



## GOBHOZA LEGAL PRACTICE

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### **ADJUDICATION IN BOTSWANA:**

#### *THE RECENT DEVELOPMENT UNDER CONSTRUCTION LAW*

Normally, whenever we get mention of Alternative Dispute Resolution (ADR), it is only Arbitration and Mediation that come to our minds. However, a fresh leaf has presented itself as an option in the form of **adjudication**.

At the end of this read, the reader should be able to get the following:  
*What is adjudication? Is it different from all other ADR mechanisms? How does it work? Is it a much desirable commercial sense-like dispute resolution method? How can parties avail this mechanism in their day-to-day commercial activities?*

#### **i. What is Adjudication?**

Adjudication has been defined in different texts, the most profound definition being that:

*“It is an accelerated form of dispute resolution in which a neutral third party determines the referred dispute as an expert and not as an arbitrator...”*

In tracing its developmental stages, adjudication is a fairly recent mechanism, more prevalent in the area of construction law.

It has been introduced to offer a speedy, efficient, cost effective and provisional dispute resolution mechanism to arbitration.

It is often a pre-arbitration process

with a window for a dissatisfied party to later refer the dispute to arbitration.” Extract from the case of ***Botswana Unified Revenue Services v. William Lee and Another*** **CACGB-185-22 (Unreported)** per Lesetedi JA.

In Botswana we see its usage gaining traction particularly in the sphere of construction where it serves two purposes such that it can be used to seek expeditious interim awards pending the processes of arbitration or litigation and equally presents itself as another Alternative Dispute Resolution mechanism at which final and binding awards and/or determinations can be issued by an expert or someone who is knowledgeable in the subject field.

Although still murky, the Court in the case of ***Your Friend (Pty) Ltd v. Time Projects (Botswana) (Pty) Ltd*** **2018 All Bots 294 (CA)** acknowledged and highlighted the distinction between adjudication and arbitration and the notable ones are that; (1) firstly arbitration is governed by statute being the

Arbitration Act whilst adjudication is purely and uniquely a contractually based mechanism. Adjudication is not governed by any statute nor imposed on the parties by any statutory instrument. It is an option that is there at the election of the parties to a contract who have to expressly agree to go through the process in settling their dispute(s). Secondly, adjudications are usually presided over by third parties who are expected to act more as experts in the technical field of which the agreement or the undertaking is concerned and not as arbitrators.

## ***ii. Standard adjudication process or procedure?***

For parties who wish to explore going through adjudication in settling their disputes, the standard process is as follows;

- a.** Parties enter into a contract that incorporates an adjudication clause or otherwise enter into an adjudication agreement which is then incorporated into the

main contract either directly or by reference.

- b.** Usually the adjudication clauses encompass the (1) Election of adjudication process as the agreed dispute resolution mechanism; (2) Appointment of the Adjudicator; (3) Provision for declaration of the dispute(s); (4) Scope of the instruction/issues; (5) Process and/or procedure for the presentation of respective submissions; (6) Timeframes; (7) issuance of the determinations.
- c.** A dispute is to be declared and an Adjudicator is then appointed in terms of the agreement.
- d.** There might be a need for a pre-adjudication meeting to put the parties to terms.
- e.** The parties will then present any evidence and make submissions on their respective cases.
- f.** The Adjudicator rules and gives an award which is binding on

the parties. In the process of adjudicating, the Adjudicator may use their expertise and go beyond that which is submitted by the parties and rely on his or her own judgment or opinion.

### **iii. Why adjudication?**

The advantages of adjudication have been highlighted at paragraph 22 of the **Your Friend (Pty) Ltd case** and they are not different from those of other ADR mechanisms. However the following two main advantages are worth mentioning as they are prominent:

- a.** With the Adjudicator being an expert in the technical field in which the subject agreement is concerned, there is fortification that the determination is likely to be more informed since it is an expert determination.
- b.** It is more accelerated than the other mechanisms. Although one common pro is that ADR mechanisms are a bit faster and more efficient than litigation, the process of adjudication is even way more faster than others.

**iv. Can the decisions and/or awards of Adjudicators be challenged?**

The starting point is that expert determinations of Adjudicators are final, conclusive and binding upon the parties to an adjudication agreement.

The binding effect of the awards usually depends on the terms and the language of the agreement. It is therefore at the election of the parties themselves to agree whether they want to subject the awards, determinations or decisions of the Adjudicator to an appeal, review or any of the analogous process or not.

In the agreement(s) where the determination is not subject to an appeal, review or any of the analogous process then no party can challenge the determination through these processes. This was the precept in case of **Three Partners Resort (Pty) Ltd v. KPMG Botswana 2014 All Bots 282 (HC)**.

Adjudication can also be a pre-arbitration step in making the determinations subject to an appeal to an Arbitrator. In such cases the written contracts should provide for the appeal mechanisms particularly through arbitration. See **Bokamoso Engineering Services (Pty) Ltd v. Debswana Diamond Company Limited 2017 All Bots 298 (HC)**.

However, this does not mean the decisions of the Adjudicators cannot be challenged on other grounds. A challenge can be mounted through the courts seeking to set aside the award on some limited grounds which usually include fraud, mistake if it is clear from the evidence and acting *ultra vires* or departure from the instructions or issues in a material respect by the Adjudicator.

**v. Armed with an award or determination, what next?**

For an award or determination to be enforceable, the process is no different from that of other ADR mechanisms. A party is to

approach court of law seeking to make it an order of court and once such an order is a made, the usual execution methods of Court Orders are applicable.

If you have interest in an in-depth discussion as well as legal advice with respect to the law as it relates to Adjudication as a Dispute

Resolution mechanism and other Alternative Dispute Resolution mechanisms please feel free to contact us at:

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