IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: D5571/2018

In the matter between:

DUMA KHUMALO STAINBANK HOLDINGS (PTY) LTD **APPLICANT**

and

ETHEKWINI METROPOLITAN MUNICIPALITY **RESPONDENT**

JUDGMENT

Chetty J:

[1] The applicant initiated motion proceedings claiming payment of R1 692 000 from the respondent, together with interest from 19 May 2017 to date of final payment. The application has its genesis in a tender for which the applicant successfully competed to perform construction work on the upgrading of the Umlazi Glebelands Hostels. The value of the contract award was in the amount of R18 240 000. As part of the contractual obligations, the applicant was required to put up a surety bond or a construction guarantee to the value of the sum of the contract. In December 2005 the applicant executed a deed of indemnity ('the indemnity') in terms of which it undertook to indemnify Constantia Insurance Company Limited (hereinafter referred to a 'Constantia') against any amounts that it was called upon to pay in terms of a surety

bond. As a consequence, Constantia issued the surety bond for the due and complete performance by the applicant of all its obligations under the contract with the respondent. The total liability for which the bond was issued was in the sum of R1 824 000.

[2] On 28 November 2017 the Head of Housing for the respondent wrote to the applicant giving immediate notice of the termination of the contract. In accordance with the terms of the contract, the respondent withheld or retained an amount of R800 000 being in respect of amounts certified for works performed. This is what is referred to herein as the 'retention fee'. As a consequence of the termination of the contract, the respondent in July 2008 made a demand on Constantia of the amount of R1 824 000 in terms of the surety bond. Constantia honoured its payment obligation and paid the respondent the said sum in August 2008.

[3] In light of Constantia honouring the surety bond, it issued summons in October 2008 against the applicant and its sureties for the amount which it (Constantia) paid to the respondent. The action was unopposed by the applicant, and default judgment was granted in favour of Constantia on 5 February 2009 by the Gauteng High Court (known then as the Witwatersrand Local Division) in the amount of R1 824 000 together with interest.

[4] Insofar as the applicant and its sureties were concerned, the contract was cancelled without valid reason. As a result, the applicant contends to have suffered a loss in the sum of the retention fee, being R800 000 as well as R1 840 000[1] which it was obliged to pay to Constantia in terms of the indemnity. When attempts at negotiations with the respondent failed to achieve any settlement, the applicant issued a summons against the respondent for the amounts of R800 000 and R1 824 000 respectively. What followed thereafter were a series of attempts by the applicant to have the matter resolved, this time invoking the assistance of the respondent's Municipal Manager and the Office of the Ombudsperson located within the municipality. Eventually a report was issued in October 2012 from the Office of the Ombudsperson with a recommendation that the Housing Department of the

[1] The respondent demanded R1 824 000 from Constantia following the cancellation of the contract.

respondent comply with a resolution of the Executive Council taken on 2 October 2007 and release R1 824 000 plus interest in respect of the surety bond and R800 000 in respect of the retention fee. The recommendation was endorsed by the respondent's Head of Legal Services.

[5] According to Mr Khumalo, the deponent to the applicant's founding affidavit, he pursued the matter for approximately two years during which time he engaged various officials ranging from the Mayor to the Head of Human Settlements within the structures of the respondent. According to him he was persuaded in July 2014 to withdraw the action instituted against the respondent on the basis that the latter's Public Accounts Committee was unable to negotiate a settlement while litigation was pending. This is denied by the respondent in its reply. Shortly thereafter the respondent's Integrity and Investigations Unit entered the fray and they too recommended that the respondent should release the guarantee of R1 824 000 and the retention fee of R800 000 to the applicant.[2]

[6] The report and recommendation of the Integrity Unit then meandered its way through the various structures of the respondent, culminating in the City Manager recommending payment of R800 000 (excluding VAT) plus R1 600 000 (excluding VAT) to the applicant.[3] The recommendation of the City Manager was then tabled for consideration by the respondent's Executive Committee on 15 September 2015, resulting in the Executive Committee resolving to pay the amounts proposed. The aforementioned resolution again served before the Executive Committee on 30 September 2015 for reasons which are not clearly apparent. The decision to pay the applicant the amounts of R800 000 and R1 600 000, both exclusive of Value Added

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[2] The conclusions of this report, dated 28 January 2015, record at 6.2.1 that 'Payments of 95% of the total award effected to DKS [the applicant], this means the Council accepted the work done by DKS. After accepting and honouring the invoices amounting to 95% of the project the Municipality cannot come and claim serious poor workmanship by DKS. If indeed there was poor workmanship by DKS, our former officials as well as the outsourced management team were party to fraud.' The report continues: 'Retention fees and the guarantee have not yet been released to DKS….Mochu Civils, the second contractor was paid an amount almost equal to the amount paid to DKS.' Understood in its context, this entails that the respondent paid a second contractor almost the same amount as it did to the first contractor, DKS (ie, the applicant), without any indication of poor workmanship by the applicant. It raises the spectre once more of wasteful expenditure by organs of state and arms of government.

[3] These amounts are consistent with the earlier demands made by the applicant, and with the recommendations by the respondent's various units, save that they have been expressed as amounts inclusive of VAT.

Tax, was reaffirmed. On that basis, the applicant contends that as at 30 September 2015 the respondent became 'indebted' to the applicant for the total amount of R2 400 000 together with interest.[4]

[7] Although the applicant was initially represented by an attorney in Durban, Mr Khumalo subsequently liaised with Constantia's attorney, Mr Lewis, informing him of the resolution passed by the respondent. It is not clear from the founding affidavit why or what interest the applicant had in the affairs of Constantia that caused Mr Khumalo to contact Mr Lewis to inform him of the resolution, other than that Constantia had already obtained judgment against the applicant under case number 36588/2008 in the Gauteng Local Division for the amount of R1 840 000 arising from the surety bond issued on behalf of the applicant. Mr Lewis, as Constantia's attorney, then issued a writ of execution seeking to attach the respondent's property to satisfy the payment of a debt owing by the respondent to the applicant 'now or in the future', in the amount of R1 840 000.

[8] I should point out that the attorney acting for Constantia against the respondent subsequently came to act for the applicant, which I found not to be entirely proper. Although it does not amount to unprofessional conduct, I find the notion of an attorney acting for one party, and then another, against a common adversary based on similar facts but different causes of action, to be problematic, particularly as it pertains to the issue of costs charged by the attorney in the event of him or her being successful. Situations like the present allow for the cross-pollination of resources and information from one matter to another. This is apparent from what appears below. These concerns are borne out in the founding affidavit where the deponent confirms that Mr Lewis (the attorney) was subsequently engaged to act for the applicant 'because of his already acquired knowledge of the overlap between this application and Constantia's application'. The deponent appears to contend that this would be a cost saving exercise, but nonetheless pursues a costs order against the respondent on an attorney and client scale, including costs for attorneys both in Johannesburg and Durban.

[4] The applicant contends that interest would accrue on the total amount of R2 400 000 excluding VAT, at a rate of 15.5%, compounded monthly.

[9] In response to the writ issued on behalf of Constantia, Mr Mfingwana, writing under the title of Head of Legal Services of the respondent, informed Constantia's attorney on 29 October 2015 that 'there are no monies due or owing to DKS Holdings [the applicant] by the Municipality [the respondent]'. It bears noting that this statement from the Head of Legal Services comes on the heels of the Executive Committee barely a month earlier on 30 September 2015 having adopted a resolution that the respondent was to pay to the applicant the sum of R2 400 000. Even more curious is a statement in the letter from Mr Mfingwana that 'the Council resolution of 30 September 2015 relating to DKS Holdings Pty Ltd was rescinded on 28 October 2015'.[5]

[10] The background to the rescission of the Executive Committee's decision on 28 October 2015, which Mr *Harcourt SC*, who appeared on behalf of the applicant, submits is invalid and of no force and effect, is to be found in the Council's decision of 30 October 2015, the relevant extract of which reads as follows:

'The relevant department had failed to implement the Exco decision to waive penalties imposed on DKS Holdings to enable the company to complete work. It had been established that the new service provider appointed to complete work was paid more than the penalties and, according to the Department, this was due to poor workmanship by DKS Holdings. It then concluded that there is no legal basis for the municipality to make any payment to DKS Holdings.

Meanwhile, Constantia after learning that the municipality had taken a decision to pay DKS Holdings, it had to serve the municipality with a writ of attachment of whatever payments the municipality would make to DKS Holdings. This attachment is based on a judgment taken against DKS Holdings for R1 824 000.00 plus interest at 15.5%. According to the writ, DKS Holdings is liable to pay the insurance company an amount of R3 680 000.00 (three million six hundred and eighty rand). Therefore, in order to get the municipality out of this attachment in terms of the written report in possession by the Head: Legal and Compliance, it is recommended that the two decisions taken in 2007 and 2015 respectively on this matter should be rescinded on the basis that the municipality is not required to pay DKS Holdings.

[5] At the time when the writ of execution was served on the respondent (5 October 2015) the Executive Committee's resolution of 30 September 2015 was still valid and enforceable. As the Sheriff's return indicates "*Mr Mfingwana the Legal Head informed me that currently there is no payment due as he is awaiting the minutes from the Council Resolution to pay"*. There was never any suggestion given that no monies were due to the applicant or that the resolution of 30 September 2015 was in the process of being rescinded.

The report presented by the Head: Legal and Compliance comprising a recommendation to rescind the decisions taken by Exco and Council on this matter was unanimously supported. Accordingly, given the legal opinion received confirming the right of the municipality not to pay any money to DKS Holdings (Pty) Ltd,

COMMITTEE RECOMMENDS

That the resolution adopted by the executive committee on 2007-10-02 to waive penalties imposed on DKS Holdings, be rescinded.

That the decision taken by counsel on 2015-09-30 to pay DKS Holdings (Pty) Ltd retention money to the value of R800 000 (eight hundred thousand rands) and release surety to the value of R1 600 000 (one million six hundred thousand) plus VAT, in respect of contract 1H-809 for the construction of housing accommodation at Umlazi Glebelands Community Residential Unit, be rescinded.'

[11] It would be a reasonable assumption to make that the Head: Legal and Compliance referred to in the minutes of the Executive Committee above is the same Mr Mfingwana who responded to the writ on behalf of the respondent and who is the deponent to the respondent's answering affidavit, save that he is described as the Chief Legal Advisor: Litigation for the respondent.

[12] Frustrated by the respondent's decision to rescind its resolution of 30 September 2015, Constantia's attorney filed an application in the Gauteng High Court in October 2016 requiring the Mayor, City Manager and the Head of the Integrity and Investigation Unit of the respondent to show cause why it should not be ordered to pay Constantia such amounts as were deemed owing to the applicant in accordance with the decision of the Executive Committee on 30 September 2015, and to pay interest on that amount.

[13] In the same application Constantia also sought an order that the applicant pay it the sum of R3 780 000 together with interest from October 2015 to date of payment. This amount comprised reimbursement of the R1 824 000 paid by Constantia to the respondent under the surety bond. The remainder comprised interest. The crux of that application, as contended by Constantia, is that the respondent laboured under the mistaken belief that its rescission of the resolution to pay the applicant absolved it of its obligation as a garnishee under Uniform rule 45 to pay over monies owed to the applicant, in circumstances where Constantia already had a money judgment against

the applicant. Despite the filing of a notice to oppose, judgment was granted against the respondent in favour of Constantia on 18 January 2017 for payment of the sum of R3 780 000 together with interest. In addition, Constantia was granted leave to execute against the respondent to recover the amounts granted in its favour. On 19 May 2017 the respondent paid Constantia the sum of R4 362 851.51.

[14] According to Constantia, prior to the above payment by the respondent, the total amount owing to it was R5 472 000. After payment on 19 May 2017 by the respondent, according to Constantia, the amount still due to the applicant by the respondent was R1 692 000. I must point out that these figures are based on the assertions as set out in the founding affidavit and although Mr *Harcourt* repeatedly submitted that these are simply a matter of arithmetical calculation, I do not necessarily share the same view. As will appear from what follows, the amount eventually claimed varies from the amount specified in the notice of motion which was R1 692 000. It is equally of concern to me why Constantia would have had locus standi to claim that amount from the respondent, notwithstanding that the applicant has demanded payment of the same amount in its own name. It is also not clear to me how this amount is calculated as the applicant's claim against the respondent has been based on payment of the R800 000 being the retention fee and R1 600 000 in terms of the surety bond issued by Constantia.

[15] The essence of the opposition to the applicant's claim is that the applicant is attempting to snatch a bargain by claiming more than it is entitled to in terms of the contract which was cancelled between the parties. Ms *Mahabeer SC* for the respondent submitted that the maximum amount that could be claimed by the applicant is R1 325 185.39 on the basis that following the cancellation of the construction contract, the respondent became liable for that amount as reimbursement for the retention fee which was withheld by the respondent, together with interest. The contention of the respondent is that notwithstanding that Constantia obtained judgment against the applicant for the amount of R1 840 000 in the Gauteng High Court, that amount excluded the interest on the capital amount of the surety bond which was paid to the respondent as an indemnity on behalf of the applicant. The remainder of the amount comprised interest, calculated from 26 October 2017. I am in agreement with the respondent that the judgment obtained by Constantia had no

application to the recovery of the retention fee in the amount of R800 000. It also appears from the correspondence and minutes of the Executive Committee meetings of the respondent that it operated under the misapprehension that when it paid Constantia, it was 'settling a debt in full and final settlement'. The only basis for Constantia to demand payment from the respondent was in the form of a garnishee order. There was no debt, in the strict sense of the word, owed by the respondent to Constantia.

[16] Accordingly, the respondent submits that the only amount for which it remains liable in terms of the cancellation of its construction contract with the applicant, is the amount of R800 000 plus interest, payable to the applicant. It concedes that this amount became payable on December 2012, from which date interest would accrue. According to the respondent's calculations, the capital amount of R800 000 would have attracted an amount of interest calculated at the legal rate, as at 31 August 2018, in the sum of R525 185.39, resulting in a total liability to the applicant of R1 325 185.39. This is where the dispute between the parties arises.

[17] In contrast to the respondent's calculations, the applicant contends that it is owed an amount of R1 692 000 plus interest from 19 May 2017, being the date when the respondent settled its indebtedness to Constantia. This amount appears to have been arrived at, according to the respondent, based on the total claim by the applicant, that is the amount of R1 824 000 plus R800 000 plus interest, less the total amount paid to Constantia. According to the respondent the applicant has erred in calculating its claim as it has failed to isolate the debt owed by the respondent as being R800 000. The respondent's complaint is that instead of the applicant restricting its claim to the repayment of the retention fee, it is impermissibly attempting to claim interest on an amount claimed by Constantia. According to the respondent, the 'debt' due to Constantia was been settled in full and the applicant has no claim to any interest arising from any 'debt' due to Constantia. As a consequence, the respondent contends that the applicant's claim has been artificially inflated beyond the R1 325 185.39 due to it as at 31 August 2018. As will be seen from what appears later in this judgment, by the time the matter was argued, the respondent had made a payment of R1 325 184.39 to the applicant, which it contends settled the matter. The applicant however persists in its claim, contending that a further R892 053.13 remains due.

[18] Regarding the recommendation of the City Manager to the Executive Committee to pay the applicant the amount of R800 000 plus the amount of R1 600 000 in respect of the surety bond, Mr Mfingwana states that this recommendation was made mistakenly and arose from an error of law as to which of the two entities, Constantia or the applicant, was to be refunded in respect of the cancellation of the contract. The Executive Committee subsequently acted on the mistaken advice and resolved to approve of the City Manager's recommendation. The point emphasised by the deponent is that the amount of the surety bond had been repaid to Constantia in full, together with interest. That payment discharged the respondent's indebtedness in full to Constantia. The deponent to the applicant's replying affidavit accepts this to be a correct assessment of the position. As such, according to the respondent, there is no liability by the respondent to the applicant in respect of the surety bond, which the respondent has already settled. The respondent is therefore liable, in its submission, only for repayment of the retention fee of R800 000 plus interest. The issue for determination is therefore whether the respondent is liable for anything beyond the amount of R1 325 185.39.

[19] In reply, the applicant bases its claim on the respondent's acknowledgment of liability and undertaking to pay, taken on 30 September 2015, notwithstanding that this same acknowledgment was rescinded within a month upon the Executive Committee receiving a further opinion from the Head of Legal Services. It begs the question whether the City Manager correctly applied his mind to the matter before recommending to the Executive Committee on 30 August 2015 that it pay to the applicant the sum of R2 400 000. Of that amount, R1 824 000 had already been repaid to Constantia together with interest. It raises the concern whether both Constantia and the applicant are being paid for the same cause of indebtedness? It cannot be that the respondent is obliged to refund Constantia *and* the applicant in respect of a single surety bond, where only one single payment was made to the respondent and that having been done by Constantia.

[20] At the same time, I am in agreement with the assertions of the applicant in its replying affidavit that the respondent appears to have mischaracterised the nature of the respondent's obligation to pay Constantia. The order secured by Constantia arose

from the termination of the construction contract awarded to the applicant. Upon the termination of that contract, Constantia became obliged to pay the respondent in terms of the surety bond. Having honoured its obligation in respect of the surety bond, Constantia then sought (as it was entitled) redress from the applicant for the amount paid on its behalf to the respondent. It issued summons in October 2008 and eventually took judgment against the applicant for the amount of R1 840 000 together with interest and costs in February 2009. The applicant was unable to settle any part of the judgment debt and by 2014 the interest due on the capital sum, in terms of the *in duplum* rule, reached the capital sum. Constantia's claim against the applicant, arising from the indemnity, was R3 680 000 – twice the amount of the capital sum. It was unable to obtain satisfaction for its debt. Once Constantia's attorney learnt that the respondent had resolved to pay the applicant the amount of R2 400 000 plus interest, it pursued the matter in terms of Uniform rule 45. The writ was returned by the Sheriff, with a notation that the respondent did not have sufficient funds to satisfy the garnishee order.

[21] Based on the respondent's 'acknowledgment of indebtedness' to the applicant and its resolution adopted at the Executive Committee on 30 September 2015, Constantia brought an application in the Gauteng High Court for an order in terms of Uniform rule 45(12) directing the respondent to pay to Constantia such amounts as were owed as at 30 September 2015 together with VAT and interest calculated from 12 December 2010. Constantia obtained an order directing the respondent to pay it the sum of R3 780 000[6] together with interest on R3 680 000 and costs. Upon the service of the order, the respondent paid R4 326 851.51.

[22] The applicant's claim is founded on the premise that the respondent adopted a resolution which remains valid and binding that it (the respondent) be obliged to pay the applicant the amount of R2 248 000 with effect from 2 December 2012, together with VAT and interest at 15.5%. If I understood the applicant's case, this was the amount which Constantia became entitled to attach in terms of Uniform rule 45(12).

[6] This amount included the sum of R100 000 as the 'agreed' costs of the application by Constantia against the applicant under case umber 2008/36588.

[23] The question which then arises is the precise indebtedness of the respondent to the applicant, taking into account the amount already paid to Constantia. Assuming that no payment had been made to Constantia, what would have been the extent of the respondent's indebtedness (if any) to the applicant? It bears noting that although various correspondences between the parties form annexures to the affidavits, they are marked 'without prejudice'.

[24] The contents of the correspondence however do not constitute 'without prejudice' correspondence in the meaning of that term. The essence of the rule relating to correspondence being 'without prejudice' has long been held to facilitate or promote the settlement of disputes without resort to litigation. In *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 674A the court referred to a statement made by Lord Mansfield that 'it must be permitted to men to "buy their peace" without prejudice to them, if the offer did not succeed; and such offers are made to stop litigation without regard to the question whether anything or what is due'. The court also held that the origin and rationale for the without prejudice rule was public policy. In holding that certain correspondence was written 'without prejudice' Trollip JA noted at 677B-D that:

'[S]uch correspondence, once respondent objected to its being adduced in evidence, was wholly inadmissible. The rationale of the rule is public policy: parties to disputes are to be encouraged to avoid litigation and all the expenses (nowadays very high), delays, hostility, and inconvenience it usually entails, by resolving their differences amicably in full and frank discussions without the fear that, if the negotiations fail, any admissions made by them during such discussions will be used against them in the ensuing litigation.'

[25] In the present matter, the respondent's attorney wrote to the applicant's attorney in March 2019 offering to settle the matter on payment of R1 325 185.39 as a full and final settlement of the applicant's claim. To the extent that the applicant claimed any greater amount, the respondent's attorney added 'any liability in excess of the settlement amount will be disputed and any claim for those excess amounts cannot proceed in application proceedings, and action proceedings must be launched in respect of this claim.'

[26] This offer to pay is repeated not only in the answering affidavit, but it assumes a pivotal role in the respondent's supplementary affidavit in which it contends that it already paid the amount of R1 325 184.39 on 10 May 2019 into the account of the applicant's attorney. On that basis the respondent contends that the matter ought not to have been set down on the opposed roll on 13 August 2020 as it had, for all intents and purposes, been settled. Insofar as the respondent is concerned, it waived privilege in relation to the offer to pay – which amount was subsequently paid to the applicant's attorney. The applicant's attorney on the other hand arrives at the same conclusion, but for different reasons. The applicant's attorney had no objection to the offer being placed before this court. To that extent, the offer by the respondent clearly cannot be regarded as being without prejudice. What is of importance is that the respondent is consistent in its stance that it does not owe the applicant anything more than the amount tendered, and subsequently paid.

[27] The payment by the respondent is calculated on the basis of a refund of the retention fee of R800 000 plus interest and costs on a party and party scale. The point of departure with regard to the applicant's calculations, which are placed in dispute, is that the applicant contends that the payment of the retention fee should also include VAT on the amount of R800 000 plus interest. The respondent adopts the view that the applicant is attempting to extract monies from the respondent, which are not due in law. In light of the respondent having made payment, it contends that if the court does not find that the matter has been settled, the applicant has in any event failed to show on what basis it is entitled to claim R1 692 000 plus interest and costs.

[28] The applicant in its heads of argument clarified the position that although its initial claim was for the amount of R1 692 000, after payment by the respondent of R1 325 284.39, a balance of R892 053.13 remains due in the principal debt[7]. This is disputed by the respondent which contends that the applicant, after receipt of the payment from the respondent, should have proceeded with a separate debatement action in respect of any further amounts it believed owed. At the same time the respondent maintains that in light of a dispute of fact emerging as to any further

[7] Counsel for the applicant contended that the payment by the respondent was directed first at offsetting the interest which had accrued. Once that appropriation was made, the amount which remains due, according to the applicant, is R893 053.13.

amounts owing to the applicant, the application should be dismissed. I am not persuaded by the submission while noting that in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) Harms JA held in paragraphs 26 and 27 that 'motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts'.

[29] The dismissal of the applicant's application solely because of the dispute which has now arisen cannot be considered as being in the interests of justice. It should be borne in mind that the dispute between the parties goes back to November 2007 when the respondent cancelled the construction contract. Although the applicant has repeatedly maintained that the contract was cancelled without valid cause, the applicant has never pursued the matter to set aside the cancellation. It has confined its application to a refund of the retention fee held by the respondent. The stance of the respondent all along, until the late delivery of a supplementary affidavit in which it made mention of the payment of R1 325 184.39, was that it did not owe the applicant anything more than this amount. Once payment had been made, it believed the matter to be settled.

[30] Uniform rule 6(5)(*g*) provides:

'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact. . . .'.

[31] The late introduction of the respondent's 'supplementary affidavit on settlement' deposed to by Ms Masinga of the respondent's Legal Department served to jettison the initial hearing of this matter set down for 13 August 2020. The introduction of this supplementary affidavit was opposed on various grounds, including that it was deposed to more than a year after the payment of R1 325 184.39 was made by the respondent to the applicant. Mr *Harcourt* submitted that no valid explanation had been set out for the delay in seeking to file a fourth affidavit. The hearing on 13 August 2020 was short lived, with the parties eventually agreeing to the matter being adjourned to enable the applicant to respond to the supplementary affidavit.

[32] In every case the court should examine the alleged disputes of fact and determine whether there is a real issue of fact that cannot be satisfactorily resolved without trial. Applying that test to the present matter, the cornerstone of the applicant's case is the Executive Committee's resolution on 30 September 2015 to pay to the applicant the retention fee of R800 000 and the surety bond monies of R1 600 000. The applicant submits that the resolution constitutes an 'acknowledgment of debt' and an undertaking to pay, which is binding on the applicant. In its supplementary heads, the applicant relies on *Adams v SA Motor Industry Employer's Association* 1981 (3) SA 1189 at 1198B, where Jansen JA considered the general principles in relation to an acknowledgment of debt, stating: 'an acknowledgment of debt, provided it is coupled with an express or implied undertaking to pay that debt, gives rise to an obligation in terms of that undertaking when it is accepted by the creditor', adding at 1198E that: '[t]he decisive question is whether the acknowledgment contains an express or implied undertaking to pay, a matter which relates to the intention of the parties.'

[33] The resolution adopted by the Executive Committee on 30 September 2015 refers to a decision to pay the applicant R800 000 (exclusive of VAT) in respect of the retention fee together with R1 600 000 in respect of the surety bond. The issue before the court is that of the indebtedness (if any) by the respondent to the applicant pursuant to its payment in May 2019 of R1 325 184,39. The argument advanced by the respondent is that it was liable to the applicant only in respect of the retention fee of R800 000 plus VAT and interest. Any suggestion that interest relative to the surety bond claim is misplaced as this was in terms of a contract between the applicant and Constantia. The respondent only became embroiled in the matter by way of a garnishee order served on it. Counsel for the applicant is correct to point out that there was no 'debt' owed by the respondent to Constantia arising from the surety bond.

[34] In an attempt to clarify the confusion as to how the amount of R884 869,03 is arrived at, Mr *Harcourt* on the morning of the re-scheduled hearing produced a summary of the applicant's claim, inclusive of interest and payments after the issue of proceedings. The respondent did not admit to the contents of the document nor the methodology employed in arriving at the sum due. Ms *Mahabeer SC* for the respondent, on the other hand, pointed out that if one considers that the total

indebtedness of the respondent was R2 400 000 plus interest, the respondent eventually paid a total of R 5 688 037.90 – more than twice the original 'debt' referred to in the Executive Committee Resolution of 30 September 2015. For that reason, the respondent adopts the position that it has paid all that is due arising from the cancellation of the contract to the applicant and no further amounts are owing.

[35] I have had careful regard to the submissions before me and at the end of the day I am unable to determine on the papers, as I am required to do in motion proceedings, whether the applicant is entitled to anything further than the sum the respondent has already paid. I do not agree with Mr *Harcourt* that the calculation of interest is an arithmetic calculation. The court has not been placed with the necessary facts and averments in order to understand how the amount of R884 869.03 has been calculated, which is necessary in order to sustain the claim. In the present matter, the amount of the applicant's claim has altered, and it is not clear to me whether any amounts are still due to the applicant, following the payment of a 'settlement' amount by the respondent. While the original amounts giving rise to the claim of the applicant are common cause, as well as the amounts claimed by Constantia from the applicant (and which were in turn paid by the respondent in terms of the garnishee order) any further amounts claimed are strenuously disputed by the respondent.

[36] In addition to these amounts is the final 'settlement' paid by the respondent, which the applicant submits was applied as a first payment against interest, resulting in a remaining balance of the capital sum. The calculation of interest (where applicable) remains in dispute and is a matter which cannot be resolved by simple calculation. This is not a situation where the court can adopt 'a robust approach'. The respondent has raised concern regarding the correctness of the calculations of the applicant. This can only be resolved by witnesses testifying as to how these figures were arrived at, and then being subjected to cross-examination.

[37] The court has discretion in terms of Uniform rule 6(5)(*g*) in the interest of ensuring a just resolution of the dispute between the parties, in circumstances such as have arisen in this matter, to refer the matter to oral evidence. Although the respondent was opposed to the matter being referred to oral evidence and argued in favour of a dismissal of the application, Mr *Harcourt* (although insisting that the amount

claimed was clearly identifiable and capable of easy calculation) accepted as a fall-back position that the matter could be referred to oral evidence on the specific issue of the calculation of the amount claimed by the applicant. The parties will however be bound to what is already contained in their respective affidavits, including the 'supplementary affidavit on settlement' and the reply thereto.

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

1. The matter is referred for the hearing of oral evidence on the following issues:
   a. Whether the applicant is entitled to an amended Order that the respondent be directed to pay the amount of R884 869.03 with interest at 15.5% from 11 May 2019 to date of payment;
   b. Alternatively, whether the respondent's payment to the applicant of the sum of R1 325 184.39 on 10 May 2019 constituted a full and final settlement of its indebtedness to the applicant, and if so, its implication for the costs of the application.
2. The provisions of Uniform rules 35, 36 and 37 will apply to this matter.
3. All persons who have deposed to affidavits in this matter may be called to give evidence at the hearing. In the event that a party seeks to call a witness who has not deposed to an affidavit in this matter then such party shall provide the other party with a statement of such witness's evidence at least 10 days before the hearing of the matter.
4. The costs of this application (13 August 2020 and 16 November 2020) are reserved for determination by the Court hearing the oral evidence.

M R CHETTY

Appearances

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Date of hearings:	13 & 16 November 2020
Date of Judgment:	14 April 2021