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LOW-VALUE ADJUDICATION

**ADJUDICATION AND THE CAASA LVDA RULES FOR
SOUTH AFRICA**

The Landscape...

Adjudication is still on the rise. From its inception in the UK, the need to resolve disputes quickly and efficiently has been recognised worldwide. Equally, while adjudication remains primarily contractual in many jurisdictions, courts remain generally reluctant to set aside the outcomes of binding decisions. Decisions to which parties of equal bargaining power have agreed.

The decision in South Africa of Framatome and Eskom Holdings Soc Limited reflects this ongoing consistency. The case shone an uncomfortable spotlight on the challenges faced by the country in its quest for a stable energy supply.

Key points from the decision include:

- Parties participating in Adjudication should be held to the outcomes of decisions made.
- Adjudication is merely an ‘intervening, provisional stage in the dispute resolution process’. It does not remove parties’ later recourse to litigation or arbitration.
- Adjudication decisions will only be overturned in the most exceptional of circumstances.

The judge referred to Hudson’s Building & Engineering Contracts. Hudson states: *“It should only be in rare circumstances that the courts will interfere with the decision of an Adjudicator, and the courts should give no encouragement to an approach which might aptly be described as “simply scrabbling around to find some argument, however tenuous, to resist payment.”*

Eskom was ordered to pay the outstanding monies with costs to Framatome.

The Landscape...

It is perhaps worth noting that this approach is reflective of recent decisions in the UK and elsewhere, such as *Grove v S&T*. In that case, two of the key points were that:

- The wide powers of the court (and therefore adjudicators) permit opening up and revising the sums shown as due in an interim application in any case where the interim application determines what is payable.
- There is no limit on the jurisdiction of an adjudicator which would prevent him or her from exercising the above powers.

As early as the 1999 case of *Macob Civil Engineering v Morrison Construction Limited*, courts have held that adjudicators' decisions should be upheld. This has been the case in all but the most exceptional circumstances. Arguably, this consistency has given confidence to parties considering using adjudication as a route to dispute resolution.

This position has been reflected in courts around the world from New Zealand to Dublin. Generally, parties unhappy with the outcome of an adjudication, statutory or contractual, have struggled to overturn such outcomes.

Low Value Adjudication in South Africa

The Construction Adjudication Association of South Africa (CAASA) has developed a set of rules for low-value dispute resolution. The aim is to help the settlement of smaller disputes in a timely and cost-effective way.

Vaughan Hattingh, director of MDA Attorneys drafted the rules. They aim to support smaller firms such as sub-contractors. Though the figures involved are relatively low, they may be crucial to smaller firms.

The rule drafting is on the basis that:

- The industry must transform. This means more smaller, less sophisticated contractors with smaller contract values.
- 30% of the value of government contracts must be subcontracted to SMEs.
- Many small companies undertake contracts at a local or provincial level. They often get bullied out of entitlements.
- We need to get back to the true purpose of adjudication: quick resolution of a current dispute which allows the cash to flow. Cash flow is vital for these smaller companies.
- Neither the Association of Arbitrators nor SAICE have such rules, nor do they have an appetite for dealing with low-value disputes.
- The biggest challenge is to educate the industry on the benefits of adjudication.

As in other parts of the world, it has been recognised that cash flow is essential to the survival of small firms in construction. This process seeks to address that through a simple and fast set of rules.

LVDA in South Africa

Key Features:

The process has a total of ten sections covering subjects such as fees, obligations, process, termination and jurisdiction. Some key features of the rules include:

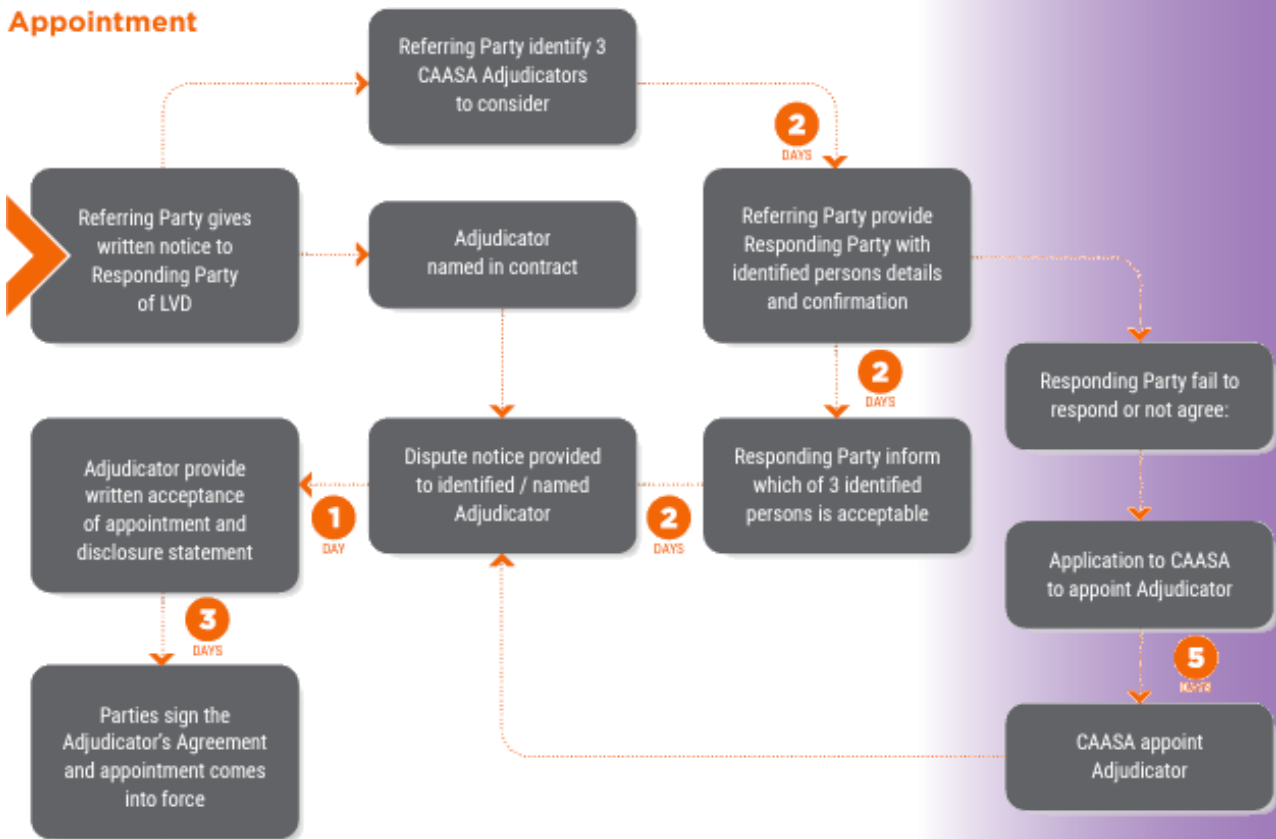
- **Maximum Value** – the maximum value for disputes referred under the rules is R1.5m (approximately £65k)
- **Timescale** – An adjudicator is chosen within 10 days of being referred. The dispute is resolved in 20 business days. The parties can agree to extend the process by up to 5 days.
- **Selection** – The referring party must specify three possible choices of adjudicator to be agreed upon.
- **Contractual** – The rules can be adopted into any construction contract. At present there is no statutory scheme in South Africa.
- **Jurisdiction** – The adjudicator determines their jurisdiction.
- **Good Faith** – Parties must act in good faith at all times.
- **Confidential** – The process is completely confidential.

Introduced in November 2023, the rules aim to change the resolution of low-value disputes in South Africa.

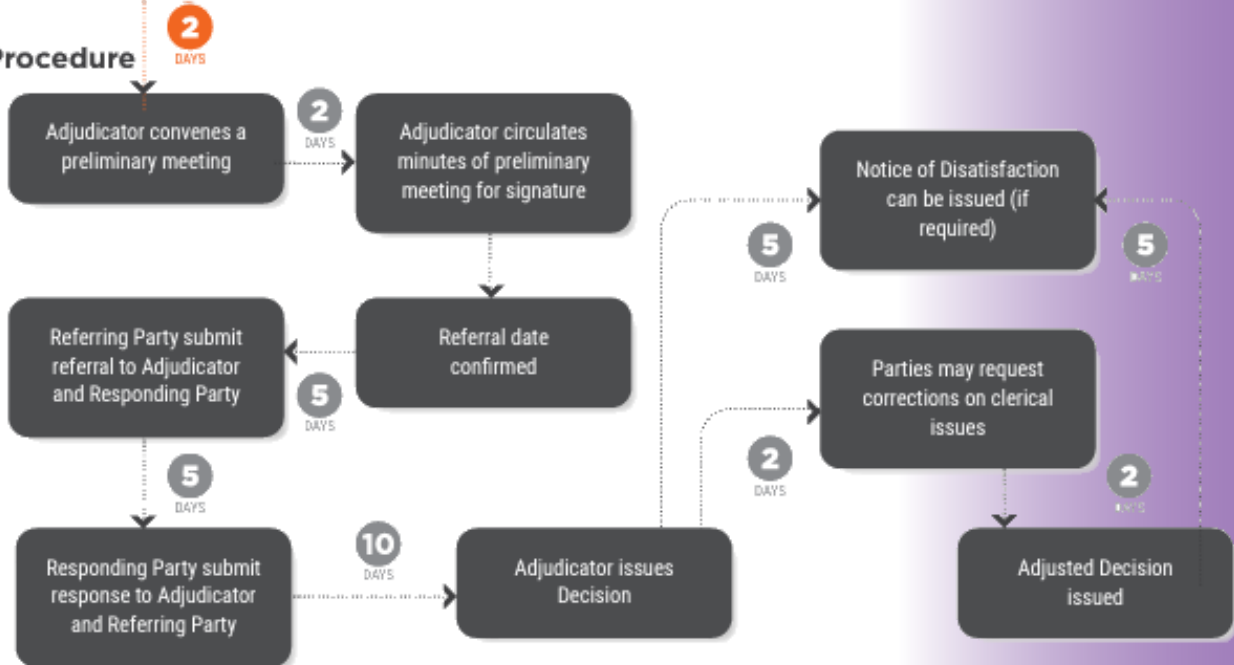
The full set of rules and guidance are at <https://bit.ly/caasalvda>

The Process

Appointment



Procedure





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