

## **ADJUDICATION RULES**

These Adjudication Rules shall apply to all construction contracts which stipulate that these rules apply. These rules may be varied by mutual agreement of the Parties in conjunction with the Adjudicator, whose agreement to such variations shall not be unreasonably withheld; failing which, these rules shall apply in their standard format.

### 1. **Definitions & Interpretations**

- 1.1. “Adjudicator” – means the sole appointed person who is to issue a Decision on a dispute (or disputes) which has been referred to him/her in accordance with these Rules.
- 1.2. “Adjudicator’s Agreement” – means the agreement entered into between the Parties and the Adjudicator in terms of which the Adjudicator is appointed to resolve the dispute/s referred to him/her.
- 1.3. “CAASA” – means the Construction Adjudication Association of South Africa.
- 1.4. “Contract” – means the contract entered into between the Parties as defined in the Adjudicator’s Agreement.
- 1.5. “days” – means calendar days, but excluding the annual builders break as declared by SAFCEC.
- 1.6. “Decision” – means the written decision published by the Adjudicator to the Parties, which is to be implemented by the Parties with immediate effect, and will be binding on the Parties, unless and until it is overturned by either agreement, arbitration or court.
- 1.7. “Parties” – means the collective reference to the Referring Party and Responding Party.
- 1.8. “Referring Party” – means the party who has declared the dispute (or disputes) and has initiated the adjudication process.
- 1.9. “Responding Party” – means the party against whom the dispute has been declared, and who will have to defend its position against the Referring Party’s claim.
- 1.10. “Rules” – means these CAASA Adjudication Rules.

- 1.11. “Referral” – means the Referring Party’s fully substantiated and supported claim presented to the Adjudicator for Decision.
- 1.12. “Response” – means the Responding Party’s reply to the Referral.
- 1.13. Where the context requires:
  - 1.13.1. Words importing the singular also include the plural, and vice versa, and
  - 1.13.2. Words importing the masculine gender also include the feminine.

## 2. Adjudicator’s Appointment

- 2.1. Once a dispute/s has arisen (and been notified) which requires resolution by adjudication, the Parties shall jointly endeavour to identify and agree on an Adjudicator, as follows:
  - 2.1.1. The Referring Party shall identify 3 or more persons from the CAASA panel of adjudicators and determine that they are willing and able to take the appointment. The Referring Party will provide these details and confirmation to the Responding Party within 7 days from the dispute notification.
  - 2.1.2. The Responding Party will then within a further 5 days notify the Referring Party of its agreement, rejection or further proposal of an Adjudicator for the dispute/s.
  - 2.1.3. Should the Parties agree on an Adjudicator, the Referring Party shall co-ordinate the formal appointment process of the Adjudicator ensuring transparent communications throughout the process.
  - 2.1.4. Should the Parties fail to agree and appoint an Adjudicator within 14 days from the issuance of the dispute notification, then the Referring Party may refer the nomination and appointment of the Adjudicator to CAASA.
- 2.2. In the event that the nomination of an Adjudicator is referred to CAASA for appointment, CAASA shall within 7 days of receiving the necessary application make the appointment and notify the Parties and the Adjudicator.

- 2.3. Once the Adjudicator has been nominated and appointed, the Adjudicator shall provide a disclosure statement to the Parties confirming his impartiality. The Parties, together with the Adjudicator, shall sign the Adjudicator's Agreement.
- 2.4. The Adjudicator's appointment will be valid for the notified dispute/s only. The Parties however may by joint agreement appoint the Adjudicator for further disputes should they so choose.
- 2.5. If the appointed Adjudicator for the dispute/s, cannot for any reason continue as the Adjudicator for the resolution of the dispute/s, a new Adjudicator will be appointed, this in the same manner as already set out herein.

### 3. Adjudicator's Jurisdiction

- 3.1. The Adjudicator, once appointed, may take the initiative of ascertaining the facts and the law necessary to determine the dispute and shall decide on the procedure to be followed in the adjudication.
- 3.2. The Adjudicator shall have the authority to determine his own jurisdiction in relation to the resolution of the dispute/s. His authority shall include, but not be limited to, the following:
  - 3.2.1. Open-up, review or revise any ruling or decisions, order, instruction, certificate or valuation previously issued under the Contract and relevant to the matter/s in dispute.
  - 3.2.2. Request further information, documents, written statements and details relating generally and directly to the disputed matter.
  - 3.2.3. Meet and question any of the Parties to the Contract, including their relevant representatives.
  - 3.2.4. Conduct hearings if required and allow procedures for such hearings as the Adjudicator sees fit and applicable considering the dispute/s.
  - 3.2.5. With the specific agreement of the Parties, apply his own expert knowledge and experience to the dispute/s.

- 3.2.6. Obtain legal or other technical advice that the Adjudicator may require. This only after having notified the Parties of his intention to do so, including the impact (if any) to the procedural time periods. Once notified, the Parties shall respond to such a request within 5 days, failing which the Parties shall be deemed to have accepted such request and the Adjudicator shall be entitled to proceed as requested.
- 3.2.7. Order the payment of any sum or sums of money in relation to the disputed matter/s between the Parties, including the payment of interest in accordance with the Contract.
- 3.2.8. Order the specific performance of any Party in relation to the dispute/s.
- 3.2.9. On his own initiative, or at the request of a Party, within 10 days of the publication of his Decision, make corrections or clarifications in order to remove any clerical or patent mistake, error or ambiguity present within the Decision.
- 3.2.10. Settle any question or dispute regarding the Adjudicator's Agreement and may on his own jurisdiction, decide to act in relation to the dispute/s.
- 3.3. The Adjudicator may conduct the proceedings in any manner that he considers appropriate, subject to the Contract and these rules, and guided by the principles of fairness and impartiality.
- 3.4. The Adjudicator is not required to observe the rules of evidence, procedure or otherwise, or of any court rules, except the rules of natural justice.
- 3.5. The Adjudicator shall, subject to obtaining the necessary consent from a third party or parties, make such site visits and inspections as he considers appropriate, whether accompanied by the Parties or not.
- 3.6. The Adjudicator shall, subject to obtaining the necessary consent from a third party or parties, carry out any tests, observations, studies or experiments as he may require.
- 3.7. The Adjudicator shall give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents, or oral

representations to be complied with, and issue any other directions relating to the conduct of the adjudication.

#### 4. Adjudicator's Obligations.

- 4.1. The Adjudicator's obligations are stated below. The Adjudicator shall:
- 4.1.1. conduct and conclude the adjudication as efficiently as practically possible and avoid incurring unnecessary delay and/or expense;
  - 4.1.2. deliver his Decision in accordance with his obligations under these Rules and the Adjudicator's Agreement;
  - 4.1.3. at all times observe the rules of natural justice;
  - 4.1.4. at all times remain impartial and independent and have no interest, financial or otherwise in the Contract, or the outcome of the dispute/s;
  - 4.1.5. inform the Parties immediately if there is anything which could (or could be construed to) affect his impartiality or independence;
  - 4.1.6. not have been previously employed by the Parties, except as may have been disclosed and accepted by the Parties;
  - 4.1.7. not be employed as a consultant or otherwise by either Party for the duration of the Adjudicator's Agreement;
  - 4.1.8. comply fully with the Contract, the Adjudicator's Agreement and these rules;
  - 4.1.9. not give advice to the Parties concerning any aspect of the dispute/s, or any other matter which may arise during the resolution of the dispute/s; and
  - 4.1.10. not be called as a witness by either Party to give evidence.

#### 5. Adjudicator's Fees

- 5.1. The Parties are jointly and severally liable to the Adjudicator for the payment of his fees and expenses, which shall be shared equally by the Parties, unless otherwise set out in the Adjudicator's Decision.

- 5.2. The Adjudicator shall be entitled to:
  - 5.2.1. require that the Parties pay an initial deposit in respect of his anticipated fees and expenses. This deposit will become due immediately upon issue of the Adjudicator's invoice, and the Adjudicator will be entitled to suspend the process until the deposit has been received in full.
  - 5.2.2. Be paid a daily fee which shall be considered payment in full for each day, or major part thereof (or an hourly fee for lesser periods of time) in respect of any and all time spent upon, or in connection with the adjudication, including all time spent travelling.
  - 5.2.3. Payment of his expenses in relation to the resolution of the dispute/s, which expenses shall include, but not be limited to the services of any additional and agreed experts required to provide further opinion and details to the Adjudicator in relation to the dispute/s.
- 5.3. The Adjudicator will be entitled to invoice for progress payments each month for the related time spent during that month.
- 5.4. The payments will become due and payable within 7 days of issuance of the Adjudicator's invoice.
- 5.5. The Adjudicator shall be entitled to suspend the adjudication process until any and all progress payments have been received in full.
- 5.6. The Adjudicator shall be entitled to exercise a lien on the issuance of his Decision until any outstanding amounts have been received in full.
- 5.7. Where a specific Party fails to pay its portion of the Adjudicator's fees and expenses, the other Party will be entitled to pay such portion and recover these amounts from the defaulting Party.
- 5.8. In the event of the Adjudicator resigning from the appointment, the Adjudicator shall be entitled to receive payment for his time and involvement in the procedure up until that date.
- 5.9. However, in the instance where the Adjudicator's Agreement is terminated due to the Adjudicator's wilful breach of any of the material provisions of Contract,

the Adjudicator's Agreement or these Rules, the Adjudicator shall not be entitled to any fees or expenses and shall reimburse the Parties for all payments received in relation to the matter.

5.10. Furthermore, the Adjudicator shall not be liable for any claims in respect of any act or omission in discharging his duties unless such act or omission is shown to have been made in bad faith.

## 6. Obligations of the Parties

6.1. The Parties shall comply with any request or direction of the Adjudicator in relation to the procedure.

6.2. If a Party fails to comply with any request, direction or timetable of the Adjudicator made in accordance with his jurisdiction, and/or fails to produce any document or written statement requested by the Adjudicator, or in any way fails to comply with a requirement under these provisions relating to the adjudication, the Adjudicator may:

6.2.1. continue the adjudication in the absence of that Party or of the document or written statement requested;

6.2.2. draw such inference from that failure to comply as circumstances may, in the Adjudicator's opinion, be justified; and

6.2.3. make a decision on the basis of the information before him, attaching such weight as he thinks fit to any evidence submitted to him outside any period he may have requested or directed.

6.3. The Parties shall at all times act in good faith.

6.4. The Parties shall be free to settle the dispute amicably between each other at any time.

## 7. Procedure.

7.1. Within 5 days of the appointment of the Adjudicator, the Adjudicator shall convene an adjudication kick-off meeting (which need not be a face to face meeting), which shall address *inter alia* the following:

7.1.1. Clarifying the Parties as well as their representative's details;

- 7.1.2. Clarifying the acceptable methods of communications including relevant addresses; etc.
- 7.1.3. Setting out the preliminary dates for possible hearings and *In loco* site visits as may be required and instructed by the Adjudicator.
- 7.2. The Parties shall deliver their respective Referral and Response submissions as follows:
  - 7.2.1. On the date calculated as being no more than 21 days after the Adjudicator's Appointment, the Referring Party shall present its fully substantiated Referral to the Adjudicator, with a copy to the Responding Party.
  - 7.2.2. On receipt of the Referral, the Responding Party shall within a further 21 days present its fully substantiated Response, with a copy to the Referring Party.
- 7.3. Further submissions which may be instructed by the Adjudicator or requested by either of the Parties, shall only be issued on approval by the Adjudicator, and in accordance with the timelines stipulated by him.
- 7.4. Furthermore, any request to provide further submissions made by either of the Parties must be so made within 5 days of receipt of the other Party's previous submission.
- 7.5. Should a hearing be required, the Adjudicator shall advise of such within 5 days of the receipt of the final submissions from the Parties. The hearing shall be held at a date and location stated by the Adjudicator and shall take place no later than 14 days after the notification of such hearing has been issued.

## 8. Decision

- 8.1. Unless the Parties agree otherwise, the Adjudicator's written Decision shall be delivered to the Parties no later than 21 days after either the conclusion of a hearing, or receipt of the final submissions from the Parties, whichever is the later.
- 8.2. However, in the instance where payments to the Adjudicator are outstanding, the Adjudicator shall be entitled to either suspend the conclusion of his Decision

or exercise a lien on the issuance of such to the Parties, until the related payments are made in full.

8.3. The Adjudicator's Decision shall:

8.3.1. include reasons for his decisions.

8.3.2. be issued to the Parties by electronic mail, unless agreed otherwise in which case the Decision shall be delivered to the Parties physical addresses as notified.

8.4. The Parties shall give immediate effect to the Adjudicator's Decision, which shall be binding on the Parties unless and until overturned or varied by agreement, arbitration or the courts.

8.5. Either Party may:

8.5.1. request the Adjudicator to clarify or correct any patent clerical or arithmetical errors or ambiguity present in the Decision. Such request must be made in writing within 10 days of the issuance of the Decision.

8.6. Should a request for clarification or correction be issued by a Party, the Adjudicator shall immediately consider the request and, if necessary, issue a corrected Decision.

8.7. Should the Adjudicator fail to timeously comply with the request, and no extension of this period is agreed between the Parties, the Adjudicator's initial Decision shall be binding on the Parties.

8.8. The Decision shall be enforceable as a matter of contractual obligation. Should a Party fail to immediately comply with the provisions of the Decision, the aggrieved Party can apply to the High Court for the enforcement of such.

8.9. If either Party is dissatisfied with the Adjudicator's Decision, then either Party may within 28 days after receiving the Decision, give notice to the other Party of its dissatisfaction. If the Notice of dissatisfaction has not been given by either Party within the 28-day period, then the Adjudicator's Decision shall become final and binding upon the Parties.

## 9. Termination

- 9.1. The Adjudicator may resign at any time upon giving notice in writing to the Parties.
- 9.2. The Adjudicator's appointment:
  - 9.2.1. may be terminated at any time by the written mutual agreement of the Parties;
  - 9.2.2. shall be deemed to be terminated should the Adjudicator fail to perform his duties in accordance with the Contract, the Adjudicator's Agreement and these rules without good cause, within 5 days after having been given written notification of such breach of his duties.
- 9.3. The Adjudicator's appointment shall expire on the date when the disputes referred to the Adjudicator have either been withdrawn or settled amicably, or on the date 28 days after the dispute/s have been decided on by the Adjudicator.

## 10. Confidentiality

- 10.1. The entire process, including the nature of the dispute, the proceedings and outcome of the matter, whether decided on by the Adjudication or not, is to be treated at all times as private and confidential, except where disclosure is necessary for the purpose of enforcing the Adjudicator's Decision.