



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 790/2020P

In the matter between:

JUANIC PROPERTY INVESTMENT CC

PLAINTIFF

and

MSUNDUZI LOCAL MUNICIPALITY

DEFENDANT

ORDER

The following order is made:

1. Judgment is granted in favour of the plaintiff against the defendant as follows:
 - (a) Payment of the sum of R1 502 406.99.
 - (b) Interest on the sum of R1 502 406.99 at the rate of 10% per annum from date of demand being 21 November 2019 to date of payment.
 - (c) The defendant is ordered to pay the wasted costs occasioned by the postponement of the matter in April 2025 on scale B.
 - (d) The defendant is ordered to pay the costs of the action on a party and party scale with counsel's fees to be taxed on Scale B.

JUDGMENT

Pillay AJ

Introduction

[1] This is an action in which the plaintiff claims contractual damages in the amount of R1 502 406.99. The damages claimed are based on the allegation that the defendant refused to issue a rates clearance certificate, in breach of a settlement agreement. The plaintiff's claim is that the amount of R 5 594 992.03 was paid to the defendant to avoid delay in transfer of two properties, and that the payment was made under protest.

[2] The essence of the plaintiff's case, as set out in his particulars of claim, disclosed that the plaintiff owned two properties described as: Erf 9[...] P[...], Registration Division FT, Province of KwaZulu-Natal, in extent of 6709 square metres, more commonly known as [...] R[...] D[...] C[...] Road, Mkondoni, Pietermaritzburg ("the first property"); and Portion 7 (of 2) of Erf 1[...] P[...], Registration Division FT, Province of KwaZulu-Natal, more commonly known as 1[...] R[...] D[...] C[...] Road, Mkondoni, Pietermaritzburg ("the second property").

[3] On or about May 2018, the plaintiff sold the first property to the AKG Essa Family Trust and Cassim Essa Trust; and the second property to Aggregate Property Company (Pty) Ltd.

[4] The plaintiff claims that at the time of the sale of the properties, the first property was allegedly in arrears in respect of amounts owing to the defendant in the amount of R288 957.76; and that the second property was allegedly in arrears in respect of amounts owing to the defendant in the amount of R5 947 933.92.

[5] In order not to delay the transfer of the properties, during September 2018 the plaintiff made an offer of R3 000 000 in full and final settlement of the arrears in respect of the two properties. The plaintiff's offer was rejected by the defendant.

[6] On 27 March 2019 the defendant, via its attorneys, made a counter-offer in respect of the arrears of the second property, in terms of which the plaintiff would pay an amount of R3 879 823.66 in full and final settlement of the amount outstanding on the second property. The defendant's counter-offer was open for acceptance for a period of seven days. The plaintiff alleged that notwithstanding the seven-day time period imposed on the plaintiff to accept the defendant's counter-offer, the parties orally agreed that the defendant's counter-offer would remain open for acceptance for a reasonable period.

[7] On 3 May 2019 the plaintiff accepted the defendant's counter-offer and alleged that an agreement was concluded on the terms set out in the defendant's counter-offer. The plaintiff alleged that the parties agreed that the plaintiff would only be liable for rates charges subsequent to March 2019.

[8] On 28 May 2019 Tomlinson Mguni James ("TMJ"), the attorneys attending to the registration of transfer of the properties, provided a written undertaking for payment of the amount of R4 021 785.04 to the defendant, being the combined agreed amount in respect of both of the properties.

[9] The plaintiff alleges that on 15 July 2019, TMJ was provided with figures by the defendant indicating that an amount of R7 531 914.73 was required to be paid in respect of the second property and an amount of R481 410.15 was to be paid in respect of the first property. It claimed that on 30 August 2019 the defendant advised TMJ that it required a written undertaking for payment upon transfer of the properties in the amount of R6 570 000 for both the first and second property, whereupon it would issue the rates clearance certificates for the properties.

[10] In order not to further delay the transfer of the properties, under protest, the plaintiff agreed for TMJ to issue a written undertaking in the amount of R6 570 000 for both the first and second property. TMJ issued the written undertaking in the

amount of R6 570 000 for both the first and second property and on 20 September 2019, registration of the properties was effected. The defendant then requested TMJ to pay the amount of R5 594 992.03 in respect of amounts it alleged was due and owing by the plaintiff in relation to both properties.

[11] Pursuant to the written undertaking issued by TMJ to the defendant, the amount of R5 594 992.03 was paid by TMJ to the defendant. The plaintiff claims that notwithstanding the plaintiff's acceptance of the defendant's counter-offer, the defendant refused to issue the rates clearance certificates. The plaintiff claims that the defendant failed to issue the clearance certificates in breach of the settlement agreement. The plaintiff consequently alleges that it paid the defendant the amount of R5 594 992.03 under protest and suffered damages in the amount of R1 502 406.99.

[12] The plaintiff's particulars also included an alternative claim of unjustified enrichment for the same amount of R1 502 406.99. At the outset of the hearing, the plaintiff's counsel, Mr van Reenen pointed out that the said claim was included as a belt and braces approach, and the plaintiff was not intending to pursue its alternative claim of unjustified enrichment.

[13] The defendant in response, pleaded two special pleas, the first being the description of the court as it was in the heading of the pleadings, and the second being a failure to comply with the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, ("the Act"). The first special plea was abandoned, and the second special plea necessitated an application for condonation. An order was eventually granted, condoning the plaintiff's non-compliance with the Act.

[14] In further defending the claim, the defendant pleaded that it is inadmissible for a party to refer to settlement negotiations which did not culminate in a valid settlement agreement, and that by referring to the settlement negotiations the plaintiff was in breach of this principle. The defendant further denied that there was ever a settlement agreement concluded and denied that a seven-day period referred to in the defendant's counter-offer remained open for acceptance, or that such was extended orally. It is also apparent from the plea that whilst the defendant admitted

that the payment was made on the plaintiff's behalf in the amount of R5 594 992.03, the defendant denies that such payment was made under protest.

[15] The plaintiff then commenced with the leading of evidence and called only one witness to testify at the trial, that being Ms Diane Mary Rauch, ("Ms Rauch"). Ms Rauch was employed as a director at the commercial litigation department of Fairbridges Wertheim Becker Attorneys, ("Fairbridges"). Ms Rauch stated that she had been initially doing work for a larger group of companies, which was later rebranded as the Wyco group, owned by a family called the Van Wykes. The plaintiff, Juanic was one of the companies in that group and was a property-owning company.

[16] In her testimony, Ms Rauch made reference to an email communication dated 27 March 2019, from one, Sharvania Ramesar ("Ramesar"), a representative of the defendant, to an employee of the plaintiff, known as Rashelle. Rashelle was employed as an assistant to Nico van Wyk ("Mr van Wyk").

[17] The email dated 27 March 2019 from Ramesar is not contentious and was admitted in the pleadings. The contents of the email states as follows:

'Dear Rashelle

After extensive negotiations and requests for write off's our client has come forth with a counter proposal as follows:

R3 879 823.66 in full and final settlement. This offer stands for 7 days only and monies are to be paid directly to our offices.

Kindly confirm whether this offer is acceptable.

Yours faithfully,
Sharvania Ramesar'

[18] Ms Rauch confirmed that she discussed the email with Mr van Wyk who gave her a brief background regarding the two properties being sold, and that the plaintiff was trying to reach resolution with the defendant on the amounts outstanding for rates and effluent charges, because there were disputes about such charges. Ms Rauch stated that Van Wyk was not certain if the defendant's offer was fair and

mandated her to undertake a review of the amounts and furnish advice on whether that offer was a reasonable offer.

[19] Ms Rauch then referred to a file note dated 4 April 2019, which she confirmed was a note she made at the time she called Ramesar. The main reason for the call was to ask for an extension of the seven-day period for the offer to remain open so that she could obtain the necessary information and conduct a review of the defendant's counter-offer. Her testimony regarding the file note confirmed that it was a contemporaneous note during her discussion with Ramesar and that the note reflects a brief discussion about what the settlement offer entailed and the figures that were quoted in her previous email dated 27 of March 2019. She testified that the note confirmed that Ramesar was working with the municipality to review further charges on the account so that it could be reduced.¹

[20] She further confirmed that her recollection of the notation regarding the seven-day time period falling away was that the offer would remain open while she obtained information to consider whether the offer was reasonable. Ms Rauch then confirmed that she made a further file note on the same day after her discussion with Ramesar which related to a communication with the conveyancing attorneys, who confirmed that the transfer of one of the properties was ready to proceed, and that the only item outstanding was the rates clearance certificate.²

[21] Ms Rauch then commented on another file note, still on 4 April 2019, which related to account number 0[...], for the property described as 1[...] R[...] D[...] C[...] Road, which was a vacant property. She testified that she pointed out to Ramesar that there was an issue regarding both municipal accounts, in that the water, effluent and electricity charges for [...] R[...] D[...] C[...], the property which was occupied by the plant had low rates, whilst the vacant property had excessive rates being charged. According to Ms Rauch there appeared to have been a transposition of the charges.

¹ Bundle A1 at 84A.

² Ibid at 84B.

[22] Ms Rauch then emailed Ramesar later that same day at 5.24 pm where she referred to discussions earlier that day pointing out that charges in relation to [...] R[...] D[...] C[...] have been included on the municipal account for 1[...] R[...] D[...] C[...]. The latter property was charged as an industrial property when it is in fact a vacant property. She testified that the transfers on the two properties were ready to proceed since October 2018 and therefore her client had been suffering damages, as they were accruing charges on the accounts. Ms Rauch then elaborated on the email communication which confirmed the plaintiff's stance that the defendant was advised in early September 2018 that the bulk electricity supply was no longer required. She pointed out that there were still electricity supply and effluent charges which should be credited.

[23] Ms Rauch then referred to a further email dated 4 April 2019 addressed to the conveyancing attorneys, requesting documents that they had in their possession relating to the municipal accounts. The email required information regarding the date when the transfer would be ready for registration and a request for the rates clearance certificates of both properties. The email concludes with the following request:

'Please can I have this information as a matter of extreme urgency as we are working past the deadline for acceptance of the settlement offer in respect of the municipal account offer by the Municipality and need URGENTLY.'

[24] Ms Rauch then referred to an email from Ramesar dated 8 April 2019, which confirmed the previous negotiations of 27 March 2019 and that the defendant came back with an offer of R3 879 823.66, and that Ramesar was still attempting to secure approval for a further write off for the amount of R84 000. This email from Ramesar concludes by pointing out that she will revert, because according to Municipal by-laws no discounts may be afforded to consumers who sell their properties, and that full amounts become due and payable before transfer takes place. Ms Rauch then referred to her further file note which recorded the full and final settlement as at 27 March 2019 and explained that this was her note reconfirming the settlement figure calculated up to that date.

[25] On 3 May 2019, Ms Rauch addressed an email to Ramesar confirming that the plaintiff was in a position to agree to the proposed figure of R3 879 823.66 in respect of account number 0[...]. Ms Rauch in that email requested that the charges totalling R157 638.38 be removed from the account and that if removed, the outstanding balance payable would be R131 319.38. Ms Rauch then recorded that her client offers, on a without prejudice basis, to pay R131 319.38 in full and final settlement of the 0[...] account.

[26] On 13 May 2019, Ramesar responds with an email communication, the contents of which state as follows:

‘Dear Diane

I have taken instructions from my client who has informed me to accept your offer of settlement on account number 0[...] in the amount of R3 879 823.66.

I have been informed that your client will only be billed for Rates on property with account number: 0[...].

Marlon has informed me that he will request a write off for the balance of the arrears on 0[...] excluding rates.’

[27] On 13 May 2019, Ms Rauch responds to Ramesar by way of an email stating in response that it is wonderful news and requesting confirmation that the final settlement payable on the account ending, 0[...], will after the write off, be in the amount of R127 801.38. Ramesar responded on the same date confirming that the amount payable will include rates for the current month, and that all that can be confirmed at that stage is that only rates will be payable. Ms Rauch responds on the same day pointing out that she is arranging with the conveyancing attorneys to provide the necessary guarantees for payment of the settlement amounts upon registration of transfer.

[28] On 24 May 2019 Ms Rauch communicated to Ramesar attaching a letter of undertaking from the conveyancing attorneys in which she states that the undertaking will be issued once there is a guarantee in favour of Absa bank. Ramesar responds on the same date confirming that the letter of undertaking should suffice and that she will be requiring assistance from her client with the rates clearance.

[29] On 7 June 2019 Ms Rauch caused a letter to be sent on the Fairbridges letterhead to Ms Ramesar making reference to the exchange of correspondence relating to settlement of outstanding municipal accounts in respect of the two properties in question. Ms Rauch confirmed in that letter that her client accepted the defendant's offer in full and final settlement of account number 0[...] (which relates to Portion 7 of Erf 1[...] P[...]) in the amount of R 3 879 823.66. Ms Rauch further confirmed her client's acceptance of the defendant's offer to write off all charges on account number 0[...] (which relates to Erf 9[...] P[...]) save for rates, and confirmed that her client will pay the outstanding rates on the aforementioned account.³ Ramesar responded on the same date thanking Ms Rauch and stating 'This is perfect'.⁴

[30] Stemming from that communication, Ms Rauch made reference to several other emails which pertained to the outstanding rates clearance certificates, which then culminated in an email being sent from Ramesar to Hayley Pillay (the conveyancing attorney) and to Ms Rauch where Ramesar confirms that she spoke to Marlon and was advised that they are awaiting a reconciliation. The email further confirms that from the time the parties *agreed on the settlement* figure until that stage, further rates have accumulated on the property leaving the arrears higher *than the settlement*. A response was then received from the conveyancing attorney that the problem arose due to the delay from the date of issuing the letter of undertaking, and therefore the figures were bound to escalate.

[31] On 29 July 2019 Ramesar communicates to the conveyancing attorneys confirming that the requested write offs and discounts were granted to the plaintiff after almost a year of negotiations. Ramesar requested that she required an undertaking once the property is registered so that payment as per the previous arrangement can be sent to her, and that she will then pay over the funds within 24 hours. The email concluded with Ramesar confirming that this has been the agreement with Ms Rauch as well as the sellers.⁵

³ Bundle A1 at 169.

⁴ Ibid at 170.

⁵ Ibid at 197.

[32] On 29 August 2019 the conveyancers communicate to Ms Rauch pointing out that the defendant has arrived at revised figures. From this email Ms Rauch ascertained that the requirement for a guarantee of R570 000 had been cancelled, which meant that she would have to provide an undertaking of R6 570 000, once revised figures were provided.

[33] On the same date a response was provided by Ms Rauch in which she confirmed that the plaintiff was acceptable to the proposed course of action subject to the proviso that the following clause is inserted into the undertaking:

‘This undertaking is given without prejudice to the seller’s rights and is not an admission of the amount owing to the Municipality, and the seller reserves its rights to claim repayment of any amounts paid in excess of the agreed settlement (dated 7 June 2019, a copy of which is attached) in terms of which our client is only bound to pay the amount of R 3 879 823.66 in relation to account number 0[...] (which relates to Portion 7 of Erf 1[...] P[...]) and only rates levied since 30 January 2019 in relation to account number: 0[...] (which relates to Erf 9[...] P[...]).’⁶

[34] In her evidence, Ms Rauch confirmed that her communication included a reconciliation of the correct rates figures for the amount of R 3 879 823.66 from 27 March 2019. She pointed out that the proposal was to issue a guarantee under protest to facilitate the transfer, as the purchasers were threatening to cancel the transactions. On 2 September 2019, Ms Rauch emailed Ramesar to emphasise that the undertaking was given to enable transfer and that such undertaking was given, not as an admission of what is owing to the defendant but so that registration of the transfer could take place. Ms Rauch then confirmed that the undertaking was given under protest and that she recorded the settlement amount in her email. She further confirmed that her client's instructions were not to proceed with the registration transfer if the accounts are not resolved, and requested Ramesar to provide account statements in respect of the relevant accounts in order to see what rates have accrued since 27 March 2019.

⁶ Bundle A1 at 214.

[35] Ms Rauch then testified that she was aware that from correspondence she received that the municipality was changing their accounting system, and that there was always an excuse about why the write-offs had not been completed. She then requested for the defendant to provide an accounting to ascertain which items were being disputed. She then recorded a file note on the same date stating that her client 'will pull the transfer prior to registration if figures with the municipality are not sorted.'⁷ Ms Rauch explained that she made the notation as she was concerned that the pressure was off the municipality to resolve the outstanding amounts that were not written off. Her notation was to record the discussion with Ramesar to point out that the plaintiff still had the opportunity to stop the transaction, which had the consequence of the municipality not receiving payment.

[36] On 18 September 2019, Ramesar communicated to Ms Rauch pointing out that the plaintiff was aware that the current rates needed to be paid because prior to reaching settlement, the plaintiff obtained the statements by their own means and paid both the current and arrear outstanding rates. Ramesar requested assistance from the defendant's accounts department, specifically one "Marlon" to urgently provide the statements. On the very same date Ms Rauch responded by stating that she was not aware of this agreement and pointed out that the problem is that the settlement figure was not implemented on the account. Ms Rauch then communicated that she was not going into further debate about how her client was supposed to get the statements as the matter was regarded as settled. Again, a further request was made by Ms Rauch to the defendant's accounts department manager, Marlon, to provide copies of the full invoices and statements on the account so as to ascertain how the R5.7 million amount was calculated.⁸

[37] Ms Rauch then testified as to the series of email exchanges from September 2019 up until 3 October 2019 where requests were made to the defendant for the invoices or statements, but with no success. The evidence of Ms Rauch also confirmed undertakings from the defendant to provide the statements but such undertakings were never honoured. This culminated in Ms Rauch sending an email communication to Ramesar on 8 October 2019 pointing out that although her client

⁷ Bundle A1 at 221A.

⁸ Ibid at 228.

would have preferred an amicable settlement regarding the overpayment of the municipal account, that she has now been instructed to issue summons as her client was not prepared to wait any further for statements. On 21 November 2019, the plaintiff issued a notice in terms of the Act. Ms Rauch then confirmed the computation of the damages claimed, the overpayment, and that there was no response to the notice.

[38] Under cross examination, Mr Flemming for the defendant dealt with the offer of settlement and the notation of Ms Rauch regarding the seven-day condition falling away. Ms Rauch was challenged on issues relating to the difference between corporate entities and municipalities and that the latter conducts its affairs differently. Mr Flemming also pointed out that Ramesar was not an employee of the defendant but an employee of the defendant's attorneys, which appeared to be a challenge regarding the authority of Ramesar to represent the defendant. Whilst the issue of authority was not pleaded by the defendant I allowed the questioning to ascertain whether that was a new defence that the defendant intended to place reliance upon. The defendant did not persist to challenge the authority of Ramesar and no amendment to the plea was sought.

[39] Under cross-examination, Ms Rauch confirmed that arising from the conversation with Ramesar, it was understood that when the seven-day period fell away, that it was open ended and the offer remained open until she was informed otherwise. She pointed out that the offer remained open and should be accepted within a reasonable period. She emphasised that from her discussions with Ramesar and correspondences exchanged, that there was never any indication that the offer was no longer on the table, and this was specifically in light of her letter of 13 May 2019 where Ramesar confirmed that she had received instructions to accept the offer.⁹

[40] When questioned regarding the date when the defendant made the offer, Ms Rauch confirmed that her understanding was that the settlement figure being offered to the plaintiff was calculated on figures up until 27 March 2019. She agreed that

⁹ Bundle A1 at 220.

insofar as additional expenses after 27 March 2019 were concerned that there would be a reconciliation and those figures would then become the discussion of a separate payment, because the amounts owing up to 27 March had already been agreed. Ms Rauch did however state that any additional charges that accrued would have to be legitimate charges. She confirmed that the additional rates and charges that were accruing on the accounts are borne out of the email exchanges and discussions which dealt with the delays in providing a reconciliation of these additional charges.

[41] Mr Flemming then questioned Ms Rauch on an email dated 29 April 2019 and Ms Rauch's query regarding the plaintiff writing off the bulk electricity charges on account 0[...] and the words recorded on her email that 'Once we have this agreed then I can take final instructions as my client will not settle the 0[...] claim unless the 0[...] account is also resolved.' She confirmed that these were her typed words and that her instructions and her intentions are different to what she typed. Mr Flemming then asked Ms Rauch to comment on the words she communicated which can only be interpreted to mean that if the issue relating to the bulk electricity charges is not resolved then her client will not settle the matter, to which Ms Rauch eventually conceded that this was the interpretation of the words written. This was then qualified by her evidence that from all the correspondence and conduct of the defendant, that it was clear that the matter was settled and that an agreement was reached that rates will only be payable on the second account.

[42] Ms Rauch was also asked to comment on her email communication of 4 April 2019, where she indicated that 'we are working past the deadline for acceptance of the settlement offer...'. Ms Rauch responded by stating that there were other conversations taking place and that this was not an agreement where the parties are binding themselves to words recorded on a page. She further responded to questions regarding escalated rates which arose due to delays and stated that it was part of the agreement that the figures as of 27 March 2019 related to amounts accrued on the account as of that date. She emphasised that anything subsequent to that date still needed to be dealt with, and which included any rates that needed to be added to the account. She pointed out that she kept asking for those rates figures and that the amount that was claimed was the difference between the amount paid

by the plaintiff and the rates that would have accrued for the periods April 2019 to September 2019.

[43] Mr Flemming then took issue with Ms Rauch's testimony that the difference of rates was taken into account when formulating the plaintiff's claim and that it was not pleaded. Ms Rauch accepted that it was not pleaded. Ms Rauch was asked to comment on the fact that there was no agreement reached on how and when outstanding rates were to be paid. Her response was that the agreement was reflected through documentation that it would be payable on transfer, that an undertaking would be issued by the conveyancers upon transfer, and that the figure of R3.8 million plus the additional account, plus the additional months' rates, would have been paid upon the transfer proceeding.

[44] Ms Rauch was challenged on her version that outstanding rates would be paid upon transfer, because transfer could not take place unless rates clearance certificates were issued. Ms Rauch persisted on the version that the outstanding rates would be paid upon transfer. That concluded the cross-examination of Ms Rauch. In re-examination Ms Rauch clarified the contents of the notice of demand and how the amount claimed was calculated. This was computed by taking into account the amount the plaintiff asserted that it paid under protest, that being the amount of R5 594 992.03 and subtracting the settlement amount of R3 879 823.66 and the amount of R 212 761.38, (being the rates charges up to the end of September 2019 for account number 0[...]), which arrived at the claimed damages for an overpayment in the amount of R1 502 406.99.

[45] Ms Rauch then concluded her re-examination by confirming that at no stage did Ramesar or the municipality ever raise issue that acceptance of the defendant's offer did not take place within the seven-day period contained in the offer. Ms Rauch then concluded that the amount claimed includes the estimated rates and that at the point of demand and after the claim was instituted, there was no challenge to the computation of the amount claimed. She testified that the defendant was working towards fulfilling the terms of the settlement and confirmed that the only outstanding issue was that of accrued rates in respect of one account and that bulk electricity charges were to be written off. The plaintiff then closed its case.

[46] The defendant commenced its case by leading the evidence of Marlon Diego Hoskins, “Mr Hoskins” was the manager employed at the Msunduzi Municipality as a debtors manager responsible for collections. He confirmed that he was familiar with the dispute relating to the properties in question and that he was familiar with Ramesar who worked at Mathew Francis Incorporated being the defendant’s current attorneys of record. He confirmed that he was aware of settlement negotiations between the plaintiff and defendant and that there was a settlement offer made, but that the offer contained a condition. He elaborated by stating that in the municipal environment amounts are not fixed in that whilst there may be an offer, billings occurred on a monthly basis, so the figures will change. He confirmed that the offer made to the plaintiff on 27 March 2019 attached a condition that the amount offered in settlement must be paid within seven days.

[47] Mr Hoskins then explained that the seven days was a condition because the billing run for the plaintiff would have taken place on 31 March 2019, and what was outstanding on that particular day would have changed on 31 March 2019. He further testified that he had not authorised Ramesar to extend the offer beyond seven days given the nature of the defendant’s activities. He pointed out that because rates would have been billed to the account on a monthly basis up until transfer of the property, and that any services consumed, in addition to rates, would have been billed. He stated that in addition to rates and services, because the amount outstanding was not settled, interest was billed on the outstanding amount.

[48] He confirmed that the parties in question were able to make an offer of settlement at any time before transfer took place. He explained that he had the authority to approve offers and that he would first require permission for a write-off and that delegation rested with the municipal council. He confirmed the relevant delegated powers and stated that for amounts less than R50 001 the authority rested with the chief financial officer, whilst amounts between R50 001 up to R1 000 001 the delegation rested with the city manager in consultation with the chief financial officer, and any amount greater than R1 000 001 must be referred to the council. At this point Mr van Reenan recalled an earlier objection to the defendant attempting to

found an evidential basis for a defence of lack of authority. Mr Flemming immediately abandoned the issue of authority and commenced with a new line of questioning.

[49] Mr Hoskins denied that the plaintiff was entitled to take the settlement amount of R3 879 823.66 and add the outstanding monthly rates. He explained that the outstanding service charges and most importantly interest from the date that the offer was made and which were not settled within seven days, were not factored in. In cross-examination Mr Hoskins then confirmed that he received the notice of demand, that he was the person to confirm the exact outstanding rates on a particular date, and the amount of interest on any particular amount. He conceded that he was able to provide this information from having access to the municipality's systems.

[50] Mr Hoskins confirmed that in April 2025 he deposed to a confirmatory affidavit in support of an application which sought the postponement of the matter. He confirmed that he was aware that the defendant sought an adjournment to secure discovery of statements reflecting outstanding interest due by the plaintiff. He stated that the defendant relies on the same information that would be in the possession of the consumer given that consumers receive statements on a monthly basis, and that statements would be provided if requested.

[51] Mr Hoskins was then questioned regarding the manner in which the present settlement took place, and asked to comment on the fact that the parties reached settlement on an amount on a specific date, and that the plaintiff can after settlement continue paying whatever rates and charges are due on the property going forward. Mr Hoskins agreed but stated that such a scenario was unusual and that it was not something he dealt with. Mr Hoskins was then asked to comment on an email dated 15 February 2019 which made reference to previous settlement discussions and the fact that he was aware of the email. His response was that 'with the amount of emails that I receive on a daily basis, which is in excess of 300 a day, I read the ones that are addressed specifically to me. The ones where I am copied in, if I get a chance to read them, I read them, if not, I just note them and continue.' He did however concede when referred to an email of 11 March 2019 sent from himself to

Ramesar that there were some discussions going on between Ramesar and the representatives of the plaintiff.¹⁰

[52] Mr Hoskins was then asked to comment on an email communication dated 13 September 2019 sent from Ms Rauch to Ramesar, and which copied Mr Hoskins. He conceded that although there was a request for statements from 1 March 2019 to date, he did not provide such statements. He was asked to comment on a request for statements for June 2019, which was again addressed to him, and he conceded that these statements were not provided by the municipality. Mr Hoskins was then referred to an email from Ms Rauch dated 1 October 2019 addressed directly to him, and which requested for statements for July, August and September 2019, and conceded that these statements could be provided.

[53] Mr Hoskins was then referred to an email communication dated 2 July 2019 and was asked to comment on the contents which recorded as follows: 'In the interim, Moges has informed me that they haven't stopped trying to process the assessment, but, due to the write offs that have been approved by Marlon, this is making it very difficult to load.'¹¹ It transpired from the evidence that the person referred to as Moges is also an official of the respondent employed at the respondent's accounts department. Mr Hoskins in response then conceded that he was writing off amounts pursuant to some agreement being reached and authority obtained. He confirmed that there were proposals made on behalf of the defendant by Ramesar and that there were write-offs which he authorised and did not question. He conceded that there was a mix up between the accounts and that charges were billed on the incorrect property.

[54] Mr Hoskins was asked to comment on the plaintiff's estimate of the accrued rates from April to September 2019 in the amount of R212 761.38, to which he replied that he was not sure why that was done given that the plaintiff was in possession of actual statements and could pinpoint the amount. He was questioned on whether he was aware of the discussions between Ms Rauch and Ramesar, to which he responded that he was copied on some of the correspondences, and had

¹⁰ Bundle A1 at 75C.

¹¹ Bundle A1 at 174C.

some knowledge of their interactions. He then simultaneously maintained that he prioritised emails sent directly to him, as opposed to emails that are copied to him. He conceded that he does not ignore emails to which he is copied and will attend to such emails when he has time.

[55] Mr Hoskins was finally taken through an email communication which queried whether he had provided an update regarding the collection of rates clearance certificates, to which he responded that he does not deal with rates clearance certificates as it is a function of the rates department. He was then asked to comment on the fact that he was aware of an agreement being concluded and he stated that with regard to the settlements he deals with, that the municipality bills for rates and the consumer will be given seven days from the date the settlement is concluded. He stated that it would not be possible for any offer to be valid for longer than seven days. He stated that in this case the plaintiff was given the go ahead on 27 March 2019 and would be billed again on 31 March 2019, resulting in more consumption and rate charges being levied to the account. He concluded that any accrued charges will require municipal resolution, and that he told Ramesar he was going to request a write-off for the balance of arrears on the account ending 0963. That concluded Mr Hoskins' evidence under cross examination and the defendant elected to close its case without any re-examination of Mr Hoskins.

[56] The parties having tendered evidence and provided their respective versions, then proceeded to provide closing arguments. The plaintiff's counsel argued that an adverse inference should be drawn due to the absence and failure of Ramesar to challenge the evidence of Ms Rauch. It was argued that the evidence of Ms Rauch therefore remained uncontroverted.

[57] Mr van Reenen argued that Ramesar ought to have been called as she was an employee of the firm of attorneys representing the defendant. He contended that the defendant, up to the stage of the trial, failed to tender any explanation for Ramesar's unavailability. He argued that there was evidence which she was required to answer in order to gainsay the material evidence presented by the plaintiff.

[58] It was submitted that the evidence of Ms Rauch established that after the conclusion of the agreement, the plaintiff found itself in a difficult position as it concluded an agreement with the defendant which stated that rates in respect of a certain account would be payable after that settlement is reached, effective 27 March 2019. The argument proceeded on the basis that whilst it was unaware as to what those rates were, it repeatedly requested the municipality for that information, both before and after transfer. It is for that reason that the plaintiff then estimated the amount of rates and sued on the basis of its calculation. The evidence from both parties disclosed that at all material times, it was within the knowledge of the defendant, precisely what amount was due. Mr van Reenan submitted that the defendant could have easily presented evidence as to what the proper calculation would have entailed through the leading of Mr Hoskins, but it chose not to do so. The evidence demonstrated that Mr Hoskins was aware of the precise amount of those rates both historically and when he gave evidence in court. The evidence of Ms Rauch which stands uncontroverted is that she estimated the amount of rates and relied upon the information contained in the statements in her possession and inserted that amount in the letter of demand which was utilised to calculate the plaintiff's claim. Despite being in a position to contradict that evidence, Mr Hoskins did not do so.

[59] It was submitted that whilst the defendant's plea was a general denial that an agreement was concluded, its denial through the evidence was on the basis that the offer put forward by Ramesar was to expire after seven days. The defendant did not plead any specific defences which it sought to rely on in the event that an agreement was found to exist. The primary and only defence advanced by the defendant in its plea was a denial of the existence of an agreement. It was further apparent that the defendant also did not respond to the letter of demand when it was sent in 2019 where the estimate of those rates charges was clearly set out.

[60] The plaintiff's counsel submitted that the defendant contented itself by simply failing to produce evidence and then unfairly arguing that the plaintiff has not set out the amount claimed with accuracy. The evidence from Ms Rauch disclosed that the plaintiff was unable to do so because of the defendant's non-responsive conduct. It was further contended that contrary to the argument advanced on behalf of the

defendant, this issue was not one of onus. It is correct that the onus to prove damages with sufficient particularity is on the plaintiff. The question in respect of the arguments advanced is one relating to the sufficiency of evidence and the calculation of damages.

[61] The plaintiff placed reliance in the decision of *Aaron's Whale Rock Trust v Murray & Roberts Ltd and Another*¹² where Berman J held as follows:

'Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to it (but of adequate sufficiency) so as to enable the Court to quantify his damages and to make an appropriate award in his favour. The Court must not be faced with an exercise in guesswork; what is required of a plaintiff is that he should put before the Court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss...'

[62] Whilst the defendant argues that the plaintiff failed to sufficiently quantify its damages in respect of the amount of rates which was to be paid, that amount related to account number 0[...] in terms of the agreement reached between Ms Rauch and Ramesar.

[63] Counsel for the defendant, Mr Flemming argued that inasmuch as the plaintiff states that there was an offer open for acceptance, it was stated by the defendant's attorney's offices that they are 'working with client to reduce the figure'.¹³ He pointed out that it was apparent from the plaintiff's attorney's letter on 4 April 2019, that it recorded that 'My client has advised me that he has made arrangements with their bankers and a bank guarantee can be issued to the value of the *amount eventually settled on*.'¹⁴ Mr Flemming contended that notwithstanding the fact that the seven-day period had "fallen away", the plaintiff's attorney addressed an email to the plaintiff's conveyancers on 4 April 2019 requesting information on an urgent basis. He placed emphasis on that communication which stated that 'Please can I have this information as a matter of extreme urgency as *we are working past the deadline for*

¹² *Aaron's Whale Rock Trust v Murray & Roberts Ltd and Another* 1992 (1) SA 652 (C) at 655H-I.

¹³ Bundle A1 at 84A.

¹⁴ *Ibid* at 85.

*acceptance of the settlement offer in respect of the municipal account offer by the Municipality and need to revert URGENTLY.*¹⁵ (My emphasis.)

[64] Mr Flemming also contended that the claim by the plaintiff that the matter was settled is also contradicted by the plaintiff's attorneys' email dated 29 April 2019, which was addressed to Ramesar,¹⁶ which stated that the defendant will not settle the account unless another account with the municipality is settled, and that accordingly the plaintiff's attorney placed a condition on the acceptance of the averred offer. It was also pointed out that the plaintiff's conveyancer addressed an email to Ramesar on 22 July 2019, which stated that due to the delay in transfer, the amounts due to the defendant had escalated, and this was a date after the acceptance of the offer. It was argued that the outstanding amount and interest due after the averred acceptance had therefore increased.¹⁷ It was contended that the plaintiff's version cannot be accepted as correct, bearing in mind that on 19 August 2019, the plaintiff's conveyancers emailed the plaintiff's director that they are awaiting revised figures, and that Moges from the defendant's rates department is still awaiting figures from Marlon, "Hoskins" the head of the accounts department.¹⁸

[65] Mr Flemming pointed out that from 19 August 2019, it was more than three months after the matter was allegedly settled, and that the inconsistencies in the various emails was pointed out to Ms Rauch, who attempted to verify the plaintiff's case belligerently. He submitted that Ramesar's emails confirmed that the payment is due prior to the issue of the rates clearance certificate, and that such email was in terms of the "Property Rates Act".¹⁹ He argued that Ramesar's email to Ms Rauch on 13 May 2019 communicated to her that payment should be made as the outstanding amount will change on a monthly basis.²⁰

[66] In response to the plaintiff's objection to any evidence led by the defendant which was not specifically pleaded, the defendant contended that the matter cannot be viewed as a proposed settlement between two parties in the ordinary course, as

¹⁵ Ibid at 87.

¹⁶ Ibid at 113.

¹⁷ Ibid at 191.

¹⁸ Ibid.

¹⁹ Ibid at 95.

²⁰ Ibid at 124.

the defendant is a municipality and the facts must be considered in the context of a proposed settlement with an organ of State. The defendant placed reliance on the decision of *Compcare Wellness Medical Scheme v Registrar of Medical Schemes and others*,²¹ to contend that an organ of State is not entitled to do anything that it is specifically prohibited from doing. It is only permitted to act in a way that it is specifically authorised to do. Mr Flemming argued that the defendant's only witness, Hoskins was consistent in his testimony and provided the court with clear evidence of the defendant's case, which confirmed that when the initial offer was made, it was only open for acceptance for a period of seven days, and that he denied that the period of seven days was extended. Mr Flemming contended that the evidence of Hoskins disclosed that condition for the time frames of seven days for an offer to be accepted and paid, was a condition so as to avoid further charges being levied on the next "payment run" and to avoid compound interest to be added to accounts.

[67] Mr Flemming further contended that the court should consider Mr Hoskins evidence which confirmed that if the amount of the offer is not paid within the seven-day period, the matter must again be referred to the defendant's Municipal Council for consideration and approval, which will in turn necessitate Mr Hoskins submitting a new report to council for consideration and approval for a new settlement offer.

[68] Mr Flemming argued that the process of submitting a settlement offer to the defendant's council is confirmed in an email addressed by the plaintiff's conveyancer to various parties.²² It was also argued that the testimony of Hoskins disclosed that approval for a debt write-off has to follow a certain process, which shows that the defendant was legally obliged to follow certain legal protocols to write-off the plaintiffs debt, and this was not done.

[69] Mr Flemming submitted that this was equally relevant to the seven-day period within which the plaintiff had to accept the offer, as this is a part of the decision of council and cannot be extended without council's consent. He argued that this

²¹ *Compcare Wellness Medical Scheme v Registrar of Medical Schemes and others* [2020] ZASCA 91; 2021 (1) SA 15 (SCA) (*Compcare*) paras 30-32.

²² Bundle at 212.

evidence, although not specifically pleaded by the defendant was elicited by the plaintiff, and is therefore admissible as evidence.

[70] The defendant's submissions proceeded on the basis that the protocols are in accordance with the Defendant's Debt Write Off Policy, and that such policy is admissible in the current circumstances. The defendant placed reliance on the Civil Proceedings Evidence Act 25 of 1965, which states that:

'5. Proof of law or anything published in official publications.

(1) Judicial notice shall be taken of any law or government notice, or of any other matter which has been published in the *Gazette*.'

[71] The defendant also contended that the alleged agreement is contrary to the *in pari delicto potior est conditio possidentis* rule, which states that the plaintiff is not entitled to benefit from an agreement which constitutes an illegal transaction (for the lack of Council's approval), and accordingly the plaintiff did not discharge the burden of proving its case.

Analysis

[72] It is clear from the evidence and arguments raised that the main issue in dispute relates to whether an agreement was concluded based on representations contained in the emails exchanged between parties who represented both the plaintiff and defendant. The defendant has belatedly claimed that the plaintiff's claim does not take into account the outstanding rates and service charges, and that the processes within the defendant preclude such a settlement. In my view, the defence with regard to the computation of accrued rates and other charges is an entirely separate issue to that of whether a settlement for the amount of R3 879 823.66 was concluded. It was clear from the evidence of Ms Rauch that the email exchanges on 13 May 2019 and 7 June 2019 demonstrated that the settlement remained extant and that is evinced from the defendant's acknowledging the plaintiff's acceptance well after the seven-day period. These subsequent email exchanges clearly expressed the parties' intention to conclude the settlement on the terms initially agreed upon, and that the seven-day period had fallen away.

[73] In addition, it was clear that there was no express cancellation of the agreement by the defendant or communication that there was no settlement agreement. It is clear from the defendant's email communications and the evidence of Hoskins that it accepted the settlement was concluded with an understanding that the outstanding issues regarding rates would be negotiated at a later stage. I find that whilst the plaintiff's acceptance of the defendant's offer contained conditions regarding the issue of rates, the defendant had expressly accepted the terms proposed by the plaintiff.²³ This was evident from Ramesar confirming that she would be negotiating a reduction in the rates with her client. The court finds that it was clear from the conduct of the parties, and the defendant's acceptance that rates could be negotiated and that the settlement agreement acquired contractual force.²⁴ I am therefore satisfied, from the testimony of Ms Rauch, that the plaintiff has established that an agreement was concluded in full and final settlement for the amount R3 879 823.66. The remaining issue for consideration is the defendant's belated claims of authority and its denial regarding the plaintiff's computation of the amount claimed.

[74] The belated illegality defence raised under cross-examination, attempted to claim that Ramesar was not authorised to enter into the settlement when there was no council resolution. This was not pleaded by the defendant, and the plaintiff's objection was placed on record at the time when the defendant's counsel sought to introduce this new defence. Mr Flemming indicated that he was simply trying to lay a basis for the context upon which the negotiations took place and did not persist with any challenge to the authority of Ramesar.

[75] I have also taken into account that the defendant persisted with this new defence in argument and also placed reliance on the "Property Rates Act" to assert that the property could not be transferred without a rates clearance certificate. It is apparent that the respondent's reliance on the Property Rates Act is misplaced as rates clearance certificates which are required when transferring immovable property to show that municipal debts such as property rates and service charges have been paid are governed by s 118 of the Local Government: Municipal Systems Act 32 of

²³ *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Ltd* [2012] ZASCA 160; 2013 (2) SA 133 (SCA) para 12.

²⁴ *Cgee Alsthom Equipments Et Enterprises Electriques, South African Division v Gkn Sankey (Pty) Ltd* 1987 (1) SA 81 (A) at 92D-F.

2000. I have, in any event, considered that there was again no attempt at seeking any amendment to the plea to introduce this additional new defence, and even if an amendment was permitted, the plaintiff was entitled to a right of replication to possibly plead an estoppel.

[76] The defendant, in my view, was in any event bound by its pleaded case. The defendant attempted through cross-examination of Ms Rauch to raise issues relating to the difference between corporate entities and municipalities. This was however not explored any further, on the basis of the plaintiff's objection. An attempt was again made to introduce this new defence during the testimony of Mr Hoskins who dealt with the delegation of powers within the municipality. This defence was likewise not pleaded and attracted a further objection. It is trite that a denial of authority must be clearly pleaded.²⁵

[77] In *Jowell v Bramwell-Jones and Others*²⁶ the court dealt with the basic rules of pleadings and stated as follows:

'... A defendant is free to frame his exception in any way he chooses, but is bound by the way in which his case is made out in the exception. Jacob and Goldrein on *Pleadings: Principles and Practice* at 8--9 put it thus:

"... For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the Court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings...The Court does not provide its own terms of reference or conduct its own inquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings..."

[78] The defendant's conduct in asserting the belated defences is tantamount to a trial by ambush, which should not be countenanced. The plaintiff was entitled to be alerted to the belated defences raised at trial, so that the plaintiff can be allowed to

²⁵ *Tuckers Land and Development Corporation (Pty) Ltd v Perpellief* 1978 (2) SA 11 (T) at 16G-H.

²⁶ *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 898E-J.

replicate and present factual material in opposition to such defences. The belated defences were not pleaded in the defendant's plea and no reliance on such defences was ever placed in the numerous email exchanges.

[79] The defendant's conduct in persisting with a trial by ambush cannot be permitted, and this is consistent with various decisions of the Supreme Court of Appeal as well as the Constitutional Court.²⁷ The defendant's reliance on the decision in *Compcare* does not assist and is clearly distinguishable in circumstances where that decision dealt with an administrative legality review. The facts pertained to a medical scheme, which sought to change its name and submitted a name-change application to the Registrar of Medical Schemes. The facts in *Compcare* did not pertain to an organ of State and did, in fact, disclose a pleaded ground of review. It is not authority for the defendant belatedly challenging the alleged lack of authority of attorneys to conclude settlement agreements, allegedly without a council resolution.

[80] The common cause facts also disclose that Ramesar confirmed that she was receiving instructions from her clients, and that her client acknowledged the terms of the settlement. Mr Hoskins had, in fact, conceded that he was writing off amounts after an agreement was reached and authority obtained. This concession was telling and puts paid to his claims that there was no settlement agreement. I am of the view that, even if the defendant's claim of lack of authority was to be entertained, there was clearly consensus between the parties regarding the concluded settlement. It is also clear to me that at no stage did the defendant inform the plaintiff or Ms Rauch that a council resolution was required. It is trite that persons contracting in good faith with a statutory body or its agents are not bound, in the absence of knowledge to the contrary, to enquire whether the relevant internal formalities have indeed been complied with.²⁸

²⁷ *Minister of Land Affairs and Agriculture and Others v D & F Wevill Trust and Others* [2007] ZASCA 153; 2008 (2) SA 184 (SCA) para 43; *Singh v Commissioner, South African Revenue Service* 2003 (4) SA 520 (SCA) para 24; *Prince v President, Cape Law Society, and Others* [2002] ZACC 1; 2001 (2) SA 388 (CC) para 22.

²⁸ *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) at 480A-E; *Absa Bank Ltd v Jansen Van Rensburg and Others* 2015 (5) SA 521 (GJ) paras 13-16.

[81] The defendant's dispute regarding the computation of plaintiff's damages is also without merit. It was contended that whilst Ms Rauch quantified the plaintiff's claim, she did not add compound interest, refuse collection, sewage charges and a mandatory meter charge, and accordingly the plaintiff did not prove the quantum of its claim. These alleged accrued charges were not pleaded and cannot be the function of the plaintiff to compute and include such charges. It was clear that the plaintiff utilised what information was in its possession to calculate its claim and was required to do so in circumstances where the defendant simply elected to not produce that information, despite numerous requests. Hoskins, except for speculating that statements were sent to the plaintiff, failed to provide any proof that they were in fact sent or why it was not sent when requests were made to the defendant's attorneys.

[82] It was apparent from the common cause facts that the defendant's failure to provide necessary information necessitated the plaintiff providing an estimated amount of the rates due to the defendant. I do not agree that the defendant is entitled to belatedly rely on any alleged inaccurate computation of damages in circumstances where the plaintiff has demonstrated at all material times, that due to the defendant's dilatory conduct, it was forced to take the necessary proactive steps and that it exercised its best efforts to quantify the damages claimed.

[83] In *Hersman v Shapiro & Co* ²⁹ Stratford J stated:

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages. It is not so bound in the case where evidence is available to the plaintiff which he has not produced; in those circumstances the Court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it not entirely of a conclusive character and does not permit of a mathematical calculation of the damages suffered, still, if it is the best evidence available, the Court must use it and arrive at a conclusion based upon it.'

²⁹ *Hersman v Shapiro & Co* 1926 TPD 367 at 379-380.

[84] In *The Quantum of Damages in Bodily and Fatal Injury Cases*,³⁰ the learned authors stated as follows:

‘... Where, on the other hand, mathematical proof of the damages suffered is in the nature of things impossible, then, provided that there is evidence that pecuniary damage in this regard has been suffered, the court must estimate the amount of the damages as best as it can on the evidence available and the plaintiff cannot be non-suited because the damages cannot be exactly computed. However, the application of this principle is dependent upon the plaintiff having adduced the best evidence available to him. Where he has not done so and the difficulties in assessing the quantum of damages are due to the manner in which he has conducted his case, then the court is justified in ordering, and does order, absolution from the instance.’ (Footnotes omitted.)

[85] I have also observed that when Mr Hoskins was asked to comment on the email communication dated 13 September 2019 sent from Ms Rauch to Ramesar, which copied Mr Hoskins, he conceded that although there was a request for statements from 1 March to date, he did not provide such statements. He was asked to comment on the fact that if he read the email, he would have been aware that a settlement was agreed. His evasive evidence was again telling when he sought to distance himself from the email by stating that the email was not addressed to him and that he does not prioritise emails that are not directly sent to him.

[86] His response to an email from the conveyancers dated 13 September 2019 and which was also addressed to him also elicited the same response, that he did not have sight of the document as it was not addressed to him. When questioned on a request for statements for June 2019, which was again addressed to him, he conceded that these statements were not provided by the municipality, when it could have been provided. When he was referred to the email from Ms Rauch dated the 1 October 2019 addressed directly to him, he conceded that it was simple to provide these statements but could not venture any explanation as to why he did not provide the requested statements.

[87] Mr Hoskins was also questioned on an email dated 2 October 2019 from Ms Rauch to Ramesar which was also copied to Mr Hoskins. It was again put to him that

³⁰ Corbett, Buchanan and Gauntlett *The Quantum of Damages in Bodily and Fatal Injury Cases* 3 ed (1985) at 99.

if he had read that email, he would have been aware that there was a settlement agreement, and an alleged overpayment. The responses from Mr Hoskins were unhelpful and ranged from answering with a question to being evasive, and which resulted in the question being asked at least four times. It was clear from the testimony of Mr Hoskins that he was extremely evasive and contradictory in the evidence that he tendered. It is also telling that he was unable to gainsay the discussions that took place between Ramesar and Ms Rauch and eventually conceded that discussions ensued between both individuals.

[88] Having regard to the material evidence tendered by Ms Rauch especially with regard to the extension of the seven-day period and the discussions surrounding the agreement, it was imperative for the defendant to call Ramesar to dispute the unchallenged evidence. The defendant was also obliged to allege and prove that it provided the relevant rates clearance certificates when requested. It failed to do so, and the court is constrained to draw an adverse inference that Ramesar was not called because she was aware of the concluded agreement and the plaintiff's unsuccessful attempts at obtaining a rates reconciliation. I accordingly reject the evidence of Mr Hoskins that there was no agreement concluded, and that the version presented by the defendant was highly improbable and likewise falls to be rejected.

[89] Ms Rauch was an impressive and consistent witness and demonstrated that the plaintiff produced the best evidence possible in order to quantify its damages. It is clearly not permissible for the defendant to withhold information and then argue that, because it has done so, the plaintiff has not sufficiently particularised the amount of its damages. Ms Rauch's evidence was unchallenged regarding the payment under protest in the sum of R5 594 992.03, from which fell to be deducted the settlement amount of R 3 879 823.66 and the amount of R 212 761.38, (being the rates charges up to the end of September 2019 for account number 0[...]), which totalled the claimed damages in the amount of R 1 502 406.99. I therefore find that the version presented by the plaintiff is the preferable one as compared to the belated claims of the defendant which attempted to raise issues of authority and baldly deny the accuracy of the plaintiff's claimed damages.

[90] Having carefully considered and evaluated all the evidence adduced, I am satisfied that the plaintiff has established on a balance of probabilities that a settlement agreement was concluded, and that the defendant breached the agreement by not issuing the relevant clearance certificates. The plaintiff has established the damages claimed in the amount of R1 502 406.99 which was an overpayment arising from the amount of R5 594 992.03 paid to the defendant under protest.

Costs

[91] I have considered the issue of costs claimed and I am satisfied that there is no reason to deviate from the principle that costs should follow the result in the circumstances of this matter. There are two relevant aspects on the issue of costs, the first being the costs of the action generally, and the cost of the postponement of the matter in April 2025.

[92] I am in agreement that the postponement application should have never been brought. The postponement application was premised on the defendant's claim that there would be a substantial amendment to the plea, together with additional discovery. The application for the postponement was opposed and an answering affidavit delivered. The application was brought a court day before the hearing was due to commence. Despite the postponement being granted, the defendant failed to file any amendment, and the plaintiff was forced to place the defendant on terms to file the alleged substantial amendment. Again, notwithstanding being placed on terms, there was still no amendment filed and no further discovery. The defendant has not explained the failure to file these documents in light of the reasons it tendered for the adjournment. I am in agreement that the application was ill-founded and constituted an abuse of the court process. It would be fair, in my view, considering the complexity of the matter, to order all costs to be taxed on scale B.

Order

[93] In the result, I make the following order:

1. Judgment is granted in favour of the plaintiff against the defendant as follows:
 - (a) Payment of the sum of R1 502 406.99.

- (b) Interest on the sum of R1 502 406.99 at the rate of 10% per annum from date of demand being 21 November 2019 to date of payment.
- (c) The defendant is ordered to pay the wasted costs occasioned by the postponement of the matter in April 2025 on scale B.
- (d) The defendant is ordered to pay the costs of the action on a party and party scale with counsel's fees taxed on Scale B.

D Pillay AJ

Heard on: 3-4 November 2025

Delivered on: 25 February 2026

Appearances

For the applicant: Mr D van Reenen

Instructed by: Austin Smith Incorporated

For the respondent: Mr AG Flemming

Instructed by: Matthew Francis Incorporated