IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

2 DECEMBER 2021

DATE SIGNATURE

Case no: 35714/2020

In the matter between:

ABRINA 3765 (PTY) LTD T/A BMW SANDTON **Applicant**

and

ZASCOTIME (PTY) LTD **Respondent**

JUDGMENT

FRIEDMAN AJ:

1 In this case, the applicant ("BMW Sandton") seeks an order against the respondent ("Zascotime") for repayment of a sum of R552 000 including VAT, together with interest from 10 June 2020, alternatively date of service of the application, and costs. The money was paid by BMW Sandton in order to procure the use of an outdoor sign ("the outdoor sign") owned by Sunrise Technologies (Pty) Ltd ("Sunrise") – located on the corner of South and Rivonia Roads in Sandton – for the purpose of advertising. Zascotime is an agent of Sunrise.

2 BMW Sandton says that the outdoor sign, which is situated near its premises, is unsightly and a nuisance and, before concluding its lease agreement with its landlord, it informed the landlord that it wanted the sign removed. The landlord promised to do its best to accommodate BMW Sandton, but pointed out that it could not guarantee that it would be able to procure the sign's removal because the co-operation of the City of Johannesburg would be necessary to do so. BMW Sandton made enquiries and discovered that Zascotime was responsible for arranging advertising on the outdoor sign. Representatives of Zascotime informed BMW Sandton that they had lots of companies, most of which were competitors of BMW, which were interested in advertising on the outdoor sign. Because BMW Sandton was anxious about the prospect of a competitor advertising on the outdoor sign, it decided to advertise on the sign itself.

3 Zascotime disputes some of these allegations, but not much turns on that for our purposes.

4 It is common cause that BMW Sandton paid R552 000 inclusive of VAT in order to advertise on the sign. BMW Sandton says that the outdoor sign is illegal because it is not compliant with the Outdoor Advertising By-Laws made in terms of section 13(a) of the Local Government: Municipal Systems Act 32 of 2000 published in the *Provincial Gazette* on 18 December 2009 ("the by-laws"). BMW Sandton says that Zascotime's representatives did not disclose to BMW Sandton that the outdoor sign was illegal and that the City of Johannesburg had applied to the High Court to have the outdoor sign demolished.

5 BMW Sandton's primary contention is that it was induced to conclude an agreement, in terms of which it paid the R552 000 which it claims in these proceedings, by the material non-disclosure by Zascotime of the illegality of the sign and the pending litigation to remove it. In its letter of demand to Zascotime on 8 June 2020, BMW Sandton's attorneys said that, had BMW Sandton known that the signboard was illegal and/or that the City had brought an application to have it removed, BMW Sandton would never have entered into any agreement with Zascotime and would have, instead, supported the City's application for the demolition of the outdoor sign.

6 There was some equivocation on BMW Sandton's part in the founding affidavit about whether an agreement was reached between it and Zascotime in relation to the outdoor sign. This related mainly to the contention of BMW Sandton that

it failed to sign the written agreement, presented to it by Zascotime (and annexed to Zascotime's answering affidavit), providing that BMW Sandton's advertising would be displayed for a period of twelve months.

7 Whether the agreement between the parties is the written agreement annexed to the answering affidavit, or an oral agreement with simpler terms, is ultimately irrelevant. In the written agreement, there is a clause which provides that "neither party has been induced to enter this agreement and to undertake the respective obligations which they have undertaken in terms hereof by any representations, warranties, whether express or implied or any other matter or condition other than as recorded herein". There is some suggestion in the papers, albeit feint, that BMW Sandton may have denied the conclusion of the written agreement to escape the implication of this clause.

8 However, if the agreement was induced by a material non-disclosure, it is void *ab initio* and therefore all clauses must fall (see, for example, *Spenmac (Pty) Ltd v Tatrim CC* 2015 (3) SA 46 (SCA)). Therefore, even if the parties agreed to this clause, it would have no impact on either BMW Sandton's argument that the entire contract must fall because it is illegal or its argument that the entire contract must fall because of a material non-disclosure. So, the dispute about whether the written agreement was actually signed, which receives disproportionate attention in the papers, is ultimately a red herring.

9 Zascotime's answering affidavit gives some compelling reasons as to why the agreement must have been signed. I agree with Zascotime that the probabilities

are that the agreement was signed and that, at the very least, an email sent by a representative of BMW Sandton informing Zascotime that the agreement was ready for collection is evidence that BMW Sandton agreed to its terms. But since, either way, BMW Sandton is entitled to pursue its claims, it is not necessary to decide whether Zascotime is correct in this regard.

The pending litigation

10 In 2019, the City of Johannesburg instituted proceedings against Sunrise for an order declaring, amongst other things, that the outdoor sign was unlawful and must be removed. This is the litigation to which I referred in paragraph 4 above and I shall describe it as "the COJ litigation" below. In 2020, BMW Sandton's landlord ("Smartgrowth") instituted its own application against Sunrise asking for the same relief sought in the COJ litigation. Both of these applications are currently pending. Zascotime, in its answering affidavit, says that the City has not taken any steps to set its matter down since March 2020 and that there is no set down yet in the Smartgrowth application either. In the time since the papers were finalised in this matter, the Smartgrowth application was set down and heard before Bester AJ. As far as I am aware, no judgment has yet been delivered.

11 The relevance of these two applications will, hopefully, become clearer below.

SHOULD THE APPLICATION SUCCEED?

BMW Sandton's arguments on illegality

12 In support of its argument that the outdoor sign is illegal, BMW Sandton relies on two provisions of the by-laws. First, in section 3.1 of the by-laws, it is provided that no person may erect any advertising sign or use or continue to use any advertising sign without the prior written approval of the Municipality first having been obtained. Secondly, in section 6(3)(c)(iii), it is provided that any advertising sign must be clear of any road traffic signs and must be positioned no closer than 50 meters from the centre of an intersection. BMW Sandton says that the outdoor sign is illegal by virtue of both of these sections of the by-laws.

13 As evidence of the contravention of section 3(1), BMW Sandton relies on a letter dated 19 October 2017 written by an employee of the COJ. There is some dispute as to whether this letter is good evidence that the City did not authorise the use of the sign. There are various extracts of the affidavits in the COJ litigation forming part of the papers in this matter. The stance of the COJ in that litigation is clearly that it did not give prior written approval for the use of the outdoor sign. All of the evidence before me seems to suggest that the requirement of prior approval was not satisfied. I return to discuss this briefly below.

14 Regarding the contravention of section 6(3)(c)(iii) of the by-laws, BMW Sandton relies on evidence forming part of the application in which the landlord seeks the removal of the outdoor sign (ie, the Smartgrowth application) – in particular, a diagram prepared by a land surveyor which shows that the outdoor sign is located 36m from the intersection (ie, less than 50m). This allegation must be

taken to have been established, since it was met with a bald denial in the answering affidavit.

15 The conclusion that the outdoor sign is illegal appears to be straightforward. However, the position is complicated somewhat by section 8(1)(j) of the by-laws. It provides that an advertising sign is not covered by the by-laws at all if the sign is part of a "Council approved initiative which is deemed to be in the public interest or which is deemed to be of local, Provincial or National interest". It seems that the point has been taken by Sunrise in the other litigation which I have described above that the outdoor sign falls under this exemption.

16 The COJ has filed a replying affidavit in the COJ litigation, denying vociferously that the outdoor sign was part of a "Council approved initiative". Although *Mr Stevens*, who appeared for Zascotime, referred me to section 8(1)(j), and explained that Sunrise (the owner of the outdoor sign) contends that the outdoor sign is exempt from the by-laws because of section 8(1)(j), there is insufficient evidence before me on this issue. What evidence as there is, would suggest that section 8(1)(j) does not apply. But the evidence is not conclusive. For reasons I give below, this is happily something that I need not decide.

Non-disclosure

17 *Mr Hollander*, who appeared for BMW Sandton, placed great emphasis on the non-disclosure leg of his case. Relying on the principles summarised

conveniently in *Absa Bank Ltd v Fouche* 2003 (1) SA 176 (SCA), *Mr Hollander* argued, in essence, the following:

17.1 When BMW Sandton concluded the agreement with Zascotime, it did not know that the COJ took the view that the outdoor sign was illegal and had instituted proceedings for (a) a declaration to that effect and (b) an order removing the sign.

17.2 These facts were, however, within the knowledge of Zascotime.

17.3 These facts were material to the decision by BMW Sandton to conclude the agreement because, had BMW Sandton known them, it would not have concluded the agreement.

17.4 The agreement was therefore induced by Zascotime's material non-disclosure and must fall.

17.5 Once the agreement is deemed to be invalid, there is no reason why restitution (in the form of repayment of the sum paid for the advertising service) should not follow.

18 *Mr Stevens* contended that the non-disclosure of the pending COJ litigation was not material – ie, Zascotime had no duty to disclose the litigation. His argument, in essence, was the following:

18.1 The City's application was launched on 27 May 2019.

18.2 On 1 August 2019, the City of Johannesburg issued a notice in which it called on all owners of advertising signs to make full disclosure of the details (relating to ownership, location and the like) within 60 days, failing which enforcement action against illegal signs would be taken. *Mr Stevens* described this as a moratorium against enforcement of the by-laws. Although I have some doubts about the proper interpretation of the COJ's notice and whether it qualifies as a moratorium in the proper sense, I shall describe it as "the moratorium" below.

18.3 On 30 September 2019, Zascotime made a declaration, which qualified it to be covered by the moratorium.

18.4 After that time, the COJ took no further steps in its litigation. In March 2020, when the parties concluded the agreement, Zascotime was therefore confident that it would be able to honour the terms of the agreement for a 12-month period (which is what the agreement envisaged) because it was protected by the moratorium.

18.5 In these circumstances, there was no reason to inform BMW Sandton of the COJ's litigation because, by that time, it was confident that it could comply with the terms of the agreement and that the City would not revive its litigation while the moratorium was in force.

19 The debate between the parties about materiality turns, in large part, on details relating to the chronology. *Mr Hollander* pointed me to the following:

19.1 The substantive decision ultimately reflected in the August notice was made in March 2019.

19.2 The City's litigation was launched, as I have already mentioned, on 27 May 2019.

19.3 After the moratorium notice was issued on 1 August 2019, the City advanced its litigation by filing a replying affidavit on 23 September 2019.

20 Based on this chronology, *Mr Hollander* argued that the City was blowing hot and cold in its approach to the supposed moratorium. At the very least, its conduct in filing a replying affidavit after the moratorium was in place suggested that there was ambiguity as to whether it intended to pursue the litigation in the face of the moratorium. Therefore, because Zascotime could not be sure that the City would hold its application in abeyance as a result of the moratorium, it had a duty to disclose the existence of the litigation to BMW Sandton.

21 In response, *Mr Stevens* argued that, at the time when the City filed its answering affidavit on 23 September 2019, Zascotime had yet to make the declaration required by the notice. It did so shortly thereafter (on 30 September 2019), thus bringing itself within the terms of the moratorium. From that point, it was entitled to assume that its ability to rent out the outdoor sign for advertising purposes would not be impeded by the City, until at least the expiry of the moratorium period in August 2022. It therefore had no reason to disclose the existence of the litigation to BMW Sandton.

22 It seems to me that the following issues are important in resolving the question of the materiality of the non-disclosure:

22.1 A barely legible version of the moratorium notice is buried in the papers. Thankfully, it is reproduced verbatim in the answering affidavit. It provides that the Executive Director: Department of Development Planning, duly authorised by the City Council, gives all owners of advertising signs 60 days to declare the existence of the signs, and whether or not the sign in question was erected with the City's approval. Having set out in the notice the various pieces of information that had to be provided in the declaration, the notice provided that a failure to make the declaration would result in the City taking steps against each owner of a sign, which might include its removal.

22.2 In its press release explaining the moratorium, which forms part of Zascotime's answering affidavit, the City of Johannesburg explained that, in issuing the moratorium, the "City has undertaken to the sector that it will not take any punitive action against any advertising assets declared to the City provided an agreement is reached on a timeframe to remove such sign if found to be none [sic] compliant with the Bylaws within the 36-month period".

22.3 The stance taken in the answering affidavit is that the "decision of COJ to proceed with the COJ application is contrary to COJ's resolutions and the public notice, as well as Sunrise's due compliance". In the answering affidavit, Zascotime essentially takes the view that both the decision of the COJ to proceed with its application, and BMW Sandton's

application (ie, this matter), are precluded by the City's notice and the subsequent declaration submitted by Zascotime. But, later in its answering affidavit when dealing directly with the non-disclosure complaint, Zascotime says that it had no duty to disclose the existence of the litigation to BMW Sandton because the litigation "is effectively dormant and COJ seem [sic] to have abandoned the litigation, correctly so, given the COJ resolutions, the transitional period and Sunrise's confirmed participation therein".

22.4 It is noteworthy, in my view, that the City in its replying affidavit filed on 23 September 2019, expressly took the point (in paragraphs 40 to 42) that the outdoor sign did not form part of the moratorium. It is also noteworthy, in my view, that in March 2020 Sunrise, which is Zascotime's principal, filed an extensive supplementary affidavit in the City's application to deal with the implications of the moratorium for the litigation. Both of these facts suggest to me that it would have been unduly cavalier for Zascotime to assume that the moratorium constituted an iron-clad answer to the prospect of the sign being declared to be unlawful.

23 There is one final consideration which I must address (I have already addressed some aspects of it briefly above). Although BMW Sandton, curiously in my view, devoted some energy in the founding affidavit to denying that it signed the written agreement in respect of the outdoor sign, Zascotime took the stance – very forcefully it has to be said – that the agreement must have been signed. At the very least, according to Zascotime, BMW Sandton's

representative gave an unequivocal acceptance of the written agreement's terms. One of the terms of the written agreement, clause 8, is headed "Objections to Advertiser's Advertisement". It provides as follows:

> **8. OBJECTIONS TO ADVERTISER'S ADVERTISEMENT**
>
> 8.1. In the event of any objection being made to the **advertiser's advertisement** by any third party which results in a formal demand being made to **Zascotime** to remove the face, then and on being so advised by **Zascotime**, the **Advertiser** shall immediately elect whether **Zascotime** shall give effect to the demand or not.
>
> 8.2. In the event of such election being that **Zascotime** does not give effect to the demand, then by its signature hereto the **Advertiser** hereby indemnifies **Zascotime** against any and all claims arising from or in connection with the objections contained in such demand and shall furthermore, within three days from the date of such notification, furnish **Zascotime** with an acceptable guarantee covering any and all legal costs and any judgement which might be granted against **Zascotime** arising from such objection.
>
> 8.3. In the event of any litigation, the **Advertiser** shall procure the services of its own attorneys and at its own cost defend and/or oppose any action and/or application contemplated above. Notwithstanding the aforegoing, **Zascotime's** attorneys shall have the right to obtain any information they may require from the **Advertiser's** attorneys in regard to such defence or opposition as aforesaid and **Zascotime's** attorney's costs in this regard shall form part of the guarantee furnished by the **Advertiser** as provided for in 8.2 above.
>
> 8.4. In the event of the **Advertiser** requesting **Zascotime** to accede to the demand referred to above, or in the event of a competent Court of Law ordering the **face** to be removed as a result of the **advertisers advertisement** contravening any statute, ordinance, law or by-law of any competent authority then and in such event the **Advertiser** shall not be entitled to withhold any payment hereinbefore referred to and shall furthermore continue to be liable for the rental referred to in 4. above.

24 The proper meaning of this clause, and its implications for the non-disclosure case, were not debated in argument. When I considered the agreement again after argument, in my preparation of this judgment, it occurred to me that clause 8.4 might have imposed a heightened duty on Zascotime to disclose the existence of the COJ litigation. In particular, my concern was that clause 8.4 might have meant that, if Zascotime were to have been ordered to remove the outdoor sign pursuant to the COJ succeeding in its application, it could have relied on clause 8.4 to claim an entitlement to keep the R552 000 which BMW

Sandton paid to advertise on the sign. I accordingly invited the parties to make further written submissions on this question.

25 Both parties took up the opportunity to file short notes on these issues, and I am grateful to them for doing so.

26 In his short note, *Mr Stevens* argued as follows:

26.1 Clause 8 as a whole, and clause 8.4 in particular, relates to objections as to the contents of an advertisement to be placed on the outdoor sign, and not the outdoor sign itself.

26.2 The whole of clause 8 relates to the advertiser's advertisement and any objection that a third party might make to it – ie, an objection to the content of the sign. The demand described in clause 8.4 is specifically directed to the demand to which reference is made in clause 8.1 – ie, a demand by a third party to remove the advertisement of the advertiser; ie, it is the content of the advertisement which is under discussion in clause 8.

26.3 Furthermore, neither clause 8 as a whole, nor clause 8.4 in particular, imposed a heightened duty on Zascotime to disclose the COJ litigation "considering (and as already submitted) [Zascotime's] belief that the sign was legal due to the moratorium".

26.4 For these reasons, clause 8 has no bearing on Zascotime's obligations of disclosure and did not create a heightened duty of disclosure.

27 *Mr Hollander* submitted the following on behalf of BMW Sandton:

27.1 With reference to some of the definitions in the contract, he argued that it would be possible to argue that, if the court ordered the removal of the sign, it would give rise to the application of clause 8.4.

27.2 In these circumstances, there was a heightened duty on the part of Zascotime to disclose the COJ litigation.

28 The issue which is raised by *Mr Stevens*' submissions is this: does the text of clause 8.4 of the agreement apply only to objections to the contents of an advertisement (say, for example, it contained indecent images in contravention of a rule or by-law)? If so, even if the COJ succeeded in its litigation, Zascotime would not be able to rely on clause 8.4 because the court order would not, in those circumstances, relate to an objection to BMW Sandton's advertisement. I do not understand *Mr Hollander* to argue that clause 8.4 definitely means that Zascotime would be able to rely on it to escape the liability to repay the contract price. If I understand his position, that interpretation is a plausible one, which triggered a duty on the part of Zascotime to make full disclosure of the COJ litigation. I return to this topic again shortly.

Analysis of the non-disclosure leg of the case

29 The answer to the question whether a particular party had a duty to disclose material information before the conclusion of a contract will depend on the circumstances of the case. In my view, Zascotime had, in the particular

circumstances of this case, a duty to disclose the COJ litigation to BMW Sandton before the conclusion of the advertising contract. I say this for the following reasons:

29.1 BMW Sandton says that, had it known of the existence of the COJ litigation, it would not have concluded the agreement. There is no reason to doubt this contention, taking into account what is said in the founding affidavit and the failure of Zascotime to dispute it meaningfully.

29.2 BMW Sandton's say-so, even if not meaningfully disputed, is not enough. The question of materiality engages, other than in cases of fraud, an objective enquiry (see *Novick v Comair Holdings* 1979 (2) SA 116 (W) at 149-50; *Orville Investments (Pty) Ltd v Sandfontein Motors* 2000 (2) SA 886 (T) at 914-6). So, we have to ask ourselves whether it is reasonable to conclude that knowledge of the COJ litigation would have had a material bearing on BMW Sandton's decision to conclude the agreement.

29.3 The first point to note – and this is where the debate about the moratorium becomes relevant – is that the starting point is that the existence of the COJ litigation gave rise to the risk that the outdoor sign would, if the litigation were to be successful, have to be removed. In fact, Zascotime's reliance on the moratorium carries the implicit concession (perhaps inadvertent) that the COJ litigation *was* material. It is a necessary implication of its defence in this case that, had the moratorium never come into existence, the fact of the COJ litigation would have given rise to a duty of disclosure.

29.4 There was much complexity about the City of Johannesburg's attitude to the moratorium. Even if Zascotime subjectively believed that the moratorium gave it total security of tenure in respect of the outdoor sign until August 2022, this was not objectively reasonable given that, even after issuing the notice, the City persisted in its litigation against Sunrise and took the view that it was not protected by the moratorium. I take the point made by *Mr Stevens* in argument that the replying affidavit was filed before Sunrise made its declaration. But the stance adopted by the City in its replying affidavit was unequivocal and was not based at all on the failure of Sunrise to make its declaration – it took the view that even prior to the moratorium, a decision had been taken that the outdoor sign must be removed and that the outdoor sign was not therefore covered by the moratorium.

29.5 It is not necessary for me to make a positive finding that Zascotime was aware of the contents of the replying affidavit when it concluded the agreement with BMW Sandton. What the replying affidavit, and the chronology as a whole, demonstrates is that the question of the City's attitude to the moratorium and what it was likely to do about its pending application was far from clear-cut. There were various contradictory pieces of evidence emanating from the City about what it planned to do.

29.6 In this case, Zascotime was the agent of the owner of the sign and its business was to sell advertising on the sign. There was an inequality of arms in the relationship between the two parties – there is no reason to believe that BMW Sandton had any knowledge of the controversies

relating to outdoor signage when it concluded the agreement, and it was reliant on Zascotime to make full disclosure of those facts. Zascotime, by virtue of its intimate relationship with Sunrise, had full knowledge of the circumstances relating to the sign. This was confirmed in the comprehensive response given by Zascotime's attorneys on 10 June 2020 to BMW Sandton's letter of demand sent on 8 June 2020.

29.7 If there had been a clause in the contract which protected BMW Sandton's interests in the event of forced removal of the sign, then perhaps things would have been different. But, if anything, the position is the opposite. I tend to agree with *Mr Stevens* that the ultimate, correct interpretation of clause 8.4 is that it applies only to situations where an objection or a court order has been made in respect of the contents of the advertisement placed on the outdoor sign. But, read literally, the clause would also apply to a situation where a court ordered the removal of the sign as a whole. The fact that the agreement could be interpreted in this way is enough, in my view, to heighten the duty of disclosure.

29.8 Why do I say so? It is because we have to take the circumstances of the relationship, viewed as a whole, into account when deciding on the duty of disclosure. Here, we have a situation where the party which has a commercial interest in the letting of the sign is aware of a complicated web of details about pending litigation which might have threatened the viability of the sign as an advertising outlet. It also had an agreement which could have given it an argument – whether ultimately successful

or not – that, in the face of a court order to remove the sign, it was not obliged to refund to BMW Sandton the full upfront payment of the 12-month fee. Taking all of these considerations into account, it seems to me that Zascotime had a duty to place all of the relevant facts at the disposal of BMW Sandton to enable it to make an informed decision. Zascotime could easily have explained the existence of the moratorium to BMW Sandton in detail, and made out a compelling case that BMW Sandton should not worry about the COJ litigation. Had it done so, BMW Sandton could then at least have made a decision based on its knowledge of all of the facts.

30 Ordinarily, for a claim based on material non-disclosure to succeed in motion court, one would expect a more comprehensive ventilation of the facts than one finds in the papers in this matter. But, ultimately, I am satisfied that BMW Sandton has made out a case for the relief that it seeks based on what I have said above.

31 I have real doubts as to whether the outdoor sign is legal, based on the fact that it is less than 50m from the intersection and given that section 8(1)(j) does not seem to apply. But, in the light of my conclusion about the non-disclosure, it is not necessary to decide that issue here.

Lis pendens

32 Before concluding, it is necessary for me to refer to the fact that Zascotime argued, relying on *Cook v Muller* 1973 (2) SA 240 (N), that I should not grant this application because of the two pending proceedings described above. *Mr Stevens* argued that the courts in the Smartgrowth and COJ litigation might find that the outdoor sign is not illegal. On this basis, he contends that this application is premature and should be dismissed by virtue of the defence of *lis alibi pendens.*

33 In my view, *Cook v Muller* (supra) is distinguishable from the present case. *Mr Stevens* referred to the case because, given that neither BMW Sandton nor Zascotime is party to either of the pending applications, I expressed serious doubt as to whether *lis pendens* could apply in the circumstances of this application. Mr Stevens relied on *Cook v Muller* as authority that *lis pendens* can apply even where the pending litigation is between different parties. But *Cook v Muller* addressed the question of whether the defence was available when the two pieces of litigation involve the same parties, but the plaintiff in one matter is defendant in the other (and vice versa). The court considered the authorities (see *Cook v Muller* (supra) at 244-5) and concluded that it was not necessary for the plaintiff to be plaintiff in both actions before the defendant could plead *lis pendens.* As long as the same underlying dispute was pending between the same parties in two different sets of litigation, *lis pendens* could be raised as a defence.

34 The present case is entirely different. I was not referred to any authority, and I am not aware of any, which suggests that proceedings to determine a point of

law should be stayed because the same question of law may be (or even will be) determined in pending litigation between other parties. But, in any event, since I have decided this matter on the basis of Zascotime's non-disclosure of the COJ litigation, and since the pending cases relate only to the legality of the outdoor sign, the defence must clearly fail.

CONCLUSION

35 In the light of everything that I have said above, the application must succeed.

36 Both the answering and replying affidavits were filed late and both sides seemed, at least for a time, to be insisting that the other make out a case for condonation. But, in oral argument I was assured that both sides have dropped their opposition to the admission of the two affidavits and that I could proceed on the basis that all of the affidavits should be let in. I am grateful for their co-operation with each other, and their approach is clearly sensible. Zascotime initially asked for a punitive costs order, but *Mr Stevens* abandoned that in argument. That issue is academic anyway, since BMW Sandton has prevailed. *Mr Hollander*, quite fairly, pointed out that, although the notice of motion invites the court to exercise a discretion on the scale of the costs order to make, there is no basis on the papers for any punitive costs order to be made. I shall accordingly make an ordinary costs order in favour of BMW Sandton.

37 The notice of motion asks for interest to run from 10 June 2020. The letter of demand was sent on 8 June 2020. *Mr Hollander* pointed out that he did not

settle the papers and could not explain the abandonment by BMW Sandton of two days' worth of interest. Given the triviality of the sum involved, this issue was not canvassed in much detail; and, although there was a brief suggestion by *Mr Hollander* that *Mr Stevens* might consent, on behalf of Zascotime, to the amendment of the notice of motion to reflect the accurate mora date, this issue was not brought to finality. In the circumstances, I intend simply to follow the notice of motion (with very minor grammatical amendments) in making my order.

38 In the light of everything I have said above, I make the following order:

1. The respondent, in the application under case number 20/35714, is ordered to repay to the applicant the sum of R552 000.00 (which includes VAT), together with interest thereon at the rate of 9.25% per annum, to run from 10 June 2020.

2. The respondent is to pay the applicant's costs.

ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 2 December 2021.

APPEARANCES:

Attorney for the applicants:	Hirschowitz Flionis Attorneys
Counsel for the applicants:	L Hollander
Attorney for the respondent:	Jurgens Bekker Attorneys
Counsel for the respondent:	B Stevens

Date of hearing: 19 November 2021

Date of judgment: 2 December 2021