

**REASONS FOR TRIBUNAL'S DECISION: DR B DE VILLIERS**, State Administrative Tribunal Commercial & Civil 19<sup>th</sup> February 2008.

- 1 At the hearing of the review of a decision made by the adjudicator under the *Construction Contracts Act 2004* (WA), the parties raised a preliminary issue, namely if the dispute falls within the jurisdiction of the *Construction Contracts Act 2004* (WA). The question arose from the ambivalent way in which the adjudicator dealt with the issue of jurisdiction in his reasons for decision. The adjudicator seems to have found in one part of the reasons that the matter "appears" to fall within the *Construction Contracts Act 2004* (WA) ([10] of his reasons), but then he also indicated in another part of the reasons that the question of jurisdiction was too complex for him to determine and thus raises "jurisdiction issues" ([27] of his reasons).
- 2 The parties were in agreement that if the matter does not fall within the jurisdiction of the *Construction Contracts Act 2004* (WA), the Tribunal cannot hear the review application. It is therefore only after the question of jurisdiction is determined that the other questions the subject of the review may be heard. The parties acknowledged that an adjudicator's decision regarding jurisdiction is in itself reviewable, but then he must make a clear determination supported by reasons for decision to enable the parties and the Tribunal to consider the matter.
- 3 The Tribunal decided to remit the matter to the adjudicator for him to make an unequivocal determination if the dispute is within the jurisdiction of the *Construction Contracts Act 2004* (WA) and to provide reasons for his decision.

**Background**

- 4 The applicants brought an application for review of a decision of the adjudicator on 16 November 2007. The applicants sought orders for the decision of the adjudicator to be set aside and for the matter to be remitted to him pursuant to s 46 of the *Construction Contracts Act 2004* (WA) (CC Act).
- 5 The matter was set down for a directions hearing on 29 November 2007. At this directions hearing, programming orders were made for submissions to be made and for the application to be heard on 8 February 2008.
- 6 During oral submissions at the hearing, the questions of jurisdiction and the authority of the State Administrative Tribunal (Tribunal) to hear the dispute were raised. The parties were in agreement that, unless the dispute complies with s 7 of the CC Act, namely that it falls within the ambit of the CC Act, neither the adjudicator or the Tribunal can deal with it.
- 7 The Tribunal gave the parties an opportunity to address it on the question of jurisdiction and in particular, whether the adjudicator had made a clear and coherent determination to establish his jurisdiction. The parties were in agreement that findings of the adjudicator were ambivalent, vague, and even inconsistent in regard to whether he had jurisdiction to deal with the dispute.
- 8 After the parties had made oral submissions, the Tribunal made a finding and subsequent order that the dispute be remitted to the adjudicator to invite him to clarify his determination in regard to the question of jurisdiction and to provide reasons for the decision. The Tribunal gave oral reasons for its decision and it undertook to provide written reasons for decision in due course since the dispute may have some public relevance. These are the reasons for the decision.

**Statutory framework**

- 9 The statutory framework against which the review occurs is as follows.

**Construction Contracts Act 2004**

- 10 The jurisdiction of the CC Act is determined as follows:

- 11 Section 7(1):

*"This Act applies to a construction contract entered into after this Act comes into operation."*

- 12 Section 7(3):

*"This Act does not apply to a construction contract to the extent to which it contains provisions under which a party is bound to carry out construction work, or to supply goods or services that are related to construction work, as an employee (as defined in the Industrial Relations Act 1979 (WA) s 7) of the party for whom the work is to be carried out or to whom the goods or services are to be supplied."*

Section 31(2):

*"An appointed adjudicator must, within the prescribed time or any extension of it made under section 32(3)(a) - dismiss the application without making a determination of its merits if - the contract concerned is not a construction contract".*

**State Administrative Tribunal Act 2004 (WA)**

- 13 The *State Administrative Tribunal Act 2004* (WA) (SAT Act) determines that in exercising its review jurisdiction, the Tribunal must deal with a matter in accordance with the SAT Act and the enabling Act - in this case the *Construction Contracts Act 2004* (WA) (s 18(1), SAT Act). The SAT Act sets out, in s 27, the nature of the hearing; the information that can be taken into account and the purpose of the review. Section 29 of the SAT Act sets out the powers of the Tribunal on review and in particular, that a decision of the Tribunal is regarded as a decision of the decision-maker (s 29(5), SAT Act). The hearing conducted by the Tribunal is *de novo*, which means the Tribunal

is not restricted to the information that was before the adjudicator when he made the decision. The Tribunal can take into account any additional information that is of relevance to the application.

#### Submissions by the parties

- 14 The parties were in agreement that the proceedings on the main issues in dispute in the Tribunal could not continue unless the question of jurisdiction is determined. It is a threshold question that had to be dealt with by the adjudicator before he could make a determination of the other issues in dispute.
- 15 The parties further agreed that the reasons for decision of the adjudicator did not determine unequivocally that the dispute complies with s 7 of the CC Act. This is evident in the fact that the adjudicator concluded in [10] of his reasons that the agreement "*appears on first view*" to fall within the CC Act. He then continued, however, in [27], that the question of jurisdiction is "*complex in itself and raises jurisdictional issues for me ...*".
- 16 The adjudicator, therefore, did not make a positive or negative determination of the jurisdiction question and as a result, there is no decision yet to be reviewed, or if there is a decision, it is not clear. The Tribunal acknowledges that even if the adjudicator had made a determination that the matter does not fall within the CC Act, such a determination would be open to review. However, in the absence of a determination the adjudicator has not concluded his functions.
- 17 Mr Michell, for the respondent, contended that it may be within the discretion of the Tribunal to determine the jurisdiction question, even if the adjudicator had failed to do so. The Tribunal did not accept this contention for the reasons set out below.

#### Consideration

- 18 The object of the CC Act is to provide a statutory framework whereby the adjudication of a payment dispute that arises from a construction contract can be determined as "fairly and as quickly, informally and inexpensively as possible" (s 30 of the CC Act). The adjudication procedure is generally informal and the adjudicator is not bound by the rules of evidence. The adjudicator may inform himself in any way he thinks fit (s 32(1) of the CC Act). Strict timelines are set out in the CC Act to ensure that a determination is made as soon as possible after a dispute has arisen (s 31 of the CC Act).
- 19 The overall scheme of the CC Act is to ensure payment disputes are dealt with quickly without prejudice to any other civil or contractual remedies parties might have. The adjudicator has a wide range of powers to familiarise it with the issues in dispute. Hence the broad powers of the adjudicator to determine the way in which proceedings are conducted.
- 20 The first question the adjudicator has to address is whether a dispute is a "construction contract" for purposes of the CC Act. If it is not a construction contract, the matter "must" be dismissed (s 31(2)(a)(i) of the CC Act). Such a determination is open to review by the Tribunal, but the adjudicator must first of all make a determination before the Tribunal can fulfil its review function.
- 21 In the matter before the Tribunal, the parties were, as mentioned above, in agreement that the adjudicator had not made an unequivocal determination of the question of jurisdiction. Even if it is accepted that the adjudicator had made a determination but expressed it in a less than eloquent way, the reasons for his decisions are not clear. The adjudicator has therefore not completed its functions.
- 22 The Tribunal will first deal with the submission of Mr Michell that the Tribunal should make a determination on the question of jurisdiction even though the adjudicator failed to do so.
- 23 The Tribunal does not accept, for the reasons that follow, that it must fill the void that was left by the adjudicator.
- 24 Firstly, the adjudicator was obliged to be satisfied that the dispute fell within his jurisdiction under the CC Act before he could deal with the merit of the issues in dispute. Section 31(2)(a)(i) of the CC Act determines that the adjudicator "must" dismiss the application without making a determination if the contract concerned is not a construction contract. The adjudicator did not make such a determination or, if he had done so his finding was so ambivalent that it could be read both ways. He appeared to have hedged his decision by saying on the one hand that it "*appears on first view*" that it is a construction contract [10], but then followed by saying that if the application is indeed brought by employees as is alleged, the CC Act does not apply and as a result, "*jurisdictional issues*" arise [27]. The Tribunal is of the view that until, and unless, the adjudicator makes an unequivocal determination on the question of jurisdiction and provided reasons for the decision, the Tribunal cannot undertake a review of its decision or make a decision on behalf of the adjudicator.
- 25 Secondly, the Tribunal can only review a decision that has been made by a decision-maker; in this case the adjudicator (s 29 of the SAT Act; s 46(1) of the CC Act). If a decision has not been made or if a decision is vague or inconsistent, the Tribunal cannot cure the uncertainty. It is for the adjudicator to clarify its finding and subsequent orders. The Tribunal is not the decision-maker of first instance; it is required to review a decision of the adjudicator. The Tribunal can therefore not, as was proposed by Mr Michell, for the sake of saving time and costs, "*fill the gap*" by making a determination of jurisdiction without the adjudicator having made a decision in the first place.
- 26 Thirdly, the CC Act empowers the adjudicator to request the parties to make further submissions, to provide additional information and documentation, to attend a conference, or to engage an expert to investigate and report to the adjudicator on any matter (s 32(2) of the CC Act). The adjudicator therefore had a wide range of

instruments to enable him to come to a determination on the question of jurisdiction. It is important, given the purpose and objects of the CC Act, that the adjudicator fully utilised the procedures available to him prior to making a determination or prior to concluding that a matter is too complex for him to deal with.

- 27 Fourthly, it seems that the adjudicator confused the provisions of s 31(2)(a)(i) and s 31(2)(a)(iv) of the CC Act. The test of "complexity" does not arise under the jurisdictional question. The question of jurisdiction is a crucial threshold question where the adjudicator must demonstrate in the reasons for decision that:
1. he has considered all the issues and submissions;
  2. he has applied his mind;
  3. he must demonstrate how he came to his conclusions and findings; and
  4. he must explain how he used the procedures available to him to assist him in making a determination or if he decided not to use the procedures, what his reasons were for not using it.
- 28 The Tribunal therefore finds that it cannot fill the void left by the adjudicator when he failed to make an unequivocal determination or provided insufficient reasons as to whether the dispute falls within the jurisdiction of the CC Act.
- 29 The Tribunal notes that s 31(3) of the CC Act provides that "if an application is not dismissed or determined", it is taken to have been dismissed. This sub-section does not bear relevance to these proceedings since the adjudicator has clearly dealt with the matter pursuant to s 31(2) of the CC Act, albeit inadequately.
- 30 The Tribunal now returns to the question of jurisdiction and the way in which issues arising from the application were dealt with by the adjudicator.
- 31 The CC Act determines that it (the CC Act) does not apply to a construction contract to the extent:  
*"to which it [the contract] contains provisions under which a party is bound to carry out construction work ... as an employee (as defined in the Industrial Relations Act 1979 (WA) s 7) of the party for whom the work is to be carried out ..."* (s 7(3)).
- 32 Industrial type disputes that affect the rights of employees can therefore not be determined by the adjudicator.
- 33 In its submissions dated 11 October 2007 to the adjudicator, the respondent made detailed submissions as to why it believed the CC Act did not apply to the construction contract. The essence of the submissions was that the applicants were for "for all intents and purposes" employees of the respondent and that they were carrying out works as part of their contract of service rather than a contract for service. The respondent went on to make further detailed submissions as to why it believed the applicants were employees for purposes of the CC Act and as a result, the CC Act did not apply.
- 34 The CC Act sets out the procedure whereby an adjudicator can obtain additional information from the parties so as to ensure that it has "sufficient information" to make a determination (s 32(2) of the CC Act). The mechanisms available to the adjudicator are to invite further written submissions; to convene a conference and/or to engage an expert to investigate and report on any matter in dispute.
- 35 The adjudicator mentioned that the jurisdiction issue raises questions that are too complex for him to deal with. It seems as if the adjudicator did not use any of these mechanisms to assist him to obtain additional or sufficient information in regard to the contention raised by the respondent, namely that the applicants were "employees" of the respondent. The adjudicator further, did not deal with any of the submissions or issues raised by the respondent in this regard nor did he invite the applicants to respond to the contentions. Those submissions remain hanging in the air. It is not possible for the Tribunal to review the decision of the adjudicator unless he addresses all the issues put to him. The parties are therefore entitled to seek from the adjudicator consideration of all the material facts and issues placed before him and a determination of the jurisdiction issue with reasons to explain the rationale for his finding.
- 36 The adjudicator dealt with the question of jurisdiction and the status of the applicants (whether they are employees or not) in the briefest possible way. The adjudicator at first found that the contract "appears on first view" to be a construction contract ([10] of his reasons) but he then observes that if the applicants were indeed employees, "the Act does not apply" ([27] of his reasons). He then concluded that "this issue [of employment] is complex in itself and raises jurisdictional issues for me as the appointed adjudicator" ([27] of his reasons). In doing so, the adjudicator confused the jurisdictional test (s 31(2)(a)(i)) and the complexity test (s 31(2)(a)(iv) of the CC Act).
- 37 At no stage, however, did the adjudicator:
- a. engage the submissions that the applicants are in fact employees;
  - b. deal with the detailed submissions of the respondent; or
  - c. invite the parties to make additional submissions, to attend a conference or did he engage an expert to assist him in making a determination on the status of the applicants.
- 38 By not fully using the wide range of procedures available to him to ensure he has the relevant information, the adjudicator failed to deal with the matter in a manner envisaged by the CC Act.
- 39 The Tribunal was informed during the hearing that the adjudicator holds a law degree. Although the Tribunal is not necessarily required to consider the exact nature and scope of the adjudicator's qualifications, the importance

of making a determination in respect of jurisdiction should be first and foremost in the mind of an adjudicator - particularly a person qualified in law.

- 40 The CC Act further provides that if an adjudicator is "*satisfied that it is not possible to fairly make a determination because of the complexity of the matter*", it "must" be dismissed (s 31(2)(a)(iv) of the CC Act). The provision related to complexity of a matter should not be confused with that of jurisdiction, which is dealt with by s 31(2)(a)(i). It appears as if the adjudicator may have read the two grounds for dismissing an application together. However, even if the matter is complex, the CC Act envisages that an adjudicator may provide for an extension of time for complex matters to be addressed through further submissions, or even a conference.
- 41 In the matter before the Tribunal, the adjudicator makes reference to the "complexity" of the issues, but he does not explain why an extension of time could not have been of assistance to him to receive further submissions on the topic. It is further not clear from the reasons for decision why the complexity of the contention that the applicants were employees was such that the jurisdictional question could not be dealt with definitively. The mere fact that a matter may give rise to issues of some complexity is obviously not enough for the adjudicator to conclude that it is "too complex" to deal with. It is inevitable that in disputes under the CC Act, issues of legal complexity may arise. That in itself does not necessarily bring the matter within the "must dismiss" category.

#### **Finding**

- 42 The Tribunal is not satisfied that the adjudicator has made a determination in regard to the threshold question whether the dispute falls within the jurisdiction of the CC Act or if a determination has been made that the reasons for decision are clear to explain the rationale of the decision.
- 43 The matter should therefore be remitted back to the adjudicator to discharge his functions under the CC Act, and to make a clear and unequivocal determination with the necessary reasons to explain how he came to a particular conclusion. After he has reconsidered the matter, the applicant can decide if it wants to proceed with the application before the Tribunal.

#### **Order**

- 44 The matter is remitted to the adjudicator pursuant to s 31(1) of the *State Administrative Tribunal Act 2004* (WA) to invite him to:
1. Clarify if the dispute falls within the jurisdiction of the *Constructions Contract Act 2004* (WA);
  2. Give reasons for his decision; and
  3. Clarify if the opportunity to obtain sufficient information, as envisaged by s 32(2) of the *Construction Contracts Act 2004* (WA), has been fully utilised.

I certify that this and the preceding [44] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

For the Applicants : Mr JD Finlay  
For the Respondent : Mr R Michell