IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A 5061/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED:

In the appeal of:

TARSPRAY CC Appellant

and

ASPHALT SERVICES CC Respondent

Coram: MAVUNDLA et WEPENER et TWALA JJJ

Heard: 20 October 2017

Delivered: 8

November 2017

Summary: Agreement - breach of agreement acceptance by innocent party results in the agreement coming to an end. The innocent party cannot base claims on the terms of contract (unless such right was specifically contracted for) for amounts in terms of the contract after the date of ending the contract but may, apart from accrued claims as at that date, claim damages from the party who breached the agreement.

JUDGMENT

WEPENER J:

[1] This is an appeal against a judgment of Makgoka J, with leave of the learned judge. The matter concerns a claim for payment for amounts pursuant to a written agreement in terms whereof the respondent undertook to do road works at rates contained in the written agreement. The agreement is set out in a written quote and an exchange of emails. Tarfix CC (Tarfix) concluded a contract to reseal a road from Boschhoek to Lyndley's Poort Dam, Northwest Province. Tarfix could do the earthworks and layer works but was not equipped to do the seal work, which it contracted out. The learned judge found for the respondent and ordered the appellant to pay the difference between the amounts found due and an amount set off by the appellant, to the respondent. The respondent being dissatisfied with the amount awarded by the court a quo launched a counter-appeal for additional amounts to be paid to it. The appellant, the respondent below made, as its main attack against the judgment of Makgoka J, the assertion that it was not the contracting party with the respondent but that the respondent entered into a contract with Tarfix. It secondly, disputed the manner of calculation of the amount awarded to the respondent.

Contracting parties

[2] All the witnesses who testified before the court a quo asserted that the agreement was between the appellant and the respondent. These witnesses included employees of both the appellant, the respondent and Tarfix. I firstly deal with the evidence of each of the witnesses who, the court a quo found supported the conclusion that the agreement was indeed concluded between the respondent and the appellant.

[3] I can hardly do better than Makgoka J who analysed the evidence and found that the agreement was indeed between the respondent and the appellant. I consequently quote his findings regarding the evidence of the witnesses, with which findings I fully agree, by liberally referring to the learned judge's judgment. Five witnesses who testified on behalf of the respondent, three of whom, asserted that the agreement was entered into by the appellant and the respondent. The appellant called no witnesses resulting in the evidence being largely common cause. The remaining two witnesses, in the main, testified about the quantum of the claim.

'Marx

[31] Marx was the contract manager of Tarfix for the Boschhoek contract during the relevant period. He testified that he was the contracts manager on the Boschhoek contract. He testified about the prior business relationship between Tarfix and the defendant and Tarfix's indebtedness to the defendant, which led to the cession referred to in above. He did not know of the plaintiff until it was brought into the negotiations by the defendant.

[32] Since the plaintiff had been brought into the picture by the defendant to do the latter's work, he had to get the prices for the plaintiff as to what it intended charging the defendant, and then work out two mark-ups - one market-related for the defendant, and another one for Tarfix to settle its debt with the defendant.

He had Dryburgh's permission to discuss technical issues directly with the plaintiff – normally one would work through a sub-contractor (in this case the defendant). He further requested the plaintiff to furnish him with its company profile, as it had to be approved as a further sub-contractor by Tarfix's engineer.

[33] He explained that the initial agreement with the provincial government on a rate of R22 m, which was meant to be mark-up in order to settle Tarfix's previous debt to the defendant. This, according to him, confirmed that the agreement Tarfix had, was with the defendant, and not with the plaintiff. Had the latter been the case, the plaintiff would have received only R16 053 m^2. The difference between the two amounts was a mark-up to make-up for the settlement of the money owed by Tarfix to the defendant's previous debt.'

Marx further testified that he and MacKinnon on behalf of Tarfix agreed with Mr Dryburgh on behalf of the respondent, that Tarfix would use the services of the appellant on the Boschhoek contract. In that way, a mark-up could be introduced 'to work off' the previously incurred debt of Tarfix to the appellant. Marx also furnished the measured quantities to the appellant for it to compile and furnish its invoice to Tarfix.

'Dryburgh

[34] Dryburgh was a member of the defendant, with 50% shares, and the managing member. He was directly and actively involved with the negotiations, first with Tarfix and later with the plaintiff. He confirmed his involvement in the negotiations referred to above. He was very clear that the defendant would not go on site before a cession was sighed. He testified that as the agreement between Tarfix and the defendant was subject to the cession being approved by the provincial government, only then would the defendant undertake a responsibility to do the surfacing job.

[35] As to the involvement of the plaintiff in the contract, he testified that he had known the plaintiff's Collin Larrett and their respective firms had undertaking a joint venture in the past. As the plaintiff had the skill to do the type of work required in the Boschhoek contract, the defendant engaged the plaintiff as a sub-contractor. He has also introduced the plaintiff to Tarfix. With regard to the

contract, the arrangement was that the plaintiff would deal directly with Tarfix, purely to facilitate ease of communication. MacKinnon and Page-Wood were the contacts persons for Tarfix and the plaintiff, respectively.

[36] He explained that the reason the quotation bill of quantities referred to earlier, was addressed to Tarfix is that he had allowed for direct dealing between the plaintiff and Tarfix. He categorically denied that the contract was between the plaintiff and Tarfix, but between the defendant and plaintiff.

[37] Regarding the cession, he testified that he and Larrett had agreed that the cession should be a three-way cession involving Tarfix, the defendant and the plaintiff, so that the money would filter down in such a way that each of the three firms would be able to directly invoice the provincial government. Once a Tarfix tax invoice had been presented, the defendant would get paid the amount of the invoice, which would be deducted from Tarfix's account with the provincial government. The defendant would in turn grant a cession of the plaintiff that once the defendant had received the funds the plaintiff would be assured of payment. A cession along these lines was drafted but never signed.

[38] According to Dryburgh, after the rates had been agreed upon with Larrett on 27 August 2009, the plaintiff became entitled to charge the defendant the fees and the rates set out in the revised quotation. According to him as of 27 August 2009, a contract was concluded between the defendant and the plaintiff. In turn the defendant contracted with Tarfix.

[39] He is the author of a letter referred informing the contractors of the failure of the provincial government to pay. On 11 October 2009 he stopped the work. The same day he travelled to the site and instructed the defendant's supervisor to stop work as a result of the provincial government's failure to pay. However, that instruction did not affect the plaintiff's obligation to remain on site.

[40] Dryburgh testified that he did not dispute the premise on which Larrett held the defendant liable for payment of its account as stated in Larrett's letter of 123 January 2010, namely, that contractually, the plaintiff had to look to the defendant for payment.

[41] Dryburgh testified that the suggestion in the attorney's letter that the plaintiff's claim against the defendant was premature was simply a delaying tactic – "to buy time". As further demonstration that the defendant understood it to have an obligation to pay the plaintiff, he met Larrett and his wife towards the end of 2009 and assured him that the defendant would endeavour to pay the plaintiff. That decision to pay was made known to the management of the defendant.

[42] During cross-examination, Dryburgh conceded that the cession was crucial to the transaction and that without it, the contract would have been detrimental to the defendant as it would have incurred more liability.

[43] With regard to the invoice of 30 September 2009 issued to Tarfix, but hew plaintiff, Dryburgh explained that the purpose was to advise the Tarfix as to the quantities that had been produced so that Tarfix could put their rates against those quantities, after which Tarfix would inform the defendant how to raise an invoice against those rates.

[44] Dryburgh also conceded during cross-examination that the amounts claimed in the liquidation application did not include what was then owed to the plaintiff by the defendant in the amount of R3,7 m in respect of the surfacing done by the plaintiff on the contract. His explanation was that during July 2010 he had a nervous breakdown, followed by a serious accident, and shortly thereafter, he signed over the commercial running of the defendant to Mr Richard Lavalle, after which he became an employee of the defendant after selling his shares in August 2012.

[45] As a result, at the date of the liquidation application he had relinquished control of the defendant. With reflection, he made a mistake by signing the affidavit which did not include the plaintiff's claim. In fact, he testified, when the defendant received the R3,6 m in August 2011 from Tarfix, his view that an arrangement should be made with the plaintiff to start Paying what was due to them (approximately R3,7 m). He suggested that half of the money be paid, and the rest on an arrangement basis. His suggestion was rejected by Mr Richard Lavalle, who was running the affairs of the defendant at that stage.

Larrett

[46] Larrett is the general manager of the Independent Group of companies, of which the plaintiff is one. He and Dryburgh had a long business relationship, and had been family friends since 1980. As a result, mutual trust had developed between them, such that most of their work commitments were done either telephonically or verbally, based purely on trust and previous experiences. He testified also that the initial, failed negotiations with MacKinnon of Tarfix concerning the plaintiff's possible involvement in the contract, as well as Dryburgh's approaching him shortly thereafter, with a possibility from them to do work on the Boschhoek contract. The correspondence exchanged between then in this regard, has fully referred to earlier.

[47] Regarding the letter written by him on 25 February 2009, he explained that it reflected the rates at which the plaintiff was prepared to do the work, communicated to both Tarfix and Tarspray, for them to be satisfied that the contract had enough value for Tarfix to settle its account with the defendant an or the plaintiff to be assured of payment. Eventually the contractual agreement between the three parties was that Tarfix would place an order with the defendant, which, in turn, would place an order with the plaintiff. The understanding was therefore that the plaintiff was a sub-contractor of the defendant. Pursuant to this understanding, MacKinnon, on 27 August 2009 (p73, C1) e-mailed him to confirm an order with the defendant, and that the defendant should in turn place an order with the plaintiff.

[48] Larrett also testified about the meeting he held with Dryburgh on 27 August 2009 at their offices in East London. Dryburgh travelled there, and met with the management of the plaintiff, including Larrett himself. It was during that meeting that the prices were agreed on. In particular, Dryburgh, on behalf of the defendant, agreed to all prices and terms. A letter confirming the prices was typed immediately after the meeting. A copy thereof was handed to Dryburgh personally before he left. The letter was later that day e-mailed to both Tarfix and the defendant. He made reference in that letter to the cession, and requested a copy thereof, to forward to its attorneys for advice.

[49] He conceded that no formal order was received from the defendant, but explained that there was a verbal commitment between him and Dryburgh

confirming that the plaintiff should go ahead with the work. Although the tripartite cession involving Tarfix, the defendant and the plaintiff was important, in the absence of the cession, the plaintiff would look to the defendant for the payment.

[50] Larrett also testified about his efforts to obtain payment from the provincial government involving interaction with Dryburgh and the officials of the provincial government. On 9 April 2010 he received an email from Dan Senekal of the defendant, in which Senekal suggested that in order to effectively include the plaintiff's claim when the defendant's claim against Tarfix, the plaintiff should cede its right to the defendant, so that the latter would act on behalf of the plaintiff to secure payment. It is not clear what became of this proposal.

[51] On 31 May 2010 he wrote an email to Dryburgh, alluding to the possibility that Tarfix had received payment from the provincial government and that such payment had been intercepted by SARS for Tarfix's tax liabilities. In the penultimate paragraph of the email, he mentioned an earlier visit to Dryburgh, who, on behalf of the defendant, had made an undertaking to him that the defendant would, with effect from May 2010, start making monthly payments to reduce the defendant's liability to the plaintiff.

[52] On 19 July 2010 he was copied an email from Senekal (defendant) to the plaintiff's accounts manager, in which, among others, the defendant committed itself to collect the amounts owing to it by Tarfix and pay the plaintiff "as and when" the defendant is paid. Larrett testified that he did not agree with Senekal's supposition that the payment to the plaintiff depended on the defendant receiving payment from Tarfix. He therefore replied to Senekal's email mentioned above, and among others, joined issue with Senekal's assertions of the defendant's conditional liability to the plaintiff. He repeated the plaintiff's stance that it looked to the defendant for payment.'

Larrett further testified about the reasons why the respondent would not do business with Tarfix. Firstly, Tarfix had a bad reputation in the market place and secondly, the conduct of MacKinnon was such that the respondent refused to deal with him and Tarfix.

'Page-Wood

[57] He also testified about the tax invoice for R1 118 262.73 dated 30 September 2009 issued by the plaintiff to Tarfix, referred to earlier, and the credit note on 16 September 2009, also in the name of Tarfix. He explained that one of the plaintiff's account clerks erroneously issued the tax invoice to Tarfix instead of the defendant, hence the credit note. On realising this error, the same person generated a credit note dated 16 September 2009. He attributed to mere human error, the fact that the date of the credit note precedes the tax invoice it purportedly cancelled out.

[4] The direct evidence of the witnesses was that the appellant and the respondent entered into the agreement, and not the respondent and Tarfix. There is no reason not to accept that evidence.

[5] There are a number of objective factors which support the direct evidence of the witnesses. Firstly, the two quotations sent by the respondent on 25 August 2009 and 27 August 2009 are addressed to the appellant, Tarfix being copied therewith. In an exchange of email messages the appellant's representative, Mr MacKinnon, confirmed the 'order with Tarspray' and confirmed that Tarspray 'must place this order' with the respondent. After acceptance of the quotation, MacKinnon pertinently said:

'as the order is between Tarspray and', the respondent.

There is consequently no scope for the contention that the agreement was not between appellant and respondent.

[6] Secondly, the parties intended concluding a three-way cession. The respondent requested its attorney to settle a cession agreement to obtain security for payment. The attorney, after settling it, referred to the fact that the details of the sub-contract with Tarspray should be added to the document. These instructions emanated from the respondent's Mr Larrett (Larrett) indicating that there can be no doubt that Larrett believed that the respondent was contracting with the appellant. In addition, the rationale for the cession between the appellant and Tarfix indicates that Tarfix

contracted with the appellant and not with the respondent. It was common cause that the first cession document was so drafted to enable Tarfix to settle its existing debt to the appellant.

[7] Thirdly, when it became apparent that Tarfix would not be paid in respect of the contract which it had with the Northwest Province, each party informed its contracting party: Tarfix advised the appellant to stop work and the appellant, in turn, advised the respondent to stop work. The evidence of Dryburgh that he issued the instruction to stop work to the appellant's contracting party, the respondent, remains uncontested.

[8] Fourthly, the manner in which the appellant made the invoice for the work performed by the respondent supports the respondent's version. Believing in the existence of a valid cession, Tarfix instructed the appellant to raise the invoice against the Northwest Province. This was done as there was no contractual relationship between the respondent and Tarfix. If Tarfix had contracted with the respondent, commercial sense would require that it would request the respondent to raise the invoice and not the appellant.

[9] Fifthly, the respondent issued three pro-forma invoices to the appellant. Although the appellant relied heavily on a tax invoice raised in the name of Tarfix, it omits the reasonable and plausible explanation given by Page-Wood that this was an error and that a credit note was immediately issued to rectify the error.

[10] Sixthly, the attempts to obtain payment were consistently directed at the appellant.

[11] Seventhly, counsel for the respondent submitted that the appellant admitted its indebtedness to the respondent on more than one occasion. Counsel's submission has much force. In response to a demand for payment, the appellant did not deny a liability to the respondent but indeed stated that the appellant 'does admit being indebted to your client for the amount claimed, but any such claim at this juncture is entirely premature'. The reason for the latter statement was explained by Dryburgh. The appellant first had to be paid by Tarfix before it could pay the respondent and, because this did not form part of the agreement, the tactic to

allege a premature claim was followed to buy time. In addition, Dryburgh admitted to the respondent's indebtedness and undertook to make payment to the respondent from 31 May 2010. Also, on 19 July 2010, Mr Senekal, on behalf of the appellant, who wrote to Tarfix, said:

'Tarspray has committed itself that it will pursue all possible means and avenues to collect the amounts owing to it by Tarfix (Pty) Ltd and will pay Asphalt Services as and when we (Tarspray) are paid.'

These admissions stand in stark contrast with the appellant's case in the court below and on appeal.

[12] Eighthly, appellant applied for the liquidation of Tarfix. I do not deal with all the submissions and passages relied upon by counsel for the respondent. One such reference, in my view, would suffice. The appellant filed affidavits in the application to liquidate Tarfix. In the affidavit Mr MacKinnon stated that Tarfix '. . . has represented and undertaken to the applicant (Tarspray) that once the respondent (Tarfix) was paid by the provincial department, it in turn would pay the applicant (Tarspray).' From this it is clear that appellant contended that Tarfix was indebted to it for the amount of the invoice for work done by the respondent.

[13] Ninthly, the appellant pleaded that there was indeed an agreement entered into between the respondent and the appellant on 27 August 2007 in East London where the parties were represented by Larrett and Dryburgh. This part of the plea supports the respondent's case. It then alleged in the plea:

'3.3.42 even if a valid and binding cession was not concluded, that should Tarfix receive moneys due under the Boschhoek contract, it might pay to the defendant the amounts that would otherwise be due to the defendant had a cession been validly concluded.'

3.3.5 There was accordingly a tacit, alternatively there was express agreement, in terms of which should the defendant receive payment of the sum due in respect of the Boschhoek contract from the client or from Tarfix, it would pay to the plaintiff such amount due to it in respect of the contract with Tarfix.'

There is no basis in the evidence that this limited agreement was indeed concluded, but the admission that an agreement was concluded is further support for the finding that the agreement was indeed concluded by the appellant and the respondent.

[14] It was thus shown on a weighty balance of probabilities that the agreement was entered into between the respondent and the appellant.

Quantum

[15] Before I deal with the question of any amount that may be owing by the appellant to the respondent and *vice versa* pursuant to the agreement, it is necessary to, shortly, have regard to the nature of the claim and the pleadings. The respondent claimed payment pursuant to the written agreement. There were two other claims: one referred to as de-establishment costs and the other, a claim for loss of profit. These claims were abandoned at the outset of the hearing and they need no further discussion. Of importance, however, remained the respondent's case on the pleadings that:

'In breach of the agreement defendant instructed plaintiff on 11/10/2009 to stop work due to the fact that defendant was unable to pay plaintiff as a result of disputes defendant has with its contractor. Defendant accepted the breach.'

The allegation that 'defendant' accepted the breach is clearly erroneous. The respondent's allegation was that the appellant breached the agreement, the acceptance whereof could only have been exercised by the respondent as an appellant could not accept its own breach to put an end to an agreement. The pleading properly construed alleges that the respondent accepted the appellant's breach, which occurred on 11 October 2009. The matter was clarified in further particulars where it is said, unambiguously, that the respondent accepted the appellant's breach on 11 October 2009. From that day the contract was at an end[1], and unless the written agreement provided for the calculation of amounts payable or claims in such an event, the respondent's entitlement to pursue rights

[1] *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) at 22E.

under or in terms of the contract had come to an end. There are no such stipulations in the written agreement and none were relied upon or argued to exist. Thus, any claim after 11 October 2009 would have had to find a basis in damages but certainly not in the terms of the contract.[2] In so far as the respondent sought payment or the enforcement of accrued rights there is no difficulty.[3]

[16] The importance hereof lies therein that some of the amounts sought by the respondent in the counter-appeal, as it was sought in the court below, were sought in terms of the agreement. The respondent sought payment for the work completed (an accrued amount), standing time (both an accrued amount and an amount not yet accrued) as well as pre-coated stone delivered to site but not used. It is the latter amount which the respondent can recover by way of damages as it is not covered by the terms of the contract nor was it an accrued claim. The respondent failed to institute such a claim after the contract came to an end and it is not entitled to these damages after acceptance of the breach, save by way of a claim for damages.

17] The court *a quo* nevertheless, included an amount of R251 497.08 for pre-coated stone delivered to site. I am of the view that this amount was erroneously included in the amount awarded to the respondent as it falls outside a claim for accrued amounts but should have been claimed as damages. The amount awarded against the appellant should consequently be reduced by the amount so awarded for the pre-coated stone.

[18] As far as the completed work is concerned, Marx testified that a total of 111 000 m^2 had been sealed by the respondent. Marx however, did not meticulously measure the quantities; he testified that his measurements led to interim certificates and that inaccuracies would be rectified when the final certificate was issued. He stated that when the interim certificates are raised he normally under-claims slightly in order to avoid disputes. Marx's calculations also differed to the

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[2] *Crest Enterprises Ltd v R Beleggings Bpk* 1972 (2) SA 863 (A) at 869A-870B:

[3] See *Shelagatha Property Investments CC v Kellywood Homes (Pty) Ltd* 1995 (3) SA 187 (A) at 196F-H and *Thomas Construction (Pty) Ltd (In Liquidation) v Grafton Furniture Manufactures (Pty) Ltd* 1988 (2) SA 546 (A) at 564B-D.

records kept by Marais who was the respondent's manager on site. Marais kept a diary of measurements and he measured with a measuring wheel. The evidence was not disturbed in cross-examination and the measurement of 116 325 m^2 of work performed can be accepted as accurate. In the circumstances, the court a quo should have awarded the respondent the agreed rate times 116 325 m^2 completed work at the time when the contract came to an end. That amount would be R1 867 365.22 – an amount of R85 482.22 more than the court allowed based on the quantity of 111 000 m^2 utilised by the court and as testified to by Marx.

[19] The appellant, contrary to the terms of the agreement, argued that certain variations to the rate of R16.053 should be applied. But the appellant did not plead such a case nor was evidence tendered by the appellant in support thereof. It would be difficult if not impossible to apply a variation rate without evidence having been put forward by the appellant to firmly establish such a case, even though not pleaded.

[20] The claim for standing time has its origin in the contract. The court a quo disallowed standing time from 12 October 2009. I have set out above why the respondent is not entitled to claims *ex contractu* after 12 October 2009. It was argued, as Marx testified, that the respondent was compelled to remain on site in order to prevent a breach of contract. But this does not assist the respondent. It accepted the breach by the appellant on 11 October 2009 and the contract was accordingly at an end on that date. The respondent can therefore not claim standing time beyond the end of the contract. The evidence regarding the respondent's continued presence on site due to discussions between the witnesses does not take the matter further. The contract was at an end and no new contract after 11 October 2009 for payment for standing time was relied upon. The standing time allowed by the court a quo was consequently accurate and an amount of R165 000 was awarded up to and including the date of the acceptance of the breach, 11 October 2009. The appellant argued that the respondent should not be allowed an award for standing time even in the amount that was awarded, especially for Sunday standing time. There is no merit in the

argument. The direct evidence was that the respondent did not stand down its operations on Sundays and it, as a matter of principle, continued work on these days in order to promote the expedient finalisation of the contract. There is nothing to gainsay this evidence and the attack on this award must fail.

[21] During argument the appellant's counsel referred to a credit which appeared on the accounts of the respondent and which was not explained. But it was also not explained in evidence and there in nothing that this court can or should do about it.

[22] Prior to the trial the respondent objected to the large volume of documents which the appellant insisted upon being included in the bundle, including some duplication of documents. This resulted in a substantial portion of the appeal record being irrelevant and unnecessarily reproduced. A court should discourage such conduct and I will reflect this in the costs order.

[23] In the circumstances, the appeal regarding the contracting party falls to be dismissed. The appeal regarding the amount awarded for the stone succeeds, and the award must be reduced by R251 497.08. The cross-appeal regarding the additional standing time is dismissed. The cross-appeal regarding the increased amount for the actual work completed succeeds, and the award must be increased by R85 482.22.

[24] Finally, it was common cause that the respondent was indebted to the appellant in the amount of R1 619 728.71 and that the amount should be set off against the amount owed to the respondent. The parties were also in agreement as to the manner in which interest is to be awarded.

[25] I propose that the following order be made:

1. The appeal is dismissed with costs save in so far as the amounts awarded by the court a quo is varied herein.

2. The appellant is to pay the costs occasioned by the inclusion of volumes 2 and 9 to 19 of the appeal record on an attorney and client scale.

3. The cross-appeal is allowed in part and is dismissed in part.

4. The order of the court a quo is substituted with the following:

    4.1 In case number 34486/2012 judgment is given in favour of the appellant against the respondent in the amount of R1 619 728.71.

    4.2 In case number 26870/2011 judgment is given in favour of the respondent against the appellant in the amount of R2 032 365.22.

    4.3 The amount in the para 4.2 above is set off against the amount awarded in para 4.1 above, resulting in a difference of R412 636.50.

    4.4 The appellant is ordered to pay the amount in para 4.3 above to the respondent.

    4.5 The appellant is ordered to pay interest on the amount referred to in para 4.3 above at the rate of 15.5%, calculated from 15 July 2011 to date of final payment.

    4.6 The appellant is ordered to pay the respondent’s costs in case number 26870/2011 inclusive of senior counsel fees as well as the costs of the postponement reserved on 12 October 2012 on the scale as between attorney and client.

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Wepener J

I agree and it so ordered.

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Mavundla J

I agree.

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Twala J

Counsel for Appellant: A.G. Sawma SC

Attorneys for Appellant: Fairbridges Wertheim & Becker

Counsel for Respondent: H van Eeden SC

Attorneys for Respondent: Muller Voigt Attorneys