REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 82121/2018

1. REPORTABLE: **NO** / YES
2. OF INTEREST TO OTHER JUDGES: **NO** / YES
3. REVISED.

..... 2019-09-05
SIGNATURE **DATE**

In the matter of:

FIRST RAND BANK LTD **APPLICANT**

and

WERNER JACOBUS VISSER DU PLESSIS **RESPONDENT**

JUDGEMENT

N N Bam AJ

A. Introduction

1. This is an application for a monetary judgement, launched during November 2018, in which applicant seeks payment of the sum of R1 277 096.45 (One Million Two Hundred and Seventy-Seven Thousand and Ninety-Six rand and Forty-Five Cents), against the defendant, interest on the aforesaid sum, and costs.

2. Applicant's case is set out in an affidavit deposed to by a Mr Corrie Verster (Verster), one of its employees, whom, it appears had been dealing with respondent over a long period. The application is opposed. Before I get to the essence of the opposition, it makes sense to first sketch out the parties' history.

B. Background

3. The parties concluded a written credit agreement during December 2000, referred to in the papers as the Credit Facility Agreement, (CFA). Applicant was represented by one of its authorized representatives while

respondent was in person. The CFA was amended seven times[1] with the last amendment having been agreed to on 14 January 2011[2]. It is the terms of this last CFA which are said to govern the parties' relationship. The relevant terms of which can be briefly summarized thus:

3.1 Applicant would make available to respondent a credit facility of R1 650 000. 00.

3.2 The credit facility had to be repaid over a period of 123 months.

3.3 The indicative minimum monthly amount payable would be R20 644 which amount would change with fluctuations of the RMB Private Bank Facility Rate of Interest.

3.4 Each monthly installment would be payable on the 15th day of each month.

3.5 A monthly subscription fee of R57.00 would be payable.

3.6 The annual interest rate applicable to the facility would be the RMB Private Bank Facility rate (defined to mean the variable rate of interest charged by RMB Private Bank, a division of the Applicant) plus 0.75%.

3.7 Any of the acts listed in clause 13.1 of the CFA Terms and Conditions would place the respondent in default of the CFA.

3.8 In the event of the Respondent being in default of the CFA, then the applicant would be entitled to withdraw the facility and claim immediate repayment of the full outstanding balance, or terminate the facility without affecting any of its rights.

3.9 A certificate signed by any authorized employee of the applicant (whose appointment or authority it shall not be necessary to prove) shall constitute prima facie evidence of the outstanding balance owing and /or due and payable by the

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[1] Copies of each amendment are attached to the applicant's founding affidavit- FA1 - FA8

[2] FA 8

respondent to the applicant and/or the rate of interest payable and/or any other amount owing and/or due and payable to the respondent, by the applicant, in terms of the CFA and/or any other matter arising from or related facility.

4. Clause 12.7 reads:

"The Bank may relax some of the provisions of the Facility or grant you an indulgence without affecting the validity of all other provisions of the Facility."

while Clause 13.1 Non - Variation reads:

"No alleged terms or conditions of any Facility letter shall be of any force and effect unless reduced to writing and signed by you and the Bank."

Clause 13.3.1.1 defines a default to include "failure to pay any amount owing to the Bank when it is due."

5. Applicant avers that it complied with its obligations in terms of the CFA and made available the credit facility to respondent who drew down on same. The credit facility was administered by applicant under account number 3-000-014-083-315. In breach of the CFA, respondent, *inter alia*, failed to pay the monthly installment due in terms thereof. As a result of such breach, applicant, in terms of its contractual rights, demanded payment of the full outstanding amount.

6. As of 5 November 2018, respondent was indebted to the applicant for the amount of R1 277 096.45[3]. On 20 February 2018, applicant caused notices in terms of section 129 (1) of the National Credit Act (NCA) to be sent to the respondent via registered post and e-mail[4] and, on 22 February 2018, respondent acknowledged receipt thereof and advised that he intended to refer the matter to the Ombudsman for Banking Services (OBS).

7. It would appear that the OBS communicated with the applicant as far back as June 2018 and during October 2018, it (OBS) advised respondent that it could not assist him any further and that his file with the OBS had been closed. I interpose to indicate that this is one of respondent's defences. Without a shred of evidence, he claims that the matter is pending before the OBS.

8. In terms of compliance with the NCA, applicant avers it has complied with the relevant provisions. It further avers that, at the time of approaching the court, the matter was not before a debt counsellor or any dispute resolution agent, consumer court or ombud with jurisdiction. Accordingly, applicant avers that it is entitled to the relief sought.

C. Response

[3] Confirmed by certificate of balance FA9, annexed to the Founding Affidavit (FA)

[4] FA 10

9. Respondent raises five main defences along with what I view as comments to demonstrate what he claims is indicative of *mala fides*, which he states has characterised applicant's conduct throughout the existence of the CFA. Respondent further seeks payment of a sum of money, which he claims must be paid by applicant due to overcharging and collecting excess interest. In conclusion, respondent seeks a costs order against applicant due to the alleged *mala fides*.

10. The defences can be crystallized thus:

(a) the complaint is pending before the OBS;

(b) the CFA was amended during June 2015

(c) excessive interest; and, there are no arrears; and

(d) dispute of fact

12. Added to the defences are the following comments:

(a) listing of respondent's name on various Credit Bureaus

(b) inability to access surplus funds from the account;

(c) refusal by applicant to restructure the account according to the advice of respondent's tax consultant. I refer to these points as comments as they hardly, if at all, address applicant's case, which is based on respondent's breach of the terms of the CFA.

(a) Whether the matter is pending before the OBS

13. Respondent relies on two documents to buttress his claim that the matter is still pending before the OBS. They are: the email dated 3 December 2018, and a letter dated 8 June 2018 from applicant to the OBS.

14. It is a fact that respondent referred the dispute to the OBS and the latter acted on it by inviting the bank to respond to respondent's queries as demonstrated in applicant's response of 8 June 2018. Respondent states that he was not happy with the responses provided by applicant and duly sent an email to the OBS to that effect. Respondent however, failed to deal with the e-mail of 23 October 2018 from the OBS in his opposing affidavit. It is important for the purposes of this discussion to reproduce the email in full. The author of the e-mail is Enrich Bytendorp, (Enrich) (apparently an employee of the OBS); he writes to Tashir Singh of applicant. The subject line reads: '*Du [P]lessis matter RMB*'

'Dear Sirs, *We refer to the aforementioned matter. We have advised the complainant that our office cannot assist him any further and that any complaint regarding the credit bureau listing should be referred to the credit Ombud. Our file is now closed.*' (own underline)

15. The e-mail of 3 December is an e-mail, also from Enrich. In the e-mail, Enrich informs respondent that he has to re-schedule their meeting as he has another commitment. During the hearing of this matter, and in order to provide closure, I diligently enquired from counsel whether respondent, since the note rescheduling the meeting of 3 December 2018, had any document

to demonstrate that the complaint before court is still pending before the OBS. The reply was in the negative. I further enquired whether the respondent had any document to substantiate his defence that the issues before court are pending before any other Ombud, such as the Credit Ombud, and the answer was again in the negative. The fact that the respondent had expressed displeasure at the applicant's responses does not mean that the matter remains pending before the OBS. On a proper reading of the letter of 8 June 2018, it is apparent that respondent had referred the very same issues that are serving before this court and it is to these same issues that the OBS advised of its decision, that it could not assist respondent any further, hence they closed their file.

16. I can find no valid reason why respondent could not contact the OBS, before the hearing of this matter, to request a letter confirming that the matter is still pending, especially after the e-mail of 23 October 2018. Nor do I find the e-mail dated 3 December satisfactory evidence that the matter is still pending before the OBS, because nothing in the e-mail makes reference to a pending complaint. If one is to carefully follow the sequence of events, respondent merely claims that the matter is still pending before the OBS solely because he had communicated his dissatisfaction with applicant's response. Since that communication to the OBS, he cannot produce a single letter confirming that the OBS is still busy with the matter. It follows that the matter before court is not pending before the OBS or any Ombud with jurisdiction and respondent's defence in this regard is without merit. Had it been otherwise,

respondent would undoubtedly have obtained such a letter. The defence must be rejected.

(b) The CFA was amended by agreement during June 2015

17. The record demonstrates that during June 2015, applicant indulged respondent by agreeing that the latter pay a reduced installment of R12 500 per month, from the R20 644 that was payable at the time. It is as a result of this indulgence that respondent claims the CFA was amended. As evidence, respondent relies on three e-mails marked, Annexures WP3, WP4 and WP5, dated 30 November 2015 and 23 June 2017 respectively. The two relevant clauses of the CFA read:

"Clause 12.7: The Bank may relax some of the provisions of the Facility or grant you an indulgence without affecting the validity of all other provisions of the Facility." and; "Clause 13.1: Non - Variation: No alleged terms or conditions of any Facility letter shall be of any force and effect unless reduced to writing and signed by you and the Bank."

18. Having perused all three e-mails[5] and found nothing in their content that remotely suggests an intention to vary the terms of the underlying CFA in any manner, but only respondent's unilateral understanding of the indulgence, I

[5] WP3, 4, & 5

turned to the only authority relied on by respondent for his proposition, *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another*[6]. In placing reliance on this authority, respondent argued that the e-mails in their current form, just as the court had found in *Spring Forest*, met the requirements called for by the non-variation or the Shrifen clause.

19. The problem facing respondent is that the contents of these e-mails suggests no such amendment of the CFA. Nor do the e-mails deal with the terms and conditions of the CFA. By way of example, in WP3 respondent is simply calling upon Verster to confirm that he pays R12 500. Later in the WP3 (another e-mail on the same page) respondent throws in matters such as the need to value the properties. WP4 has no relevance to the subject matter at hand while in WP5 Verster, states unequivocally, with a tone suggesting impatience, that the R12 500 interim payment was only for short term, until respondent moves the CFA to another financial institution. He goes on to state that it is now apparent that respondent is not moving the facility any time soon and that the matter cannot be left indefinitely. In the same e-mail, Verster deals with one of respondent's comments, the listing of his name on the Credit Bureaus and he states that he had discussed the matter -allegedly with legal people within the bank- and that the listing is correct as respondent is in arrears with his account. As already foreshadowed, nothing in the three e-mails deals with the terms of the CFA, much less an amendment. As of present date, the only the terms and conditions that govern the parties'

[6](725/13) [2014] ZASCA 178; 2015 (2) SA 118 (SCA) (21 November 2014)

relationship are those evidenced in the CFA, some of which have been quoted in paragraph 3 of this judgement.

20. Spring Forest on the other hand, had to do with emails exchanged by the parties with clear and unequivocal intention to cancel a contract and the terms on which the debtor could cancel. By way of example, in one of the e-mails, the creditor offered that the debtor could: *'cancel the agreement and walk away'*, subject to payment of all arrears at that point. The content of the e-mails is plain that there is an agreement reached by the parties to cancel the contract. Both parties confirmed the terms discussed during their meeting and the creditor, once again, its offer. The debtor exercised one of the options to cancel and carried its side of the bargain by effecting payment of the outstanding arrears and that was the end of the matter. To put it clearer, the e-mails exchanged by the parties evidence an agreement to cancel the underlying contract, which is not the case in WP3, WP4 and WP5. On the contrary, it is apparent that the e-mails do not deal with the terms of the CFA nor is there a matter which deals with amending the CFA. The bank is merely indulging respondent by way of a reduced installment in an apparent short term arrangement. Nowhere is there any reference made in the e-mails that respondent is completely released from the commitment to pay applicant the correct installment. In *Soil Fumigation Services Lowveld CC v Chemfit*

Technical Products (Pty) Ltd[7], the court had occasion to comment on a similar defence which went against the grain of a non-variation clause. It noted:

> 'The price structure relied upon by the defendant as the basis for its counterclaim is admittedly not based upon any list price. Having regard to the proviso in clause 1, such deviation could be relied upon only if embodied in a written agreement. The plaintiff's insistence that this proviso is valid and enforceable, is clearly supported by the decisions this court, eg in SA Sentrale Graanmaatskappy Bpk v Shifren en andere 1964 (4) SA 760 (A) and, somewhat more recently, Brisley v Drotsky 2002 (4) SA 1 (SCA). In order to overcome this critical impediment, the defendant's counsel relied on a letter by Koppenol to the plaintiff in which he referred to 'an agreement on a cost price and 9% mark-up'. This argument, however, soon proved to be unsustainable. The first difficulty was that, on a proper interpretation of the letter, it does not purport to be the written manifestation of an agreement or even the recordal of the terms of an agreement. On the contrary, its stated purpose was to establish a recordal of Koppenol's unilateral understanding of what he described as an oral agreement.....'

21. The value of non-variation clauses was highlighted by the court in *HNR Properties CC and Another*[8] (the question before the court was whether an

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[7] Note 6 supra

[8] v Standard Bank of SA Ltd 2004 (4) SA 471 (SCA),at para 15

alleged oral or implied release from the suretyship agreement was permissible in the circumstances of that case):

> 'The object of a clause such as the one under consideration is fairly obvious. It protects the creditor. It enables the creditor to determine its rights with reference to the documents in its possession. The creditor does not have to rely on the memory of employees or ex-employees. It protects the creditor against spurious defences and unnecessary litigation.' ....'I would add that the need for a provision such as clause 15 is all the greater where the creditor, as in the present case, is a large organisation comprising different divisions and employing a large number of people.'

22. Respondent's comparison of apples with oranges is disingenuous. The fact that in the *Spring Forest* matter the court accepted that the e-mails and the electronic signatures met the requirements of the non-variation clause was but one of the elements, the content evidenced a mutual intention to end the parties' contractual relationship. The e-mails (WP3 to WP5) did not vary the CFA and nothing further need be said about them.

23. I had occasion to refer to the South African Concise Oxford Dictionary[9] for the meaning of the word interim and found the following synonyms: intervening time; provisional; relating to less than a full year's business activity, while the Concise Oxford Dictionary,[10] has the following, short-term,

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[9] 4th edition 2005, 601

[10] Seventh edition, page 523

stopgap, emergency, impromptu, intervening, temporary, interregnum, and transitional.

24. During argument, I enquired from respondent's counsel under what circumstances would a creditor simply decide to reduce an installment payable by almost a half, if not to temporarily accommodate a debtor who is struggling to keep up with repayment, and there was no answer. In any event, if I understood the submissions made by applicant's counsel, the respondent has not even kept to the terms of the interim arrangement in that he has not consistently paid the reduced installment. Against the evidence provided by the applicant, respondent produced a spreadsheet[11] he had compiled. On his own version, if one looks at the spreadsheet, he has, at times, defaulted on the reduced installment.

25. There was a further reason proffered by respondent's counsel as basis for the alleged amendment of the CFA. This reason is recorded solely to be dismissed. Respondent submitted that no one ever went back to him to advise him that he should start paying the original installment. This is, notwithstanding that way back in 2017, regard being heard to WP5, respondent knew that he had been listed on the various Credit Bureaus, solely because he was in arrears with his account, in light of him paying the reduced installment. This reasoning by respondent defies logic. Having already found that the terms of the CFA was not amended and that the June

[11] WP 6 page 151 of the record

2015 arrangement was an interim one, there was no duty on the applicant to call upon respondent to pay the original installment of R20 644. Besides, the act of affording a debtor an indulgence is not a novel idea. It is a well-known business practice, and is in fact encouraged by some credit providers, that customers approach them or see a debt counsellor when they are experiencing temporary difficulties in meeting their obligations. As soon as the customer's position improves, many often take it upon themselves to pay a larger installment to purge any arrears. The defence has no merit and must be rejected.

(c) Excessive interest; and No arrears

26. I have decided to deal with these two defences under one heading for convenience. Borne out of the misconception that the CFA had been amended by the interim arrangement of June 2015, respondent argues that since inception of the credit facility, applicant has been collecting interest from his account in excess of the amounts which it was entitled to. There is no explanation why, if respondent had a genuine claim in respect of such excess interest, had to wait until applicant brought these proceedings. The last CFA was amended in 2011. It incepted in 2000. Surely, if respondent had a claim in respect of excess interest collected from 2000 and 2014, it would have long prescribed. I further note that no admissible evidence has been provided to

substantiate this claim. The only piece of evidence submitted is an excel spreadsheet marked WP 11[12], prepared by respondent's wife, which depicts some calculations for the period running between April 2001 to June 2015 along with an affidavit[13] deposed to by the wife, an accountant. It remained unclear throughout counsel's submissions what the purpose of the two documents were. As I understood it, respondent at no time gave notice to present his wife as an expert witness to the court. It follows that the two records cannot be taken into consideration in weighing the merits on this particular issue.

27. Two further documents are highly relevant to the discussion of overcharging and collecting interest. They are, WP7[14] and WP13[15]. WP13 is an e-mail dated 21 September 2016, from applicant's Verster to respondent. In manuscript, the amount R53 000 is noted in the middle of the page and only three lines are typed therein. With this document, respondent sought to demonstrate that applicant has in the past admitted to overcharging him interest. He further claims that applicant pay him the amount of R53 000 without delay. Applicant's counsel took umbrage at what he terms' respondent's opportunistic conduct in submitting the e-mail and moved swiftly with a submission, which was not resisted by respondent's counsel, that the document is privileged. It is plain from the tone and language of the three

[12] WP 11 page 161 -164 of the record

[13] WP 12

[14] page 153

[15] page 168

lines in the document that this is case. It is on this basis that the document shall be disregarded. Similarly, respondent's claim of R53 000 is dismissed. The court sees no need to engage in an elaborate debate about the privilege parties have when engaged in negotiations to resolve their disputes.

28. Annexure WP7[16] is a statement generated from applicant's records as at 15 August 2015 (within two months of concluding the interim arrangement) . It notes the outstanding balance on the CFA as R1 320 660; the monthly payment is noted as R25 251 which, on his own version, respondent was not paying at the time. According to this document, there were no arrears at the time. When reading this document with WP6[17] (the excel spreadsheet prepared by respondent), one cannot miss the large payment of R50 000, paid in during July 2015. With this document, respondent suggests that he was on track with his payment of R12 500. Accordingly, applicant had no basis asserting to list him on Credit Bureaus. But applicant selectively reads from the document in that he overlooks that his proper installment was R25 251, as reflected therein. But for the interim arrangement, respondent ought to have been paying the full amount of R25 251. Both points must be rejected as respondent cannot substantiate his claims.

Additional comments made by respondent

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[16] page 153

[17] page 151

29. The three points I deal with from this paragraph to paragraph 33 were raised as defences against applicant's case. As will be apparent, they disclose no defence nor are they evidence of *mala fides*.

(i) Listing of respondent's name in Credit Bureaus

30. This point is borne out of the fallacious argument that the CFA was amended in June 2015. Respondent avers that his attempts to successfully apply for credit with other financial institutions, in order to move the credit facility, have been frustrated by the applicant's listing of his name with TransUnion and other Credit Bureaus. I note that no evidence in this regard has been submitted to demonstrate such refusal by other financial institutions. He claims that applicant did not inform him that he had decided to list him.

31. Respondent has been in arrears with his account since June 2015 and since he has not been paying the full installment, the arrears have been accumulating. To demonstrate that respondent has no case, he was informed, back in 2017, by Verster, that the arrangement that he pay R12 500 was a short term one until he moves the facility to other financial institutions. He was further informed that the listing in the Credit Bureaus is not a mistake as he was in arrears with his account. There no evidence that he followed the advice of the OBS to refer the issue of his listing to the Credit Information Ombud. The truth is, respondent has no case. Referring the matter to an Ombud will be a farce because he had been informed by the OBS -in one of its letters- that he was in breach of his agreement with the bank and that the latter may take legal action against him. I conclude that applicant had every

right to list respondent on the Credit Bureaus subject to the relevant prescripts such as the NCA.

(ii) ***Inability to access surplus amounts paid into the account***

32. Respondent avers that in the early years of their relationship with the applicant he was able to draw down surplus amounts. '*However, without my knowledge or consent and without being informed thereof, the applicant at the time of the conclusion of the 2009 single credit facility, changed the structure of the credit facility* ***with the intention that it would be an ongoing and permanent agreement. However, the intention of the parties was that the change in structure of the single credit facility would be amended in the near future to reflect the true intention of the parties.*** *As a result of this, I was unable to access surplus funds deposited by me into the credit facility.*'

33. It was difficult to work out the nub of respondent's submission from the preceding paragraph. There is however, a hint of a possible relief by way of rectification, but the so called '**intention of the parties**' has not been stated nor has respondent established the necessary facts entitling him to the relief of rectification. In *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd*[18]

[18](680/2002) [2004] ZASCA 31; [2004] 2 All SA 366 (SCA) (31 March 2004), para 21

'.....it is clear that the remedy of rectification is not one which easily lends itself to a fallback position by way of afterthought. It is a settled principle that a party who seeks rectification must show facts entitling him to that relief 'in the clearest and most satisfactory manner' (per Bristowe J in Bushby v Guardian Assurance Co 1915 WLD 65 at 71; see also Bardopoulos and Macrides v Miltiadous 1947 (4) SA 860 (W) 863 and Levin v Zoutendijk 1979 (3) SA 1145 (W) 1147H-1148A). In essence, a claimant for rectification must prove that the written agreement does not correctly express what the parties had intended to set out therein. (See eg Meyer v Merchant's Trust Ltd 1942 AD 244 at 253.) In the opposing affidavit there is no suggestion whatsoever of any common intention different from the one recorded in clause 1 of the credit agreement. Consequently, the argument based on rectification cannot succeed' (own underline).

34. The point raised has no merit, neither does it demonstrate any *mala fides* on the part of applicant.

(iii) ***Restructuring the debt such that the two entities that own the immovable properties are debtors to the applicant***

35. Two mortgages were registered against two properties in order to provide security to applicant for the credit facilities provided to respondent. The first mortgage relates to Portion 2, Erf 305, Hatfield, which is owned by an entity known as Vestcor Developments (Pty) Ltd. The second relates to Erf 29 Val de Grace, owned by Erf 129 Ontwikkelings CC. Respondent was advised by his tax consultant that in order for the two entities to be tax compliant, each entity had to conclude its own loan agreement with the applicant in order for each entity to service its own loan agreement. He states that he has been

asking applicant to provide him with sensible reasons for its failure to assist him with the replacement of the loan facility with two the loans but applicant has failed to do so.

36. Applicant has no obligation to accede to the advice of respondent's tax consultant pertaining to the optimum arrangement of the three tax payers' (respondent's and the individual companies') affairs. In any event, the essence of the request to the applicant, as I understand it, is concerned with an application for credit by the two entities, which falls to be assessed in terms of applicant's criteria for granting credit, based on the latter's business policies. It is not a matter for the courts, in other words. Most importantly, the submission demonstrates no *mala fides* on the part of applicant.

(d) Dispute of fact

37. Basing his submissions on two documents, WP14 and WP15, respondent suggests that applicant's records are nonsensical and incorrect. WP14 is a statement from the applicant dated 17 November 2018, which records the outstanding balance as R1 270 613.62 with a required minimum installment of R45 534.87. The statement shows that respondent is in arrears totaling R852 040.89. WP15 is a further statement dated 8 December 2018 and it notes the required monthly installment as R17 000. The amount in arrears is noted as R847 040.89 and the balance outstanding is R1 265 613.62. Ignoring everything else in the document, respondent first deals with the

amount of R45 477 and suggests that it exceeds the amount of R20 644 that was originally agreed upon and the later installment of R12 500 agreed to in June 2015. On the amount of R16 942 (basic installment), while the required installment is R17 000, respondent suggests that following an increase in interest rates during December 2018, applicant, of its own accord, changed the basic repayment. He then concludes that the amount claimed by the applicant is not due. He further implores the court not to adjudicate on the matter and refer it to trial as there is a dispute of fact.

38. It has been four years since the interim agreement was reached in June 2015. Since then, respondent has used every single avenue to escape his responsibility under the CFA. Now the parties are before court and respondent still expects applicant to participate in jousting by raising unmeritorious defences. The reason his installments increased to R45 534.87, as explained in applicant's reply is because he has simply failed to pay the required installment after the interim arrangement of June 2015. The installment called for by the December statement in the amount of R17 000 does not take into account the arrears, which explains the substantial reduction from the correct installment of R45 534.87. Against the mounting evidence of his breach of the CFA, respondent so far has proffered nothing cogent. The net result is that there is no dispute of fact evidenced by the submissions made by respondent. The case made by the applicant is based squarely on the breach of the undisputed terms of the CFA. Nowhere in his

affidavit does respondent seriously address that issue. In *Dulce Vita v Chris van Coller*[19] the court noted the following regarding a dispute of fact:

> '..... In my view the proper approach to the situation is that outlined in Wightman t/a JW Construction v Headfour (Pty) Ltd & another[20]
>
> 'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.....'

39. Respondent has failed to demonstrate that there is a dispute of fact. This defence is rejected.

Conclusion

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[19](192/12) [2013] ZASCA 22 (22 March 2013), para 29

[20] 2008 (3) SA 371 (SCA) para 13

40. In the result, respondent's case fails in its entirety as he has produced no satisfactory evidence to counter applicant's case.

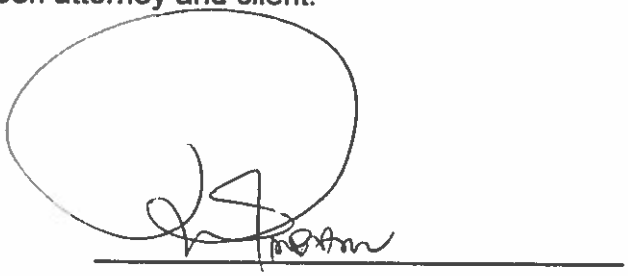
Order

41. Applicant's case is upheld and the following order is issued:

i) Respondent is hereby ordered to pay applicant the amount of R1 277 096.45 (One Million Two Hundred and Seventy- seven Thousand and Ninety-six rand and Forty-five Cents);

ii) Respondent is ordered to pay interest on the amount of R1 277 096.45 (One Million Two Hundred and Seventy-seven Thousand and Ninety-six rand and Forty-five Cents) from a date, SEVEN (7) days from date of this judgement; and

iii) Costs on the scale as between attorney and client.



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ACTING JUDGE OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA

APPEARANCES

DATE OF HEARING	**: 12 August 2019**
DATE OF JUDGMENT	**: 27 AUGUST 2019**
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