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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 17044/2020

In the matter between:

COURIER-IT S.A. (PTY) LTD

Applicant

(Registration Number 1998/010351/07)

and

FRANKEES (PTY) LTD

First Respondent

(Registration Number 2015/235687/07)

TIMOTHY JOHN WHITEHEAD

Second Respondent

(Identity Number [...])

Date of hearing: 15 June 2021

Date of Judgment: Delivered electronically on 8 July 2021

JUDGMENT

Nuku J

[1] This is an application in which the applicant seeks payment of the sum of

R204 185.12 together with interest and costs of suit from the first and second respondents (*"the respondents"*).

[2] The applicant's claim as against the first respondent is in respect of courier and transportation services (*"the services"*) rendered by the applicant to the first respondent at the latter's special instance and request pursuant to a written agreement (*"the agreement"*) concluded between the parties. It is alleged that the first respondent has failed to pay for the services and as a result thereof it is indebted to the applicant in the sum of R204 185.12.

[3] The applicant's claim as against the second respondent is based on a written deed of suretyship (*"the deed of suretyship"*) signed by the second respondent binding himself as a surety and co-principal debtor with the first respondent and in favour of the applicant for the due fulfilment of the first respondent's obligations as stipulated in the agreement. The amount of R204 185.12 is claimed against the second respondent on account of the alleged failure of the first respondent to pay for the services referred to in the preceding paragraph.

[4] The respondents oppose the application on three grounds. These are that:

- (a) the relief sought by the applicant is based on hearsay (*"the hearsay ground"*);
- (b) the applicant's claim and entitlement to payment has been compromised (*"the compromise ground"*); and
- (c) there are material disputes of fact which cannot be resolved by way of motion proceedings and that the applicant was aware or ought to have been aware of these material disputes of fact prior to launching the application (*"the material disputes of fact ground"*).

[5] The applicant conducts the business of courier and transportation. On 19 January 2018, the applicant concluded the agreement with the first respondent. The agreement required the applicant to render services to the first respondent. The agreement required the first respondent to pay the applicant for the said

services within 30 days from the date of invoice failing which interest calculated at the rate of 5% above the maximum rate of interest *a tempora morae* would be charged on late payments.

[6] The agreement afforded the first respondent a right to query the applicant's invoices within 15 (fifteen) business days from the date of invoice, failing which such invoices that have not been queried would be deemed to be correct in all circumstances. The agreement also entitled the applicant, in the event of default by the first respondent, to rescind or suspend performance of any of its obligations to deliver a consignment. The agreement also provided that the first respondent would be liable for all costs incurred by the applicant in the recovery of any amount not paid by the first respondent on a scale as between attorney and own client including collection commission as well as costs of counsel on brief.

[7] On 19 January 2018, and in terms of the deed of suretyship, the second respondent bound himself as a surety and a co-principal debtor with the first respondent in favour of the applicant for the due fulfilment of the obligations of the first respondent as stipulated in the agreement. The second respondent also renounced the benefits of excussion, division and cession of action.

[8] Subsequent to the signing of the agreement and the deed of suretyship, the first respondent made use of the applicant's services. The applicant, in turn, and from time to time rendered certain invoices to the first respondent. The first respondent did not query any of these invoices within the 15 (fifteen) day period referred to in the agreement.

[9] From about March 2020, a number of emails were exchanged between the applicant's representatives and the first respondent's representatives regarding the first respondent's indebtedness to the applicant. It is not my intention to set out all of these emails. These emails show that on 9 March 2020, Ms Lovisa Terling ("*Ms Terling*") of the first respondent enquired from Ms Amber van der Walt ("*Ms van der Walt*") of the applicant about the outstanding amount owed by the first respondent to the applicant. Ms van der Walt responded on the same date advising that a sum of R199 992.47 had been outstanding for more

than sixty days. She (Ms van der Walt) also advised that she would request Mr Chad Johnson ("*Mr Johnson*") who was a debtors' clerk of the applicant to provide Ms Terling with the latest statement.

[10] On 10 March 2020, Mr Johnson provided Ms Terling with the latest statement. The amount outstanding in terms of the latest statement as provided by Mr Johnson, was more than the amount which Ms van der Walt had relayed Ms Terling. This difference in the amounts was, however, explained by Ms van der Walt to Ms Terling to the latter's satisfaction. Having been satisfied with the explanation Ms Terling then requested sometime to consider the statement. With some reluctance, the applicant afforded the first respondent until 18 March 2020 to effect payment.

[11] The first respondent made no payment on the 18th March 2020. On 20 March 2020, Ms Nicolette Furness ("*Ms Furness*") of the applicant sent an email to the first respondent enquiring about payment of the outstanding amount. Ms Terling responded on the same date advising that she was still working on the matter and would revert as soon as possible. To this Ms Furness responded, still on the same date, with an email demanding immediate payment of the sum of R160 000.00. Mr Dale Smiedt ("*Mr Smiedt*") of the first respondent, responded to the email from Ms Furness on the same date. Mr Smiedt bemoaned the fact that the applicant had provided the first respondent with 20 000 lines of information, that the statement provided made no sense as it did not match the first respondent's records, and advised that the applicant could proceed with a summons. Ms Furness responded to Mr Smiedt's email requesting him to send her the reconciliation that the first respondent had done thus far.

[12] On 23 March 2020, Mr Smiedt emailed Ms Furness requesting a statement showing all the payments made by the first respondent. On the same day, Mr Johnson provided Mr Smiedt with a copy of the ledger in respect of the first respondent's account from the inception. Mr Johnson also indicated that the first respondent's account would be placed on hold. Mr Smiedt responded on the same day advising that the information provided was unhelpful and requested a list of all the payments received by the applicant from the first respondent. Mr Johnson provided the requested information on the same day.

[13] On 25 March 2020, Mr Smiedt emailed Ms van der Walt acknowledging that the applicant had unilaterally decided to place a hold on the first respondent's account, that the applicant would not allow the first respondent to collect the goods and that the first respondent would hold the applicant liable for damages incurred, the amount of such damages which would be deducted from the amount owed by the first respondent to the applicant.

[14] On 30 March 2020, Ms Delia Talliard of the applicant emailed Mr Smiedt requesting confirmation that payment would be made on 31 March 2020. There was no response to this email and no payment was made on 31 March 2020.

[15] On 30 April 2020, Mr Johnson emailed Mr Smiedt enquiring how he (Mr Smiedt) would like to have the matter resolved. Mr Smiedt responded on 4 May 2020 requesting the applicant's banking details and also indicated that the first respondent intended to make a payment in full and final settlement. Mr Smiedt also advised that the first respondent would provide the applicant with the first respondent's calculations simultaneously with the payment.

[16] On 8 May 2020, Mr Smiedt emailed Ms Talliard and it is necessary to quote the contents of this email which read:

"Please note that we have come to the following decision referring to the attached account statement,

- 1. We do not believe that we owe you the +-R250,000 claimed in that your accounts department has never correctly allocated any of the payments that we have made from inception to date.*
- 2. We believe that you have overcharged us on thousands of deliveries.*
- 3. You have caused us significant damage, some of which is intangible and some of which is tangible. We are aware of at least +-R75,000 of damage suffered by you holding on to our deliveries (which amounts to theft). We have written off these deliveries and refunded customers including providing them with discounts on future purchases to keep them aligned. Naturally, we have lost customers as a result of this and that damage is still being quantified.*

4. *As a result of the above, we are terminating our agreement with you and offering you R50,000 in full and final settlement of any claims that either party may have against the other arising out of any cause whatsoever, which amount has already been paid to you and can be found attached hereto with this proof of payment.*
5. *Please note that payment was made by another company in our group of companies, Brand Mash Pty Ltd, however can be refunded to Frankees Pty Ltd, details below, if you disagree with our settlement offer."*

[17] There was no response to the above email until 7 September 2020 when Mr Johnson emailed Mr Smiedt requesting a detailed remittance for the payment of R50 000 as well as queries pertaining to the outstanding balances. Mr Johnson also advised that upon receipt of the requested information, the applicant would do its reconciliation and thereafter revert to the first respondent regarding the settlement amount. There does not appear to have been any response to this email. Instead, on 17 September 2020, the applicant's attorneys sent letters of demand to the respondents demanding payment of the sum of R204 185.12.

[18] Smiedt and Associates attorneys responded on behalf of the first respondent by way of a letter dated 18 September 2020. In the said letter it was denied that the first respondent was liable to the applicant. The basis of the first respondent's denial of liability appears in paragraphs 8, 9, 10 and 11 of the said letter which read:

- "8. *On 8 May 2020, our client addressed further correspondence to your client explaining that it was making a payment of R50, 000 to your client in full and final settlement of any claim your client may have against it and further explained the reasons as to why it was making such payment, as per annexure D. Further, in the very same letter, our client explicitly stated that if your client rejected the*

offer, it should repay our client the R50, 000 and further provided banking details for such payment.

9. *Your client then next contacted our client on 7 September 2020 asking for a detailed remittance of the R50, 000 payment and "once we have reconciled, we will revert with feedback regarding settlement amount" attached hereto as annexure "E".*
10. *Your letter of demand clearly shows that payment of R50,000 having been accepted by your client as originally your client claimed R254 185,12, which our client submits could only have been accepted in full and final settlement of the alleged claim.*
11. *It is further clear that your client has accepted the amount as to date it has not been refunded and even if it were to be refunded it would not change the fact that your client had in fact accepted our client's full and final settlement proposal. Quite clearly, as a result of your demand but also as a result of the almost 5 months that have gone by since our client made payment in full and final settlement, the proposal was accepted" .*

[19] The respondents' attorneys of record responded on behalf of the second respondent on 29 September 2020. In their letter they also denied that the second respondent was liable to the applicant. The basis of the second respondent's denial of liability was also stated in similar terms as those of the first respondent referred to in the preceding paragraph.

[20] For completeness I mention that Annexure "D", referred to in both the letter from Smiedt and Associates dated 18 September 2020, and the letter from the respondents' attorneys of record dated 29 September 2020, is the email of 8 May 2020, the contents of which appear in paragraph [16] above. Annexure "E" is the email of 7 September 2020 referred to in paragraph [17] above. Impasse having been reached the applicant launched the current application.

[21] It is against the above factual background that this court must consider whether the applicant is entitled to the order sought, or whether the application falls to be dismissed on any of the grounds of opposition put up by the respondents. I deal first with the hearsay ground.

[22] The deponent to the answering affidavit indicated that a point *in limine* would be raised on the basis that the application is based on hearsay evidence. This was based on the fact that the deponent to the founding affidavit is Mr Stephan Van Der Meer (*"Mr Van Der Meer"*), the sole director of the applicant's attorneys of record. In this regard the complaint was, as Mr Van Der Meer is not an employee or the director or a shareholder of the applicant, he has no personal knowledge of the facts to which he deposed to. The deponent concluded by stating that "*Further argument will be addressed at the hearing of the matter. Based on these submissions, it will be argued that the application should be dismissed on this basis alone.*"

[23] The hearsay ground was not pursued with much vigour in both the respondents' written and oral submissions. I start first with the respondents' oral submissions. No oral submissions were made during the hearing of the matter in pursuance of the hearsay ground. Also, no argument was made for the dismissal of the application based on the hearsay ground. This despite what was stated in the answering affidavit that further argument would be addressed at the hearing of the matter.

[24] Turning to the respondents' heads of argument, the respondents merely bemoaned the fact that the applicant's papers are characterised by an unusual feature in that they are deposed to by Mr Van Der Meer who has no personal knowledge of the matter and, more particularly, the facts around the compromise of the applicant's claim.

[25] I did not get the impression that the respondents sought to have the application dismissed on the basis that the applicant's founding and replying affidavits were deposed to by Mr Van Der Meer. The submission, as I understand it, is that on the critical question as to whether the applicant's claim was compromised, the matter ought to be determined on the basis of the evidence

presented by the respondents for the reason that the applicant presented inadmissible hearsay evidence by Mr Van Der Meer.

[26] The applicant conceded that Mr Van Der Meer does not have personal knowledge of the facts prior to the 17th September 2020. The applicant, however, argued that the facts relevant to the determination of this matter are undisputed and/ or have been admitted by the respondents.

[27] It is common cause that Mr Van Der Meer has no personal knowledge of the events prior to the 17th September 2020. It is also common cause that the purported offer of compromise was made prior to the 17th September 2020, and that the events relied upon by the respondents as indicative of the fact that the first respondent's offer of compromise occurred prior to 17th September 2020.

[28] As can be seen from the exposition of the facts above, the determination of this matter turns on the interpretation of the correspondence exchanged between the parties. None of the correspondence exchanged is disputed. It is in regard to that correspondence that the court must determine whether the applicant's claim was compromised and that correspondence speaks for itself. That being the case, there could be no basis for the dismissal of the application based on the hearsay ground. I deal next with the material disputes of fact ground.

[29] The material dispute of fact ground was pleaded with reference to the email of 8 May 2020 wherein the Mr Smiedt had written that he does not believe the first respondent is indebted to the applicant in the amount of ±R250 000, as the applicant had not correctly allocated payments, had overcharged on *"thousands of deliveries and the applicant, in refusing to release the first respondent's orders had caused the first respondent tangible and intangible damage in the sum of not less than R75 000."*

[30] The material disputes of fact ground also received a passing remark in the respondents' heads of argument. In this regard paragraph 8 of the respondents' heads of argument states that: *"The second unusual feature of the matter is the fact that the applicant has ignored an obvious dispute of fact in seeking a money*

judgment on motion. A consideration of the application papers reveals a clear dispute between the parties as to whether the claim was compromised. A resolution of this dispute requires a determination by this Court as to the respective parties' animus and conduct. While ultimately the question will be one of interpretation, it is rare it is submitted, that such a question can be decided without reference to viva-voce evidence." (footnote omitted). The submission goes further that the applicant, despite being aware of the said dispute of fact, it elected to proceed on motion and that if the court is unable to determine the matter in favour of the respondents, it should dismiss the application.

[31] During argument counsel for the respondents also made it clear that the material dispute of fact relied upon by the respondents relates to the question whether the applicant's claim had been compromised. Indeed, this appears to be in line with what is stated in the respondents' heads of argument that: *"Notwithstanding that it was manifest prior to the launching of this application that the essential issue in dispute was whether the applicant's claim had been compromised, this received no more than a passing reference in the founding papers "*

[32] From the above it became clear that the central issue relates to the compromise and not so much whether the first respondent had disputed the amount/s charged by the applicant in respect of the services. To the extent that this is at variance with the pleaded material disputes of fact ground, I must accept that the respondents abandoned their reliance on fact that the first respondent had disputed the amount/s charged by the applicant.

[33] Simply put, the respondents' case is that the compromise extinguished their indebtedness to the applicant. And, to the extent that the applicant disputes the compromise, this is a dispute of fact which must be determined in favour of the respondents in which event the application ought to be determined. That being the case, it appears to me that the material disputes of fact ground is not a stand-alone ground but is tied to the compromise ground. It is thus not dispositive of the matter on its own but should be considered together with the compromise ground to which I now turn.

[34] Counsel for both parties were in agreement that the respondents bear the *onus* of proving the compromise. This is in line with what was stated by this court in **Hubbard v Mostert**¹ (*"the Hubbard Judgment"*), that: *"It is a trite principle of our law that the person who alleges a compromise bears the onus of establishing the compromise."*

[35] A compromise has been described as a settlement by agreement of disputed obligations, whether contractual or otherwise.² The author states further that: *"Because compromise is a form of novation and involves the waiver of existing rights it must be as clearly and unambiguously proved as any other waiver or novation."*³

[36] The respondents stated the above proposition in their heads of argument with reference to a passage in **Reid Bros (South Africa) Ltd v Fischer Bearings Co Ltd**⁴ (*"the Reid Bros (South Africa) Ltd judgment"*) where Watermeyer ACJ stated: *"Now a binding offer is as a rule constituted by the acceptance of an offer, and an offer can be accepted by conduct indicating acceptance, as well as by words expressing acceptance. Generally, it can be stated that what is required in order to create a binding contract is that acceptance of an offer should be made manifest by some unequivocal act from which the inference of acceptance can be logically drawn"*.

[37] In an attempt to persuade this court that the applicant's claim was compromised, the respondents implored this court to consider the email of 8 May 2020 quoted in paragraph [16] above and pointed out that:

37.1 the amount claimed by the applicant was clearly disputed in the said email;

37.2 the email refers to the payment as an *"offer"* rather than payment of admitted liability;

¹ 2010 (2) S A 39 1 (WCC) at para [11]

² RH Christie *The Law of Contract in South Africa* 6th ed at 473

³ RH Christie *The Law of Contract in South Africa* 6th ed at 473

⁴ 1943 AD 232 at 241 which was referred to in para [9] in the Hubbard judgment

37.3 the amount offered, being a rounded number of R50,000 is objectively unlikely to have been a payment of an admitted liability in circumstances where there were thousands of line items; and

37.4 the words *"in full and final settlement of all claims that either party may have against the other arising out of any cause whatsoever"* used in the email are inconsistent with the notion that the payment was in respect of an admitted liability.

[38] It was further submitted that the fact that the email of 8 May 2020 was sent to various email recipients, that there was no response thereto until 7 September 2020 and the fact that the applicant appropriated and retained the sum of R50 000, all point to the fact that the applicant accepted the offer of compromise and as such the applicant is barred for suing for the balance.

[39] To sum up the respondents' submissions are that the requirements of a compromise have been established in that:

- (a) there was a dispute between the parties as to the indebtedness of the first respondent to the applicant;
- (b) the first respondent made an offer in full and final settlement of the applicant's claim and paid an amount of R50 000 as part of the offer; and
- (c) the offer was accepted when one has regard to the conduct of the applicant.

[40] Mindful of the fact that most of the cases the respondents relied on to establish the compromise were concerned with payment of cheques marked *"full and final settlement"* which cheques were deposited by the creditor, the respondents submitted that: *"In an age of electronic banking, payment by cheque*

is now rare. Debtors have the power to make payment directly into the creditor's accounts, which is what took place in the present matter. The respondents in the present matter do not rely on the fact that the money was paid into the account of the applicant as indicating acceptance but rather, the applicant having been made aware of the basis upon which the payment was made and receiving direction as what to do with such payment if it was not accepted as payment in full and final settlement, the applicant elected to retain the payment and appropriate it, without demur. This, according to the respondents would constitute acceptance on the same basis as a party receiving a cheque in similar circumstances and electing to deposit the cheque and appropriate payment."

[41] For its part, the applicant contended that the respondents have failed to establish the essential requirements of a compromise which are:

- (a) a true dispute of an obligation;
- (b) the compromise having regard to the terms of the contract; and
- (c) the acceptance of the offer of compromise.

[42] In support of its contention that there can be no compromise in the absence of a true dispute of an obligation, applicant's counsel referred this court to two decisions, namely; **Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and another**⁵ ("the Buffalo Freight Systems judgment") and **Karson v Minister of Public Works**⁶ ("the Karson judgment").

[43] As already stated above, it was contended on behalf of the respondents that the first respondent had disputed its liability to pay the applicant and that this was contained in the email of 8 May 2020. In the alternative, counsel for the respondents submitted that the dispute of liability is not an invariable requirement of a compromise. In this regard he referred this court to the decision of the

⁵ 2011 (1) SA 8 (SCA)

⁶ 1996 (J) SA 887 (E) at 893-894

Supreme Court of Appeal in **Absa Bank Ltd v Van De Vyver NO**⁷ (the Absa Bank Ltd judgment)? where Howie JA stated that: *"There is logically no reason why compromise cannot be offered and attained where the debtor has no defence"*.

[44] I have gone through the Buffalo Freight Systems judgment and could not find any support for the proposition advanced by applicant's counsel. It is so that in the Karson judgment, Leach J regarded the existence of a dispute as to an obligation by the debtor to pay as an essential requirement of a compromise. The correct legal position, however, is as explained by Howie JA in the Buffalo Freight Systems judgment that although Innes CJ in **Odendaal v Du Plessis**⁸ appeared to confine compromise to the case where an alleged debtor denied all liability, there is no suggestion that he intended to formulate a statement of universal application. This, in my view, overruled the Karson judgment to the extent that it sought to suggest that the existence of a dispute to pay is an essential requirement of a compromise. In my view, for the consideration of whether the applicant's claim was compromised, it is not necessary to consider whether the first respondent's indebtedness was disputed. What has to be considered is whether the first respondent made an offer which was accepted by the applicant.

[45] That the first respondent made an offer of settlement is clear from the email of 8 May 2020 despite the applicant's protestation. It is this offer that must be considered on its terms. This offer referred to payment which had already been made. This immediately distinguishes this matter from those where an offer is accompanied by a cheque. The distinction is that in the case of an offer accompanied by a cheque it is the creditor that decides to present the cheque for payment and this is something that can be taken into account in considering whether the offer was accepted. On the other hand, where a debtor pays into the creditor's account, the creditor would not have taken any positive steps which could give rise to an impression that it accepted the offer.

[46] Alive to the above distinction, the respondents argued that they do not rely

⁷ 2002 (4) SA 397 (SCA) at para [15]

on the payment, but on the retention of the money by the applicant. It is necessary to look at the offer in order to determine whether the applicant is entitled to retain the money whilst not accepting the offer. In this regard, the offer stated that the payment **can** be refunded in the event of the offer being acceptable (my emphasis).

[47] Counsel for the applicant submitted that from the reading of the offer it is clear that the applicant was given an election to either refund the money or not. In the alternative he submitted that the offer is ambiguous as to the applicant's right to retain the money in the event of the offer being rejecting. He therefore urged the court, in line with what was stated in the Hubbard judgment to construe the *contra proferentem* and to hold that the applicant is entitled to retain the payment and to sue for the balance.

[48] One would have to strain the language in order to come to a conclusion that the applicant was obliged to refund the payment of the sum of R50 000. This is because there is no way of interpreting the "can" to mean that the applicant was obliged to refund the payment of the sum of R50 000. At best the applicant was told that it would be able to refund the money or was permitted to refund the money in the event of it rejecting the offer. At worst the offer was ambiguous as to the applicant's right to retain the payment whilst rejecting the offer in which event the offer must be construed *contra profer entem*. In the circumstances, the fact that the applicant retained the money cannot give rise to the impression that the applicant accepted the offer.

[49] What is more is that the applicant wrote to the first respondent on 7 September 2020 requesting a detailed remittance as well as queries pertaining to the outstanding balance whereafter it would revert. If anything this was an indication that as at the 7th of September 2020, the applicant still required certain information from the first respondent and that it was upon receipt of such information that the applicant would revert to the first respondent. This must be viewed in light of the email of the 4th May 2020 wherein Mr Smiedt had advised that the first respondent would make the payment in full and final settlement and that the applicant would be provided with the first respondent's calculations.

[50] It is common cause that the first respondent never provided the applicant with the calculations. The applicant was thus entitled to call for the calculations. The conduct of the applicant in calling for the first respondent's calculations is inconsistent with the notion that it accepted the offer. As stated in the Reid Bros (South Africa) Ltd judgment what is required in order to create a binding contract is that acceptance of an offer should be made manifest by some unequivocal act from which the inference of acceptance can be logically drawn.

[51] The argument by the respondents' counsel requires this court to ignore this communication of 7 September 2020 without proffering any cogent reasons why it ought to not be considered. This communication is part and parcel of the applicant's conduct after it had received the offer.

[52] To recap, the applicant's conduct that fall to be considered in order to determine whether it accepted the first respondent's offer include:

- (a) the fact that it retained the payment made by the first respondent;
- (b) the delay in responding to the offer; and
- (c) the response when the applicant ultimately responded.

On these facts and as already stated above, the applicant was entitled to retain the payment as it had an election to do so in terms of the offer. Also, the applicant requested the first respondent to furnish it with its calculations so that it could consider same and this is inconsistent with acceptance of the offer. This leaves only the delay in responding to the first respondent's offer. The delay on its own cannot be construed as an unequivocal acceptance of the offer by the applicant viewed in light of all the relevant circumstances. The result is that the respondents have failed to establish that the applicant's claim was compromised.

[53] The respondents' entire case relied on the compromise. The respondents having failed to establish the compromise, it falls on this court to determine whether the applicant is entitled to the relief it seeks.

[54] The first respondent did not query the invoices rendered by the applicant

within the 15 day period referred to in the agreement. In accordance with the terms of the agreement, the invoices are deemed to be correct in all circumstances. According to these invoices the first respondent owed the applicant a sum of R254 182.12 before the payment of the sum of R50 000.00. Thus the aforesaid sum of R254 182.12 is deemed to be correct. Deducting the sum of R50 000.00 entails that the first respondent is liable to the applicant in the sum of R204 182.12 which the first respondent has failed to pay. The second respondent, on the strength of the deed of suretyship, is also liable to the applicant in the sum of R204 182.12. The applicant's claim having been established, and the defence set up by the respondents having failed, it follows that the application should succeed.

[55] The parties had contracted on the basis that the first respondent would be liable for interest calculated at the rate of 5% above the maximum rate of interest *a tempore morae* and as such the applicant is entitled to an order to that effect.

[56] As the applicant has succeeded, I can find no reason why the costs should not follow the result. The parties had contracted on the basis that the applicant would be entitled to recover costs on an attorney and owned client scale including costs of counsel on brief. In light of the amount of the applicant's claim falling within the jurisdiction of the Magistrate's Court, counsel for the applicant indicated that the applicant does not seek the costs on the High Court scale but on the magistrate's court scale. Costs are accordingly awarded on the Magistrate's Court scale.

[57] In the result I make the following order:

- 57.1 The first and second respondents are ordered to pay applicant the sum of R204 185.12 plus interest at the rate of 5% above the maximum rate of interest *a tempore morae*, calculated from 28 September 2020 to date of payment.
- 57.2 The first and second respondents are ordered to pay the applicant's costs on the appropriate Magistrate's Court scale and on a scale as between attorney and own client.

Judge LG Nuku

APPEARANCES

For the Applicant : Advocate FW Landman
Instructed by: Van Der Meer Attorneys
(Ref: Mr S Van Der Meer)

For the 1st & 2nd Respondents : Advocate D Goldberg
Instructed by: Bagraim Attorneys (Ref: Mr B Shiff)