THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 425/2020

In the matter between:

SASOL SOUTH AFRICA (PTY) LTD **Appellant**

and

MURRAY & ROBERTS LIMITED **Respondent**

Neutral citation: *Sasol South Africa (Pty) Ltd v Murray & Roberts Limited* (Case no 425/2020) [2021] ZASCA 94 (28 June 2021)

Coram: SALDULKER and ZONDI JJA and LEDWABA, GORVEN and POTTERILL AJJA

Heard: 18 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 28 June 2021.

Summary: Construction contract – contract providing for dispute resolution process – arbitration award final and binding on the parties until and unless set aside on review – Project Manager refusing to implement some of the findings of arbitrator – dispute

relating to Project Manager's refusal to implement arbitrator's findings referred to adjudicator for adjudication - adjudicator applying the principles established in arbitration award – a party to the contract not entitled to ignore the adjudicator's decision simply on the ground that it considers it to be invalid – appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Weiner J) sitting as court of first instance:

1. Save to the extent reflected in paragraph 2 hereof, the appeal is dismissed with costs including the reserved costs for the application for leave to appeal and the costs of two counsel where so employed.

2. The order of the court a quo is varied to read as follows:

'(a) The respondent (Sasol) is ordered to make immediate payment to the applicant (Murray & Roberts) as follows:

1 R130 959.39 plus VAT;

2 R2 340 290.55 plus VAT;

3 R10 888 833.76 plus VAT;

4 R2 420 242.59 plus VAT;

5 R173 938.58 plus VAT;

6 R1 469 609.12 plus VAT;

7 R335 400.27 plus VAT;

8 R991 562.24 plus VAT;

9 R934 931.85 plus VAT; and

10 R102 842.50 plus VAT.

(b) The respondent is ordered to pay interest on the amounts set out in paragraphs 1 to 10 above plus VAT from 10 June 2019 (being the date from which the respondent was *in mora* by having failed to make payment to the applicant in accordance with the decision) to date of payment to be calculated on a daily basis at the interest rate equal to the prime lending rate of ABSA Bank and compounded annually.'

JUDGMENT

Zondi JA (Saldulker JA and Ledwaba, Gorven and Potterill AJJA concurring)

Introduction

[1] On 15 March 2015 the appellant, Sasol South Africa (Pty) Ltd (Sasol) as an employer and the respondent, Murray & Roberts Limited (Murray & Roberts) as a contractor, concluded a construction contract in terms of which Murray & Roberts would render certain engineering and construction services to Sasol at its Secunda plant. The contract provided for the appointment of a project manager to perform certain functions under the contract and the mechanism to resolve the disputes that might arise between the parties. The dispute had to be notified and referred first to the adjudicator, appointed in terms of the adjudicator's contract, for adjudication, whose decision was enforceable as a contractual obligation and had to be complied with, pending the referral to arbitration. A dissatisfied party could thereafter refer the dispute to arbitration.

[2] During the execution of the contract various disputes arose between the parties. These mainly related to the correctness of the assessments made by a project manager in respect of payments claimed by Murray & Roberts in terms of the contract. Murray & Roberts referred the disputed payments to the adjudicator. Ten disputes related to the application of what was termed PMC200. Murray and Roberts presented for payment timesheets signed off by Sasol daily which, it contended, bound Sasol contractually to make those payments. Sasol, in turn, took the view that PMC200 should be applied. This would mean that the hours worked were not dispositive of the entitlement to payment. They were only a record and the project manager was entitled to deduct costs arising from a failure to remove resources upon the request of the project manager pursuant to PMC200. The adjudicator rejected Murray & Roberts' claims and confirmed the project manager's assessments.

[3] Dissatisfied with the outcome, Murray & Roberts referred the disputed payments (Disputes 1 and 2) to the arbitrator. No decision was made by the arbitrator on the other 8 disputes arising from the same issues because they had not yet arisen when Disputes 1 and 2 were referred to him. The arbitrator found in favour of Murray & Roberts. He held that the timesheets were contractually binding and that the project manager's instruction (PMC200), pursuant to which the payments were disallowed, was not valid. Murray & Roberts requested the project manager to implement the terms of the award by adjusting payments in relation to all 10 disputes. He

implemented the terms of the award for some of the disputes and refused to implement them for the rest, apparently on Sasol's instruction.

[4] In consequence Murray & Roberts notified Dispute 16 requiring the project manager to give effect to the ruling on Disputes 1 and 2 in relation to the balance of the 10 disputes. This was not a referral of the balance of the 10 disputes to the adjudicator, since he had previously decided Disputes 1 to 3, 5 to 6 and 8 to 12 against Murray and Roberts prior to the award of the arbitrator. The adjudicator reviewed the project manager's refusal to pay on the basis of the decision of the arbitrator that costs pursuant to PMC200 should not be deducted and ordered Sasol to pay the disallowed payments. Murray & Roberts demanded of Sasol to comply with the adjudicator's award. Sasol refused. It contended that the decision of the adjudicator was invalid. More about this aspect later.

[5] Sasol's refusal to comply with Murray & Roberts' demand prompted Murray & Roberts to approach the Gauteng Division of the High Court, Johannesburg (high court), on 12 June 2019, seeking to enforce as a contractual obligation the decision made by the adjudicator on 12 May 2019 on Dispute 16. Dispute 16 related to assessment number 38 issued by the project manager on 16 November 2018 in terms of which the project manager had disallowed certain payments claimed by Murray & Roberts. Sasol opposed the application and sought to justify its refusal to comply with the adjudicator's decision by contending that it was invalid. In turn, Sasol launched a counter-application in which it sought an order declaring that the decisions previously made by the adjudicator in respect of disputes 3 to 6 and 8 to 12 were enforceable as contractual obligations. The high court (Weiner J) upheld Murray & Roberts' claim and dismissed Sasol's counter-application. It granted Sasol leave to appeal to this Court.

Factual background

[6] The facts which gave rise to the dispute are the following. On 15 March 2015 Sasol and Murray & Roberts concluded an NEC3 Engineering and Construction Contract for structural, mechanical, electrical instrumentation and piping work related to phase 1 of the volatile organic compound abatement project at Sasol, Secunda. It was a time charge contract which meant that Sasol would bear the risk of overruns.

[7] The written agreement between the parties comprises various parts of the NEC3 Engineering and Construction Contract of June 2005 (with amendments June 2006). As already stated the contract provided for the nomination of the project manager to perform certain prescribed functions and duties. The contract also provided for a dispute resolution process and the parties opted for Option W1, which contained the agreed dispute resolution provisions.

[8] The agreed dispute resolution procedures comprise the following three steps:

(a) The notification of a dispute (clause W1.3(1));

(b) The referral of the dispute to adjudication (clause W1.3(1); and

(c) The referral of the dispute to the tribunal (agreed to be arbitration) in the event that a party is dissatisfied with the adjudicator's decision (clause W1.4(2)) or if the adjudicator does not notify his decision within the agreed time (clause W1.4(3)). In terms of W1.3(10) the adjudicator's decision is binding on the parties unless and until revised by the tribunal and is enforceable as a matter of contractual obligation between the parties. It is not an arbitral award. The adjudicator's decision is final and binding if neither party has notified the other within the times required by the contract that he or she is dissatisfied with a decision of the adjudicator and intends to refer the matter to the tribunal.

Project manager's instruction

[9] Due to budget constraints and time overruns, during February 2017, Sasol became concerned and decided to appoint a team to reassess the amounts due to Murray & Roberts. On 1 March 2017 the project manager by way of a project manager's communication, termed PMC200, instructed Murray & Roberts to demobilise with immediate effect failing which, he would disallow the costs of the resources in terms of clause 11(25) of the contract. The demobilisation concerned involved the removal from site of resources, namely manpower and equipment. The reassessment of past payments and the disallowance of the resources referred to in PMC200 were reflected in the project manager's payment advices 27 and 28 for the months of March and April 2017 and they related to payment applications number 35 and 36. The application of PMC200 resulted in an amount of about R42 million being deducted for those months.

Murray & Roberts' referral

[10] Aggrieved by the deductions, Murray & Roberts, after giving notices of both disputes on 19 May 2017 and 5 June 2017 respectively, submitted the disputes to the adjudicator on 7 July 2017 relating to payment applications 35 and 36 (Disputes 1 and 2). On 20 October 2017 the adjudicator issued a decision upholding the project manager's assessments. Murray & Roberts thereafter referred Disputes 1 and 2 to the arbitrator.

[11] While the arbitrator's award in respect of Disputes 1 and 2 was still pending the project manager continued to assess the payment applications submitted by Murray & Roberts in terms of PMC200, and this resulted in certain amounts being disallowed. Murray & Roberts on each occasion disputed the disallowed payments and referred them to the adjudicator as Disputes 3, 5, 6, and 8 to 12. As he had done for Disputes 1 and 2, the adjudicator upheld the project manager's assessments and found in favour of Sasol.

[12] On 9 October 2018 the arbitrator rendered an award in favour of Murray & Roberts in relation to Disputes 1 and 2. He determined that the PMC200 was not contractually binding and that the timesheets submitted by Murray & Roberts for payment, were contractually binding. Sasol subsequently brought an application for the review and the setting aside of the arbitration award but its application was dismissed by the high court and Sasol's petition for leave to appeal was also dismissed by this Court.

Referral of dispute 16

[13] Armed with the arbitrator's award, Murray & Roberts approached the project manager and requested him to give effect to the legal and factual position between the parties resulting from the award by revising his assessment of the amounts due in respect of Disputes 1 and 2 and his assessments contained in a number of other payment certificates. On 23 November 2018 the project manager issued the revised assessment. In his assessment the project manager, on the instruction of Sasol, disregarded certain portions of the award which Sasol contended were invalid and had undertaken to take them on review. Those portions related to the arbitrator's findings

that the timesheets were contractually binding and PMC200 was not valid. Murray & Roberts was dissatisfied with the assessment and on 16 January 2019 it referred the dispute as Dispute 16 to the adjudicator.

[14] Before the adjudicator, Sasol had contended that Murray & Roberts had sought the adjudicator to revisit and reconsider his earlier decisions and that the dispute relating to payment advice 38 was not a new dispute, but was an attempt by it to again refer the disputes relating to payment advices 27 to 37 before the adjudicator. Sasol submitted that the adjudicator did not have jurisdiction and was expressly precluded from reconsidering those parts of the disputes in respect of which the arbitrator had already issued an award.

[15] The adjudicator rejected Sasol's jurisdictional challenges and proceeded to consider the dispute. His reasoning is set out as follows in paras 32 and 33 of his decision:

'[. . .] I cannot see any reason why, if an arbitrator gives an award which overturns an adjudicator's decision, other decisions of the adjudicator which were made on the same principle as the overturned decision, cannot be changed to conform with the arbitrator's award, but can only be overturned in a further arbitration. Apart from that fact that that will put the Contractor to unnecessary expense, it also files in the face of the underlying practicalities and principles of the contract.

I accordingly find that, to the extent that the arbitrator's award establishes principles that are applicable to the other disputes, I may revise any of my prior decisions based on new information.'

[16] As already stated when Murray & Roberts on 16 May 2019 demanded that Sasol comply with the terms of the adjudicator's decision it refused to do so. Hence Murray & Roberts brought the application in the high court seeking to enforce the decision of the adjudicator on Dispute 16. Sasol opposed the application and justified its refusal to comply with the adjudicator's decision by contending that it was of no force or effect in that, so it argued, in conducting the adjudication and in issuing his decision, the adjudicator had acted outside of his powers.

[17] In substantiation of its defence Sasol asserted, first, that the adjudicator decided a dispute which was the same or substantially the same as the ones that he had previously decided which, it argued, was something that he was not permitted to do under the adjudicator's contract; second, that he had received information after the time allowed for him to do so had expired; and third, that he had given his decision outside the time period allowed for him to do so.

[18] In challenging the merits of the decision, Sasol contended that the adjudicator had failed to consider the dispute before him, in particular the timesheets which formed basis of Murray & Roberts' claims and the effect of such failure, it argued, prevented it from making submissions on those timesheets. In *Carillion Construction v Devonport Royal Dockyard Ltd* [220] EWCA Civ 1358 the court at para 52 endorsed the correctness of the principle that 'where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision.'

[19] The first point taken by Sasol was that the adjudicator erred in holding that the arbitration award applied to all other payment assessments or his previous decisions. It argued that the arbitration award applied only to the disputes that were referred to arbitration and it did not apply to all other payment assessments disputes. This was because, so proceeded the argument, the hierarchy of dispute resolution processes in the contract required that all steps should be followed before the dispute was referred to the arbitrator. Sasol argued that to hold that the arbitrator's award established a principle to be applied to all other payment assessments would render dispute resolution processes meaningless as this would mean that the arbitrator's award was to be applied to all previous assessments and decisions, even if no notice of dispute had been given or if no referral to the adjudicator had been made in relation to a particular project manager's assessment. Relying on *Graham v Park Mews Body Corporate and Another [2011] ZAWCHC 370;* 2012 (1) SA 355 (WCC); [2012] (1) All SA 187 Sasol submitted that the fact that the arbitrator came to a particular finding in relation to PMC200 in relation to Disputes 1 and 2 was inadmissible in another arbitration about any other dispute.

[20] In *Park Mews* the court at para 61 referred to the judgment in *Land Securities plc v Westminster City Council* [1993] 4 All ER 124, in which Hoffmann J held as follows at 127:

'In principle the judgment, verdict or award of another tribunal is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties. The leading authority for that proposition is Hollington v F Hewthorn & Co Ltd [1943] 2 All ER 35, [1943] KB 587, *in which a criminal conviction for careless driving was held inadmissible as evidence of negligence in a subsequent civil action. There has been criticism of this decision and important exceptions have since been created by statute, notably in the Civil Evidence Act 1968, but none of them apply here.*

In Hunter v Chief Constable of West Midlands [1981] 3 All ER 727 *at* 734*,* [1982] AC 529 *at 542, Lord Diplock said that Hollington's case was 'generally considered to have been wrongly decided'. He did not elaborate on this remark, which in any case was not necessary for the decision. In Savings and Investment Bank Ltd v Gasco Investments (Netherlands) BV* [1984] 1 All ER 296 at 303, [1984] 1 WLR 271 *at 280 Peter Gibson J said that Hollington's case still represented the common law. Still more recently the principle has been applied by the Privy Council to exclude evidence of the conviction of a principal offender at the trial of an accessory (see Hui Chi-ming v R* [1991] 3 All ER 897, [1991] 1 AC 34).

Mr Barnes QC for the plaintiff did not seek to challenge Hollington's case as a statement of the common law, but he said that it is based upon the rule which excludes opinion evidence. Goddard LJ, who gave the judgment of the court said ([1943] 2 All ER 35 *at 40,* [1943] KB 587 *at 595):*

"It frequently happens that a bystander has a complete and full view of an accident; it is beyond question that while he may inform the court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide; but in truth it is because his opinion is not relevant. Any fact that he can prove is relevant; but his opinion is not. The well-recognised exception in the case of scientific or expert witnesses depends on considerations which, for present purposes, are immaterial. So, on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant.".'

[21] I disagree with Sasol's submissions. In the arbitration award, the tribunal determined certain principles which the project manager was contractually obliged to apply in terms of clauses 50 and 51.3 when assessing payment advice 38 (PA 38),

but instead the project manager decided to do so selectively. As correctly submitted by Murray & Roberts, in Dispute 16 the adjudicator merely 'stepped into the shoes' of the project manager and reviewed and revised the project manager's failure by finding that he should have applied the principles determined by the tribunal and that, if he had done so, he would have assessed PA 38 in the amounts set out in the adjudicator's decision.

[22] The second point taken by Sasol was that in terms of clause 2.1 of the adjudicator's contract 'the adjudicator does not decide any dispute that is the same or substantially the same as one that he or his predecessor has previously decided.' It argued that the disputes in respect of the previous assessments of the project manager had been decided by the adjudicator. Those assessments had, so proceeded the argument, become adjudicator's decisions and were contractually binding on the parties. The project manager was no longer entitled to change them.

[23] The interpretation of clause 2.1 contended for by Sasol is incorrect. In the first place, Dispute 16 related to whether the project manager was correct to withhold payment in the face of the arbitrator's finding that he had been incorrect to do so as a result of PMC200. In terms of the contract, the project manager was obliged to consider and to take into account contractual entitlements determined in favour of Murray & Roberts in the arbitrator's award. This obligation was imposed on him by clause 50.5 and 51.3 of the construction contract. Clause 50.5 provides the following:
'*The Project Manager corrects any wrongly assessed amount due in a later payment certificate.'*
Clause 51.3 states:
'*If an amount due is corrected in a later certificate either*

- *by the Project Manager in relation to a mistake or a compensation event or*
- *following a decision of the Adjudicator or the tribunal,*

interest on the correcting amount is paid. Interest is assessed from the date when the incorrect amount was certified until the date when the correcting amount is certified and is included in the assessment which includes the correcting amount.'

[24] In this matter the project manager was requested to make an assessment in compliance with the terms of the award. In the process of making an assessment and

on the instruction of Sasol he refused to comply with certain portions of the award. Upon a referral to him of the project manager's refusal to comply with the terms of the arbitrator's award, the adjudicator had the power in terms of clause W1.3(5) of the contract to 'review and revise any action or inaction of the Project Manager . . . related to the dispute . . .'. When the adjudicator acts under this clause, he does not reconsider a prior decision which he himself had made, but he simply does what the projector manager was supposed to have done in terms of the contract in accordance with the principles established in the arbitration award. The adjudicator was entitled to act in circumstances where the project manager had, on Sasol's version 'declined to apply the part of the arbitration award that is subject of the review application'. It was thus never in dispute that the project manager was obliged to apply the award and Dispute 16 was only about the manner in which the project manager applied it. For these reasons Sasol's contention must fail.

[25] A third ground of Sasol's attack on the validity of the adjudicator's decision, was that the adjudicator failed to notify the dispute timeously, that is to say when he issued his decision, his jurisdiction had ceased. Sasol asserted that the adjudicator should have issued his decision on 12 March 2019, and not on 12 May 2019. Sasol contended that when the adjudicator issued his decision he no longer had jurisdiction to do so, his jurisdiction having, so Sasol argued, ceased on 12 March 2019. In elaborating on its defence Sasol stated that Murray & Roberts referred Dispute 16 to adjudication on 16 January 2019 and that in terms of the contract the four-week period provided for in clause W1.3(8) for receiving information terminated on 12 February 2019 and the further four-week period for the adjudicator's decision on 12 March 2019 as the parties had not agreed to extend it.

[26] Sasol relied heavily on the judgment of Twala J in *Group Five Construction (Pty) Ltd v Transnet SOC Limited* [2019] ZAGPJHC 11, para 21 in which it was held that, without the consent of the parties, the adjudicator cannot extend the time period beyond the four-week prescribed period.

[27] Explaining the processes that occurred between the date of receiving the referral, up to the time of giving his decision, the adjudicator stated that

from 16 January to 21 February 2019, the parties submitted e-mails and written submissions. On 27 February 2019, within the four-week period from the date of submission of Sasol's submissions, he informed Sasol and Murray & Roberts that he would allow Murray & Roberts to submit further information, as requested by Mr Fourie of Sasol in his e-mails, dated 19 February 2019 and 21 February 2019 to ensure that any decision he arrived at, was based on correct facts. He allowed Sasol to reply to anything new in those submissions. In addition to what was contained in the e-mails, the adjudicator requested further information from both parties.

[28] The adjudicator also invited the parties to motivate if they wanted to submit oral argument. On 5 March 2019, Murray & Roberts submitted its further information. Sasol responded to Murray & Roberts' further information and supplied the information requested by the adjudicator on 14 March 2019. An oral hearing was held on 16 April 2019 and Murray & Roberts and Sasol submitted written heads.

[29] In view of the considerable reliance placed on the *Group Five* decision by Sasol, it would be appropriate to analyse that decision in a little detail. The facts are adequately set out in the headnote as follows:

'In January 2011, the applicant and respondent entered into a written engineering and construction contract ("the ECC"). A dispute arose pertaining to the respondent's issuance of a final payment certificate. After the applicant notified the respondent of the dispute, in April 2018, the matter was referred for arbitration and in September 2018 the arbitrator rendered his award. The present application was for an order directing the respondent to give effect to the decision of the arbitrator's award.

On 19 July 2018, the arbitrator requested further information from the applicant. He then requested that the parties allow him an additional seven days to finalise his request for further information, after which he would be in a position to finalise his award within 4 weeks. The respondent refused to grant the arbitrator the extension requested. The arbitrator continued to communicate and received certain information from the applicant without any further contribution and participation from the respondent and published his decision on 18 September 2018.'

[30] When Group Five sought to enforce the adjudicator's decision, Transnet opposed it and contended that the decision was invalid. It submitted that the adjudicator failed to publish his decision within four weeks which period was from 29 June 2018 to 29 July 2018. It contended that the adjudicator should not have proceeded with the adjudication of the matter without the consent of both parties since it refused to give consent on 31 July 2018. It submitted that since it had, by filing a notice to refer the dispute to arbitration on 31 July 2018, brought the adjudication process to a stop and disempowered the adjudicator from continuing with the adjudication. The court upheld Transnet's submissions and held at para 21 that:

'In terms of clauses W1.3.3 and W1.3.8 of the agreement between the parties the time period for the publication of the adjudicator's decision is four weeks from the date when he receives the last submissions from the parties, unless the parties agree to grant him an extension of time. These clauses do not state what should happen when a party does not grant the consent to extend the period. I am of the respectful view that the intention of the parties to make the requirement of consent from the parties to afford the adjudicator more time is meant to give the parties control over the process of the adjudication. It is meant to give the parties some power to deal, should they find themselves in that situation, with a recalcitrant adjudicator. The ineluctable conclusion is therefore that, absent such consent to the extension of time, the adjudicator should publish his report on due date failing which his mandate is terminated. I am therefore unable to disagree with Counsel for the respondent that, from the plain wording of these clauses, the adjudicator is not competent to proceed and act beyond the time period set by the agreement if he is unable to secure the necessary consent from both parties. No other meaning can be ascribed to these provisions for they are not at all ambiguous.'

[31] Returning to the facts of the present matter, in my view, when the adjudicator considered the dispute, he was obliged to gather sufficient facts to enable him to make a decision and to do so within the framework provided for in the construction contract and the adjudicator's contract.

[32] Clause W1.3(3) of the construction contract states the following:

'*The Party referring the dispute to the Adjudicator includes with his referral information to be considered by the Adjudicator. Any more information from a Party to be considered by the Adjudicator is provided within four weeks of the referral. The period may be extended if the Adjudicator and the Parties agree'.*

[33] It was submitted by Murray & Roberts that this clause allows both parties to provide further information or to reply to further information until the last day of the four-week period. Only after that day, would the adjudicator be in a final position to consider whether, based on the information already received, additional information would '. . . *enable him to carry out his work* . . .'. I agree with this submission.

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

'The Adjudicator may…

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

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

[35] CIause W1.3(8) provides as follows:

'*The Adjudicator decides the dispute and notifies the Parties and the Project Manager of his decision and his reasons within four weeks of the end of the period for receiving information. The four-week period may be extended if the Parties agree*.'

In the context of the subsequent agreement in the adjudicator's contract, '. . . *the end of the period for receiving information* . . .' clearly adds an additional two weeks after the request for additional information. It undermines Sasol's argument that the four-week period in clause W1.3(3) had not been extended by agreement. The parties expressly extended the period by agreeing with the adjudicator that he could ask for additional information to be provided to him within two weeks.

[36] Additional clause 2.5 of the adjudicator's contract provides:

'The Adjudicator may ask for any additional information from the Parties to enable him to carry out his work. The Parties provide the additional information within two weeks of the Adjudicator's request.'

[37] It was submitted by Murray & Roberts that the phrase '. . . *any additional information* . . .' logically refers to information over and above that which the adjudicator received in the four-week period provided for in clause W1.3(3) and which the adjudicator started to consider after that period, resulting in his decision that additional information would '*enable him to carry out his work*'. I agree with Murray & Roberts' submission.

[38] CIause 1.7 of the adjudicator's contract regulates the position where there is a conflict between the provision of the adjudicator's contract and the construction contract. It provides:
'If a conflict arises between this [adjudicator's] *contract and the contract between the Parties then this* [adjudicator's] *contract prevails*.'

[39] The adjudicator's contract allows an entitlement to more information and more time than that provided for in the '*contract between the parties*' and to the extent that there is a conflict between the adjudicator's contract and the construction contract, the adjudicator's contract must prevail.

[40] From these events, it must be accepted that the date of hearing constituted '*the end of the period for receiving information*'. The adjudicator was therefore obliged in terms of clause W1.3(8) to deliver his decision and his reasons within four weeks of the end of the period for receiving information (being 16 April 2019), which he did on 12 May 2019. The *Group Five* case upon which Sasol relied, is distinguishable on the facts from the present case in that in that case the court did not consider the implication of additional clause 2.5 of the adjudicator's contract which gives the adjudicator the right to request and to receive additional information, after which the four-week period for his decision commences. The contention that the decision is invalid because of the adjudicator's failure to deliver his decision within four weeks of the end of the period for receiving information, must therefore be rejected.

[41] In the alternative, Sasol argued that the adjudicator's jurisdiction ceased when Sasol issued a notice of dissatisfaction in terms of clause W1.4(3) of the construction contract. In terms of this clause 'if the adjudicator does not notify his decision within the time provided by this contract, a party may notify the other party that he intends to

refer the dispute to the tribunal. A party may not refer a dispute to the tribunal unless this notification is given within four weeks of the date by which the Adjudicator should have notified his decision'.

[42] On 26 March 2019 Sasol gave its first notice of dissatisfaction in terms of W1.4(3). This notice was given on the basis that the adjudicator had failed to give his decision within four weeks from the end of the period for receiving information. In para 2 of the notice Sasol stated:

'7. The Employer accordingly notifies the Contractor, which this notification constitutes, that the Employer intends to refer the matter (Dispute 16) to the tribunal due to the fact that the Adjudicator has not issued his decision in respect of Dispute 16 within the period stated in the contract.'

[43] Sasol's notification was premature because at the time that it was issued the period within which the adjudicator was required to deliver his decision, had not expired. He was entitled to receive from the parties, and to request the parties to provide, additional information either in terms of clause W1.3 (8) of the construction contract or of the additional clause 2.5 of the adjudicator's contract.

[44] In any event the adjudication proceeded until it reached its finality despite Sasol having given notification of referral. On 16 April 2019 both parties made oral submissions after which the adjudicator undertook to deliver his decision within two weeks of 16 April 2019. This period was not the period stipulated in the contract but was the period determined by the adjudicator himself and within which he had expected to make the decision available to the parties. This did not happen.

[45] When the adjudicator failed to deliver his decision within the period stipulated by him, that is, within two weeks of 16 April 2019, Sasol, on 7 May 2019, gave its second notice of dissatisfaction. Sasol contended that the adjudicator was not entitled to extend this period for him to provide his decision. It gave notice of its intention to refer the dispute to the tribunal. In para 6 of the notice Sasol stated:

'6. Accordingly and insofar as it may be argued that the Employer's notification in terms of Clause W 1.4(3) as issued on the 26th of March 2019 was invalid and the Adjudicator was entitled to disregard it, which is denied by the Employer, the Employer hereby gives notice in

terms of Clause W1.4(3) of its intention to refer the dispute to the tribunal as a result of the Adjudicator not having provided his decision within 2 weeks of the 16th of April 2019, the period as extended by him.'

Again Sasol's notification was premature for the simple reason that in terms of W1.3(8) the adjudicator had to make his decision within four weeks of the end of the period for receiving information. The parties made submissions on 16 April 2019, which meant that the adjudicator had to make his decision within four weeks of 16 April 2019.

[46] On 12 May 2019 the adjudicator issued his decision. Thereafter on 28 May 2019 Sasol served a third notice on the adjudicator of its intention to refer the dispute to the tribunal. Sasol did not refer the dispute to the tribunal and neither did it take the decision to the tribunal for it to be set aside. It therefore remained binding and was enforceable as a matter of contractual obligation between the parties.

[47] Lastly, Sasol contended that Murray & Roberts' failure to place before the adjudicator timesheets on which its claims were based, deprived it of the opportunity to consider them in addressing the adjudicator. The adjudicator, argued Sasol, failed to afford it a right to be heard before he took a decision on timesheets. And that in doing so, he breached the *audi alteram partem* principle. This contention must fail. Sasol did not squarely raise this point before the adjudicator. Sasol's refusal to pay Murray & Roberts was not based on the ground that the timesheets were incorrect, but rather based on the project manager's reliance on clause 11.2(25) in disallowing the costs of resources. The calculation and quantum of the amounts reflected in the timesheets were never in dispute between the parties.

[48] In the result the appeal must fail. But the order of the high court must be amended in the light of the fact that some of the amounts Sasol was ordered to pay had since been paid and the parties provided this Court with the draft order reflecting what the true position should be in relation to the amounts still to be paid by Sasol.

[49] In the result an order in the following terms is made:

1. Save to the extent reflected in paragraph 2 hereof, the appeal is dismissed with costs including the reserved costs for the application for leave to appeal and the costs of two counsel where so employed.

2. The order of the court a quo is varied to read as follows:

‘(a) The respondent (Sasol) is ordered to make immediate payment to the applicant (Murray & Roberts) as follows:

1 R130 959.39 plus VAT;

2 R2 340 290.55 plus VAT;

3 R10 888 833.76 plus VAT;

4 R2 420 242.59 plus VAT;

5 R173 938.58 plus VAT;

6 R1 469 609.12 plus VAT;

7 R335 400.27 plus VAT;

8 R991 562.24 plus VAT;

9 R934 931.85 plus VAT; and

10 R102 842.50 plus VAT.

(b) The respondent is ordered to pay interest on the amounts set out in paragraphs 1 to 10 above plus VAT from 10 June 2019 (being the date from which the respondent was *in mora* by having failed to make payment to the applicant in accordance with the decision) to date of payment to be calculated on a daily basis at the interest rate equal to the prime lending rate of ABSA Bank and compounded annually.’

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D H ZONDI
JUDGE OF APPEAL

APPEARANCES:

For appellant:	P H J van Vuuren SC (with him H M Viljoen)
Instructed by:	Cliffe Dekker Hofmeyr, Sandton
	Phatshoane Henney Attorneys, Bloemfontein
For respondent:	L J van Tonder SC
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