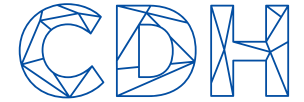


Dispute Resolution

ALERT | 2 September 2025



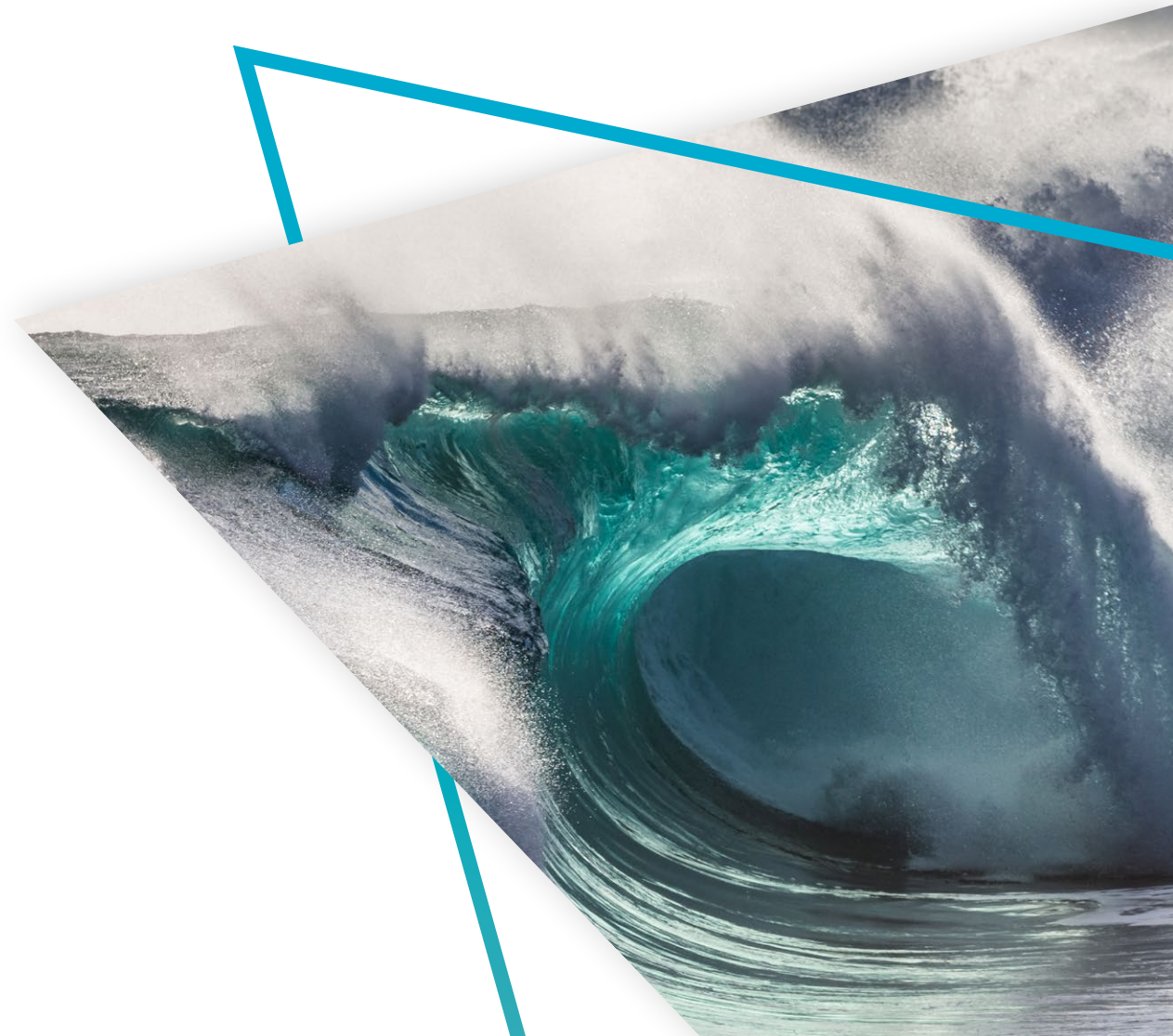
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When protest payments pay off

In *KwaDukuza Municipality v Consolidated Aone Trade and Invest 6 (Pty) Ltd [in Liquidation] and Others* (1273/2023) [2025] ZASCA 86 (11 June 2025), the Supreme Court of Appeal (SCA) was called upon to decide whether payments made under protest are recoverable and whether or not a municipality is entitled to retain funds paid for rates beyond the period set out in section 118(1) of the Municipal Systems Act 32 of 2000 (Municipal Systems Act), to the extent that such payments are made under protest and duress. The facts, legal reasoning and practical implications of this case are important for anyone dealing with disputed municipal claims and/or considering whether to pay under protest.

Facts

Consolidated Aone Trade and Invest 6 (Pty) Ltd (CATI 6), owned several immovable properties, including the Ballito Bay Mall properties in KwaZulu-Natal. Following CATI 6's provisional liquidation in September 2013 and final winding up in March 2015, the liquidators (the second to fourth respondents in this application), sold the properties for R135 million to Cyber Savvy Merchants (Pty) Ltd.

For the properties to be transferred, the liquidators were required to obtain a rates clearance certificate from KwaDukuza Municipality (Municipality) under section 118 of the Municipal Systems Act. Section 118(1) requires municipalities to issue certificates confirming that:

*"[A]ll amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties **during the two years preceding the date of application for the certificate have been fully paid.**"* (emphasis added)

Without the clearance certificate, the properties could not be transferred.

The liquidators applied for the rates clearance certificate, and the Municipality claimed payment of an amount that extended well beyond the two-year period provided for in section 118 of the Municipal Systems Act. When the liquidators disputed these amounts, the Municipality threatened service disconnection and refused to issue the rates clearance certificate unless the full amount was paid.

Due to the dispute regarding the rates clearance amount, Cyber Savvy (the purchaser) obtained a court order, by consent between the parties, which directed the Municipality to issue a statement for the two-year period preceding the date of the order, and that the liquidators of CATI 6 must make payment of the statement amount in order for the Municipality to issue the rates clearance certificate. The consent order also provided that any payment made by the liquidators of CATI 6 would be without prejudice to the CATI 6's rights to approach the court for a declarator as to the actual amount due, and a refund, if any, of any amounts paid in excess of what was legally due.

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Despite this clear limitation to the two-year period, the Municipality continued demanding the full historical amount. Facing continued refusal to issue the certificate and threats of service disconnection, the liquidators eventually paid R21,165,901.22 under protest in April 2018, explicitly reserving their rights to claim repayment. The Municipality later admitted its calculation was incorrect, confirming only R17,423,354.82 was actually due, and that R3,742,546.40 had been overpaid.

The court a quo's finding

In the KwaZulu-Natal High Court, Chili J granted the liquidators' application for recovery of funds paid under protest, being the overcharged amount made up of rates payable beyond the two-year period. Judge Chilli found that the liquidators were entitled to recover all amounts overpaid to the Municipality, which was considerably more than the R3,742,546.40. The Municipality's defence for retaining the additional amount was that in terms of section 10(3) of the Prescription Act 68 of 1969 (Prescription Act), regardless of whether a debt is deemed to have prescribed, payments of a prescribed debt constitute settlement of such debt.

The legal position

The SCA dealt with the interpretation of section 118 of the Municipal Systems Act and whether, in light of this section:

- CATI 6 had the right to recover payments made under duress and protest, in circumstances where the Municipality demanded payment of historic debt beyond the two-year period; and
- the payment fell within the realm of section 10(3) of the Prescription Act, where payment of a prescribed debt constitutes settlement of that debt.

The SCA also dealt with payments made under duress and protest, and how payments of this nature have been dealt with by our courts in the past.

The Municipality argued that section 118(1) did not prevent it from pursuing claims for the full outstanding amount. However, the Court rejected this interpretation, stating that

"the view expressed by the Municipality is contrary to what this court stated in the case of Nelson Mandela Municipality [v Amber Mountain Investments 3 (Pty) Ltd (Nelson Mandela Bay) [2017] ZASCA 36; 2017 (4) SA 272 (SCA)] that section 118(1) 'clearly applies to municipal debts which have become due in the two years preceding the date of the application for the certificate and does not apply to future municipal debts.'"

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The court emphasised that the wording of section 118(1) is "clear and unambiguous" and that "the purpose of section 118(1) is to secure payment of all consumption charges 'in connection with that property', due for the period of two years before the application for a rates certificate." The court further held that "the demand for payment beyond the two-year period, as a requirement for the issuing of a rates clearance certificate, is 'a substantive obstacle to alienation.'"

The court concluded that "Any payment demanded under the rubric of section 118(1) for historical debts charged on the property predating the two-year period would not be lawful."

Section 118(3) of the Municipal Systems Act provides that:

"An amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property."

This means municipalities enjoy preference above other claims when lodging claims with liquidators, and the normal prescription period of three years applies.

The court cited *City of Tshwane Metropolitan Municipality v Mitchell* [2016] ZASCA 1; [2016] 2 All SA 1 (SCA); 2016 (3) SA 231 (SCA), which stated that section 118(1) operates as "an embargo provision with a time limit" (the two-year period) whilst section 118(3) serves as "a security provision, creating security for payment of historical outstanding municipal debts in favour of the municipality, without a time limit."

Payments made under protest and duress

At the time of making payment, the liquidators of CATI 6 stated in writing that the payment was made under protest, solely to obtain the certificate, and they reserved all rights to claim repayment. In dealing with the liquidators of CATI 6's recovery claim, the court cited *Commissioner for Inland Revenue v First National Industrial Bank Ltd* [1990] ZASCA 49; 1990 (3) SA 641 AD; [1990] 2 All SA 327 (A) at 649G-J, which comprehensively explained the nature of payments under protest:

"The addition of the words 'under protest' when a payment is tendered can, so it seems, fulfil one or more of several functions: (i) The phrase can serve as confirmation that, in the broad sense, the payment was not a voluntary one or, in the narrower sense, that it was due to duress ... (ii) It can serve to anticipate or negate an inference of acquiescence, lest it be thought that, by paying without protest, the solvens conceded the validity or the legality of the debt ... The object is to reserve the right to seek to reverse the payment. The effect is not to create a new cause of action but to preserve and protect an existing one."



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The Municipality relied on section **10(3) of the Prescription Act**, which provides that payment of a prescribed debt constitutes settlement and is irrecoverable.

However, the court found this protection did not apply in these circumstances for two key reasons:

- firstly, the consent order (obtained by Cyber Savvy) created an agreement between the Municipality and CATI 6 whereby the Municipality specifically waived its rights under section 10(3); and
- secondly, when payment was made, CATI 6 was in liquidation with a *concurso creditorium* in operation, meaning the payment of the prescribed debt preferred the Municipality above other creditors despite it already having a preferent claim under section 118(3).

The court emphasised the principle from the case of *Walker v Syfret NO* [1911] AD 141, that “to deprive the estate of a valid defence to a claim against it is as prejudicial to the creditors as to take from it the most tangible asset of corresponding amount”.

The court ultimately did not agree with the Municipality that section 10(3) of the Prescription Act entitled it to retain the funds paid under protest.

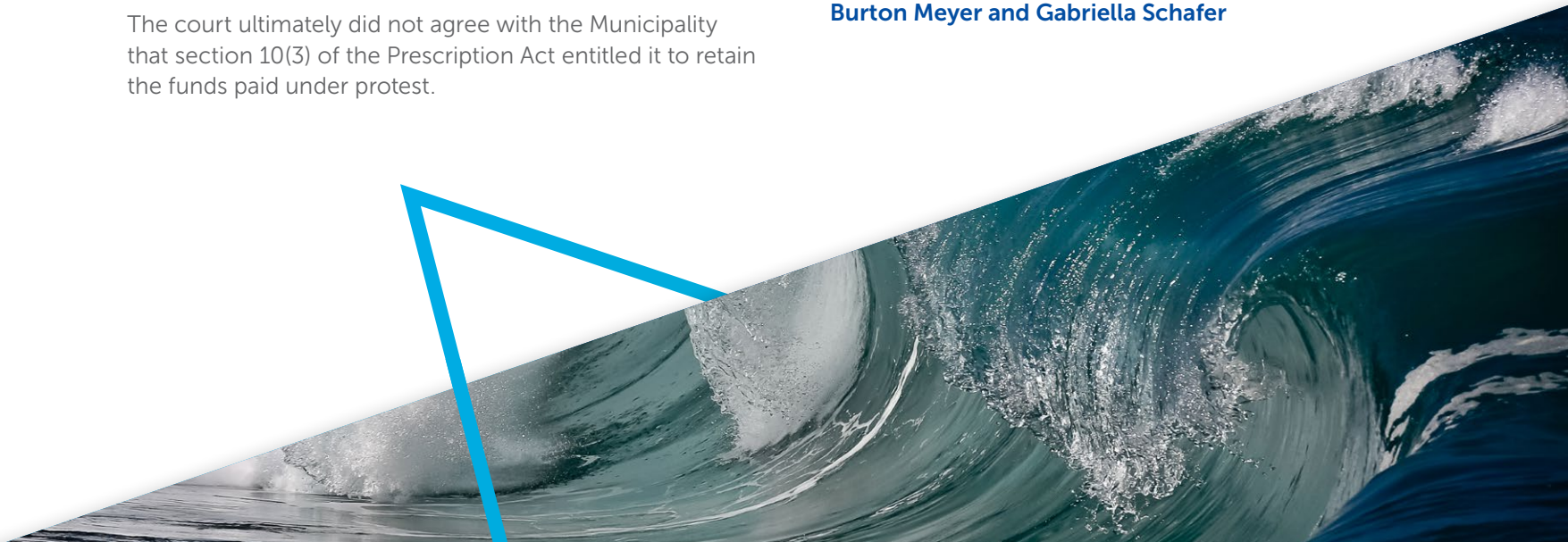
SCA’s decision

The SCA dismissed the Municipality’s appeal, confirming that municipalities cannot use their power to withhold rates clearance certificates to collect debts falling outside the statutory two-year period under section 118(1). The decision reinforces that payments made under protest in such circumstances remain recoverable, protecting both property owners and creditors in insolvency proceedings from municipal overreach.

Key takeaways

It is important to note, however, that the mere fact that a payment is made under protest does not automatically render it recoverable. A payment under protest may be recoverable if the paying party can demonstrate that they had a valid legal defence to the payment and that it was therefore not made voluntarily. To avoid any dispute regarding the voluntariness of the payment at a later stage, it is essential that the protest is clearly recorded at the time the payment is made.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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