



MEMBERS' DINNER

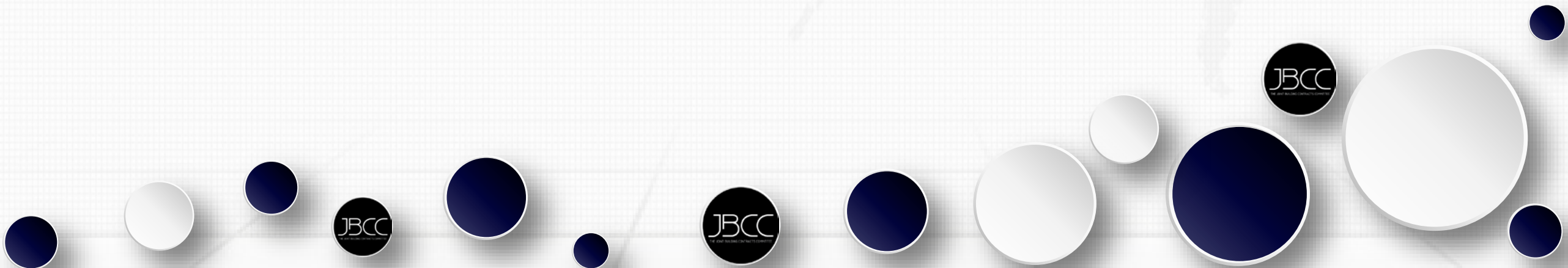
19 July 2025

Inanda Club, Sandton, South Africa



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**IS THE 'PAY NOW ARGUE
LATER' CONDITION IN
CLAUSE 30.0 OF THE JBCC
UNCONSTITUTIONAL?**





CONTENTS

1

Development of Building Contracts
in South Africa

3

2

Tiered Dispute Resolution Process

6

3

Adjudication Training in South Africa

8

4

Barkhuizen v Napier [2007]

10

5

JBCC Edition 6.2 May 2018

13

6

Enforcement of Adjudicator's
Decisions

15

7

*Zingwazi v EC Department of Human
Settlements*

19



1

DEVELOPMENT OF BUILDING CONTRACTS IN SOUTH AFRICA

Agreement and Schedule of Conditions of Building Contract (“White” and “Blue” Forms):

1932;

Various other revisions;

1981/1988;

Joint Study Committee;

MCC Contract;

JBCC Committee - 1984;

JBCC Publications:

- 1991 (1st);
- 1998 (2nd);
- 2000 (International);
- 2003 (3rd);
- 2004 (4th);
- 2005 (4.1th);
- 2007 (5th);
- ~~2014 (6.1th)~~;

May 2018 (Principal Building Agreement (PBA) Ed 6.2 Minor Works Agreement (MWA) Ed 5.2);

May 2020 (Small and Simple Works Contract (SSWC) Ed 1.0, Direct Contractors Contract (DCC) Ed 1.0).



2

TIERED DISPUTE RESOLUTION PROCESS

Either **party** may give **notice** to resolve disagreement - preferred option, no 3rd party, quick, negligible cost.

Adjudicator makes determination = structured process according to agreed Rules - mostly technical in nature - dissatisfied **party** = pay first argue later.

Not accept arbitrator's award (limited reasons); formal process, time-consuming, can be expensive.



At any time, in any process - involve a mediator to assist the **parties** to find an acceptable solution.

After notice of dissatisfaction > formal process - much longer, more expensive, according to agreed Rules.



3



ADJUDICATION TRAINING IN SOUTH AFRICA

RICS Diploma in Construction Adjudication:

- International recognition;
- Minimum face-to-face sessions (4 days);
- Mainly online through RICS training platform;
- Training period = 10 months (May to March);
- Cost approximately R43 000 (incl. VAT).

University of Pretoria Certificate in Construction Adjudication:

- In conjunction with MDA Consultants;
- Mainly face-to-face sessions (16 days);
- Limited online training (Covid-19 pandemic necessitated change);
- Training period = 10 months (February to November);
- Cost approximately R55 000 (incl. VAT).

4

BARKHUIZEN V NAPIER [2007]

**The Constitutional Court outlined
in *Barkhuizen v Napier*¹ that:**

“The proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights.”

- Public policy demands that contracts freely and consciously entered into must be honoured;
- A court will declare a contract invalid that is *prima facie* contrary to a constitutional value or principle, or otherwise contrary to public policy;
- Where a contract is not *prima facie* contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;
- The party who attacks the contract or its enforcement bears the onus to establish the fact;
- A court will use the power to invalidate a contract or not to enforce it, sparingly, **AND ONLY in the clearest of cases in which harm to the public is substantially incontestable**;
- A court will decline to use this power if a party wants to escape the consequences of a contract;
- Contractual relations are a major component of economic development. **It is imperative that parties are confident that contracts will be upheld.** This fosters a fertile environment for the advancement of constitutional rights.



5



JBCC EDITION 6.2 MAY 2018

30.0 DISPUTE RESOLUTION

To Adjudication

- 30.6.3 *A determination given by the adjudicator shall be immediately binding upon and implemented by the **parties** notwithstanding that either **party** may give **notice** to refer the determination to arbitration.*
- 30.6.4 *Where the adjudicator has given a determination, either **party** may give notice of dissatisfaction to the other **party** and to the adjudicator within ten (10) **working days** of receipt of the determination, or an extended time period provided in the applicable rules for adjudication whereafter such dispute shall be referred to arbitration*



6

ENFORCEMENT OF ADJUDICATOR'S DECISIONS

High Courts of South Africa have exhibited a clear willingness to enforce adjudicators' decisions made through the application of *ad hoc* adjudication.

Basil Read (Pty) Ltd v Regent Devco (Pty) Ltd;²

Freeman et al v Eskom Holdings;³

Tubular Holdings (Pty) Ltd v DBT Technologies;⁴

Esor Africa (Pty) Ltd v Frankie Africa (Pty) Ltd v Bombela Civils JV;⁵

Stefanutti Stocks v S8 Properties;⁶

Zingwazi v EC Department of Human Settlements.⁷

² *Basil Read (Pty) Ltd v Regent Deveco (Pty) Ltd* (41108/09) [2010] ZAGPJHC 75 (9 March 2010)

³ *Freeman NO and Another v Eskom Holdings Limited* (43346/09) [2010] ZAGPJHC 29 (23 April 2010)

⁴ *Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd* (06757/2013) [2013] ZAGPJHC 155; 2014 (1) SA 244 (GSJ) (3 May 2013)

⁵ *Esor Africa (Pty) Ltd/ Frankie Africa (Pty) Ltd v Bombela Civils JV (Pty) Ltd* (38844/11) [2012] ZAGPJHC 54 (11 April 2012)

⁶ *Stefanutti Stocks (Pty) Ltd v S8 Properties (Pty) Ltd* (2008/2013) [2013] ZAGPJHC 249 (23 October 2013)

⁷ *Zingwazi Contractors CC v Eastern Cape Department of Human Settlements and Others* [2021] ZAECGHC 50; [2021] 4 All SA 299 (ECG); 2021 (6) SA 557 (ECG) (11 May 2021)

Tubular Holdings: On adjudicators' determination the court decided that the parties must give prompt effect to a decision. If a party is dissatisfied, he must nonetheless live with it.

Esor Africa: Respondent cannot withhold payment of the amount determined by the adjudicator ... pending the outcome of the arbitration.

Basil Read v Regent Devco: The court decided that in terms of the contract the parties are bound to accept the adjudicator's decision and give effect thereto without delay. The remedy available to the dissatisfied party is to refer the matter to arbitration. Until such time as the adjudicator's decision is set aside by the arbitrator, the parties must give effect to the adjudicator's award.

Freeman et al v Eskom Holdings: An adjudicator's decision is final and binding unless and until revised by the tribunal, in this instance arbitration.

Stefanutti Stocks v S8 Property: The court also decided that the adjudicator's decision remains binding and enforceable until revised in the final determination by an arbitrator. The judgment in this case therefore followed the others to say that an adjudicator's decision is final and binding on the parties and that the parties contractually agreed to accept it as such. The remedy to the dissatisfied party is to refer the matter to arbitration but must in the meantime give prompt effect to the decision.

Zingwazi v EC Department of Human Settlements: The High Court in East London had to rule on whether it was unconstitutional for the claimant to pay not knowing if they would be able to recover the monies when the arbitration process may overturn the adjudicator's decision. Court decided that the adjudicator's decision remains binding and enforceable.



7

***ZINGWAZI V EC DEPARTMENT
OF HUMAN SETTLEMENTS***

- The adjudicator decided in favour of *Zingwazi*, for payment by *the Department* of the sum of R12 657 815.80.
- *The Department* was dissatisfied with the determination and elected to refer the matter to arbitration and did not pay in terms of the determination.
- *Zingwazi* instituted motion proceedings to prosecute the arbitration proceedings to finality and to pay in terms of the adjudicator's determination.
- *Zingwazi's* relief was granted but was suspended pending the finalisation of a counter application by *the Department*.
- *The Department* also argued that should they be able to overturn the decision they might not be able to recoup the amount as the contractor might no longer be in business (unconstitutional?).
- The counter application was dismissed.



THANK YOU

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