

SOUTH AFRICA / JUDGMENT

Auto Commodities (Pty) Ltd v Ettienne and Christine Makarios (Pty) Ltd (2024/002133) [2025] ZAGPJHC 676 (16 May 2025)

[2025] ZAGPJHC 676

COURT

South Gauteng High Court, Johannesburg

BEFORE

Pearse

CASE / FILE NUMBER

2024/002133

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2024-002133

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

In the matter between

AUTO COMMODITIES PROPRIETARY LIMITED

Applicant

And

ETTIENNE AND CHRISTINE MAKARIOS

Respondent

PROPRIETARY LIMITED

JUDGMENT

PEARSE AJ:

AN OVERVIEW

1. The applicant claims payment of the balance of an account alleged to be due and payable by the respondent in respect of diesel supplies in terms of an agreement between the parties. Against the backdrop of diesel orders and deliveries over a period of years, there is disagreement between the parties as regards certain terms of supply and, more pertinently, what products were supplied, in what volumes, at what prices and against what supporting documents. It is the respondent's case that these uncertainties give rise to genuine and material disputes of fact that preclude the final relief sought by the applicant on motion. The applicant counters that final relief on motion is warranted on the strength of what is admitted, not pertinently denied, averred and untruthfully or at least inadequately explained on the respondent's papers.
2. At and after the hearing of the application, however, the matter took a turn down a path that led to the discovery of a form of compromise referred to in paragraph 49 below or a dispute of fact referred to in paragraph 50 below, either of which precludes the (revised) final relief sought by the applicant on motion – at this time. In my view, a dismissal of the application would do an injustice to the applicant. Instead, in the exercise of my discretion, I intend to remove the matter from the roll such that, if and when necessary in due course, it may be re-enrolled for hearing.

THE AGREEMENT

3. The applicant is a purchaser and on-seller of diesel to customers such as the respondent, which re-sell diesel to their customers.
4. It is the evidence of Christine Mienie, a director of the respondent, that in November 2020 she and her husband were invited to the home of their neighbour, Andrew Joubert, a director of the applicant, who sought to persuade the respondent to switch from an

existing supplier of diesel to the applicant on assurances of improved quality of product and terms of supply. The evidence is

confirmed on oath by Ettienne Mienie, the respondent's guiding mind.

5. On 18 November 2020 the applicant (represented by Mr Joubert) and the respondent (represented by Mr Mienie) concluded an oral agreement in terms of which the applicant would supply diesel to the respondent on specified terms (the supply agreement).
6. There is general consensus – subject to two disputes – in the parties' versions of the terms of the supply agreement.

What is not in dispute is that the applicant would supply diesel as and when ordered by the respondent, that the respondent would attend at the applicant's premises in Krugersdorp to collect the diesel and that the applicant would determine the quantity of diesel dispensed to the respondent and furnish it with an invoice and delivery receipt or 'cash on collection' (COC) metre reading record in respect of each delivery. There are disputes in relation to pricing and payment that do not require consideration

for purposes of this judgment.

7. Pursuant to the supply agreement, the respondent placed orders with the applicant and collected loads of diesel from its premises.

These transactions occurred between mid-November 2020 and mid-November 2023.

8. In late September and early October 2023 Messrs Joubert and Mienie exchanged WhatsApp messages in an endeavour to agree a date and time to meet to discuss the status of the account. Whereas Mr Joubert testifies that Mr Mienie “kept on telling me that he would make payment of the arrears”, Ms Mienie says that:

“[t]he only reason that a dispute arose with regards to the amount of diesel that was provided by the Applicant to the Respondent was because the paperwork had not been provided. It is presently impossible for Respondent to calculate if there is any amount due by the Respondent to the Applicant as we are still waiting for the requisite documents.”

9. Certain payments were made by the respondent to the applicant in this period. It is not disputed that these payments did not reduce

the indebtedness to the applicant because the respondent continued to place orders and collect loads of diesel. Ms Mienie asserts that such payments were made when paperwork was eventually received that placed the respondent in a position “to correlate and confirm what was due” to the applicant.

10. There was a meeting on 11 October 2023 between the applicant’s Mr Joubert and Norah Geyser and the respondent’s Mr Mienie.

10.1. On the applicant’s version, the respondent’s indebtedness to it at the time was in excess of R790,000.

10.2. The respondent disputes the alleged indebtedness and challenges the applicant “to provide the relevant paperwork confirming the amount of diesel that was provided, at what price and the amount that is outstanding”, claiming that the founding papers do not include delivery notes and declaration forms in respect of purchases of diesel.

11. By email dated 27 November 2023 addressed to the Mienies, Mr Joubert sent to the respondent a letter of demand by the applicant,

which, in relevant part, reads as follows:

“1. The parties entered into an oral agreement for the supply of diesel.

2. Our initial agreement was all product collected will be settled when invoice is sent or within 24 hours after collection, before any further collections may be done open (‘first agreement’).

3. On Wednesday, 11 October 2023, we had a meeting at our offices and it was agreed that all arrears will be paid immediately, that the terms of the first agreement remains for all collections and that if receive a signed credit application incorporating a deed of suretyship and a credit account is approved, a credit limit of R500 000 would be extended where bulk deliveries could be made to 239 TBE premises, should the rules of the estate allow it. Full payment for bulk deliveries to be done on month end not exceeding credit limit of R500 000 on both collections and deliveries ('second agreement').

...

5. It has come to our attention that, despite your undertakings, you failed to pay the arrears and accordingly you failed to keep to the terms of our second agreement.
6. Your account is in arrears in the amount of R844,661.36 as of 27/11/23 and we have repeatedly requested that the account be settled.
7. In light of your failure to adhere to the second agreement, we regret to inform that we have no other alternative than to suspend supply of product until your account is paid.
8. We hereby demand payment of the amount of R844,661.36 on or before 30 November 2023, failing which, we will cancel the second agreement and claim payment of the outstanding amount, together with interest and legal costs."
12. The respondent admits receipt of the letter of demand but does not seem to have responded to it. Be that as it may, the answering

affidavit denies:

12.1. that supplies of diesel were payable on invoice or within 24 hours of collection;

12.2. the second agreement as alleged by the applicant;

12.3. that "there is an amount of R805 788.87 outstanding. The Applicant must first provide us with the delivery notes and the declaration forms showing the quantum that has been billed for diesel"; and/or

12.4. that the dispute is capable of resolution on paper, submitting that:

"there is a dispute as to the oral agreement between the parties and that dispute is material in that it has a substantial impact upon the amount that may be outstanding ... Only after there is an agreement, or finding, on what the oral agreement was and after the declaration notes and the delivery notes have been provided and cross referenced with the price for the diesel that has been charged verses the prevailing rate for diesel at the time of said charge and quantities have been confirmed will it be possible to determine what may be outstanding. The Applicant is well aware of this and is avoiding same."

13. On 04 December 2023 the applicant's attorney (Mr Joubert's wife) emailed to the respondent a second letter of demand asserting, in relevant part, that:

“2. Our instructions are that you are indebted to our client in the amount of R807 943.01 (‘outstanding amount’), for goods sold and delivered, which amount is outstanding, due and payable by you to our client.

5. Having considered the matter, and given the fact that the above was the only reason extended to our client for your failure to make payment of the outstanding amount, we have taken the liberty to carefully scrutinise and analyse the statement, which is supported by invoices accompanied by signed delivery notes / COC metre reading records. To assist you, we attach same herewith for your attention and record purposes. We believe that this will indicate to you that our client has written record of all product collected by your driver. Therefore, your averment that you do not have invoices and/or delivery notes for all the entries on our client’s statement of account is an internal function within your organisation, which you

must resolve and are no longer relevant, as we have now placed you in possession of the full basis of our client’s claim.

7. If you still have any queries, despite the detailed schedule and supporting documents, and in a final effort to avoid unnecessary legal action, we propose that the parties convene a roundtable meeting in an attempt to curtail legal costs and to bring the matter to a speedy finality, thus avoiding protracted and expensive litigation.”
14. The respondent admits receipt of that letter of demand but takes issue with any suggestion that “invoices and delivery notes were provided”, countering that “no delivery notes have been attached to the founding affidavit.” According to the respondent, delivery notes and declaration forms are essential evidence of supplies of diesel and yet, despite its numerous requests, these documents have not been provided by the applicant.
15. On 11 December 2023 the parties held a roundtable meeting at which the applicant was represented by its attorney and Ms Geyser and

the respondent was represented by Mr Mienie. A ‘minute’ of the meeting was prepared by the applicant’s attorney on that day. It records that:

“2.1 You do not dispute the entries from 9 October 2023 – 15 November 2023 as reflected on our client’s statement of account dated 4 December 2023, marked as items 1-26, with supporting documents. ...

2.2 We have requested that you make payment of the amount of R805 788.87, to avoid further interest being levied. ...

2.3 You refused to pay the amount of R805 788.87 because, according to you, there are ‘paperwork’ outstanding on some of the orders dating back to somewhere in September 2023 for 11 (eleven) days. You have already paid these amounts but now, after the fact, dispute same. ...

2.4 In order to resolve any possible dispute which you may have, and in order to assure you that our client's house is in order, our client has undertaken to engage in the immense task to go through your entire account from June 2023 to 6 October 2023 and to provide you with each written record of receipt of product. The supporting documents will be provided to you on or before Monday, 18 December 2024.

2.5 You will be given an opportunity until close of business, 27 December 2023, to peruse same and revert to our client on any valid queries which you may have on the 'paperwork' provided by our client. This will be the final extension given to you as our client has already given you ample opportunity to reconcile your account."

16. The applicant's attorney informed the respondent by email on 14 December 2023 that the supporting documents had been compiled such that every entry on the statement of account was supported by a signature by Charles Lake on behalf of the respondent of receipt of the diesel.[1] Hence the applicant's claim "remained as per the attached statement of account attached to the email of 14 December 2023" and the respondent was afforded "an opportunity to collect the supporting documents from our client's offices, as arranged, and to scrutinize same."[2]
17. According to the applicant, although Ms Mienie replied by email on the same day that "we do not agree that all documents were given at collection time you never delivered which is false" and that "I told you that I have not received delivery notes and some invoices which I can also prove", the respondent failed either to particularise these assertions or to collect the bundle of supporting documents.
18. Ms Mienie submits that there was no point in collecting the supporting documents once it was established that they would not include delivery notes bearing original signatures.

THE APPLICATION

19. This application was initiated by the applicant on 12 January 2024 and served on the respondent on 18 January 2024. The notice of motion seeks payment of a sum of R805,788.87 plus interest thereon at the rate of 11.75% per annum a tempore morae to date of final payment and costs of the application on the attorney and client scale. The founding affidavit is deposed to by Mr Joubert. Its contents are confirmed by Ms Geyser and Machiel Vorster. As appears from the founding papers:

19.1. The applicant describes the purpose of this application as being to secure "an order for payment of the amount owed by the respondent to the applicant, together with interest thereon from date of mora, being 1 December 2023, to date of final payment and costs."

19.2. According to the applicant, "[t]he respondent is indebted to the applicant for the sum of R805 788.87", an indebtedness that is admitted on the record and in respect of which there is no factual dispute, whether material or otherwise.

20. The applicant attached to its founding affidavit, as annexure AAJ10, an extract of an account statement dated 04 January 2024 “reflecting transactions in respect of the respondent from 27 September 2023 and reflecting each purchase of diesel and each payment.” In addition, as noted, annexure AAJ14 is the complete statement of account attached to the email of 14 December 2023.

21. The respondent delivered its answering affidavit on 15 May

2024. Its deponent is Ms Mienie. Its contents are confirmed by Mr Mienie. As appears from the answering papers:

21.1. Ms Mienie alleges that, after receipt of the founding papers in this application, it took her husband and her:

“months to work through all the paperwork and check, in particular, at what rate, the Applicant billed the Respondent for the diesel. As we still do not have all the paperwork that we require, the Applicant has only provided paperwork for June through November 2023, we are still unable to calculate what, if anything is due by the Respondent to the Applicant.”

21.2. The respondent submits that, to the knowledge of the applicant, there is “a bona fide defence to their claim and that there are factual disputes between the parties. The Applicant is aware that they should not have proceeded by way of a notice of motion and that they should have proceeding by way of action proceedings.”

21.3. Paragraph 58.2 read with annexure AH offers an explanation for the respondent’s insistence on the production of delivery notes

– as opposed to delivery receipts – in respect of diesel purchases. The issue appears to relate not to product volumes, since both forms of documents appear to reflect such details, but rather to signature verifications:

“Delivery notes are original documents with original signatures on, the documents that have been attached by the Applicant are either

documents that have been created by themselves alternatively the delivery receipts which are carbon copies, and are not proof as they are easily amended, and COC meter reading records that do not have any signatures on them.”

21.4. Paragraph 58.3 read with annexure AI offers an explanation for the respondent’s insistence on the production of declaration

forms – in addition to delivery notes – in respect of diesel purchases. However, the explanation relates to compliance (by a third party) with health and safety regulations and does not appear to provide any basis for non-payment in respect of products ordered and delivered under the supply agreement.

22. On 30 May 2024 the applicant delivered its replying affidavit deposed to by Mr Joubert. As appears therefrom, he:

22.1. takes issue with Ms Mienie's deposition to the answering affidavit on behalf of the respondent, averring that she effected

only certain payments to the applicant and that "all she could know [about the dispute] is what was told to her by ... Mr Mienie"; and

22.2. contends that Ms Mienie's answering affidavit raises no cogent defence to the applicant's claim.

23. Written submissions on behalf of the applicant were delivered on 11 June 2024.

24. No written submissions were delivered by or on behalf of the respondent. This is explicable with reference to a notice of withdrawal of its erstwhile attorney uploaded on CaseLines on 30 January 2025.

THE HEARING

25. At the hearing of the application, counsel for the applicant, JW Steyn, informed me that, despite the respondent's opposition to this matter, it had made payments to the applicant in reduction of its indebtedness, which had decreased from R805,788.87 to R180,778.87. In his submission, the respondent's payments were an acknowledgement that the reduced balance was due and payable to the applicant, especially as the papers disclosed no genuine defence to the applicant's claim. He urged this court to reject the suggestion of an absence of supporting documents in respect of purchases of diesel, given the statement of account that is annexure

AAJ14 to the founding affidavit and the reconciliations and supporting documents that comprise annexures AAJ15 (June 2023), AAJ16

(July 2023), AAJ17 (August 2023) and AAJ18 (September 2023) to the founding affidavit.

26. In addition, Mr Steyn argued that, despite the parties' engagements over an extended period of time and the fact that the respondent has access to its own books and records, including in respect of diesel sales to its own customers, the respondent was yet to identify any pertinent dispute in regard to any line item in the applicant's statement of account. It could be expected of the applicant to specify anomalies or discrepancies in the parties' records.

27. When asked whether the respondent might have paid invoices that it considered to be supported by documents, Mr Steyn said that the payments were in lump sums rather than invoiced amounts. In other words, in his submission, the respondent had sought – but failed – to discharge its admitted indebtedness to the applicant.

28. While there is plausibility to this submission, I am mindful also of Ms Mienie's explanation, noted in paragraph 34 below, that the respondent had resigned itself to trying to settle the applicant's claim at a time when it lacked the financial means to persist with a legal fight.
29. In the circumstances, I probed Mr Steyn on the absence of any supplementary affidavit placing the payment update on oath and supporting a revised draft order that had been uploaded on CaseLines on 29 April 2025.
30. He undertook to ensure delivery of such an affidavit without delay.
31. Ms Mienie, who represented the respondent the hearing of the application, explained that the company could not afford legal representation and that her husband was not in court as he had to attend to its affairs. She traversed the background to and initial operation of the business relationship between the parties.
32. According to Ms Mienie, the applicant submitted a higher-than-expected statement in the course of 2023, which could not

be reconciled with the respondent's records for reasons including the absence of signed delivery notes.

33. In her view, the documentary impasse was and is the reason for the litigation.
34. Ultimately, though, the respondent had sought to settle the alleged indebtedness as it could no longer afford legal representation and wished to extricate itself from the litigation. It was Ms Mienie's submission that the parties had reached an agreement that the application would not proceed as set down; yet the applicant reneged on that agreement and refused to remove the matter from the court roll. She offered to show the court an exchange of Whatsapp messages stored on her mobile phone.
35. Mr Steyn replied that he was instructed to place on record that the respondent had failed to comply with a payment arrangement agreed between the parties.
36. Given the undesirability of receiving evidence from the bar – especially on a fundamental issue – I debated with Ms Mienie and Mr Steyn my inclination to afford the parties an opportunity to supplement their affidavits in respect of (only) events following delivery of the replying affidavit, i.e. the circumstances in which further payments were made by the respondent to the applicant and whether the parties had reached any relevant agreement or arrangement.

THE SUPPLEMENTARY AFFIDAVITS

37. After the hearing I issued a directive in the following terms:

“1. By no later than 16:00 on Friday 02 May 2025, the applicant is to deliver a supplementary founding affidavit addressing the facts relating to the reduced quantum and varied interest prayers set out in the draft order that appears on CaseLines at 21-12 and 21-13.

2. By no later than 16:00 on Tuesday 13 May 2025, the respondent is to deliver a supplementary answering affidavit addressing the allegations contained in the supplementary founding affidavit and any settlement or further reduction of any such indebtedness.
3. By no later than 16:00 on Friday 16 May 2025, the applicant is to deliver any supplementary replying affidavit addressing the allegations contained in the supplementary answering affidavit.
4. The affidavits referred to in paragraphs 1 to 3 above shall not traverse facts that predate the applicant's replying affidavit that appears on CaseLines at 04-112 to 04-125, save in special circumstances explained in any such affidavit."
38. Later that day a supplementary founding affidavit was uploaded on CaseLines, in which the applicant confirmed counsel's payment update and annexed a statement of account as at that date. In the affidavit Mr Joubert:

38.1. states that on 18 October 2024 Mr Mienie visited his office and advised that he wished to settle the indebtedness. (The terms of a common-cause agreement reached on that day are recorded in the transcripts referred to in paragraphs 39.2 and 40.2 below.) Thereafter, between 17 January and 11 April 2025, the respondent paid to the applicant a sum of R625,000 by way of five lump-sum amounts;

38.2. addresses WhatsApp messages exchanged with Mr Mienie on 03 April 2025 in respect of the indebtedness. Although the messages appear to be without-prejudice communications, neither party claims privilege and both parties refer to them in their supplementary affidavits. Mr Joubert reads the messages as recording an agreement that, to reach a milestone repayment total of R705,000 and bring about a removal of the matter from the court roll, the applicant would accept payment by the respondent of R80,000 on 11 April 2025 and R80,000 before 24 April 2025; [3]

38.3. refers to only one other Whatsapp message forming part of annexures SAF2.1 to SFA2.5, being his reminder to Mr Mienie on 23 April 2025 that a second payment of R80,000 was due to be paid before midnight that evening (i.e. before 24 April 2025); and

38.4. explains that, when the Mienies informed Mr Joubert that the second payment of R80,000 could not be made on 24 April 2025, the applicant's attorney advised the respondent by email that a request for an indulgence was rejected and the application would proceed in court in the following week.

39. The respondent delivered a supplementary answering affidavit on 13 May 2025. It is deposed to by Ms Mienie and not confirmed by Mr Mienie. As appears therefrom:

39.1. Paragraph 1 records that Mr Mienie runs the business of the respondent, even though it is registered in Ms Mienie's name, whereas she has been "a housewife for the last 15 years" who "wasn't directly involved with the business dealings."

39.2. Paragraphs 3 and 4 address exchanges of WhatsApp messages, including a ‘voice note’ recorded on 18 October 2024 and forwarded to Ms Mienie on 02 January 2025. An unsworn transcript of the voice note is annexed to the affidavit. The transcript (which is consistent with the applicant’s transcript referred to in paragraph 40.2 below) records an agreement between Messrs Joubert and Mienie on 18 October 2024 that the respondent would make unspecified monthly payments to the applicant in reduction

of the R805,000 on the statement and, by the court date in April 2025, if a substantial portion of the indebtedness had been settled

(such that R50,000 or R100,000 remained outstanding), the court date would be “cancelled”. But if, for example, only R100,000 was repaid in the ensuing six months (such that approximately R700,000 remained outstanding), the applicant would seek judgment in that amount plus interest and costs. Ms Mienie alleges that Mr Joubert did not keep his word inasmuch as the applicant proceeded with the court hearing even though the respondent had made payments totalling R625,000:

“Andre [Joubert] did not keep his word to cancel the court dates although payments were made of R625 000 of the R805 000 that was presumably outstanding.

On the 2nd and the 11th of April Andre repeats this pattern and do not cancel the court date although another payment of R80 000 was made to him as he requested to cancel the court date. So he disregarded his verbal agreement again with a message.”

39.3. Paragraphs 8, 15 and 16 foreshadow claims for damages that the respondent intends pursuing against the applicant but they lie beyond the ambit of these proceedings.

39.4. Paragraphs 9 to 11 revert to alleged terms of the supply agreement but they fall outside my directive of 30 April 2025.

39.5. Paragraphs 13 and 14 return to the respondent’s primary reason for resisting the claim of the applicant, being the alleged inability to produce documents supporting and verifying supplies of diesel in respect of which payment is claimed. The directive did not invite evidence on this score.

39.6. Save as outlined in paragraph 39.2 above, the supplementary answering affidavit does not elaborate on the circumstances in which the respondent made five payments (totalling R625,000) between 17 January and 11 April 2025.

40. On 15 May 2025 a supplementary replying affidavit was uploaded on CaseLines, in which the applicant’s Mr Joubert argues that the supplementary answering affidavit strays into matters that are not permitted by the directive (paras 5-8) and then:

40.1. addresses what was agreed between the parties on 18 October 2024, i.e. that, if the respondent paid at least R705,000 before the court date (such that between R50,000 and R100,000 remained outstanding), the applicant would remove the matter from the roll. However, “[t]his did not happen. ... The court date was not cancelled and the applicant persisted with the application currently before court” (paras 9-10);

40.2. attaches an unsworn transcript of the voice note (para 14.4). The transcript (which is consistent with the respondent’s transcript referred to in paragraph 39.2 above) records an agreement between Messrs Joubert and Mienie on 18 October 2024 that the respondent would make unspecified monthly payments to the applicant in reduction of the R805,000 on the statement and, by the court date in April 2025, if a substantial portion of the indebtedness had been settled (such that R50,000 or R100,000 remained outstanding), the court date would be “cancelled”. But if, for example, only R100,000 was repaid in the ensuing six months (such that approximately R700,000 remained outstanding), the applicant would seek judgment in that amount plus interest and costs;

40.3. attaches an email sent by Mr Joubert to Ms Mienie on 02 January 2025, the material contents of which are translated and summarised as follows:

“It is clear from my email that a payment of +/- R700 000.00 was required before 24 April 2025 for the matter not to be proceeded

with, the applicant would forego costs and interest and a new agreement to be reached regarding the balance outstanding, which was to be an amount of between R50 000.00 and R100 000.00 (paragraph 4). I also stated that if I was not satisfied with the amount paid, by the Court date, costs and interest would be persisted with (paragraph 5)” (para 14.5);

40.4. asserts that the October 2024 agreement was recorded in a letter sent by the applicant’s attorney to the respondent’s erstwhile attorney on 08 January 2025 attaching the voice note and the email referred to in paragraph 40.3 above and stating that “[u]p to date hereof your client failed to make any payment to our client and the outstanding amount remains unpaid” and that “[i]f your client fails to adhere to the terms of the agreement by 1 April 2025, by settling at least an amount of R705 000.00, the argument of the application will proceed on the opposed roll” (paras 14.2-14.3);

40.5. attaches an email sent by the applicant’s attorney to Ms Mienie on 04 February 2025 referring to a payment of R4,000 and warning that “[i]f you fail to adhere to the terms of the [October 2024] agreement by 1 April 2025, by settling at least an amount of R705 000.00, the argument of the application will proceed on the opposed roll” of 28 April 2025 (para 14.7); and

40.6. attaches two further emails sent by the applicant’s attorney to Ms Mienie on 03 April 2025 referring to four payments totalling R545,000 and ‘recording’ the terms of the October 2024 agreement that “[i]f you fail to adhere to the terms of the settlement agreement by 1 April 2025, by settling at least an amount of R705 000.00, the argument of the application will proceed on the opposed roll.” According to Mr Joubert, “[t]he court date was not cancelled because the amount

of at least R705 000.00 was not paid and the additional payment of R80 000.00 referred to in the WhatsApp messages was not made before the court date” (para 15.1).

41. What I make of the supplementary evidence is this:

41.1. The terms of the October 2024 agreement are recorded in the transcripts referred to in paragraphs 39.2 and 40.2 above. Whatever uncertainty may exist as regards what sum was to be paid by the court date to secure its ‘cancellation’,

the terms are common cause between the parties.

41.2. On 02 January 2025 Mr Joubert informed or reminded Ms Mienie of the October 2014 agreement by email referred to in paragraph 40.3 above and stated that, for the matter not to proceed as set down, payment of approximately R700,000 was required before 24 April 2025.[4] On the same day he forwarded the voice note to her by WhatsApp message.

41.3. On 08 January 2025 the applicant’s attorney sent to the respondent’s erstwhile attorney a letter attaching the voice

note and the email referred to in paragraph 40.3 above and stating that, unless an amount of at least R705,000 was settled by 01 April 2025, the matter would proceed on the opposed roll.[5]

41.4. The respondent paid R4,000 to the applicant on 17 January 2025.

41.5. The respondent’s erstwhile attorney withdrew on 30 January 2025.

41.6. The respondent paid R20,000 to the applicant on 03 February 2025.

41.7. On 04 February 2025 the applicant’s attorney sent to Ms Mienie an email referring to a payment of R4,000 and reiterating that, unless an amount of at least R705,000 was settled by 01 April 2025 (purportedly in terms of the October 2024 agreement), the matter would proceed on the opposed roll.

41.8. The respondent paid R21,000 to the applicant on 05 February 2025.

41.9. The respondent paid R500,000 to the applicant on 02 April 2025.

41.10. At 10:16 and 10:33 on 03 April 2025 the applicant’s attorney sent to Ms Mienie two further emails referring to four payments totalling R545,000 and reiterating that, unless an amount of at least R705,000 was settled by 01 April 2025 (purportedly in terms of the October 2024 agreement), the matter would proceed on the opposed roll.

41.11. The parties’ supplementary affidavits disclose and address an important exchange of Whatsapp messages between 12:18 and 14:00 on the same day (03 April 2025):

41.11.1. Mr Joubert: “Ettienne. Jy skuld ’n som total van R260 000 Om by die R705 000 uit te kom skuld jy nog R160 000 wat jy gesê het jy R80 000 sal betaal teen Vryday 11 April en R80 000 voor 24 April wat ek sal aanvaar. Daar bly dan nog R100 000 oor. Laat weet asb hoe jy beplan om die oorblywende R100 000 af te betaal?”

41.11.2. Mr Mienie: “hi dat jy ook die datum hof datum kansleer met ontvangs van 80000 volgende week”. ... “ek ... maak soos ooreengestem het”.

41.11.3. Mr Joubert: “Ons sal die hofdatum kanselleer met die ontvangs van die betaling volgende week. Bevestig asb dat die verdere R80 000 voor die 24ste sal betaal word. Deel ook asb met my die plan rakende die balans R100 000 en hoe of teen wanneer ons dit sal ontvang?”

41.11.4. Mr Mienie: “gaan werk aan 160000 dan kan ek sb weer met jou reel wat ook sal pas”. “as dit ok is met jou”. ... “dat ek nou jou 160000 aan werk dnki baie”.

41.11.5. Mr Joubert: “Dankie”.

41.11.6. Mr Mienie: “dnki”.^[6]

41.12. The respondent paid R80,000 to the applicant on 11 April 2025.

42. I understand that:

42.1. the respondent did not make any further payment to the applicant; and

42.2. the application was not removed from the roll but was heard by this court as described in paragraphs 25 to 36 above.

MY ANALYSIS

43. It is common cause that in October 2024 it was agreed that the respondent would make monthly payments to the applicant in reduction of the claimed sum of R805,000 and, by the court date in April 2025, if a substantial portion of the indebtedness had been settled (such that only a relatively small amount remained outstanding), the application would be removed from the roll and not proceed as set down.

44. As it happened, no payments were made until early January 2025, when Mr Joubert and the applicant’s attorney drew the October 2014 agreement to the attention of Ms Mienie, who, it may be inferred, caused the respondent to make five payments (totalling R625,000) between 17 January and 11 April 2025.

45. That left a balance of approximately R260,000, which Messrs Joubert and Mienie came to discuss in two parts – R160,000 and R100,000 – notably by way of the 03 April 2025 exchange of Whatsapp messages quoted in paragraph 41.11 above.

46. Both representatives of the parties seem to have been satisfied that the second part could be addressed in due course.

47. The more pressing part was the first. It appears that Mr Mienie proposed and Mr Joubert accepted that the first part could be paid, in two tranches of R80,000 each, on 11 and 24 April 2025.

48. It may be gathered that Mr Joubert wished any postponement of the hearing to be dependent on timely payment of both tranches.

49. But the 03 April 2025 exchange of WhatsApps – put up by the applicant and spoken to by Ms Mienie on behalf of the respondent – seems most naturally to be read as recording the parties’ consensus that payment of the first tranche on 11 April 2025 would itself bring about an entitlement to a postponement. If so, there is substance to the claim that the applicant reneged on its agreement with the respondent.
50. In any event, there is a material dispute of fact as to whether an entitlement to a postponement of the hearing would be triggered by timely payment of (a) the first tranche of R80,000 or (b) the first and second tranches of R80,000. On the ordinary principles applicable to motion proceedings, I am unable to reject – as untruthful or otherwise untenable – the version of Ms Mienie that, by agreement between the parties, the hearing should have been postponed on payment of the first tranche on 11 April 2025.
51. If (as I consider to be the case) either the form of compromise referred to in paragraph 49 above or the dispute of fact referred to in paragraph 50 above precludes the (revised) final relief sought by the applicant on motion – at this time – the question becomes whether the application should be dismissed. In my view, a dismissal of the application would do an injustice to the applicant. At the time of initiating the application in January 2024 and at all times before April 2025, the applicant could not have foreseen any such compromise or dispute. The application was not frivolous or vexatious and appears to have precipitated the five payments (totalling R625,000) between 17 January and 11 April 2025. In any event, nothing in this judgment determines the merits of the application (i.e. of the applicant’s claim or the respondent’s defence), which may yet come before another court.
52. In the exercise of my discretion, I intend to remove the matter from the roll such that, if and when necessary in due course, it may be re-enrolled for hearing.

THE ORDER

53. The applicant’s notice of motion and draft order seek costs on the attorney and client scale in the event of success. At the hearing Mr Steyn motivated for such an order or, should I not be minded to grant punitive costs, for a costs order on scale C, on the basis that the applicant had been put to considerable trouble by the respondent.
54. The respondent’s answering affidavit asks that the application be dismissed without costs alternatively that it be postponed with costs reserved. Ms Mienie did not address the question of costs.
55. Without determining the merits of the application (i.e. of the applicant’s claim or the respondent’s defence), it appears to have precipitated the five payments (totalling R625,000) between 17 January and 11 April 2025. In the exercise of my discretion, I consider that the applicant is entitled to costs (at least) until the latter date. But I do not find the respondent’s conduct in resisting liability to the applicant to be deserving of punitive censure. Nor do I find the matter to be of sufficient complexity, value or importance to warrant an award of costs on the highest scale contemplated in rule 67A(3) read with rule 69(7). It seems to me

appropriate that the costs of the proceedings after 11 April 2025 be determined by a court seized with the merits of the application if and when it is re-enrolled for hearing.

56. In the circumstances, I grant the following order:

56.1. The application under case number 2024-002133 is removed from the roll.

56.2. The respondent is directed to pay the costs of the application, on scale B, until 11 April 2025, whereafter the costs of the application are reserved.

PEARSE AJ

This judgment is handed down by uploading it to CaseLines and emailing it to the parties or their legal representatives. The date of delivery of this judgment is 16 May 2025.

Counsel for Applicant: JW Steyn Instructed by: Swart Redelinghuys Nel Gauteng Inc Director for Respondent: Christine Mienie Date of Hearing: 30 April 2025 Date of Supplementary Founding Affidavit: 30 April 2025 Date of Supplementary Answering Affidavit: 13 May 2025 Date of Supplementary Replying Affidavit: 15 May 2025 Date of Judgment: 16 May 2025

- [1] The statement of account attached to the email is annexure AAJ14 to the founding affidavit.
- [2] The reconciliations and supporting documents comprise annexures AAJ15 (June 2023), AAJ16 (July 2023), AAJ17 (August 2023) and AAJ18 (September 2023) to the founding affidavit, which span some 270 pages of the CaseLines record.
- [3] I return to this reading of the Whatsapp messages in paragraph 41.11 below.
- [4] Without making a finding in this regard, this seems to be an accurate statement of the terms of the October 2024 agreement.
- [5] Without making a finding in this regard, this seems to be an inaccurate statement of the terms of the October 2024 agreement.
- [6] I am mindful that annexures SAF2.1 to SFA2.5 depict other Whatsapp messages that appear to have followed the exchange on 03 April 2025 but neither party invited this court to make anything of them or, indeed, even mentioned them in their supplementary affidavits.

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Prepared on 13 October 2026 · Esheria