

# Dispute Resolution

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### SOUTH AFRICA

Does a time-bar challenge negate an adjudicator's jurisdiction to determine a referred dispute?



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**DISPUTE RESOLUTION  
ALERT**

## Does a time-bar challenge negate an adjudicator's jurisdiction to determine a referred dispute?

Adjudication serves as a crucial dispute resolution tool in South African construction contracts, offering a rapid, interim solution to keep projects moving amid disagreements.

Increasingly integrated into major construction agreements, adjudication decisions are legally binding until overturned by arbitration, litigation or mutual agreement.

The recent case of *Eskom Holdings SOC Limited v Babcock Ntuthuko Engineering (Pty) Ltd* [2024] ZAGPJHC 990 (3 October 2024) sheds light on how our courts address the enforcement of adjudicators' decisions when jurisdictional challenges are raised by litigants.

In this case, the full bench of the High Court (Full Bench), with leave of the Supreme Court of Appeal, was called upon to decide an appeal against the judgment of Makume J (the court *a quo*). In particular, the Full Bench, had to decide whether the decision of the court *a quo* to enforce an adjudicator's decision in favour of Babcock Ntuthuko Engineering (Pty) Ltd (Babcock) should be upheld despite objections from Eskom Holdings SOC Limited (Eskom), which argued that procedural delays and alleged errors rendered the adjudicator's decision unenforceable.

### Background

Eskom and Babcock entered into an NEC3 Engineering and Construction Contract (April 2013 edition) (Contract) for the construction of 400 kV transmission lines.

The Contract stipulated that disputes should first be referred to adjudication and, if unresolved, to arbitration. The Contract also set specific time limits for notifying a dispute arising in connection with the Contract and referring it to adjudication.

The project manager rejected Babcock's payment claims, and Babcock notified Eskom and the project manager that it disputed the project manager's rejection of its payment claims. Mr Peter Odell was appointed as the adjudicator and found in favour of Babcock (Decision).

### Time-bar dispute and subsequent proceedings

Babcock's referral focused significantly on establishing that it was submitted within the required time frame.

Eskom countered these submissions and argued that Babcock's referral of the disputes was time-barred because Babcock failed to refer the disputes within the timeframes stated in the Contract.

The adjudicator decided the matter in Babcock's favour regarding the time-bar. The Decision also required Eskom to pay specific amounts to Babcock. Eskom notified its dissatisfaction with the Decision and referred the dispute to the tribunal (i.e. arbitration). In the interim, Babcock made application to the High Court to enforce the Decision.

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## Principles considered by the Full Bench

On appeal, Eskom raised three arguments:

1. The adjudicator did not have jurisdiction, and the Decision was thus unenforceable. In particular, Eskom alleged that Babcock failed to refer the disputes within the time periods stated in the Contract.
2. The court *a quo* decided the matter on a basis other than the pleaded case.
3. The relief sought by Babcock did not constitute an enforcement of the Decision, and it was not authorised by the Contract.

The Full Bench discussed the purpose of adjudication and the enforceability of the Decision in the context of a referral to arbitration.

On the purpose of adjudication, the Full Bench cited Eyvind Finsen's commentary in *The Building Contract – A Commentary on the JBCC Agreements* (second edition, page 229), noting that:

*"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."*

On the question of enforceability, the Full Bench cited *Stefanutti Stocks (Pty) Ltd v S8 Property (Pty) Ltd* [2013] JDR 2441 (GSJ), and emphasised that:

*"The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration, or by agreement between the parties."*

## The findings of the Full Bench

Eskom argued that the enforcement of the Decision was wrongly granted as Babcock was time-barred which, according to Eskom, meant that the adjudicator did not have jurisdiction to decide the dispute.

Eskom's argument was premised on its interpretation of *Framatome v Eskom Holdings SOC Ltd* [2022] (2) SA 395 (SCA), in which the Supreme Court of Appeal stated:

*"It is trite that, if upon an application for enforcement of an adjudication decision, it is found that the adjudicator did not have the requisite jurisdiction, his decision will not be binding and enforceable."*

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Eskom claimed that the adjudicator did not have the jurisdiction to decide the time-bar challenge and that the court *a quo* should thus have ruled in Eskom's favour (as the time-bar challenge fell outside the scope of the papers).

As a point of departure, the Full Bench referred to various English cases, including *C&B Scene Concept Design Ltd v Isobars Ltd* [2002] BLR 93 (TCC), where it was held that:

*"Enforcement of an adjudicator's decision cannot be prevented whether it was caused by errors of procedure, fact, or law, unless the adjudicator has purported to decide matters that were not referred to him."*

The Full Bench stated that the decision in *Framatome* asserted the principle that even where an adjudicator has "fallen into an error," their decision is still binding if the adjudicator has confined themselves to addressing the questions put before them.

The Full Bench found that the time-bar challenge was put before the arbitrator, and the arbitrator considered and decided it.

The Full Bench pointed out that although the adjudicator's decision on the time-bar challenge was contentious, the adjudicator decided a matter before him and did not exceed his jurisdiction. Eskom had its remedy in arbitration, which was being pursued. Consequently, the Full Bench dismissed Eskom's jurisdictional complaint.

In summary, the question of whether the adjudicator made an incorrect finding regarding the time-bar challenge was irrelevant, given that this matter was in any event before an arbitrator tasked with deciding this matter. The application to enforce the Decision was in accordance with the terms of the Decision. Accordingly, the Full Bench ultimately dismissed the appeal on all grounds.

**Takeaways**

The purpose of adjudication is to provide a quick, interim solution for disputes, allowing projects to continue without being bogged down by prolonged litigation or arbitration. Adjudicators' decisions are enforceable immediately, pending final resolution of a dispute that remains unresolved (usually in arbitration).

An adjudicator has jurisdiction to decide *point in limine*, in particular whether the disputes have been referred within the prescribed period. The challenge, in and of itself, does not nullify the adjudicator's jurisdiction, nor does a finding against the party that raised it.

The key consideration where a jurisdictional question is concerned is whether the adjudicator has made a finding on issues not pleaded by the parties. Challenges to an adjudicator's decision will not typically prevent enforcement unless it is demonstrated that the adjudicator exceeded their jurisdiction. The proper forum for disputing the substance of an adjudicator's decision remains arbitration or litigation.

**Marco Neto, Zodwa Malinga and Khaya Mantengu**



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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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