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

Case Number: 6550/2019

In the matter between:

MARK TAME N.O.

First Plaintiff

ALBERTUS JOHANNES NEL VAN NIEKERK N.O.

Second Plaintiff

CHRISTOPHER ERIC HYLAND N.O.

Third Plaintiff

JOHANNES PETRUS DU PLESSIS N.O.

Fourth Plaintiff

and

TALA LIGHT WEIGHT CONSTRUCTION (PTY) LTD
REGISTRATION NO.: 2016/472029/07

First Defendant

ARNOLD STEYNBERG

Second Defendant

XBS ADMINISTRATION (PTY) LTD
(REGISTRATION NO.:2013/041309/07

Third Defendant

CWR TRADING SOUTH AFRICA (PTY) LTD
REGISTRATION NO.:2013/188471/07

Fourth Defendant

YVAN TORIANNINI

Fifth Defendant

JUDGMENT

MAGARDIE AJ

Introduction

1. The plaintiffs in this action are the trustees of the Chapman's Bay Development Trust ("the Trust"). By combined summons issued on 17 April 2019, the plaintiffs seek payment of restitutional damages from the defendants arising from alleged overpayments made by the Trust to the first defendant. These payments were made by the Trust pursuant to two Building Contract Turnkey Solution Agreements ("the building contracts" or "the agreements") concluded between the Trust and the first defendant on 31 January 2018. The first defendant at the time was known as AFCO Building Solutions (Pty) Ltd ("AFCO").
2. The building contracts provided for the engagement of AFCO, as the contractor, to construct two freestanding residential dwellings on land owned by the Trust at erf 4[...] and erf 4[...]1, Chapman's Bay, Cape Town. The dwellings to be constructed would be within a new housing development known as the Chapman's Bay Estate. The contracted amounts for the construction of the dwellings were R3 274 419.00 (VAT

inclusive) for the dwelling on erf 4[...] and R3 525 417.00 (VAT inclusive) for the dwelling on erf 4[...]1.

3. In addition to their claims for overpayments to AFCO, the plaintiffs seek payment of construction delay penalties and an order for attorney and own client costs as provided for in the building contracts. A further claim was initially brought by the plaintiffs against the second and fifth defendants in their personal capacities as directors of AFCO. The cause of action so pleaded by the plaintiffs was that the second and fifth defendants had conducted the affairs of AFCO recklessly by failing to execute the contractually required works in a proper and workmanlike fashion.
4. The claims against the second and fifth defendants on the basis of reckless trading were abandoned at the commencement of the trial. The plaintiffs however persist with their claims for overpayment and penalties against the second, third and fourth defendants on the basis of suretyships concluded by these defendants on 24 August 2018. The second defendant, third defendant and fourth defendant's liability in terms of the suretyships is limited to a maximum amount of R800.000.00.
5. The amounts claimed by the plaintiffs from AFCO are R728 159.66 in respect of the dwelling constructed on erf 4[...] and R828 863.00 in respect of the dwelling on erf 4[...]1. These amounts are alleged to represent the difference between what the Trust paid AFCO before the contracts were cancelled in February 2019 and the value of the work executed by AFCO on the partially built dwellings as determined by the plaintiffs' quantity surveyor. The plaintiffs subsequently performed remedial work on the dwellings, however no claim for damages was sought by the plaintiffs in this regard.
6. The penalties claim relates to the contractually stipulated daily penalty payable by AFCO should construction be in excess of 210 days. The

plaintiffs seek payment of a combined penalty in the amount of R281 250.00. This claim comprises of an amount of R86 250.00 with regard to erf 4[...] and R195 000.00 in respect of erf 4[...]1. It was conceded by AFCO during the trial that it was liable for payment of contractual penalties.

The building contracts

7. The building contracts at issue were both concluded on 31 January 2018 between the first plaintiff, representing the Trust and Mr. Carel Visagie, representing the first defendant.
8. The terms of the building contracts are largely identical except those relating to the different erfs and the contract price for the completion of the works. The terms of the building contracts, their conclusion and the validity of these terms is common ground. I outline below the key provisions of the building contracts which assumed prominence in the course of the trial.
9. Clause 1.10 of the building contracts provides that the works shall comprise the construction of the works described in the agreement, "...substantially in accordance with the plans and specifications referred to in the schedule, the schedule of PC Items and in terms of the provisions of this Agreement." Clause 2.1 records that the contractor undertook to construct the works on the property "...in a proper and workmanlike manner, substantially in accordance with the agreement." Clause 5 provides that the construction of the works was to be concluded in terms of architectural drawings and plans approved by the local municipality, which were attached as schedules to the agreements.
10. Clause 6.1 deals with payment milestones. In terms of clause 6.1.1, an advance payment of 40% of the agreed contract price was to be paid by the Trust to AFCO, of which 10% was payable on signature of the agreement.

The remaining 30% was payable as soon as the building plans were approved, whichever date was the earlier. Subsequent to the conclusion of the building contracts, the Trust paid AFCO an amount of R1 309 767.00 as the advance payment in respect of the dwelling to be constructed on erf 4[...]. An amount of R1 410 167.00 was paid as the advance payment relating to erf 4[...]¹.

11. The effect of clause 8.1 of the building contracts became a central point of contention in the course of the trial and subsequent argument. This clause provides for the agreed contract price in respect of the works to be paid to AFCO as contractor "...as per the confirmation of the QS (quantity surveyor) of the monthly progress achieved. The contractor shall submit the payment to the QS before the 20th of each month. Payment by the employer will be made into the contractors account and only after confirmation of the progress that has been reached for the month by the QS to the employer. The determination of the QS shall be final and binding on the parties."
12. Clause 11 of the building contracts deals with their termination. In terms of clause 11.1, should AFCO as the contractor be in material default of any of its obligations in terms of the agreement, the Trust was entitled to notify AFCO thereof in writing and thereafter entitled to terminate the agreements should such default continue for a further period of 14 days. In that event, the Trust would be entitled to employ others to complete the works. The clause goes on to provide that "...the damages for such termination shall be a debt due by the contractor to the employer as determined by the QS whose decision shall be final and binding on the parties."
13. Clause 15.1 states that "...the dimensions and sizes as shown on the drawings will be strictly observed as far as practical and the contractor shall be entitled to vary any measure by a maximum of 1% in his discretion."

14. In terms of clause 15.4, the agreements constituted the entire contract between the parties as it related to the construction of the works on the property. The clause records that "...no prior representations, stipulations or warranties not expressly recorded herein shall be binding unless reduced to writing and signed by the parties." Similarly, clause 15.5 states that "...no agreement purporting to vary any terms and conditions have or shall be of any force and effect, unless the said agreement is reduced to writing and signed by the parties."

The pleadings

Breach of the agreements

15. The essence of the plaintiffs' claims against the defendants, as they emerge from the pleadings, is that AFCO breached the agreements by failing to construct the residential dwellings on the two erven in a proper and workmanlike manner and substantially in accordance with the building contracts. The pleaded case by the plaintiffs in this regard is that:

- 15.1 AFCO's construction of the works was not concluded in terms of the architectural drawings and the plans approved by the local municipality.
- 15.2 damp proof membranes that were installed to prevent moisture penetration from the surface bed into the walls were either punctured or incorrectly laid.
- 15.3 internal door openings were too low and incorrectly set out and as a result, there was not enough space for the doorframe, door, door finish and the screed.

- 15.4 the vertical brickwork and retaining fill were not fitted with a damp proof membrane and many of the window openings were not square.
- 15.5 the general quality of the electrical installation was of a very poor standard and had to be replaced. In this respect, it is alleged that the electrical installation chase into the slabs of the houses was not to industry standards and compromised the slabs.
16. AFCO in its plea denied the allegations of breach of the building contracts. By virtue of a report from third party engineer, J3 Engineering, which was annexed to its Plea, AFCO pleaded that J3 Engineering had assessed the quality of the work performed by AFCO and confirmed that it was in line with industry standards.
17. According to this engineer's report, no irregularities had been found with the DPC installation. As to the waterproofing of the vertical brickwork, the engineer's report concluded that an application of torch on waterproofing would be adequate to ensure that the structure was waterproof. J3 Engineering also recorded in its report that its view was that no potential cracking would occur in respect of the mortar joint thickness and that the structural integrity of the dwellings had not been compromised by irregular mortar jointing. AFCO however did not rely on the J3 Engineering report at the trial.

Penalties

18. Clause 8.2 of the building contracts provides that the time for practical completion of the works was 210 days from the commencement date as provided for in the agreement. In terms of clause 10, the penalties payable

by the contractor for late completion of the works to practical completion and thereafter, were an amount of R2 500.00 per day.

19. The plaintiffs in their particulars of claim initially sought payment of an amount of R122 500.00 representing penalties for 49 days in respect of erf 4[...]. This amount was determined after deducting from the number of days the plaintiffs spent on site, the contract allowance of 210 days and agreed rain delays. In respect of erf 4[...]¹, an amount of R217 500.00 was initially claimed as delay penalties for 87 days.
20. AFCO, in its plea, denied that the penalties so claimed were due to delays for which AFCO could be faulted. AFCO alleged inter-alia that the plaintiffs were responsible for these delays and that obstructive and unprofessional conduct by the plaintiffs had unduly prevented AFCO from completing its work.
21. AFCO accordingly denied that it was liable for the penalties claimed and pleaded in the alternative that it was not liable for such penalties to the extent alleged by the Plaintiff.
22. Matters however took a different turn at the trial. It was at that stage accepted by counsel for AFCO that in respect of the construction on both erven, AFCO was liable to pay contractual penalties to the plaintiffs, subject to the quantification thereof.
23. The evidence of the plaintiffs' witness, Mr. Matthew Elsworth, a former project manager for the construction project, was later led in this regard. Mr. Elsworth was not cross-examined by the defendants' counsel and his evidence stood uncontested. Mr. Elsworth testified that the penalties in respect of erf 4[...] amounted to R86 250.00 and R195 000.00 in respect of erf 4[...]¹. The defendants submit that these penalty amounts, albeit

undisputed at the trial and amounting to a total of R281 250.00, are lower than the amount of R340 000.00 initially claimed by the plaintiffs. The defendants submit that while the plaintiffs claim for penalties should be granted, no order of costs should be made in respect of the penalties claim, as AFCO has been substantially vindicated in its plea to the penalty claims. I shall deal later with these submissions.

Cancellation of the agreements

24. On 20 and 21 September 2018 the Trust directed correspondence to AFCO in terms of clause 11.1 of the agreements, notifying AFCO that it was in breach of the agreements and demanding that the breaches be rectified within 14 days.
25. In his email correspondence sent on 20 September 2018, Mr. Elsworth recorded that the areas which required rectification by AFCO related inter-alia to the replacement of damp proof membranes, internal door openings which were too low, vertical brickwork, window openings which were not square. In addition, his email stated that the electrical fix had chanced into the slab, was not industry standard and could compromise the slab.
26. The Trust alleges in its particulars of claim that AFCO failed to rectify its breaches of the agreements. AFCO in turn pleads that it was not required to remedy any issues as the work had been done in accordance with industry standard.
27. On 25 February 2019 the Trust's attorneys directed a letter to AFCO informing it that both building contracts were cancelled and that AFCO was required to cease work immediately and vacate the construction site by 8 March 2019. The letter recorded inter-alia that the Trust was in the process

of liquidating its damages as a result of the cancellation and would advise AFCO in this regard as soon as the amount had been finalized.

28. AFCO does not deny that the Trust was entitled to cancel the building contracts on 25 February 2019.

Damages

29. The damages allegedly suffered by the Trust and its entitlement to repayment of alleged overpayments made to AFCO, is a significant area of contestation between the parties. In its particulars of claim, the plaintiffs plead that as at the date of cancellation of the agreements, the Trust had paid AFCO an amount of R2 099 200.00 in relation to erf 4[...] and an amount of R2 452.685.00 in relation to erf 4[...]1. It was not disputed by AFCO that it had been paid these amounts.
30. The plaintiffs then plead that in relation to erf 4[...] "...the completed works were certified by the Quantity Surveyor in terms of the agreement as R1 371 050.34. As a result, the Plaintiff suffered damages in the amount of R728 159.66 which is the amount overpaid to the First Defendant." Similarly, and in respect of erf 4[...]1, the plaintiffs plead that "...the completed works were certified by the Quantity Surveyor in terms of the agreement as R1 623 821.96. As a result, the Plaintiff suffered damages in the amount of R828 863.00, which is the amount overpaid to the First Defendant."
31. At paragraph 24A of its amended particulars of claim, the plaintiffs plead that "...it would be equitable and in the interests of justice that it be excused from restoring to the First Defendant that which it received in terms of both agreements."

32. AFCO in its plea denies the plaintiffs' allegations regarding the damages they allege were suffered by the Trust as a result of AFCO's breach of the agreements. AFCO pleaded that the plaintiffs had failed to provide evidence of the valuation by the quantity surveyor referred to in its particulars of claim or further evidence supporting its alleged damages.
33. It was on this basis then that the battle lines were drawn. The key disputed issues emerging from the pleadings were AFCO's alleged breach of the building contracts and the plaintiffs' entitlement to restitution or restitutionary damages for the alleged overpayments.

The evidence

34. The plaintiffs led the evidence of four witnesses.
35. The plaintiffs' witnesses were Mr. Simon Humphreys, a professional quantity surveyor, Mr. Mark Tame, the first plaintiff and a trustee of the Trust, Mr. Rory Cole, a professional land surveyor and Mr. Matthew Elsworth, the project manager engaged on the construction project. I have earlier set out the uncontested evidence of Mr. Elsworth regarding the quantum of the contractual penalties.
36. The defendants for their part elected not to call any witnesses. The defendants closed their case after the evidence of the Trust's witnesses had concluded.

Mr Simon Humphreys

37. Mr. Humphreys is a professional quantity surveyor. His expertise and professional qualifications were not disputed.

38. Mr. Humphreys was employed by the Trust on an hourly basis for a limited scope of work appointment as the quantity surveyor on the erf 4[...] and erf 4[...]1 construction project. Following the cancellation of the building contracts and during March 2019, the plaintiffs instructed Mr. Humphreys to inspect the construction work on erf 4[...] and erf 4[...]1 and to calculate the value of the construction work on the two erven as at that date and prepare a valuation statement.
39. Mr. Humphreys prepared a final valuation statement in relation to erf 4[...] as at 27 March 2019, which was introduced into evidence. The erf 4[...] valuation statement records that the value of the "...completed work (incl. VAT), excluding unfixed materials", amounted to the sum of R1 371 040.34 and that the percentage work complete was 41.87%.
40. Mr. Humphreys also prepared a valuation statement in relation to erf 4[...]1 as at 6 March 2019. This statement that the value of the completed work at the time including VAT and excluding unfixed materials was R1 623 821.96. The percentage work completed by AFCCO is recorded as being 46.06%.
41. Both reports were prepared by Mr. Humphreys based on his observations and calculations during March 2019. Mr. Humphreys explained in detail the methodology in terms of which his valuation statements were prepared and the manner in which he arrived at his calculations. According to the valuation statements and Mr. Humphrey's oral evidence, the amount he determined as "value of works executed" was comprised of two components. The first component was the value of the contractor's work for items such as earthworks, masonry, waterproofing, plastering, plumbing and electrical work. The second component was PC (prime costs) and specialist trades such as water and electrical connection and engineering costs. The total of these two amounts together with VAT resulted in the

amount he determined as the “value of completed work” and set out in the valuation statements.

42. Mr. Humphreys testified that certain payment certificates, which were also introduced into evidence, “...basically says what the client owes the contractor” and is the “contractual certificate for payment.” His evidence was that on a monthly basis, he would meet with AFCO staff regarding their applications for payment and go through same. He would then prepare a valuation and would issue it to the plaintiffs.
43. The cross examination of Mr. Humphreys commenced with a focus on a “recovery statement” which he had prepared and which he explained was an adjustment on the certified amount. The document records that the recovery statement was “...issued in terms of 33.0 of the JBCC Principal Building Agreement.”
44. When questioned on this by this by the defendants’ counsel, Mr. Humphreys confirmed that the Joint Building Contracts Committee (“JBCC”) Principal Agreement was not applicable in this case. He explained that the JBCC was referred to in the recovery statement he had issued, because it was “...a convenient form of documentation.” Mr. Humphreys conceded that in the present case, it was the terms of the building contracts that were applicable, not those that are contained in a JBCC contract. When referred to clause 8.1 of the building contracts, he confirmed that he was the quantity surveyor or “QS” referred to in this clause.
45. Mr. Humphreys was specifically referred to the provision of clause 8.1 of the building contracts, which states inter-alia “...the determination of the QS shall be final and binding on the parties.” It was put to Mr. Humphreys that the effect of this part of clause 8.1 of the building contract, was that there was no scope for a recovery by the plaintiffs. He conceded that it was in the

JBCC scenario that a recovery would form part of the certification of works by the quantity surveyor. Insofar as the building contracts were concerned, he emphasized that he was not party to the preparation of the contracts and had only been employed to do the valuations.

46. On being questioned further regarding clause 8.1, Mr. Humphreys accepted that the clause provided for his determination as the quantity surveyor, to be final and binding on the parties in respect of payments to the contractor. He accepted that he was the judge of payments to be made to the contractor, what progress had been made by the contractor and that he had previously prepared the certificates for payment to AFCCO. Mr. Humphreys did not however concede the correctness of the submission put to him by the defendants' counsel, that the effect of clause 8.1 was that there was no room for an overpayment because his determination was final and binding on the parties.
47. Mr. Humphreys was then referred to clause 11.1 of the building contracts, which deals with the termination of the agreements. The clause states inter alia that "...the damages of such termination shall be a debt due by the contractor to the employer as determined by the QS whose decision shall be final and binding on the parties." He confirmed that he had not engaged in a damages determination exercise as contemplated by this clause, that he was not involved in determining damages or penalty and that clause 11.1 of the agreement had not been implemented or invoked. Mr. Humphreys was questioned further regarding the drafting of the building contracts themselves. He stated that he did not know anything about how the contracts were prepared or distributed.
48. A further line of the cross-examination of Mr. Humphreys related to the amounts and calculations in the valuation statements which he had prepared. He confirmed under cross-examination that his calculations

included an item of future work which at that stage had not been done yet. He however stated that this was for a minor amount. It was put to Mr. Humphreys by the defendants' counsel that his calculations were not limited to overpayment and also referred to future aspects to be installed in the building. The response of Mr. Humphreys was, "...within reason." He explained however that this was part of striving to be fair and that it was common practice to err "...a little bit on the contractor's side when he says that he will have finished". This, he said, had been the case with AFCO on a number of the interim valuations.

Mr Mark Tame

49. Mr. Tame is the first plaintiff and a trustee of the Trust. He began by explaining his involvement in the construction project, which was a joint venture aimed at developing the Chapman's Bay properties for onward sale to residential buyers. Mr. Tame's role in the project and joint venture was to take responsibility for the financial, marketing and sales aspects as well as leading the project in relation to civils and engagement of contractors.
50. With regard to the building contracts at issue, Mr. Tame testified that the contracts had been handed to the Trust by AFCO and that after consulting the Trust's attorney, various changes had been made to the contracts by mutual agreement. He could not however recall the exact changes which had been made.
51. After providing this context to the construction project and the conclusion of the contracts, Mr. Tame's evidence then focused on the contractual clauses and what he maintained were the breaches thereof by AFCO. He testified that AFCO had not complied with clause 1.10 of the building contracts, which defines the works which were the subject of the agreements and

which work had to be completed "...substantially in accordance with the plans and specifications", attached as schedules to the agreements.

52. When asked to expand on this, Mr. Tame said that it was in the first place unusual in his experience as a developer for the Trust to have to pay upfront such a large deposit, such as the 40% advance payment required by clause 6.1.1. of the agreement. The Trust however had accepted this and paid the amount as it was considered necessary to advance the project and the advance payment was specifically made for the purpose of purchasing building materials.
53. Mr. Tame's evidence then moved on to what he maintained were a series of breaches of the agreements by AFCO. He testified that AFCO's non-compliance with the agreements began right at the outset of construction, when AFCO cleared the wrong site in the development area. He stated that this caused problems as the site was situated in an ecologically sensitive area. His evidence was that this was but one of a number of problems which the Trust had experienced with AFCO throughout the project.
54. The problems referred to by Mr. Tame in his evidence included construction delays, problems with the quality of materials provided by AFCO and problems with their sub-contractors, who he stated in one instance, had not been paid by AFCO. Mr. Tame testified that "...overall, it was not a great experience."
55. According to Mr. Tame, the Trust had complied fully with all of its obligations in terms of the agreements, while AFCO had not. The attention of Mr. Tame was drawn specifically to clause 5.1 of the building contracts, which provides in part that the employer (the Trust), shall not give instructions to the contractors' workmen or sub-contractors or interfere with or vary an instruction given by the contractor or sub-contractor. He

confirmed that the Trust had complied with this requirement and that while project meetings were held between AFCO, the Trust and its project team, there was no micro-management of AFCO by the Trust. He stated that the project meetings were generally amicable and aimed at resolving issues.

56. On being led further regarding the contractual breaches by AFCO, Mr. Tame testified that in respect of erf 4[...]1, the height levels as constructed by AFCO were incorrect and that the problem was even worse with erf 4[...]. In respect of erf 4[...], he said that the height levels were so out that the Trust had to change the entire roof structure.
57. The height level exceedances had according to Mr. Tame, been brought to the Trust's attention by neighboring homeowners in the residential development. He testified that the Trust had to undertake remedial work after termination of the building contracts with AFCO. With regard to the erf 4[...] dwelling, this involved a redesign of the roof, which required submission and approval by the Home Owners Association. In addition, plumbing and electrical work had to be taken over by other contractors.
58. Mr. Tame was referred to the position which pertained after the cancellation of the agreements on 25 February 2019 and after AFCO had left the site. He was asked how far the houses were from completion at that stage. He answered they were "...substantially from completion" and that as far as he could recall, the roofs for the houses were not on at that stage.
59. As to the approximate cost to the Trust of the remedial work which had to be undertaken on the houses, he testified that it was a substantial amount and that on both houses, the Trust "...had ended up paying about R5 million." He did however record that to be fair, there had been additions by the Trust to the erf 4[...] property.

60. Regarding the damages sought by the Trust, Mr. Tame testified that on his understanding, the Trust was seeking payment of "...the difference between what was paid and what was put in." His evidence was that the defendants had been compensated for the work that they had done. According to Mr. Tame, it would not make financial sense for the properties to be demolished and payment demanded from the defendants for the full amount paid by the Trust.
61. An extensive aspect of the cross-examination of Mr. Tame dealt with the correspondence directed by Mr. Elsworth to the Trust on 20 September 2018 setting out the details of defective work performed by AFCO. It will be recalled that in this correspondence, AFCO was put on terms to rectify within 14 days a number of areas of what the Trust maintains was defective and poor workmanship. This included replacement of damp proof membranes, internal door openings which were too low, vertical brickwork, window openings which were not square and the electrical fix which had chased into the slab, was not industry standard and could compromise the slab.
62. In the said correspondence, Mr. Elsworth in addition stated "...this approach to the product [by AFCO] has created a build that is severely behind schedule, will produce a finished house that is unsaleable in the market and will ultimately have issues manifest in its lifetime because of poor waterproofing and brickwork."
63. Mr. Tame was cross-examined on the various areas of poor workmanship recorded in the 20 September 2018 correspondence. He conceded that with regard to the replacement of the damp proof waterproofing, AFCO employees had remedied and corrected this defect. He conceded that "by and large", the waterproofing and door problems listed by Mr. Elsworth, had

been rectified by AFCO. The same applied to the vertical brickwork problems which he accepted had been rectified by AFCO.

64. With regard to the electrical fix, which Mr. Elsworth had stated was not industry standard and of a generally “appalling quality...and needs to be completely redone”, Mr. Tame re-iterated in cross-examination that this aspect had not been rectified by AFCO and had to be remedied later by the Trust, at its own cost. He stated that while it was true that “...the walls wouldn’t fall over”, the overall quality of the workmanship by AFCO was poor.
65. A further aspect of the cross-examination related to what defendants’ counsel put to Mr. Tame as being the approach in construction disputes, which was that where there is a query regarding poor workmanship, the problem would be fixed by the owner and the costs then claimed from the builder. The position was not, as counsel put it, for the owner to claim back what the builder had been paid. Mr. Tame conceded that in respect of the remedial work for the electrical fix, the Trust had remedied this problem but had not sought to claim these costs from the defendants.
66. Mr. Tame was questioned as to why the Trust had decided not to sue the defendants for damages for the costs it had incurred in performing remedial work on the houses constructed by AFCO. He responded by stating that the Trust did not want to go down the line of claiming damages as this would end up involving expert witnesses, being a “...he said, she said” and that this would “...waste the courts time.” He stated that while the Trust had decided not to claim damages from AFCO for the remedial work it had to pay for to complete the build, it had embarked on the present case, which “...was about remedying a wrong.”

67. With regard to the provisions of the building contracts relating to the final determinations by the quantity surveyor, Mr. Tame stated under cross-examination that these clauses had been specifically included to prevent back and forth disputes regarding payment claims by AFCO. He conceded that in respect of the remedial work performed, the costs and details thereof were not before the Court, the Trust had not claimed these as damages from the defendants and that what the Trust was claiming was an overpayment.

Mr Rory Cole

68. The plaintiff's next witness was Mr. Rory Cole. Mr. Cole is a professional land surveyor. His expertise and qualifications were not disputed.
69. Mr. Cole was instructed by the plaintiffs to take as built measurements of the construction work carried out by AFCO on erf 4[...] and erf 4[...]1. He prepared a report dated 4 February 2019, which was introduced into evidence.
70. Mr. Cole testified that the as-built height of the dwelling constructed by AFCO on erf 4[...], exceeded at three points the design final floor level ("FFL") height in the agreed architectural drawings.
71. The as-built heights taken on the first floor living room differed by +0.59m (590 millimetres) in relation to design FFL height, the as-built heights taken on the garage differed by +0.43m (430 millimetres) and the as-built heights taken on the top of the wall differed by +0.35 m (350 millimetres) in relation to design FFL height.
72. With regard to the as-built height of the house on erf 4[...]1, Mr. Cole found that at five points, the as-built height exceeded the specified design FFL

height. These differences in as-built height versus design FFL height, related to the first-floor bedroom (+0.8m) (800 millimetres), the first floor living room (+0.18m) (180 millimetres) and the garage (+0.06m) (60 millimetres).

73. In relation to design apex height, the living room timber truss apex differed from specification by +0.04m (400 millimetres) and the bedroom timber truss apex by +0.58m (480 millimetres). Mr. Cole testified that the extent to which the as-built heights of constructed dwellings exceeded the design FFL heights, was not in line with the architectural drawings which the parties had agreed to.
74. The cross-examination of Mr. Cole focused on the extent to which his findings on the various exceedances of design FFL height, fell within the 1% variation or tolerance range provided for by clause 15.1 of the building contracts. It will be recalled that clause 15.1 states that "...the dimensions and sizes shown in the drawings will be strictly observed as far as is practical and the contractor shall be entitled to vary any measure by a maximum of 1% in his discretion." It was apparent at the outset of the cross-examination, when counsel for the defendant, referring to his own calculations of the 1% variation or tolerance allowed by clause 15.1, that Mr. Cole was unaware of the details of this clause. He stated in this regard that "...yeah, but I don't know what the tolerance is, so I'm not sure if its 1%. I can't comment on that."
75. It was put to Mr. Cole that all three of the heights in respect of the house constructed on erf 4[...] fell within the 1% tolerance / variation range provided for by clause 15.1 of the contract. Mr. Cole conceded that this was the case and accepted that if the tolerance was 1%, erf 4[...] would have no problem regarding heights. In respect of the house constructed on erf 4[...]1, it was put to Mr. Cole that four of the five heights in relation to this

property, fell within the 1% tolerance provided for by clause 15.1. Mr. Cole accepted this to be so.

76. In respect of his findings regarding the +0.8m (800 millimetres) design FFL versus as-built surveyed height exceedance for the first-floor bedroom of the erf 4[...]1 house, it was put to Mr. Cole that this was a mere 16cm over the 1% tolerance or variation range provided for by clause 15.1. Mr. Cole's response was that in his view, "...this was quite a lot over."

Evaluation

Requisites for restitution

77. It was authoritatively stated by Innes CJ over a century ago in *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines*¹ that the purpose of and the fundamental rule in the award of damages for breach of contract, is to place the innocent party in the position he or she would have occupied had the contract been properly performed, so far as that can be done, by the payment of money and without causing undue hardship to the defaulting party.
78. The party who has complied with his obligations in terms of the agreement but who is a victim of a breach thereof by the other party, is thus entitled to be placed in the position he would have occupied had there been no breach. The application of the rule thus entails a comparison between the financial situation the injured party would hypothetically have occupied had the agreement been fulfilled and that party's actual financial situation subsequent to the breach.²

¹ *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines* 1915 AD 1 at 22.

² *Culverwell v Brown* 1990 (1) SA 7 (A) at 25.

79. A party who however seeks restitution, thereby exercises not a claim for contractual damages per se, but a distinct contractual remedy. In *Kudu Granite Operations (Pty) Ltd v Caterna Ltd*³, Navsa, JA and Heher AJA (as he then was), said the following:

“There is a material difference between suing on a contract for damages following upon cancellation for breach by the other party (as in *Baker v. Probert* 1985(3) SA 429 (A), a judgment relied on by the Court a quo) and having to concede that a contract in which the claim had its foundation, which has not been breached by either party, is of no force and effect. *The first-mentioned scenario gives rise to a distinct contractual remedy: Baker at 439A, and restitution may provide a proper measure or substitute for the innocent party’s damages.*”

80. This principle was subsequently approved by the SCA in *National Sorghum Breweries (Pty) Limited t/a Vivo Africa Breweries v International Liquor Distributors (Pty) Limited*⁴, where Olivier JA noted that a claim for restitution in the form of repayment of the purchase price previously paid by the claimant, was a distinct contractual remedy.

81. The Court held that the required elements for a cause of action seeking restitution in this form, were the following:

“...the necessary allegations were the conclusion of the contract, the breach thereof, the payment of the purchase price, and the cancellation of the contract.”

³ *Kudu Granite Operations (Pty) Ltd v. Caterna Ltd* 2003 (5) SA 193 (SCA) at 202 E-F.

⁴ *National Sorghum Breweries (Pty) Limited t/a Vivo Africa Breweries v International Liquor Distributors (Pty) Limited* (2001 (2) SA 232 (SCA at para 4.

82. In what follows, I evaluate whether the plaintiffs have established the requirements for restitution of the amounts which they claim from AFCO.

Conclusion of the contracts

83. It is common cause and established on the evidence that the building contracts at issue were concluded between the parties. The validity of the contracts and their terms is common ground. The payments made by the Trust to AFCO are also not disputed.

Breach of the contracts

84. Clause 2.1 of the building contracts sets out the standard required for the construction of the two dwellings on erf 4[...] and erf 4[...]1. This clause makes it clear that AFCO was contractually obliged to construct the houses "...in a proper and workmanlike manner, substantially in accordance with the agreement." Clause 1.10 in addition required AFCO to construct the houses "...substantially in accordance with the plans and specifications referred to in the schedule [to the agreement]."
85. As stated earlier, Mr. Cole's report and his oral evidence was that the as-built height of the house on erf 4[...] exceeded the design final floor level ("FFL") height at three points. In respect of the as-built measurements for height of the house on erf 4[...]1, he found that at five points the as-built height exceeded the design FFL height.
86. Mr. Cole had testified that the extent to which the design heights had been exceeded in the constructed dwellings, was not in line with the agreed architectural drawings. Mr. Cole however conceded that all three of the heights in respect of the house constructed on erf 4[...] fell within the 1% variation range provided for by clause 15.1 of the agreements. He also

conceded that four of the five height exceedances in relation to dwelling on erf 4[...]1, fell within the 1% variation range.

87. Mr. Cole's survey had found a +0.8m (800 millimetres) as-built surveyed height versus design FFL height exceedance in respect of the first-floor bedroom of the dwelling constructed on erf 4[...]1. He disputed and did not accept the submission by the defendants this was merely a 16cm exceedance of the 1% contractual tolerance range. His response, as stated earlier, was that this was "...quite a lot over."
88. Mr. Cole was a credible witness, his expertise was not disputed and I accept the veracity of his evidence. His evidence regarding the as-built height exceedance for bedroom 1 of the dwellings constructed by AFCO on erf 4[...]1, was not disputed. Nor is there any dispute that this measurement exceeded the maximum 1% tolerance or variation range permitted by clause 15.1 of the building contracts.
89. The plaintiffs have in my view established that in this respect, there was a material breach by AFCO of its obligations under clause 1.10, clause 2.1 and clause 15.1 of the building contracts.
90. Turning then to the evidence of Mr. Tame, he testified in detail that the quality of the work performed by AFCO on both houses was not proper and workmanlike and was in breach of clause 2.1 of the building contracts.
91. Mr. Tame's evidence in my view corroborates the evidence of Mr. Cole in a number of respects. His evidence further confirms that the height levels for both houses were incorrectly constructed by AFCO and not in accordance with the agreed architectural drawings and specifications. There was no significant challenge to Mr. Tame's evidence that in respect of the dwelling constructed by AFCO on erf 4[...], the height levels were so out that the

Trust had to change the entire roof structure. Nor was his evidence disputed insofar as it related to the remedial work which the Trust had to perform on the house built on erf 4[...], which involved a redesign of the roof that required approval of the Home Owners Association.

92. It was submitted by the defendants that Mr. Tame had testified that “substantial completion of the two houses had been achieved by AFCO.” That is not my reading of Mr. Tame’s evidence. As stated earlier, the plaintiffs’ counsel specifically asked Mr. Tame to comment on the position which pertained after the cancellation of the agreements on 25 February 2019 and after AFCO had left the site. Mr. Tame was asked how far the houses were from completion at that stage. He answered that the houses were “...*substantially from completion*”, not that they were substantially completed, as submitted by the defendants.
93. Mr. Tame’s evidence in this regard is also consistent with the evidence and valuation statements prepared by Mr. Humphreys, which record that as at March 2019, the percentage work completed by AFCO on the erf 4[...] dwelling was only 41.87% and in respect of erf 4[...]1, the percentage of work completed was 46.06%. These figures were not disputed by the defendants.
94. Mr. Tame was closely questioned about the email correspondence directed by Mr. Elsworth to AFCO on 20 September 2018, which put AFCO to terms to remedy poor workmanship relating to the damp proof membranes, internal door openings, vertical brickwork, window openings which were not square and the electrical fix which had chased into the slab. As the plaintiffs’ counsel submitted, Mr. Tame conceded acknowledged and conceded that the damp proof membranes and internal door openings had subsequently been repaired by AFCO.

95. Mr. Tame however made it clear that with regard with regard to the electrical fix, which Mr. Elsworth had described as not being industry standard and of a “generally appalling quality”, that this aspect had not been rectified by AFCO at all and remained a problem, which the Trust had to subsequently repair at its cost. He consistently maintained under cross-examination that while it was so that the walls of the houses “would not fall over”, the work done on the houses by AFCO was not workmanlike or professional.
96. Mr. Tame conceded that aspects of the defective workmanship were later repaired by AFCO after they were put on terms. In my judgment however, the fact that certain admitted defects were later repaired by AFCO, would not have made the appearance of these defects any less burdensome for the Trust. The Trust had already paid AFCO a substantial deposit and was compelled to place AFCO on terms to repair a number of serious building defects. A professional builder who constructs door openings that cannot fit a door and window openings which are not square, can hardly be said to have performed his work in a workmanlike manner. I therefore do not consider Mr. Tame’s concession to redound to the benefit of AFCO. The plaintiff’s palpable sense of frustration with the conduct of AFCO in the construction process was readily apparent from Mr. Tame’s evidence and the correspondence directed to AFCO by Mr. Elsworth.
97. Having denied in terms in its Plea that it breached any of the provisions of the building contracts as they related to the obligation to perform quality and proper workmanship in its construction of the dwellings, one would have expected evidence from AFCO at the trial in support of these denials. It was not to be so. The defendants closed their case without calling any witnesses, let alone evidence from J3 Engineering, on the basis of whose report it was pleaded by AFCO that it performed quality work in line with industry standards.

98. I agree with the submissions by the plaintiffs' counsel that Mr. Tame was a credible, honest witness. There is no reason not to accept his evidence relating to AFCO's breaches committed during the building of the dwellings on both erven. I consider the plaintiffs to have established that AFCO materially breached its obligations under clause 1.10 and clause 2.1 in its construction of the works required by clause 1.10 of the building contracts.

Cancellation of the contracts

99. There is no dispute between the parties that the building contracts were cancelled by the Trust. The defendants accept that the Trust was entitled to cancel the building contracts on 25 February 2019.

Restitution of payments made to AFCO

100. The main dispute between the parties is whether the Trust is entitled to restitution or restitutionary damages in the form of payment of the difference between the amounts which the Trust paid to AFCO and the value of the completed works as determined by Mr. Humphreys.
101. Three main arguments were advanced by the defendants in support of their contentions that the plaintiffs were not so entitled and that failure of the plaintiffs' claims for the alleged overpayments was inevitable. Firstly, it was contended that the plaintiffs' claims amounted to a re-valuation or revisiting of the work performed by AFCO and that this was not permitted by the contracts. The Trust had therefore not proved, so it was argued, that the completed works had been "certified by the quantity surveyor in terms of the agreement" as alleged at paragraphs 23 and 24 of the particulars of claim.

102. Secondly, the defendants argued that the Trust had elected not to hold AFCO liable for payment of damages as provided for in clause 11.1 of the building contracts and that consequently, the specifics of the defective work and the cancelation of the contracts were of no moment. Thirdly, it was submitted that even if the Trust and the QS were entitled on some basis to revalue the work done, the valuation statements prepared by Mr. Humphreys lacked integrity and could not be relied on as they included future rectification expenses and materials on and off site.

103. Clause 8.1 of the building contract is key to the first main contention advanced by the defendants. That contention being that the Trust's claims amount to a re-evaluation of the work performed, which is not permitted by the contracts and clause 8.1 in particular. Clause 8.1 in its entirety states:

“The CONTRACT PRICE shall be paid by the CONTRACTOR as per the confirmation of the QS of the monthly progress achieved. The CONTRACTOR shall submit the payment to the QS before the 20th of each month. Payment by the EMPLOYER will be made on the last day of the month into the CONTRACTOR'S account and only after confirmation of the progress that has been reached for the month by the QS to the employer. The determination of the QS shall be final and binding on the parties.”

104. The purpose of clause 8.1 is in my view to establish and regulate a contractual mechanism for payment of the agreed contract price by the Trust to AFCO. That mechanism requires payment to the contractor to be made on the basis of and expressly subject to “confirmation” by the QS “...of the monthly progress achieved.” The clause then goes on to determine the dates by which payments claimed by the contractor are to be submitted and when such payments are to be effected by the employer. The latter is again subject to the QS confirming to the employer the

progress that has been achieved by the contractor for the month to which the payment relates.

105. Finally, the clause provides that the determination by the QS shall final and binding on the parties. This “determination” by the QS, can only be reasonably interpreted to relate to the confirmation of the work done by the contractor. That confirmation is a necessary pre-condition for payment to the contractor. The clause in essence provides for a mechanism to avoid payment disputes during the contract period by requiring the assent and confirmation of the QS regarding monthly progress before payment can be made to the contractor. The QS is in addition vested by clause 8.1 with the power to confirm monthly progress by the contractor and his determination in this regard is final and binding on the parties.
106. I consider the interpretation of clause 8.1 set out above to be sensible and business-like and consistent with the intentions of the parties. Although the evidence of Mr. Tame is not necessarily admissible regarding the meaning of clause 8.1, it is noteworthy he confirmed that the clause was specifically inserted in the agreement in order to avoid disputes and “back and forth” regarding payments to the contractor.
107. Clause 8.1 of the building contracts in my view neither expressly nor impliedly preclude the Trust from seeking restitution as a contractual remedy for breach of the provisions of the contract.
108. Nor does clause 8.1 in terms preclude the quantity surveyor from determining, after the cancellation of the building contracts, the value of the work which had been performed by the contractor. Clause 8.1 serves a different and distinct purpose. It is a dispute avoidance mechanism which places the function of making final and binding determinations regarding

payment claims by the contractor during the lifespan of the contracts, in the hands of the quantity surveyor.

109. The defendants' contention that clause 8.1 bars the restitutionary relief claimed in the action, rests on the premise that the "certification" of the completed works referred to by the Trust in paragraphs 23 and 24 of the particulars of claim, amounts to an impermissible "re-valuation" of the work previously done by AFCO. The proposition and premise on which it is based is unpersuasive. The effect of clause 8.1 of was to render, during the course of the contract, determinations by the quantity surveyor authorizing payments to AFCO, final and binding. This however does not in my judgement mean that Mr. Humphreys was subsequently and after the contracts had already been cancelled, precluded by clause 8.1 or the building contracts from making a determination as to the quantum of the completed works on site as at March 2019.

110. In making such a determination, I do not agree that Mr. Humphreys' evidence impermissibly revisits or re-evaluates the work previously performed by AFCO, as the defendants sought to argue. The argument overlooks the purpose for which the evidence was tendered. Mr. Humphreys was tasked by the plaintiffs to quantify and determine the monetary value of the completed works as at March 2019. He did so in his valuation statements. He gave undisputed evidence explaining the methodology and calculations underlying his determinations. In particular, it was not disputed that the monetary value of the completed works on both erven as at March 2019 was that determined by Mr. Humphreys in his valuation statements and no evidence to the contrary was led by the defendants.

111. Mr. Humphreys was extensively cross-examined on whether his valuation statements were consistent with clause 8.1 of the building contracts. He did

not concede that the clause precluded him from determining the value of the works executed by AFCO. The valuation statements themselves are an undisputed written recordal of the basis on which he had quantified the value of the works and the specific components of that valuation.

112. The defendants' contentions that Mr. Humphrey's valuations of the completed work done by AFCO are precluded by the terms of the building contracts, are in my view without merit.

113. The second argument advanced by the defendants was that the restitutionary relief sought was not competent or established because the Trust had elected not to hold AFCO liable for payment of damages as provided for in clause 11.1 of the building contracts. This contention misconstrues the nature of the restitutionary remedy, which as stated earlier, our Courts have held to be an independent contractual remedy.

114. The plaintiffs were not required to expressly label their main cause of action as one for restitution or restitutionary damages. All that they were required to do was plead the elements of their cause of action for restitution, being the agreements, payment to AFCO, breach of the agreements by AFCO and cancellation by the plaintiffs. Where upon cancellation of a contract, a plaintiff seeks recovery of his own performance by claiming repayment of money, the nature of his cause of action is that of a distinct contractual remedy, not an enrichment action.⁵

115. It is so that the Trust may have an additional remedy in law for damages sustained due to the defendants' breach of contract, including damages in respect of the remedial work subsequently performed by the Trust. The existence of such a remedy does not non-suit the Trust from seeking

⁵ Probert v Baker 1983 (3) SA 229 (D) at 233. The judgment was referred to by the SCA with approval in Kudu Granite Operations (Pty) Ltd v Caterna Ltd 2003 (5) SA 193 (SCA) at 202 E.

restitution of the difference between the amounts it paid to AFCO for work done and the actual value of the completed work which was executed by AFCO. More so in circumstances where the quantified value of the completed work, has on the undisputed evidence of Mr. Humphreys been determined to be of a significantly lesser value than the amount which the Trust paid AFCO for that very work. The notional availability of an alternative remedy to the Trust for it to sue for its full damages as a result of the conduct of AFCO, is in my view not mutually exclusive of its right to seek restitution as an independent contractual remedy and substitute for its damages.

116. The defendants third argument was that the valuation statements prepared by Mr. Humphreys lacked integrity and could not be relied on as they included future rectification expenses and materials on and off site. The criticism is in my view, overstated. The focus during cross-examination of Mr. Humphrey on a relatively minor amount of R3 139.50 included in his recovery statement document as being “work executed by others”, does not in my judgment detract from the veracity of his evidence as a whole or his valuation methodology which, as stated earlier, was not materially disputed by the defendants. The defendants disputed the Trust’s entitlement to restitution not Mr. Humphrey’s calculations of the value of the completed works executed by AFCO.

117. I am not persuaded that the evidence of Mr. Humphreys and valuation statements recording the value of the completed works executed by, falls to be rejected on the basis contended by the defendants.

118. The various grounds on which the defendants contend that the plaintiffs have not established their claim to restitutionary damages, are in my view individually and cumulatively without merit.

Equity of restitution

119. The general principle of reciprocity applies to the restitutionary remedy and requires that when a contract is cancelled and restitution claimed, the innocent party must also make or tender to make restitution of whatever he has received.⁶ The principle is not absolute and the failure to tender such restitution is not necessarily fatal to the innocent party's claim. As Nienaber JA stated in *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd*⁷

“the rule that a rescinding party must tender restitution is not an inflexible one; it applies only where such restitution remains physically possible. When, through no fault of the party rescinding restoration is no longer physically possible, he is not precluded by that fact alone from resiling from the contract.”

120. The general rule that a party claiming restitution is required to tender restoration of what it received pursuant to the contract, may be departed from in an appropriate case, taking into account equitable considerations. Trollip JA put it thus in *Feinstein v Niggi*⁸

“The object of the rule is that the parties ought to be restored to the respective positions they were in at the time they contracted. It is founded on equitable considerations.

Hence, generally a court will not set aside a contract and grant consequential relief for fraudulent misrepresentation unless the representee is able and willing to restore completely everything that he has received under the contract. The reason is that otherwise,

⁶ Marks Ltd v Laughton 1920 AD 12 21.

⁷ *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd* (271/96, 272/96) [1998] ZASCA 67; 1999 (2) SA 719 (SCA); [1998] 4 All SA 465 (A) (17 September 1998).

⁸ *Feinstein v Niggi* 1981 (2) SA 684 (A) 700G – 701A.

although the representor has been fraudulent, the representee would nevertheless be unjustly enriched by recovering what he had parted with and keeping or not restoring what he had in turn received, and the representor would correspondingly be unjustly impoverished to the latter extent.

(see *Actionable Misrepresentation* (supra at para 294 and note 5 thereto); *Marks Ltd v Laughton* 1920 AD 12 at 21; *Harper v Webster* 1956 (2) SA 495 (FC) at 502B - D; *Van Heerden en Andere v Sentrale Kunsmis Korporasie (Edms) Bpk* 1973 (1) SA 17 (A) at 31G - 32A). But since the rule is founded on equity it has been departed from in a number of varying circumstances where considerations of equity and justice have necessitated such departure (see *Harper's* case where the cases are collected and especially at 500B, 502E)."

121. The plaintiffs submitted that it would be equitable and that justifiable that the Trust be excused from restoring to AFCO what the Trust had received from in respect of the construction of the dwellings on the two erven. The plaintiffs submitted that Mr. Tame's evidence was that it would not be commercial sensible or feasible for the properties to be demolished in order to put the parties back in the position that they would have been in prior to the conclusion of the agreements.
122. It was furthermore submitted that there was another factor justifying the Trust being excused on equitable grounds from restoring what it had received from AFCO. This was that AFCO had already been paid for the work that it had performed and that both the amounts paid to AFCO and Mr. Humphreys evidence regarding the value of the work performed by AFCO, were unchallenged. The Trust in any event does not seek restitution of the full amount paid to AFCO. The Trust submits that it seeks restitution in the

form of payment of the balance of the moneys paid to AFCO, that being the difference between what was paid to AFCO for the construction of the two dwellings and the actual value of the partially built dwellings so constructed.

123. The defendants did not seek to challenge Mr. Tame's evidence that demolishing the properties in order to restore what the Trust had received from AFCO, would not make practical or commercial sense. The dwellings on the property were already partially built to roof height at the time of cancellation of the contracts on 25 February 2019. It is difficult to see how restoration of the constituent building materials purchased by AFCO for aspects such as masonry, plastering, plumbing, waterproofing and electrical work and utilized to construct two partially built houses, would at his stage be practical, let alone physically possible.

124. Mr. Tame's evidence was that both properties had subsequently been sold to third parties following the remedial work performed by the Trust to complete the build. On this basis as well, restoration by the Trust to AFCO would be physically impossible. The defendants did not seek to argue the contrary.

125. I am consequently of the view that the plaintiffs have established that there are just and equitable grounds to excuse the plaintiffs from restoring what the Trust had received from AFCO, prior to the cancellation of the two building contracts on 28 February 2019.

Conclusion

126. The plaintiffs have in my view established their entitlement to restitutionary damages for payment of the difference between the amounts the Trust paid to AFCO for construction of the dwellings and the value of the completed

work executed by AFCO. The plaintiffs' claims succeed for the reasons set out above.

127. With regard to costs, the plaintiffs sought costs on the attorney and own client scale as provided for in clause 12 of the building contracts. The defendants did not suggest that costs would not be payable on the basis of the scale agreed in clause 12 of the contracts, in the event of the plaintiffs' claims succeeding.

128. I am not persuaded by the defendants' submissions that no order as to costs ought to be made in respect of the plaintiffs' penalties claim. The defendants' plea actively resisted the penalties claim inter-alia on the basis that the plaintiffs had "forced numerous delays at own behest" and that the plaintiffs had acted in an obstructive and unprofessional manner and delayed AFCO from commencing with its work. None of these allegations were pursued by the plaintiffs at the trial or put to the plaintiffs' witnesses. The submission that the defendants had only disputed the quantum or extent of the penalties and had in fact never disputed their liability for the penalties, is untenable and not borne out by the pleadings.

129. The plaintiffs claim against the fifth defendant however stands on a different footing. The plaintiffs claim against the second and fifth defendant in their personal capacity on the basis of reckless trading, was only abandoned at the start of the trial on 29 April 2024. I agree with the submissions by the defendants' counsel that no claim against the fifth defendant survived the abandonment. The fifth defendant is accordingly entitled to his costs.

Order

130. I make the following order:

130.1 The first defendant is ordered to pay the plaintiffs:

130.1.1 the amount of R728 159.66.

130.1.2 the amount of R828 863.00.

130.1.3 the amount of R281.250.00.

130.1.4 interest on the aforesaid amounts a *tempore morae*.

130.2 The second, third and fourth defendants, jointly and severally, the one paying the other to be absolved, are ordered to pay the plaintiffs:

130.2.1 the amount of R800 000.00.

130.2.2 interest on the aforesaid amounts a *tempore morae*.

130.3 The first, second, third and fourth defendants are ordered pay the plaintiffs costs on scale as between attorney and own client.

130.4 The plaintiffs claim against the fifth defendant is dismissed with costs, including the costs of counsel on scale C.

S G MAGARDIE
Acting Judge of the High Court
Western Cape Division

Appearances:

For the plaintiffs: Adv P Torrington

Instructed by: Dykes Van Heerden (Cape Inc)

For the defendants: Adv F Arnoldi SC

Instructed by: Bennecke Thom Incorporated

Date of hearing: 29 April 2024, 30 April 2024 and 27 May 2024

Date of judgment: 24 February 2025