Signed: Tertius du Toit: Adjudicator.

**STELLENBOSCH**

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MUNISIPALITEIT • UMASIPALA • MUNICIPALITY

Without Prejudice

15 March 2017

VAKALA CONSTRUCTION (PTY) LTD
P.O Box 37
Wellington
7655

Attention: Johan van Zyl

Dear Sir

VAKALA CONSTRUCTION (PTY) LTD // STELLENBOSCH MUNICIPALITY - CONTRACT NO. B/SM 03 / 15: THE CONSTRUCTION OF A 4ML RESERVOIR IN KAYAMANDI AND ASSOCIATED WATER SUPPLY PIPELINES – ADJUDICATION AWARD

1. The Adjudication Award published by Adv Tertius du Toit on 6 March 2017 in relation to the above Contract refers.
2. The Stellenbosch Municipality hereby notifies you of our dissatisfaction with the award and our intention to issue a notice in terms of Clause 10.6.1.2 to dispute the validity and/or the correctness of the decision.
3. The GCC 2010 however provides for a 28 day cooling off period before such notice may be issued and we accordingly invite you to Amicable Settle the matter in terms of Clause 10.4.
4. Subsequent Arbitration procedure will be a costly exercise which will be counterproductive for both Parties. We therefore invite you to make a full and final settlement offer in relation to the disputes that formed the subject matter of the above Adjudication Award. We request that you make such offer within 7 days of this letter, where after you should afford as a further 7 days to consider and respond to your offer.
5. We fully reserve all our rights on the above matter.

Yours faithfully

GERALDINE METTLER
MUNICIPAL MANAGER

+362 KM

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ACKNOWLEDGEMENT OF RECEIPT OF DOCUMENTATION

**TO: MR JOHAN VAN ZYL
VAKALA CONSTRUCTION (PTY) LTD
JVZ Building
Stokery Road
Wellington
7655**

RECEIVED BY: _____

DATE RECEIVED: 15 MARCH 2017

23-06-47 fc /vakala

23 March 2017

THE EMPLOYER
STELLENBOSCH MUNICIPALITY
 Plein Street
 Stellenbosch

Attention: Mr Dries Van Taak / Esias de Jager

Dear Sir,



PO BOX 37, WELLINGTON, 7655
 STOKERY ROAD, WELLINGTON

Tel: (021) 862 1973/4

Fax: (021) 862 1975

Email: marko@vakala.co.za

CONTRACT NO. B/SM 03 / 15: THE CONSTRUCTION OF A 4ML RESERVOIR IN KAYAMANDI AND ASSOCIATED WATER SUPPLY PIPELINES

NOTICE OF DEFAULT AND INTENTION TO TERMINATE

1. In accordance with the Adjudicator's Award dated 6 March 2017 (hereinafter referred to as the "Award"), *"Payment of the amount awarded shall be made within 14 (fourteen) calendar days of date of the publication of the award."*
2. We confirm that in terms of the Award the following amounts were due, on or before 20 March 2017:
 - a. **R2,161,192-00 (excluding VAT)** in respect of the time-related General Items, penalties reversed and additional costs;
 - b. **R37,054-22 (excluding VAT)** in respect of costs of Mr Kruger;
 - c. **R2,123-00 (excluding VAT)** in respect of the interest accrued in respect of the costs of Mr Kruger; and
 - d. **R261,877-00 (excluding VAT)** in respect of the interest accrued in respect of the amounts awarded.
3. Pursuant to the provisions of the Award, payment by the Employer was due on or before 20 March 2017.
4. We confirm that the Employer has failed to make payment in respect of the amounts awarded on or before 20 March and still fails to do so and is accordingly in breach of Contract.

5. In accordance with Clauses 9.3.1, 9.3.1.1, 9.3.1.1.2 and 9.3.1.1.3 of GCC 2010 we demand herewith that the Employer make payment in the amount of R2,806,960-69 (including VAT).
6. Kindly be advised that in the event that the Employer persists in failing to pay us after 14 (fourteen) days of date of this demand we shall be entitled to terminate the abovementioned Contract in accordance with Clauses 9.3.1, 9.3.1.1 and 9.3.1.1.2 of GCC 2010. All our rights are strictly reserved in terms of the Contract and in law.
7. We trust that the Employer comprehends the seriousness of this matter and that same deserves the Employer's urgent attention.

Yours faithfully



FAHEEM CROMBIE
CONTRACTS ADMINISTRATOR

For: Vakala Construction
CC J van Zyl

For: EDIFICE CONSULTING ENGINEERS
CC Mr. T Koch

23-06-48 fc /vakala

30 March 2017

THE EMPLOYER
STELLENBOSCH MUNICIPALITY
Plein Street
Stellenbosch

Attention: Mr Dries van Taak

Dear Sir,



PO BOX 37, WELLINGTON, 7655
STOKERY ROAD, WELLINGTON

Tel: (021) 862 1973/4

Fax: (021) 862 1975

"WITHOUT PREJUDICE"

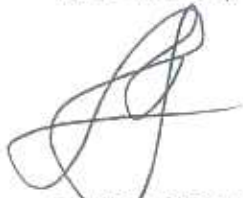
CONTRACT NO. B/SM 03 / 15: THE CONSTRUCTION OF A 4ML RESERVOIR IN KAYAMANDI AND ASSOCIATED WATER SUPPLY PIPELINES

SETTLEMENT OFFER

1. Your correspondence dated 15 March 2017, our notice of default and intention to terminate 23 March 2017 and the above matter refers.
2. We confirm that in accordance with our notice that the amount due, by yourselves, is R2,806,960-69 (including VAT) and further that payment of such amount is due on or before 6 April 2017.
3. In an attempt to avoid the matter being referred to Arbitration, and further to avoid costs and delays in payment we hereby confirm that we are willing to accept the amount of R2,350,000-00 (including Vat) in full and final settlement, of the matters referred to Adjudication.
4. We further confirm that the abovementioned settlement offer is based on the premise that you will release and make payment of the full retention held by the Employer in the amount of R621,855-45 (excluding VAT), which amount should have been released and paid on or before 23 January 2017, such payment being made within 7 (seven) days of this writing.
5. We kindly request that the Employer confirm its acceptance of this offer within 7 (seven) days of this writing, failing which we will have no option but to pursue our contractual rights, as stated in our notice dated 23 March 2017. All our rights are strictly reserved in terms of the Contract and in law.

6. We trust that the Employer comprehends the seriousness of this matter and that same deserves the Employer's urgent attention.

Yours faithfully



FAHEEM CROMBIE
CONTRACTS ADMINISTRATOR

For: VAKALA CONSTRUCTION
CC J van Zyl

For: EDIFICE CONSULTING ENGINEERS
CC Mr. T Koch

15 March 2017

Stellenbosch Municipality
 1st Floor, 71 Ecclesia Building
 Plein Street
 Stellenbosch
 7600

Attention: Mr D van Taak

**RE: CONTRACT NUMBER: B/SM 3/15: UPGRADING OF KAYAMANDI BULK WATER
 SUPPLY: ADJUDICATION**

As per your request, herewith a summary of the Adjudication Process, a brief Analysis of the Adjudicator's Rulings and the Strategy to proceed with the Disputed Claims:

Background

1. The above mentioned Contract was concluded between the Parties on or about 11 November 2014 in the amount of R 14 074 158.11 inclusive if 14% VAT.
2. The time for achieving Practical Completion was 7 working months.
3. The conditions of contract applicable to the Agreement between the parties are the General Conditions of Contract for Construction Works, Second Edition, 2010 (GCC2010) as amended by the Contract Data.
4. Site Handover took place on 13 November 2014.
5. Works Commencement Date was 17 November 2014 with the original Due Completion Date being 6 August 2015.

Director:
 Dr AD Malan
 B Eng, M Eng, LLB, PhD, AAArb

Address: Imperial Executive Suites
 Imperial Terraces 2nd Floor
 Tyger Waterfront

Registration Number: 2008/000141/07
VAT Number: 4610251532
 Instrument Property Consultants t/a
 Instrument Construction Lawyers

E-mail: toit@instrumentgroup.co.za
Cell: 082 899 3641
Tel: 021 914 8279

Note: the company by no means represent or hold ourselves out to be practicing Attorneys.

Status of Claims

6. During the execution of the Works, various claims were submitted by the Contractor.
7. These Claims were evaluated by the Engineer and rulings were provided in terms of the GCC2010.
8. Several of the Claims were not approved by the Engineer, but there were Claims that were found to comply with the Contract and were subsequently approved by the Engineer.
9. The Claims that were not approved by the Engineer were rejected for various reasons including;
 - 9.1 non-compliance with procedural requirements or conditions precedent in terms of the GCC 2010 and were accordingly time barred'
 - 9.2 not basing their claim or not relying on an appropriate contractual entitlement or cause of action for the alleged relevant events;
 - 9.3 not proving cause and effect on the critical path as required for extension of time and/or claiming damages;
 - 9.4 not substantiating damages, but using Bill of Quantity rates which is not proof of actual cost.

Adjudication Procedure

10. All of the Claims that were not approved by the Engineer were placed under Dispute by the Contractor and an ad-hoc adjudication process was followed.
11. Subsequently, during the adjudication process, the following process was followed:
 - 11.1 Statement of Claim (Contractor): 9 June 2016
 - 11.2 Statement of Defence (Employer): 11 August 2016
 - 11.3 Statement of Reply/Replication (Contractor): 1 September 2016
 - 11.4 Hearing including Experts: 9 December 2016
 - 11.5 Heads of Argument (both parties): 9 December 2016
 - 11.6 Publication of Award: 6 March 2017 (see Annexure A)
12. The Contractor's total claims in their Statement of Claim amounted to R1,9 mil and the Adjudicator awarded the amount of R2,2 mil (see Annexure B) to be paid with interest of 15,5% from 9 June 2016 the date of the Contractor's Statement of Claim. The Adjudicator ruled that the above amount is payable within 14 calendar days of the publishing date, which is on 20 March 2017. The standard payment period in the GCC 2010 is however 28 days from certifying payment.

Analysis of the Adjudicator's Rulings

13. We disagree with the Adjudicator's Ruling for various reasons *inter alia* of which a synopsis is as set out below, with specific reference to the paragraphs in the Ruling;

13.1 Paragraph 31 to 34 - Engineer's position

- 13.1.1 The Engineer is not an agent binding the Employer and cannot amend the Contract. The Engineer does not have a power of attorney. The Employer may therefore request the Adjudicator to open up, review or revise any ruling, decision, order, instruction, certificate or valuation by the Engineer relevant to the dispute. See Rule 6.4.1 of Adjudication Rules.
- 13.1.2 It is therefore not the Employer's rulings and determinations which it allegedly repudiated, but rather the Engineers impartial and independent professional rulings.
- 13.1.3 The Adjudicator is recognising this impartial role of the Engineer required in making rulings or determinations, but contradicts it in its ruling and it is evident in paragraph 33 and 34 that he does not apply the principle.
- 13.1.4 The Adjudicator is furthermore of the opinion that the Engineer can amend the Contract as alleged in paragraph 31. He quotes Clause 6.3 which deals with the authority and the power of the Engineer to issue Variations to the Scope of Works. This power is derived from the Contract itself and must be distinguished from the power to amend the terms and conditions of Contract itself. The Engineer does not have a power of attorney to bind the Employer as agent, but only to act to the extent provided in the Contract itself.

13.2 Paragraph 35 – Time Barring

- 13.2.1 The Employer's entire defence was not founded on time barring as averred by the Adjudicator in paragraph 35.
- 13.2.2 It is evident that because of this misconception, that the Adjudicator did not apply its mind to the Employer's other defences relied on pursuant to each individual Claim based on the merits of each Claim.

13.3 Paragraph 51 to 55 – Barkhuizen Case

- 13.3.1 We disagree with the Adjudicator's interpretation of the above authority and its averments in paragraphs 52 to 55 of its Ruling.
- 13.3.2 Supreme Court of Appeal held that The Constitution requires the courts to "employ its values to achieve a balance that strikes down the unacceptable excesses of 'freedom of contract' while seeking to permit individuals the dignity and autonomy of regulating their own lives". The court however found, for various reasons, that the unfairness of the time bar clause was not self-evident. The court further found that the applicant concluded the contract freely while exercising his constitutional rights to dignity, equality and freedom. Nothing existed to invalidate the bargain he concluded, and that he must be held bound to his agreement. The contract and time bar was accordingly upheld by the Supreme Court of Appeal.
- 13.3.3 The contract in the above case was an insurance contract and we cannot find any principle why the ruling will be different under the GCC 2010.

13.4 Paragraph 57 to 60 – Imprefed

- 13.4.1 The relevance of the above case is that the Claimant should not notify and rely on a certain entitlement and then subsequently in Adjudication rely on a different clause, cause of action or entitlement.
- 13.4.2 The Adjudicator should put himself in the position of the Engineer and review what was put to the Engineer. A good example is where the Contractor relied on Clause 2.3.1 and/or Clause 5.9.6 in the Adjudication, without being relied on in the Claim put to the Engineer. The facts did not support a claim under Clause 2.3.1 as there was no evidence that the technical data during construction was different from the technical data that the Contractor tendered on. Clause 5.9.6 on the other hand required additional notice to put the Employer *in mora* in terms of Clause 5.9.3 which was never issued or averred.

13.5 Paragraph 62 to 63 – Walter Lilly Case

- 13.5.1 The relevance of the case is to set out the onus of proof in order to claim damages or additional cost and not to use Bill of Quantity rates which the Adjudicator allowed.
- 13.5.2 The GCC 2010 is very specific in when Day Work Rates can be used after specific instruction from the Engineer and are accordingly not conclusive evidence to quantify damages.

13.6 Paragraph 64 and 65 – Design Error

- 13.6.1 The Adjudicator confirmed that it could not be proven on a balance of probabilities that the defects were due to a design error.
- 13.6.2 In order for the Contractor to succeed in an extension of time under Clause 5.12.2.3 as read with Clause 8.3.1.10 it should have proven that the defect was due to a design error and under Clause 5.12.2.4 that the defects was entirely beyond its control.

13.7 Paragraph 76 to 78 – Ovcon Case

- 13.7.1 We disagree with the Adjudicator's interpretation of the above authority which was based on completely different conditions of contract and was a claim for expense and loss or damages and not extension of time. The court in any event ruled against the Contractor and did not uphold its claim.
- 13.7.2 The Adjudicator is furthermore confusing terminal or total float and free float. Total float under some contracts, including the GCC 2010, may belong the Contractor and would not prevent the Contractor from claiming extension of time. However using up free float due to delays will not have the effect that the critical path being delayed and can as a consequence not cause a delay to Practical Completion as required by Clause 5.12.1 of the GCC 2010 in order to be awarded extension of time. Claims 3, 4 and 5 were due to delays on the Civil Work section which was not on the critical path. The Contractor admitted that the Reservoir section was on the critical path at the time.
- 13.7.3 The Adjudicator nevertheless awarded extension of time without the Contractor claiming it because of the fact that it involved free float and not terminal float. He furthermore awarded more days than what was put forward as the non-critical delays. Claim 3 was based on a non-critical delay of 3 days where he awarded 5 days plus Time Related P&G which were not claimed. Claim 4 was based on a non-critical delay of 1 day where he awarded 2 days plus Time Related P&G which were not claimed.

13.8 Paragraph 790 to 81 – Claims 3 to 5

- 13.8.1 The Contractor admitted that it was not entitled to extension of time due to the delay not being on the critical path and accordingly needed to rely on an

entitlement that may support a claim of additional cost and therefore purported to rely on Clause 2.3.1.

13.8.2 The event or circumstance in the present case does not in any event support a claim under Clause 2.3.1. The circumstances were not different from any technical data.

13.8.3 The Contractor has not complied with the written notice required in terms of Clause 5.9.3 to be entitled to a claim in terms of Clause 5.9.6.

13.9 Paragraph 82 – Claims 6 and 10

13.9.1 The particulars of the events or circumstances were described by the Claimant in terms of Clause 10.1.1.1 as:

13.9.1.1 Execute additional work of any kind necessary for the completion of the Works in terms of Clause 6.3.1.5

13.9.1.2 Change the specified or approved sequence or method of construction in terms of Clause 6.3.1.6.

13.9.2 It was the Defendant's submission that the critical path extends through the Reservoir section of the Works. The Civil Works section is on the non-critical path.

13.9.3 In order to illustrate the inconsistency in the Claimant's claims due to the failure to perform any delay analysis, we provide a summary of the Claimant's Extension of Time claims of the Contract:

13.9.3.1 Claim #2 – Strike – 7 working days

13.9.3.2 Claim #6 – Additional connections and Constraints – 39 working days

13.9.3.3 Claim #9 – Requirement to Perform Test – 6 working days

13.9.3.4 Claim #10 – Instruction 300 mm Socketed Valve – 5 working days

13.9.3.5 Claim #12 – Public Holiday-24 September 2015 – 1 working day

13.9.3.6 Claim #13 – Search and Remedy Defects – 20 working days

13.9.3.7 Total = 78 working days

13.9.4 If the Claimant however succeeds in all those claims to the full extent of 78 working days, it will extend the original Due Completion Date of 8 August 2015 to 26 November 2015. The Claimant's maximum claim for Extension of Time until 13 November 2015, which is the current Due Completion Date, will be for 69 working days. The 78 working days which the Claimant was therefore claiming is 9 working days more than the critical path and the Claimant was

therefore claiming Extension of Time for alleged delays which are not on the critical path

13.9.5 The Adjudicator awarded the above extensions and further added 5, 4 and 2 days for Claims 3, 4 and 5 which were admitted by the Contractor not to be on the critical path. The Adjudicator went on to award 43 days for Claim 13 where the claim has been reduced in the Claimant's Statement of Claim to 20 working days.

13.9.6 It is a basic principle in awarding extension of time that the total amount of extension of time and Time Related P&G awarded cannot exceed the duration from the original date of Practical Completion (6 August 2015) until the actual date of Practical Completion (13 November 2015) which is 69 working days. This is clearly an situation where concurrent delays occurred and the extension of time should be reduced to the net effect of such claims on the critical path and not accumulative total claimed.

13.10 Paragraph 85 – Claim 12

13.10.1 The risk of encountering public holidays while exceeding the Due Completion Date is a Contractor's Risk Event.¹ Encountering a public holiday is not a circumstance under Clause 5.12.1 entitling the Claimant to extension of time. The alleged event or circumstance is also not covered by Clause 5.12.2.3 (Any provision of these Conditions which allows for extension of time) or by Clause 5.12.2.4 (Any disruption which is entirely beyond the Contractor's control).

13.10.2 In the present case, the non-working day 24 September 2015 was already taken into account in calculating the extension of time and setting the revised Due Completion Date in relation to Claim #6. A public holiday does not provide an independent cause of action or entitlement (circumstance or event), but will be taken into account in the calculation of the extension of time if granted in terms of Clause 5.12.1 as read with Clause 5.1.1.

13.11 Paragraph 86 – Claim 13

13.11.1 The Contractor initially claimed 43 days extension of time from 16 October 2015 to 17 December 2015. Practical Completion was however issued on 13 November 2015 and the Contractor amended its claim in the Statement of Claim to 20 days. The Adjudicator went on not to only award 43 days plus time related

¹ An event or cause of delay which under the contract is the risk and responsibility of the Contractor.

P&D, but also awarded another 20 days' time related P&D for an alleged backdated date of Practical Completion from 17 December 2015 to 13 November 2015. (There is no basis to calculate 20 days' time related P&D between the above dates, whether using calendar or working days – calendar days were used to calculate time related P&D)

13.11.2 Even if he was correct in his averment, then he cannot compensate the Contractor for both the above scenarios. These claims should have been determined in the alternative, but he awarded both without setting out the facts and provisions of the contract on which the decision was based.

13.12 Paragraph 87 – Dissatisfaction Claim 13

13.12.1 The Adjudicator did not set out the facts and the provisions of the Contract on which the decision is based. He has left the hearing before any arguments could have been ventilated and there is no indication that he applied his mind to the dispute even on the papers as submitted to him.

Strategies to proceed with the Disputed Claims

Effect Payment ordered by Adjudicator

14. The Municipality will need to decide whether to honour the Adjudicator's Decision and pay the amount ordered on 20 March 2017 or whether they will resist payment.

Issue a Disagreement Notice

15. The Employer should issue a Disagreement Notice in relation to the Adjudicator's decision after 28 days in terms of Clause 10.6.1.2 to reserve its right to submit the matter to Arbitration, irrespective and independent of the issue of interim payment.

Enforcement of Payment by the Contractor

16. In the matter of Stefanutti Stocks (Pty) Ltd v S8 Property (Pty) Ltd the case involved a standard written agreement used in the building industry, namely, the JBCC Principal Building Agreement. Clause 40 of this agreement deals with dispute resolution. It provides that in the event of a disagreement a party can give notice to the other party to resolve the

disagreement. If the matter is not resolved within the prescribed time it's deemed to be a dispute and an adjudicator is appointed. The adjudicator's decision 'shall be binding on the parties who shall give effect to it without delay unless and until revised by an arbitrator ... should notice of dissatisfaction not be given within the (prescribed) period ... the adjudicator's decision shall become final and binding on the parties'. If notice of dissatisfaction is given the dispute will be 'finally resolved by the arbitrator'.

17. In this case, Stefanutti, the contractor, referred a dispute to an adjudicator and took the view that it didn't have to pay the amounts ordered by the adjudicator as the matter hadn't been finalised.
18. The judge then looked at how adjudication found its way into construction contracts in South Africa such as the JBCC agreement. He pointed out that in a book entitled 'The Building Contract – A commentary on the JBCC Agreements' the author, Eyvind Finsen, says this: 'The purpose of adjudication being the quick, if possible temporary, resolution of a dispute and the granting of interim relief to the successful party, the whole purpose of adjudication would be frustrated if the successful party was unable to enforce the determination against the other party.'
19. The judge quoted liberally from a recent decision of the Gauteng High Court, the case of Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd (discussed in our last article) which itself made reference to a number of South African decisions. The judge in the Tubular Holdings case said that 'the moment the decision is made the parties are required to "promptly" give effect to it...the requirement to give prompt effect will precede any notice of dissatisfaction.... (the notice of dissatisfaction) 'will have no effect on his obligation to give effect to the decision... the binding effect of the decision endures, at least, until it has been revised.' So the decision of the adjudicator is binding on the parties even if a notice of dissatisfaction is filed, and if no notice of dissatisfaction is filed the adjudicator's decision becomes 'final and binding'.
20. The judge rejected S8's argument that a decision of an adjudicator, which is interim in nature, cannot be enforced by a court. It is clear from this case, the Tubular Holdings case and the recent cases quoted in both judgments that parties to construction contracts are increasingly relying on adjudication as a legitimate form of dispute resolution. The enforceability of an adjudicator's decision, however, remains the main obstacle for the successful party and will depend on the interpretation of the specific adjudication clauses.

21. The wording of GCC 2010 is distinguishable from JBCC on which the Stefanutti Stocks Case is based. The GCC 2010 contains no contractual obligation to give prompt effect to the ruling. Clause 10.6.2 supports the obligation that failure to comply with the decision can be referred to arbitration or court if "not disputed".
22. Clause 10.5 of the GCC 2010 deals with Adjudication and incorporating the Adjudication Board Rules. Rule 7.6 states that GCC 2010 Clause 10.6 shall apply when either the Contractor or the Employer is in disagreement with the Adjudicator's Decision.
23. Clause 10.6.1 provide for the right to refer the matter to Arbitration by disputing the validity or correctness of the decision between the period of 28 and 56 days.
24. Clause 10.6.2 states; "In the event that a decision of the Adjudication Board was not disputed and a party fails to comply with the decision, the other party may, without prejudice to any other right he may have, refer the failure to arbitration or court proceedings, whichever is applicable in terms of the Contract. (own emphasis)

Review of Adjudicator's Decision

25. There is authority in the United Kingdom that Adjudications can be taken on review or applications can be made to declare an Adjudication void on grounds of denial of natural justice, failure to act in good faith or failure to comply with the Adjudication Act. In South Africa adjudication is not based on an act but on agreement of specific Adjudication Rules.
26. Clause 10.5 of the GCC 2010 deals with Adjudication and incorporating the Adjudication Board Rules. Rule 7.3 provides that "The facts and the provisions of the Contract on which the decision is based, shall be set out simultaneously with its publication".
27. It is evident from this submission that the Adjudicator did not comply with Rule 7.3 in his Decision. We have not found any authority on the consequences of such breach and would research such in the event of considering the approach of applying for the Adjudication to be declared void.
28. It is further submitted that the Adjudicator did not apply its mind to the facts of the matter and applied the facts to the relevant law, including the relevant provisions of the Contract. His subjective judgements which were not based on any relevant law or the relevant

provisions of the Contract are evident from the following assertions as reasons for his decisions;

- 28.1 Paragraph 33: *"This means also that the Employer cannot now, in the Adjudication procedures, distance himself from the determinations and agreements and instructions made and issued by the Engineer of the Contract."*
- 28.2 Paragraph 35: *"It is clear that the Employer's entire defence of the Contractor's claims was founded on the concept that the Contractor is Time-barred from obtaining any relief under the Contract whatsoever."*
- 28.3 Paragraph 43: *"It means that when the time-bar provision in the Contract in dispute can and has been legally invoked by the Employer, he, the Stellenbosch Municipality, will for all times be indebted to Contractor for the amount of money, which he may be entitled in terms of the Contract."*
- 28.4 Paragraph 46: *"In my experience during my 33 active years as a construction engineer, the time-bar provisions in the contract has never been invoked"*
- 28.5 Paragraph 48: *"There can therefore be no practical reason for the Employer to invoke any of the time-bar provisions in the Contract"; and*
- 28.6 Paragraph 53: *"There is no doubt in my mind that a Court would find that the invoking of the time-bar provisions in this Contract by the Employer, being an Organ of State, and in ruling circumstances, is untenable to the extent that it flies in the face of Public Policy"*
- 28.7 Paragraph 63: *"I do however not regard the Walter Lilly Case to be at all relevant as the Contractor in this matter, claims his losses and expense to be reimbursed at the applicable Scheduled Rates and Prices in the Contract Bill of Quantities and Prices."*
- 28.8 Paragraph 73 to 75: *"More-over, the Employer have built many similar reservoirs before, inter alia, the adjacent one. What happened there? If a leak-proof reservoir was required, why was it not specified in the design? I cannot resist the distinct feeling that the entire issue was in fact a storm in a teacup".*
- 28.9 Paragraph 77 to 78 *"The question of whether Float was contemplated in the Contract served in the Supreme Court in OVCON (Pty) Ltd v Administrator of Natal 1991(4) SA71 (D&C), where it was essentially found that when Float was not contemplated in the Contract, i.e it was not specified in the Contract, but allowed by the Contractor for his own purposes, such Float is the property of the Contractor. There is therefore no reason why the Contractor should not claim payment of his Time-related P&G costs at scheduled rates, nor is there any reason why the Employer should not be held liable for such payments".*

Recommendation

29. It is evident from the above that it is my view that the Adjudicator made various misinterpretations of the provisions of the Contract, authorities relied on and the extent of the extension of time claimed. These factors per se justifies to disagree with the decision and to refer it to Arbitration.
30. Arbitration is a final dispute resolution process and the Law of Evidence applies which do not apply in Adjudication proceedings. This opens up a complete new dimension where the parties attempt to bring various applications to derail or set aside each other's case without getting to the merits of the case. I would therefore recommend that the Municipality involve Senior Council to strengthen our Legal Team on such possible procedural issues that may arise.
31. It is furthermore anticipated that the Contractor will institute High Court proceedings to enforce the Adjudicator's Decision for payment. We will need Council to represent the Municipality in High Court.
32. We therefore recommend that the Municipality appoint an Attorney to brief an Advocate on the matter in order to advise on the above matters and for the Legal Team to finalise a strategy to be followed for the Municipalities' approval.

Yours faithfully



Per: AD Malan