

SOUTH AFRICA / JUDGMENT

Tondolo t/a Tondolo Partnership v MJ Mboya Project Managers CC and Another (99968/15) [2019] ZAGPPHC 278 (2 July 2019)

[2019] ZAGPPHC 278

COURT

North Gauteng High Court, Pretoria

BEFORE

Mabuse

CASE / FILE NUMBER

99968/15

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IN THE HIGH COURT OF SOUTH
AFRICA
GAUTENG DIVISION, PRETORIA
(1)

REPORTABLE:

YES/NO
(2)
OF
INTEREST TO OTHER JUDGES: YES/NO
(3)
REVISED
CASE
NUMBER: 99968/15

DATE:

2 July 2019
MARY
TONDOLO t/a TONDOLO PARTNERSHIP
Plaintiff
V
MJ
MBOYA PROJECT MANAGERS CC
First Defendant
MHLAWAKHEJOELMBOYA
Second Defendant

JUDGMENT

MABUSE J:

[1] This is a claim for payment of money. By the combined summons issued by the registrar of this court on 15 November 2015, the Plaintiff

claims, from the Defendants, payment of the sum of R7,745,851. 72 plus interest and other ancillary relief. The said amount is in respect of architectural services rendered by the Plaintiff to the First Defendant. Initially the Plaintiff had claimed from the First Defendant payment of the sum of R9,373,276.57 in respect of the said services. The said amount was reduced to R7,745,851.72 after the Plaintiff had abandoned, at the beginning of the trial, a sum of R1,727,424,85 in respect of loss of profit.

[2] THE PARTIES

2.1 The Plaintiff is Mary Tondolo t/a Tondolo Partnership, a professional architect duly registered in terms of the Architectural Profession Act 40 of 2000 ("the Act"). She conducts business as a sole proprietor under the name and style of Tondolo Partnership at 200 Bram Fisher Drive, Kensington B, Gauteng Province.

2.2 The First Defendant, MJ Mboya Project Managers CC, is a close corporation duly registered as such in terms of the Close Corporation laws of this country. Its principal place of business is located at Unit 6, Block C, Halfway Gardens Office Park, Asparagus Road, Midrand, Gauteng Province. The Second Defendant is the sole member of the First Defendant.

2.3 Mhlawakhe Joel Mboya, an adult male is the Second Defendant. He works at the same place where it is the First Defendant's place of business.

THE

BACKGROUND

[3] The Plaintiffs cause of action is based partly on a written agreement and partly on an oral agreement. In or around June 2011 the Department of Health of the North-West Province ("the Department") approached the Plaintiff with the view to designing certain prototype community health care ("CHC") centres. The prototype designs would then be built on specific sites designated by the Department from time to time. The Department indicated to the Plaintiff that such CHC centres would be built at Mathibestadt, Maquassi Hills, Jouberton and Sekhing ("the community health care centres").

[4] Before 26 July 2011, the Department appointed the First Defendant as the project manager and principal agent in respect of all four of the aforementioned CHC centres.

[5] THE PLAINTIFF'S CAUSE OF ACTION

According to the Plaintiffs amended particulars of claim the Plaintiffs cause of action is, as indicated supra, based partly on an oral agreement and partly on a written.

A. THE ORAL AGREEMENT

According to the Plaintiff, on 26 July 2011 and at Mmabatho she, acting personally, and the First defendant, duly represented by the Second Defendant, concluded an oral agreement on the following terms. that:

5.1 the First Defendant was the sole party that had direct agreement with the Client;

5.2 the First Defendant would take full responsibility for the planning and overseeing of the construction of the CHCs;

5.3 the First Defendant would appoint the Plaintiff as Architect as a consultant in Respect the design and construction of the CHCs according to Client's requirements;

5.4 the First Defendant would be responsible for payment to the payment to the Plaintiff in respect of services rendered pertaining to the design and the construction of the CHCs.

B. THE WRITTEN AGREEMENT

According to the Plaintiff the written agreement consists of two documents, a Fee Structure letter dated 22 November 2011 and a letter of appointment dated 18 April

2012. Further, according to her, in concluding the said written agreement, the Plaintiff represented herself while the First Defendant was represented by the Second Defendant.

5.2.1 Fee structure letter dated 22 November 2011

This is the letter that the Plaintiff sent to the First Defendant. This letter, it is so pleaded by the Plaintiff, was sent by the Plaintiff to the First Defendant at the specific request of the First Defendant. This fee structure letter set out the Plaintiff's fee schedule as prescribed by the Act. The salient terms of this fee structure letter are the following:

"The Architectural Professional Act Nr. 4 of 2000 prescribes the fees which are due for the development of a project and the subsequent professional involvement during site construction. It also prescribes the professional fees due for re-use of the drawings and documentation for any subsequent project which is based on a prototype. The fee for re- use of a prototype was considered to be 15% of the full fee (percentage fee and base fee taken together) based on the final cost of each project. The fee for the initial prototype is considered to be a full fee as set out in the National tariffs.

The professional architectural fee for Mathibestadt is therefore to be considered in full as it includes all the building units while the documentation and design fees for the other sites are to be considered as repetitive.

For any further clarification on our fees due please refer to Professional Fees Guidelines of South African Council for the Architectural Profession. "

Copies of the PFG in respect of the services rendered by persons registered in terms of the Act were annexed to the Plaintiff's particulars of claim as Annexures 'A2' to 'A4'.

The Plaintiff claims that the First Defendant accepted the fee schedule as set out in the foregoing letter. According to her the agreement in respect of the fees she charged the First Defendant for service she was appointed to render was concluded on the basis of the fee structure she set out in the letter dated 22 November. Despite having received the Plaintiff's letter dated 22 November 2011, for inexplicable reasons, the First Defendant did not directly respond to the letter. On the contrary, the First Defendant wrote and sent to the Plaintiff a Letter of Appointment, to which I will now turn my attention.

5.2.2 The Letter of Appointment

5.2.2.1 According to the Plaintiff's particulars of claim this portion of the parties' written agreement was concluded by and between them at Randburg on or about 18 April 2012. It was written to the Plaintiff by the Second Defendant on behalf of the First Defendant.

5.2.2.2 The letter of appointment to which I shall refer as 'A5' for purposes of brevity, sets out the terms on which the First Defendant appointed the Plaintiff as an architect. The Plaintiff accepted and agreed to the terms of A5. It states, inter alia, that:

5.2.2.2.1 RE: Architects: Letter of Appointment: Mathibestadt, Maquassi Hills, Jouberton Extension 21 and Sekhing Community Health Centres;

5.2.2.2.2 that the appointment of the Plaintiff was based on the latest Public Works fee scale including applicable discount for repetitive work and a 10% discount on the first prototype;

5.2.2.2.3 the service for which the architect as appointed were fully detailed under section 2.0 (scope of works) of the letter of appointment;

5.2.2.2.4 that (the fees applicable payable to the Plaintiff would be "as agreed";

5.2.2.2.5 that payment terms were to be based on the Construction Project Management Scale;

5.2.2.2.6 disbursements would be 10% of the total fee, otherwise pre-agreed with MJ Mboya Project Manager.

[6] According to the plaintiffs particulars of claim:

6.1 it was a tacit term of the agreement that the First Defendant would effect payment of the Plaintiffs invoices within 30 days alternatively within a reasonable time of receipt of any such invoices;

6.2 the Construction Project Management Fee Scale refers to the Guideline Scope of Services Recommended Guideline Tariff of Fees for persons registered in terms of the Project and Construction Management Professions Act 48 of 2000 ("PCMPA").

[7] The Plaintiff pleaded further that she has:

7.1 complied with all her obligations in terms of the agreement;

7.2 performed the services required of her by the First Defendant from time to time over the course of the project of the design and construction of the community health care centres;

7.3 issued invoices to the First Defendant in respect of the work done by her in terms of and in accordance with the agreement;

7.4 the fees of the plaintiff as reflected in such invoices were in accordance with the Act and furthermore in accordance with the parties' agreement.

[8] It is her case furthermore that despite the Plaintiff having delivered to the First Defendant and the First Defendant having received such invoices and despite furthermore lawful demand therefor, the First Defendant has failed to comply with the parties' agreement inasmuch as it failed to make payment of such invoices within 30 days, or a reasonable time, of receipt thereof. The relevant receipts have been fully set out in the Plaintiffs particulars of claim. They are not in dispute:

8.1 in respect of Mathibestadt CHC the total of such receipts is R1,695,711.59;

8.2 in respect of Sekhing CHC the total of such receipts is R1,581,108.28;

8.3 in respect of Matlosane or Jouberton Extension 21 CHC the total of such receipts is R2,779,871.15;

8.4 in respect of Maquassi Hills, Wolmaranstad the total of such receipts is R1,589,160.70.

It is for that reason that the Plaintiff claims the said amount of R7,645,851.72. May I hasten to point out that it is not in dispute that the First Defendant has received the relevant invoices nor is it in dispute that the First Defendant has admitted that it has not paid such invoices?

[9] THE FIRST DEFENDANT'S CASE

Although initially in its amended plea, the First Defendant denied that it had entered into an agreement with the Plaintiff as alleged by the Plaintiff it admitted subsequently in its reply to the Plaintiffs Request for Further Particulars that an agreement was reached between it and the Plaintiff. It admitted furthermore that the oral part of the agreement was reached between it and the Plaintiff after it had originally denied it in its amended plea. It will be recalled that the Plaintiff had referred to the two types of agreements, one oral and the other written. The First Defendant disputes both. It:

9.1 denies that it was liable and responsible to make payments to the Plaintiff in respect of services rendered by the Plaintiff to it relating to the design and construction of the community health care centres.

9.2 alleges further that the Plaintiff and the First Defendant had also agreed orally on specific terms and conditions relating to the basis upon which the Plaintiff was entitled to remuneration for professional services, the procedure for the Plaintiff to follow in submitting invoices to the First Defendant and the Defendants' liability for payment.

9.3 Those oral terms and conditions were, according to the Defendants, that:

9.3.1 the Plaintiffs fees for Sekhing, Matlosane and Maquassi Hills projects would be based on 15% of the Project Cost Base Fee ("PCBF") and a Time Base Fee ("TBF") for any part of the project that did not form part of the prototype based on 2011 Architectural and Construction Project Management ("ACPM") Fee Scale;

9.3.2 the Plaintiffs fee for Mathibestadt would be on a PCBF of 5.85%, based on 2011 ACPM Fee Scale;

9.3.3 at the finalisation of each stage over the projects the Plaintiff would submit a worksheet reflecting services rendered, for the First Defendant's approval;

9.3.4 upon the First Defendant's approval the Plaintiff would submit an invoice to the First Defendant, for architectural services rendered, at the finalisation of each stage over the project;

9.3.5 the First Defendant would draft an invoice for submission to the Department. The First Defendant's invoice would include the amount reflected in the Plaintiffs invoice;

9.3.6 the Plaintiff would, in addition to a 10% discount of fees as agreed with Plaintiff, deduct 3% from all payments for administration and bank charges;

9.3.7 the First Defendant would only be liable to make payment to the Plaintiff's invoices submitted to it upon the Department making payment to the First Defendant; and,

9.3.8 in the event that the Defendant was not paid by the Department the First Defendant was not liable to pay the Plaintiff for an invoice submitted to it.

THE EVIDENCE

[10] The Plaintiff's first witness was Alexandra Nwangi Kanunyu ("Kanunyu"). This witness was employed by the Department as the Chief Architect; Directorate Infrastructure; Delivery Program Management. His duties included, inter alia, managing a program; monitoring and controlling project managers and contractors and perusing invoices. He started working for the said Department in 2014.

- [11] He testified that in his aforementioned capacity he was aware of three projects, namely, Mathibestadt, Sekhing, and Jouberton or Matlosane. According to his evidence Maquassi Hills was not among those projects because there were still some feasibility studies and planning to be done in respect of it.
- [12] He continued with his evidence and told the Court that the First Defendant was appointed by the Department to render Project Management Services. According to his testimony the First Defendant had a downward agreement with other disciplines that would assist him to achieve the objectives of the various projects. The Plaintiff, in casu, was one of such disciplines. He told the Court furthermore that the document at page 180 of bundle C2 was a contract of appointment of a Project Manager entered into by and between the Department and the First Defendant. This document is dated 21 June 2011.
- [13] According to his evidence the project manager would have been expected to:
- 13.1 perform his duties in terms of the schedule for such projects;
 - 13.2 assist the employer, in other words, the Department, to achieve its objectives to build four CHC's;
 - 13.3 make sure that the contract was completed within time and to the satisfaction of the end users;
 - 13.4 make sure that the Department received value for money;
 - 13.5 administer all the four contracts;
 - 13.6 certify the monthly payments and to close out the contract. All the project manager's foregoing tasks are set out in the Guidelines of Scope of Services and Tariff of Fees ("GSSTF") for Registered Project Managers ("RPM").
- [14] The payment certificates are issued by the Department, so continued his evidence. The professional service provider would invoice the project manager who would then compile a consolidated invoice and raise it with the Department. The quantity surveyor assesses all the work and gives his assessment to the project manager. Each discipline has its own tariff of fees. The project manager would then raise a tax invoice and send it to the Department. On receipt of the tax invoice from the project manager, the employer or Department would verify that the different levels or stages of the project had been reached. If the employer is satisfied, the invoice would then be submitted for payment.
- [15] He testified furthermore that the employer is entitled to rely on the project manager; that he is the employer's trusted advisor and that the Plaintiff was the architect referred to. At one stage the services of the said architect were terminated.

- [16] As far as Kanunyu was concerned, two of the invoices submitted in 2014 in respect of Mathibestadt and Sekhing were not paid. These invoices were not paid because the employer had requested certain documents from the project manager. Those documents were still outstanding as at June 2015 when the employer sent out a reminder. The reasons for requesting further documents from the project manager were, firstly, that the invoice had increased the amount and, secondly, there were no supporting documents.
- [17] There were four other invoices that the employer received from the project manager in 2014. Kanunyu did not have the information regarding those four invoices. He expected the First Defendant to have the details of such invoices.
- [18] Kanunyu was aware of the letter dated 9 September 2016 from the First Defendant from which he read paragraphs 8, 9 and 10 at page 401 in Bundle C2. The said paragraphs 8, 9 and 10 read as follows:
- "[8] This breach has been occasioned by the potential risk of a court interdict suspending the construction works as a result of the long running dispute between the consultant and the architect regarding the non-payment of professional fees. Refer to Annexure 'D'.
- [9] It is common cause that the employer will be liable to pay contractual claims to the contractor as a result of standing time should a court interdict suspending the works being issued. This will in turn amount to fruitless and wasteful expenditure of taxpayer's money.
- [10] Correspondence from the employer dated 5 July and 12 July 2016 respectively urging the consultant to resolve the dispute with the architect is attached. Refer to Annexure 'E:'"

He also read Annexure 'E' at page 425 and paragraphs 1 and 2 at page 426. Paragraphs 1 and 2 of Annexure 'E' stated as follows:

"The subjects above, the ad-hoc meeting we had on Monday 30 May 2016, as well as the correspondence of the Head of Department to you on 31 May 2016 bears reference:

1. THE PAYMENTS OF ARCHITECT AND QUANTITY SURVEYOR

You were instructed by the Head of Department in his letter dated 31 May 2016 to replace the architect and quantity surveyor you are using for the Jouberton CHG project with Tondolo Partnership and MM Sakonda and Partnership as architects and quantity surveyor respectively. You have since dispatch of the letter by email not responded on this matter and I am now requesting that you respond and confirm in writing, adherence to the Departments request. Your response must reach the office before close of office on Friday 8 July 2016.

2. SETTLEMENT OF OUTSTANDING ARCHITECT FEES

The Department has received from the legal advisors of the architect which you have used to plan, develop and design a new Jouberton CHG, correspondence indicating that you owe the architect an amount of R3, 169,053.00 (VAT included) for professional services rendered on this project. The Department , on the other hand, has paid you're company, as appointed project managers, an amount of R4,319,615.29 which you have claimed from the Department for architectural services rendered believing that you would pay the architect involved "

This letter was addressed by the Acting Chief Director; Planning Services; to the First Defendant. It is dated 5 July 2016.

THE EVIDENCE OF KAGISO MOSIMANYANE

[19] This witness testified that he was employed by the Department as Assistant Director Finance in Mahikeng. His duty was to provide financial management control in respect of infrastructure services to ensure that projects are performed in line with the budgets. His primary duties included, inter alia, monitoring expenditure against allocated budget and making sure that the payments that the Department made were all lawful; making follow ups; and attending to internal queries raised by internal control. In addition, he manages the performance of his subordinates and

facilitates the payment process.

[20] On receipt of such invoice from the project manager he puts the date stamp on it. It is not in dispute. He outlined the entire procedure that his section follows on receipt of any invoice up to the stage of payment.

20.1 When he was referred to Bundle '82' page G39 he told the Court that it was a Register of Payments extracted from the BAS System. According to him they are able on the Bas System to verify the payment reports; registration of payments that would show payments within a specific period.

20.2 Pages G39 to G41 of Bundle '82' showed payments made to Mboya Project Managers as at 31/03/2013. .

20.3 The Standard Bank account number 420084487 into which the funds were deposited on 14 November 2011. According to invoices G39 to G41 pages 1 to 41 the total sum deposited into the relevant bank account was R4,200,844.87. The name of the account is MJ Mboya Project Management with reference number 18218000.

[21] Pages G39 to G41 of Bundle 'B2' reflected payments made by the Department to Mboya Project CC from 2011 to 2013. During this period, the First Defendant was paid the total sum of R34,559,549.39. All these payments were made from the year 2011 to March 2013.

[22] The report at page 942 to 943 of BAS Report showed payments from 1 April 2013 to 24 April 2015. The information with regard to these two pages was captured on 31 March

2017. It did not reflect any payment between 24 April 2015 and 31 March 2017. All these payments were made to the First Defendant. They amounted to R13.3 million.

MARY DOROTHEA TONDOLO

[23] As indicated somewhere supra, this witness was at the same time the plaintiff in this matter. She testified that she is a professional architect. She graduated in architecture at the University of Witwatersrand. Furthermore she studied at the Massachusetts University of Technology where she earned an Advanced Masters' Degree in architecture. She earned another Masters' Degree in Urban Design and Urban Planning from the University of Venice in Italy. From the same University she earned a Doctorate Degree in Architecture. Her qualifications were not in dispute.

[24] She told the Court that she started working in an architecture's office in Germiston when she was only 18 years old. After graduating from the University of Witwatersrand she worked in an office in Johannesburg. While she was studying at the Massachusetts Advanced University of Technology, she worked in Boston. While she was studying in Italy she also worked there. She has been having her own practice since 1997. She is a registered architect with the South African Council of Architects (SACA). She is also a registered member of South African Institute of Architects (SAIA) and of the Gauteng Institute of Architects (GIA).

[25] She was involved in the design of the Health Community Centre for IDT in Bapong, North West. The Department saw and understood the value of the concept design and how it was built. She was then asked to develop three prototypes along the same concept. Each prototype had to have the functions which were required by the community of the places where the Community Health Centres were to be built.

[26] She read into the record the contents of a document dated 22 November 2011 from Tondolo Partnership to Mr Mboya and Mboya Project Managers. Reference was made to North West Provincial Government. It was proposed new CHC Centres in Mathibestadt, Sekhing, Jouberton and Wolmaranstad. Professional fees for the design and repetitions were also referred to. The document set out the circumstances under which Tondolo Partnership was prepared to be appointed; the purpose for which she was so appointed and the scope of the work or the projects the Plaintiff had been appointed to design.

[27] She also read the following part of said the document:

"To develop a prototype or prototypical Community Health Centre Project, the various building units had to be designed individually first and then assembled into a coherent urban form which can be implanted on the various sites. The Architectural Profession Act No. 41 of 2000 ("The Act") prescribes the fees which are due to the development of a project and the subsequent professional involvement during site construction. It also prescribes the professional fee due for reuse of the drawings and documentation for any subsequent projects which are based on a prototype. The fee for the reuse of the prototype is considered to be 15% of the full fee, percentage fee, and base fee taken together based on the final cost of each project. The fee for

this initial prototype is to be considered a full fee as set down in the National Tariffs. "

[28] She continued and read the following paragraph of the same letter:

"The Professional Architectural Fee for Mathibestadt is therefore to be considered in full as it includes all the building units while the documentation and design for the other sites are to be considered as repetitive. For any clarification on our fees due please to refer to the Professional Fees Guidelines for the South African Council for the Architectural Profession."

According to this witness, Mathibestadt was the first building. All three subsequent buildings put up along Mathibestadt designs were prototypes. These were prototypes that had been reused. Architectural Professions Act 41 of 2000, the SA Council for the Architectural

Profession Annual Update of the Professional Fee Guidelines enables the Plaintiff to work out the professional fees according to the building costs of the project.

[29] The Act deals with the Project Costs Base and Time Base Fee tables. The PFG was issued in terms of s 34(2) of the Act. The project costs base fee tables came into effect from 1 January 2011. They superseded the Board Notice 13 of 2010.

[30] She was appointed purely as an architect to provide a design construction and to do site supervision.

[31] She then relied on certain paragraphs of 'A5'. The first of such paragraphs read as follows:

"Furthermore to our discussions we have pleasure in confirming your appointment as architect for the abovementioned project (the project referred to Mathibestadt, Maquassi Hills, Jouberton Extention 21, Sekhing Community Health Centres) based on the following terms and conditions. "

Agreement

31.1 "Your appointment is based on the latest public works, latest pre-scale in auditing applicable discounts, for repetitive work and a 10% discount on the first prototype. The services for which you are appointed are fully detailed under section 2 scope of this letter. Your duties and responsibilities for the above sections of the work shall, inter alia, be as set out in the agreement between client and architect. "

31.2 The said letter further stated that on 15 January 2015 the Plaintiff sent the First Defendant an email with an indication of the outstanding payments on invoices for Mathibestadt and Sekhing. The said email ended with:

"We urgently plead when payment can be expected as this is long overdue and we are unwilling to continue without any feedback from yourself."

31.3 She testified further that on the CHC Centres:

“The fees would be as agreed between the parties and payment terms would be based on the construction project management fee scale. The fee agreement referred to above is set out in my letter dated 22 November 2011 that I wrote to you. In the letter it states that my fees would be based on the Fee Guidelines published by the South African Council for Architectural Profession as mandated by the Architectural Profession Act

31.4 “Various invoices were submitted, some of them were late. The following invoices have, despite the lapsed reasonable time, remained unpaid.”

The First Defendant did not respond to this letter.

[32] She testified further that at a certain stage the First Defendant terminated her services in a letter. She was accused by the First Defendant of failing to co-operate with the other teams as required. As a result, no progress was made on the project. The First Defendant asked her, in the same termination letter, to submit her fees and disbursements to date on the project for submission to the Department.

32.1 She wrote back to the First Defendant and copied the Department. In her letter, the Plaintiff complained that dating as far back as 22 August 2012 to 10 October 2014 a total of 12 invoices for professional work and disbursements undertaken relative to Mathibestadt, Sekhing, Matlosane and Maquassi Hills were issued by the Plaintiff to the First Defendant and that no payment was received in respect of those invoices. As a consequence the Plaintiff regularly enquired as to when payment would be made. No response was received from the First Defendant.

32.2 The said letter further stated that in January 2015 the Plaintiff sent the First Defendant an email with an indication of the outstanding payments on invoices for Mathibestadt and Sekhing. The said email ended with "We urgently plead when payment can be expected as this is long overdue and we are unwilling to continue without any feedback for yourself."

32.3 She testified furthermore that on 4 February 2015 the Plaintiff sent another email with the same underlying intent. The First Defendant failed to respond to all such emails.

32.4 The Plaintiff received payment for some invoices. According to her evidence the Plaintiff made reasonable and diligent progress in the execution of its duties as was necessary in the circumstances of the project as required by the letter of appointment and has therefore discharged its obligations.

32.5 In terms of the payment terms as set out in the Letter of Appointment, Tondolo Partnership was entitled to proportional payment of fees as the services were rendered in stages. According to her evidence it was a tacit term of agreement that payment should be made within 30 days or within a reasonable time after the First Defendant received the invoices and that the First Defendant has, in that regard, defaulted.

32.6 On 8 June 2015 the Plaintiff addressed the following letter to the First Defendant:

"On or about 18 April 2012, Tondolo Partnership was appointed by MJ Mboya Project Managers CC as architects to undertake the design development and in certain aspects relating to site supervision on the above four Community Health Centres. The fees would be as agreed between the parties and payment terms would be based on the construction project management fee scale. The fee agreement referred to above is set out in my letter dated 22 November 2011 that I wrote to you. In the letter it states that my fees would be based on the Fee Guidelines published by the South African Council for the Architectural Professions as mandated by the Architectural Professional Act.

32.7 In terms of your letter of appointment read with SACAP Guidelines my appointment cover SACAP work stages 1-4 as well as the specific aspects of SACAP supervision as set out herein above. The appointment included the 10% discount for the first design prototype and applicable discount for repetitive work for the remaining design prototype.

32.8 Various invoices were submitted and some of them were paid. The following invoices have, despite the lapse of a reasonable period, remained unpaid."

Then the Plaintiff set out all those invoices that remained unpaid. They are not in dispute. The First Defendant did not respond to this letter.

[33] The Plaintiff testified further and:

33.1 denied that the determination of her fee scale was made orally. She was adamant that it was made in writing;

33.2 testified that the Plaintiff's fees for Sekhing, Matlosane and Maquassi Hills projects would be based on 15% of the Project Cost Base Fee and a Time Base Fee for every part of the project that did not constitute part of the prototype based on the SACAP Guidelines. She was not hired as a project manager. For that reason her fees could not be based on the ACPM Fee Scale;

33.3 in respect of Mathibestadt she testified that it was not correct that the Plaintiff's fee would be a project cost base fee of R5.85%. According to her, there was no fixed percentage at the beginning because the final fee would be based on the final contract costs of the project. The percentage was to be calculated on that final amount according to SACAP tariffs;

33.4 she denied that she was supposed to submit a worksheet. She testified firstly, that there was no agreement between the parties that the Plaintiff should submit a worksheet and secondly, that the Plaintiff had not been told how to submit a worksheet. Thirdly and finally, she told the Court that she never received any request to submit a worksheet;

33.5 she denied that she was obliged to submit her invoice only after completing the worksheet. This was so for the reasons mentioned in point 3 above;

33.6 she admitted that she and the First Defendant had agreed that there would be a 10% discount on fees. She also admitted that they had agreed that there would be a 3% deduction from payments made to her for administration and bank charges;

33.7 she admitted furthermore that the parties had agreed that the First Defendant would only be liable to make payment to the Plaintiff once the Department had made payment to it but that once the Department had paid the Project Manager the Plaintiff would be paid within a reasonable amount of time. In other words, the Plaintiff was prepared to wait until the Department had paid the Project Manager as long as the Plaintiff would be paid within a reasonable period of time after the First Defendant received such payment.

[34] Project per project and starting with Mathibestadt she testified how the invoices, forming the subject matter of the Plaintiff's claim, were formulated. She charged the Project Manager with a professional fee for the new kitchen and laboratory buildings. According to her evidence, these two buildings were initially not included in the scope of the Mathibestadt CHC Project. Their scope of work in respect of this project involved starting drawings and construction drawings from phase 1 to 4 for both the new kitchen and laboratory buildings. The construction of the new kitchen was to start. A contractor had been issued with drawings when the Department decided to stop the construction of both the kitchen and the laboratory. So this work which was done from phase 1 to phase 4 was based on a time fee schedule. In fact it was based on a percentage of the cost of the building. The cost of the building was worked out at R3,063,710 million. They then looked at the statutory tariff for a building of this nature and worked out the professional fee. Since they had only started from phase 1 to 4 they could only claim 70% of the total fees. That was the fee allowed in terms of SACAP tariffs. An invoice in respect of this work was submitted to the Project Manager but the Plaintiff received no feedback from the First Defendant.

[35] When the Plaintiff requested the First Defendant to furnish it with further particulars, to enable it to prepare for trial, the First Defendant raised new defences. In respect of the Mathibestadt CHC Project invoice, the First Defendant stated that the sum of R276,093.98 should actually be R235,033:

35.1 the reason for this, as stated by the First Defendant, was that the provisional sum should be deducted from stage 1 to 4 for fee calculation purposes. Therefore the fee should, according to the First Defendant, be around R75,210.47 subject to full completion of activities in the stages mentioned;

35.2 the approval of the drawings by the Council has not been done;

35.3 the drawings have not been coordinated with other consultants.

35.4 Finally, the final account has not been agreed as the Plaintiff had resigned from the project. These are therefore the reasons that the First Defendant gave for failing or refusing or neglecting to pay the Plaintiff's invoices in respect of services rendered by the Plaintiff to the First Defendant for the Mathibestadt CHC Project.

[36] The Plaintiff disputed these new defences on the ground that:

36.1 they were never discussed or taken up with the Plaintiff;

36.2 the calculations in respect of stages 1 to 4 cannot be deducted for the purpose of calculating the professional fee due to the Plaintiff because the service rendered was in respect of two buildings outside the main tender. The Plaintiff's fee was calculated on the actual construction cost amount;

36.3 with regard to the approval of the drawings, she disputed the First Defendant's new defence and testified, on the contrary, that the Plaintiff submitted the plans for approval to Mathibestadt Town Council and that such approval was obtained. The Plaintiff has copies of the plans in her offices;

36.4 she denied the statement by the First Defendant that the drawings have not been fully coordinated with other consultants. She disputed this statement and testified that if the drawings had not been fully coordinated with other consultants the buildings would not be standing up due to structural reasons. Furthermore the electricity and water would not be available.

[37] About the second invoice she testified that it was for disbursements for travelling time. Travelling time was calculated from the office to the site. It included the expenses of the motor vehicle and the toll fees. She worked out the number of kilometres for each inspection and the number of trips. Her travelling time was 3 hours. The invoice in respect of these disbursements set out above was submitted to the First Defendant and the First Defendant never rejected or in any way questioned it. The invoice included the printing costs.

[38] In respect of the Plaintiff's request for further particulars, the new defences that the First Defendant raised were firstly, that payment in respect of the relevant invoice had not been received by the First Defendant from the Department and secondly, that the parties must still agree on a final account.

[39] The next invoice in respect of Mathibestadt CHC was dated 30 June 2015 for RS?,240.54. This invoice was for professional fees for architectural work. It was a reconciliation of fees for services rendered during construction. They represent estimates of the final reconciliation fee. The final construction cost was estimated at R80m. According to SACAP fee tariffs based on the estimated construction cost of R80m they worked out the Plaintiff's final fee at R4,690m. These fees represent only 97% of the work done because they had not completed all the works of the project. An allowance of 3% was made and another one of 10% discount was also made.

[40] In regard to this invoice, the First Defendant raised the following defences in its further particulars. The First Defendant stated that the fees were not paid because the Plaintiff did not attend tenders and compulsory briefing meetings and other site meetings. The Plaintiff disputed this allegation. On behalf of the Plaintiff Ms Tondolo testified that the Plaintiff attended these meetings. Up to 2015 the Plaintiff had attended 75 such site meetings. She concluded by saying that all the other invoices were calculated on the same basis. Not a single one of these invoices was sent back for correction.

ELIZABETH YOLANDA VAN DER VYVER

- [41] She was called to testify as an expert. That she was one, was not in dispute. She was a registered architect with a Master's degree in that field. She has been in practice since
1996. She had prepared a report on the tasks she had been given. In compiling her report she had regard to certain documents, in particular, the drawings that the Plaintiff had prepared. Her evidence at first touched upon the drawings by the Plaintiff, in other words, whether such drawings were of the required standard. It touched furthermore on whether the statutory requirements had been complied with and what was expected of an architect when he or she is given work. When she was referred to the Board Notices she testified that it was a document that related to the work stages.
- [42] According to her own assessment, the drawings were of high quality. They had been prepared according to the old style with full specifications. The four stages being inception stage, the first stage; the concept and viability, the second stage; design development, the third stage; and documentation and procurement, being the fourth stage. The Plaintiff had done everything set out in the letter dated 22 November 2011 from the Plaintiff to the First Defendant. Everything was according to schedule of the Board Notices. The Government Gazette requirements and the architectural work stages had been fulfilled.
- [43] From the inspection of Ms Tondolo's drawings, the drawings were detailed to such an extent that they went beyond the scope of duty for the work stages involved.
- [44] Having been referred to the said letter dated 22 November 2011 in respect of the four projects she testified that Ms Tondolo's appointment, according to the said letter, was for professional services to design and supervise construction and to take the projects all the way to conclusion. The said letter sets out the tasks the Plaintiff was to perform and in particular the fee structure. Everything was done according to schedule and Board Notices.
- [45] According to her testimony it is common cause to charge according to work stages. If the work stages take rather too long to complete, an architect can send invoices which are based on the percentage of work stages. In this respect the architect estimates the fees. On the basis of the 2011 PFG, the first thing to do is to determine the building costs before the final price can be determined by the quantity surveyor or after a tender procedure. It is normal to use a price per square meter.
- [46] It is not correct that the provisional sum should be excluded from the invoice. A final account does not have to be agreed at the conclusion of the work because a final account is fixed by the agreement at the beginning.
- [47] She testified furthermore that she had gone through all the invoices in respect of which the Plaintiff claimed payment and was satisfied that all such invoices were prepared accordingly.

[48] She continued to testify that an architect is required to do an inspection as this is a statutory requirement; that there is no requirement in the PFG that an architect must attend site meetings. This is compulsory for the contractors though. It is also not necessary for the architect to attend any coordination meetings. The architect can always obtain information from the contractors. She has not seen any lack of coordination from the works.

THE EVIDENCE OF ZOE SCHOLTZ

[49] She started her evidence by confirming the contents of her report. She is a chartered accountant with a Bcom Accounting Degree. She had been mandated by the Plaintiffs attorneys to list payments received by the First Defendant from the Department; to quantify what the Plaintiff had claimed from the First Defendant for architect fees, based on the Department's Register of Payments; the First Defendant's bank statement and the First Defendant's invoices. She had also been asked to quantify the amount that the Plaintiff had invoiced the First Defendant, based on the Plaintiffs invoices; to quantify what the First Defendant had paid to the Plaintiff based on the First Defendant's bank statements description and supported by the Plaintiff's bank statements.

[50] In compiling her report she had she had access to the following documents:

50.1 Mboya CC Bank Statements;

50.2 Mboya CC Money Market Call Account Bank Statements;

50.3 a letter from Tondolo Partnership to Mboya CC dated 22 November 2011;

50.4 a Letter of Appointment from Mboya CC to Tondolo Partnership dated 18 April 2012;

50.5 Mboya CC invoices to the North West Department of Health;

50.6 The North West Department of Health Register of Payments;

50.7 An email dated 9 December 2017;

50.8 Tondolo Partnership Bank Statements and;

50.9 An email dated 28 July 2015.

[51] The first part of her mandate was to consider the payments that the First Defendant, Mboya CC, had received from the Department. For the purposes of this exercise she had:

51.1 Mboya CC's current account bank statements;

51.2 invoices that had been issued by Mboya CC to the Department;

51.3 the register of payments from the Department.

She reconciled these payments from the bank statements to the invoices.

[52] Her first task was to consider what payments the First Defendant, Mboya CC, had received from the Department. In this regard she had the bank statements of the First Defendant. In addition she had statements that she received from the Plaintiffs attorney.

[53] According to her evidence:

53.1 the First Defendant issued invoices to the Department amounting to R47,862,234.91 between 21 October 2011 and 10 December 2014. All these invoices, according to evidence, were paid in full by the Department. This fact is clear from table 1 of her report. To be precise the relevant invoices commenced on 21 October 2011 and ended on 15 October 2015.

53.2 the First Defendant issued to the Department architect fees invoices amounting to R15,114,267.25;

53.3 as at 28 July 2015 the Plaintiff invoiced the First Defendant R13,846,556.59 including VAT. This amount was less than the amount that the First Defendant had invoiced the Department by R1,267,710.66;

53.4 as at 28 July 2015, the First Defendant paid the Plaintiff a total sum of R8,648,287.00. This resulted in an outstanding amount of R8,198,269.49, according to the Plaintiffs calculations or R6,456,958.00 according to the First Defendant's invoicing;

53.5 after 28 July 2015, the Plaintiff invoiced the First Defendant an additional amount of R2,434,241.93. In total for the period from November 2011 until August 2015, the Plaintiff invoiced the First Defendant R16,280,798.53, which amount is more than the amount the First Defendant invoiced and received in respect of architect fees from the Department by R1,166,531.27;

53.6 as at 5 August 2015, the First Defendant had paid the Plaintiff a total sum of R8,648,297.00, based on the Plaintiff's calculations the outstanding amount was R1,632,511.40 or R6,456,980.00 based on the First Defendant's calculations;

53.7 the Department made its last payment to the First Defendant on 30 April 2015. The First Defendant made its last payment to the Plaintiff on 30 May 2015;

53.8 she corrected the amount that is outstanding to R7,645,851.73 hence the Plaintiff's claim for payment of such an amount.

THE EVIDENCE OF ROELF NEL

[54] This witness was the Plaintiff's attorney of record. Before he testified, he had been sitting in Court. No issue though was made about the fact that he had been sitting in Court before he testified. He only testified in the matter simply because of a statement that had been put to Ms Tondolo by counsel for the Defendants. That statement was that the second defendant had wanted to meet with the Plaintiff in an attempt to settle the disputes between the Plaintiff and the First Defendant and that the Plaintiff was unwilling to have such a meeting and finally that she took no steps to convene such a meeting.

- [55] Mr Nel, testified that he was the one who requested a meeting with the Defendant; that such a meeting took place between him and the Second Defendant on 17 August 2015. He proceeded with this evidence and testified that at such a meeting he asked the Second Defendant, who was at all material times speaking for the First Defendant, why he did not make a tender for the outstanding payments owed by the First Defendant to the Plaintiff. He further asked the Second Defendant to furnish reasons why the Second Defendant did not pay the Plaintiffs outstanding fees.
- [56] The Second Defendant asked him to hand over the drawings. Mr Nel told him that they would not hand over the drawings to the First Defendant. The Second Defendant then promised to revert to Mr Nel on 27 August 2014. The date came and passed but the Second Defendant never reverted to Mr Nel. Mr Nel then reported to his client telephonically.
- [57] Mr Mboya, the only member of the First Defendant, gave evidence on behalf of the First Defendant. The First Defendant led, in addition, the evidence of a certain Isaac Phiri. Through its sole member the First Defendant testified that, as the preference of the Department, the First Defendant appointed the Plaintiff as an architect for certain projects at Mathibestadt, Sekhing, Jouberton, otherwise known as Matlosane and Maquassi Hills. The First Defendant appointed the Plaintiff in a letter of appointment dated 18 April 2012.
- [58] It is the First Defendant's case that it appointed the Plaintiff as an architect on the terms and conditions contained partly in a letter dated 22 November 2011 written by the Plaintiff to the First Defendant and partly in terms of 'A5', its letter dated 18 April 2012, to the Plaintiff and finally on certain oral terms. The letter dated 22 November 2011 set out several terms on the basis of which the Plaintiff was appointed. He stated, inter alia, that:
- 58.1 that Tondolo Partnership was appointed through the First Defendant's Project Management Consultancy Firm by the Department as architect to undertake the design, development and site supervision of certain four community health centres;
- 58.2 the scope of the project or the design of the prototype typical centres, what they were expected to reflect;
- 58.3 the fees and the rates payable by the First Defendant to the Plaintiff for the services that the Plaintiff would render; and
- 58.3 the deductions and percentages thereof that the Plaintiff was going to make.
- [59] As indicated above, Mr Mboya testified that the appointment of the Plaintiff was based on 'AS'. Mr Mboya testified that 'AS' constituted one part of the written agreement between the First Defendant and the Plaintiff and that the Plaintiffs letter dated 22 November 2011 constituted another part of such an agreement.

- [60] He confirmed that the parties had agreed that the fees payable by the First Defendant to the Plaintiff would, according to the Plaintiff's letter dated 22 November 2011, be as agreed. Furthermore he agreed that in terms of clause 8.8 of the POC, the payment terms were to be based on the construction project management scale.
- [61] He disputed the Plaintiffs averment, as contained in clause 8.9 of the POC, that it was a tacit term of the agreement that the First Defendant would effect payment of the Plaintiffs invoices within 30 days from receipt of any such invoice, alternatively, within a reasonable time upon receipt of any such invoice. According to him, the First Defendant and the Plaintiff had agreed that the First Defendant would only pay the Plaintiffs invoices within 30 days after the Department had paid the Defendants' consolidated invoices which would include the Plaintiff's relevant invoice.
- [62] When it was pointed out to the Second Defendant that the Plaintiff had stated in the POC that she had complied with all its obligations in terms of the agreement and had performed the services required of her by the First Defendant, from time to time over the course of the project design and construction of the community health centres, the Second Defendant disputed it. On the contrary the First Defendant testified that there were drawings that had not been approved by the council of the Local Authorities. As the Plaintiff had resigned from the project, the First Defendant was compelled to appoint a new architect. It was this new architect who got the drawings, in particular in respect of Jouberton, approved. As far as Sekhing was concerned, the drawings were never approved until the First Defendant was removed from the Project. The Second Defendant denied, on the foregoing basis, that the Plaintiff
- had solely complied with all its obligations. He testified furthermore that the Plaintiff had failed to attend all the mandatory
- site meetings which included compulsory site meetings.
- [63] Mr Mboya admitted that the First Defendant has not paid any of the invoices constituting the Plaintiff's claim and added that it was so because the Department had not paid any of them. He added that the other reason was that the First Defendant and the Plaintiff had not agreed on a final account. He gave a variety of other reasons why the First Defendant has not paid the Plaintiff. He actually raised all sorts of complaints about the manner in which the invoices were prepared by the Plaintiff. He conceded, on a question by the Court, that he never went back to the Plaintiff to draw her attention to the incorrectly prepared invoices.
- [64] In summary, it was testified, on behalf of the First Defendant that the First Defendant would prepare an activity schedule. From the activity schedule the First Defendant would then generate an invoice. The invoice would then be sent to the Department. Then after the Department had paid, the First Defendant would then notify the other service providers that it had received the money. The First Defendant would then tell the service providers how much to invoice him for. According to the First Defendant the Plaintiff did not follow protocols. The First Defendant received correspondence from the Plaintiff's attorneys and

the Second Defendant agreed to a meeting with the Plaintiff's attorney. This aspect already has been testified about by Mr Nel.

- [65] The Department has still not paid the First Defendant notwithstanding a lawful demand by the First Defendant's attorney. It is for that reason that the First Defendant has issued summons against the Department for payment of an amount of R42 million in respect of the outstanding payments.
- [66] Mr Isaac Edson Phiri ("Mr Phiri") was the First Defendant's second witness. According to his testimony, he is a quantity surveyor. He qualified in June 1995 from Copperbelt University. At the time he testified he was studying for his master's degree in property management through Witwatersrand University in Johannesburg. Mr Phiri is self-employed and runs a business called Third Dimensions Quantity Surveyors.
- [67] He testified that he knew all the projects involved in this action. He was involved in the relevant project abovo, from 2010 until the First Defendant dispensed with his services. Any reference in the First Defendant's papers to a quantity surveyor refers to him. His role was to provide project management services to the First Defendant, in particular to advise the First Defendant with regards to the costing of the projects. He was referred to a document contained at page 36, bundle D. About the said document, he testified that it was a determination of professional fees for the whole team for project Mathibestadt CHC, in particular for the kitchen and laboratory. This document was required by the First Defendant. The laboratory and the kitchen of Mathibestadt CHC were not part of the original project. The First Defendant required additional fees.
- [68] The document at page 37 of bundle D was the fee estimates for the project management for the First Defendant. These were the estimated costs for the kitchen and laboratory of Mathibestadt CHC. The fee was based on the value of the works. Page 38 of Bundle D constituted the architectural fee calculation for the Mathibestadt CHC's kitchen and laboratory. The architectural fee was based on the value of the works. The recommended fees were based on the gazetted fees as at 2011. He testified furthermore that the table on page 38 of Bundle D was an extraction from the architectural fees on page 32, Board Notice 173 of 2010 of Bundle A. This is the annual

update of the PFG issued in terms of section 34(2) of the Act. He used it to calculate the architectural fees.

- [69] He pointed out in his evidence that the Plaintiff was not the principal agent and furthermore that the principal agent was the First Defendant. Referring to page 37 of Bundle A he testified that the diagram on that page represents the apportionment of fees between stages. He explained how the calculation of fees according to work stages was made.

ASSESSMENT OF THE EVIDENCE

[70] Before dealing with the evaluation of the evidence that the onus lies on the Plaintiff to prove her case. This is a principal of law better set out in *Pillay v Krishna and Another* 1946 AD 946, 952. Citing voet, the Court, per Davis A.J.A., as he then was, had the following to say:

"But there is a third rule, which voet states in the next section as follows:

He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that denial is absolute. This rule is likewise to be found in a number of places in the *Corpus Iuris*: I again give only one version: 'ei incumbit probatio qui dicit, non qui negat' (D: 22.3.2). The onus is on the person who alleges something and not on his opponent who merely denies. "

Accordingly the burden to prove is cast upon the Plaintiff to satisfy this Court that she is entitled to succeed on her claim. In the ordinary course of events, no burden of proof is, in this case in particular, cast on the First Defendant who merely denies the Plaintiff's allegations.

[71] In this regard the Plaintiff has a duty not only to allege but also to prove the terms of the parties' agreement on which she relies. The plaintiff has an added onus to prove that the First Defendant has received payment from the Department. It is not in dispute that:

71.1 the parties herein had concluded an agreement both in writing and oral;

71.2 in terms of the said agreement the First Defendant had appointed the Plaintiff to provide architectural services to the First Defendant;

71.3 the First Defendant was obliged to pay the Plaintiff her fees for such services rendered;

71.4 the First Defendant has not paid the Plaintiff all the fees for the services rendered;

71.5 in principle the First Defendant has not paid the Plaintiff the fees she claims in her amended particulars of claim;

71.6 it is also not in dispute that the First Defendant owes the Plaintiff the sum of R7,645,851.72.

[72] The dispute between the parties is centred on the following allegation made by the Plaintiff in her amended particulars of claim:

"8.9 It was a tacit term of agreement that the First Defendant would effect payment of the Plaintiff's invoices within 30 days from receipt of any such invoice, alternatively within a reasonable time upon receipt of any such invoice. "

Where a party relies on the tacit contract, in the same manner as the current plaintiff does, it is necessary to plead that the contract is tacit. The Plaintiff has, in my view, satisfied this requirement.

- [73] Kanunyu admitted during cross examination that as far as he could remember, the First Defendant was paid around R47.8 million for all the four projects. He was unable though to give any indication as to what portion of the said amount was in respect of architectural services. He told the Court that without the tax invoices he could not tell how much of the R47.8 million constituted architectural fees.
- [74] It will be recalled that Mr Kanunyu told the Court that, in his aforementioned capacity, he was also involved in the process of approving the First Defendant's invoices. He testified furthermore that he recalled that there were two invoices from the First Defendant that were submitted in December 2014 for the disbursement claims in respect of Mathibestadt and Sekhing CHC's. They perused those invoices and in January 2015 the Department requested the First Defendant to furnish it with supporting documentation. The Department received no response from the First Defendant as a consequence of which during June 2015 the Department sent a reminder to the First Defendant. These invoices were only resubmitted during September 2017. It will be recalled furthermore that Mr Kanunyu testified that if there was an error in one invoice the whole invoice would not be paid. That the said invoices were submitted to the Department by the First Defendant is not in dispute. However, what is not very clear is whether or not Ms Scholtz took them in account when she executed her task. She has not made any mention of such invoices in her evidence or report.

KAGISO MOSIMANYANE

- [75] The purpose of Mosimanyane's testimony was to show the total amount paid by the Department to the First Defendant for the period 2011 to 2013. These payments were in respect of invoices 1 to 88 of Bundle B2. According to his evidence the report at pages 42 to 44 of the BAS Report showed payments from 1 April 2013 to 31 March 2017. All these payments were made to the First Defendant. They amounted to R13.3 million.
- [76] His evidence was intended to assist the Plaintiff to prove her claim. He had no knowledge of the working relationship between the First Defendant. Mainly he is preoccupied with the processing of invoices in the finance section of the Department. Despite the fact that he dealt mainly with the processing of invoices, he was not in a position to testify whether the invoices that constituted the Plaintiff's entire claim were paid by the Department or not.
- [77] That this witness's evidence could not support the Plaintiff's case is clear from the following circumstances. His evidence covered payment of invoices from 2011 to 2015 although the details of such payments were captured in 2017.

THE PLAINTIFF

- [78] Ms Tondolo stated that the agreement between the Plaintiff and the First Defendant was actually one where the fees were discussed. That agreement or discussion was then followed by a letter which she submitted and which stated what her fees as an architect were going to be. She was adamant that the agreement had been concluded at this stage; that the letter that followed was not an agreement and that the Plaintiff was claiming fees as an architect.

[79] She was adamant furthermore that despite what 'A5' stated, she was never appointed as a project manager but as an architect.

[80] Under cross-examination she admitted:

80.1 that the parties had agreed that the First Defendant would only be liable to make payment of the Plaintiffs invoices submitted upon the Department making payments to the First Defendant;

80.2 secondly, that the parties had agreed that in the event that the First Defendant was not paid by the Department the First Defendant was not liable to pay the Plaintiff for the invoices submitted to the First Defendant.

[81] Despite the admission that she made as pointed out in paragraph 80 supra it was pointed out to her that in the replication she denied even the admission she made as set out in paragraph 80 supra or set out in paragraph 4.3.8 of her replication. In other words, while she admitted that:

- (1) the parties had agreed that the First Defendant would only be liable to make payment of the Plaintiffs invoices submitted to the First Defendant upon the Department making payment to the First Defendant; and,
- (2) in the event that the First Defendant was not paid by the Department, the First Defendant was not liable to pay the Plaintiff for any invoice submitted by the Plaintiff, for its replication, Ms Tondolo denied that she had agreed so with the First Defendant.

81.1 When it was put to her that in her replication she denied the whole of the First Defendant's plea, she disputed it;

81.2 She admitted that when " he gets paid I will get paid". She admitted paragraph 4.3.7 of the First Defendant's amended plea, which is the one that states that the First Defendant would only be liable to make payment of the Plaintiff's invoices submitted to it upon the Department making payment to the First Defendant and in the event that the First Defendant was not paid by the Department, the First Defendant was not liable to pay the Plaintiff for an invoice submitted to it.

[82] Although the Plaintiff had stated in the particulars of claim that:

"It was a tacit term of the agreement that the First Defendant would effect payment to the Plaintiff's invoices within 30 days from receipt of any such invoice alternatively within a reasonable time upon receipt of any such invoice: she conceded that the real term of the parties' agreement about payment was that the Defendant would pay once it has been paid by the Department.

[83] To make sure that there was no misunderstanding she admitted during further cross-examination by Mr Nalane that:

83.1 "the First Defendant would only be liable to make payment of the Plaintiff's invoices submitted to the First Defendant upon the

Department making payment to the First Defendant:

83.2 she agreed furthermore, still under cross-examination, that it was a term of the parties' agreement that in the event that the First Defendant was not paid by the Department, the First Defendant was accordingly not liable to pay the Plaintiff for any invoice submitted to it by the Plaintiff.

[84] The evidence of the Plaintiff contradicts paragraph 8.9 of the POC. In fact the Plaintiff concedes that the contents of paragraph 8.9 of the POC do not reflect the agreement between the Plaintiff and the First Defendant. Contrary to paragraph 8.9 of the POC, Ms Tondolo confirmed during cross-examination that the agreement between the Plaintiff and the First Defendant with regard to when the First Defendant should make payment of the Plaintiffs invoices was only after the Department had paid the First Defendant.

[85] The testimony of Ms van der Vyver, Mr Nel and Ms Scholtz does not in any way assist the Plaintiff with what the parties had agreed upon. If anything the evidence of Ms Scholtz assists in confirming the amount due by the First Defendant to the Plaintiff. That amount was, after adjustment of some figures, R7,635,511.43. The First Defendant, through Mr Mboya, the Second Defendant, gave evidence that was dissatisfactory in several respects. It is, however, of paramount importance to point out that the fact that Mr Mboya's evidence was in many respects dissatisfactory, and I will demonstrate this part by reference to such unsatisfactory evidence, did not assist the Plaintiffs case. It is equally of paramount importance to point out that on the crucial point of when the First Defendant was obliged, in terms of the parties' agreement, to make payment of the Plaintiffs fees, the Second Defendant's evidence is consonant with the Plaintiffs version. The Plaintiff and the First Defendant were ad idem on this point.

[86] Before dealing with the unsatisfactory portions of the Second Defendant's evidence, it is only proper to refer to the argument by Ms Joubert. It is correct that the First Defendant claimed that there was no obligation on its part to pay the Plaintiffs invoices as it had not received any payment from the Department. Ms Joubert's argument was that this defence by the Defendants was irrelevant because it was clear that the First Defendant had received payment in full from the Department in respect of the invoices submitted by it, including the amounts in respect of the Plaintiff's architectural fees. In this regard Ms Joubert relied on the report of Ms Scholtz and also on the evidence of Mr Mosimanyane.

[87] Ms Scholtz, it will be recalled, had prepared an expert report for the Plaintiff from various sources that were made available to her. On the basis of such sources she came to a conclusion that:

"4.6.16 Mboya CC received payment in full from the NWDOH for its invoices which included architect fees of R15,114,267 25.11

And

"4.6.19 ... however as set out in our findings above, the NWDOH paid all the Mboya CC invoices in full which included architect fees of R15,114,267 25."

There is also the evidence of Mr Mosimanyane, on which Ms Joubert relied, for the conclusion that the First Defendant has received payment in respect of all invoices submitted for the period 2011 up to 2017.

[88] For the following reason, the evidence of both Ms Scholtz and Mr Mosimanyane is, on this point, unreliable. While both of them testified that "all invoices" submitted by the First Defendant were paid, there is the uncontroverted evidence of Kanunyu that he sometimes scrutinised invoices; that tax invoice no 2014/10 dated 10 October 2014 (page 93 of Bundle A) and another invoice whose details he could not recall were not paid. In respect of these two invoices the Department had, according to his evidence, requested to be furnished with supporting documents to substantiate the amount claimed. It will also be recalled that Mr Kanunyu testified, in response to a question by the Court, that where even a single item in an invoice was questioned, the whole invoice would not be paid. These two invoices remained unpaid up to the end of June

2015. It find it surreal that Mr Mosimanyane did not testify about these invoices. It is even more surreal that it was never drawn to the attention of Ms Scholtz. She did not testify about them. That these two invoices were submitted by the First Defendant to the Department is not in dispute. When both Mr Mosimanyane and Ms Scholtz referred to "all the invoices" submitted by the First Defendant to the Department were paid, both of them referred also to these two invoices. The Court accordingly finds it difficult to rely on the evidence of both Mr Mosimanyane and Ms Scholtz.

[89] As I indicated earlier, there are portions of the Second Defendant's evidence that are unsatisfactory. An example of such dissatisfaction emanates from the manner in which the First Defendant pleaded its case, in particular, the reasons that it gave for failing or refusing or neglecting to pay the Plaintiff's fees. According to Ms Joubert's heads of argument, the Second Defendant deposed, on behalf of the First Defendant, to an affidavit opposing the Plaintiff's application for summary judgment. In the said affidavit, the Second Defendant raised certain defences as reasons why the First Defendant did not pay the Plaintiffs invoices. These defences were neither raised in the affidavit opposing the application for summary judgment nor in the First Defendant's plea. Instead they were raised only in the Plaintiffs second request for further particulars to prepare for trial.

[90] It is not proper to litigate in that manner. It leaves doubt in the mind of the Court whether the First Defendant's defences are genuine. The only observation one can make with regard to such defences is that, as I have stated earlier, they do not assist the Plaintiff to discharge the onus that rests her. Consequently the Plaintiff has failed to proof the vital term of the agreement and finally that the First Defendant has received payment in respect of the invoices on which her claim is predicated.

[91] The Plaintiff's claim against the Second Defendant is predicated on the provisions of ss 64 and 65 of the Close Corporations Act 69 of 1984 ("the CCA"). In respect of this claim it is pleaded in the alternative by the Plaintiff that:

91.1 at all material times the Second Defendant, the sole member of the First Defendant, received and submitted the Plaintiff's invoices to the Department;

91.2 he received payments from the Department in respect of the relevant invoices;

91.3 knowing that such payments were not due to the First Defendant;

91.4 acted fraudulently, alternatively recklessly and further alternatively grossly negligently;

91.6 that such a conduct constituted the abuse of the corporate juristic personality of the First Defendant; and

91.7 thereby attracted personal liability to the Second Defendant as contemplated by the provisions of the said sections of the CCA.

[92] S 64 of the CCA provides as follows:

"(1) If at any time appears that any business of a corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose, a Court may on the application of the Master, or any creditor, member or liquidator of the corporation, declare that any person who was knowingly a party to the carrying on of the business in any such manner, shall be personally liable for all or any such debts or any liabilities of the corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability."

Section 65 provides as follows:

"Whenever a Court on application by an interested person, or in any proceedings in which a corporation is involved, finds that the incorporation of, or any act by or on behalf of, or any use of, that corporation, constitutes a gross abuse of the juristic personality of the corporation as a separate entity, the Court may declare that the corporation is to be deemed not to be a Juristic person in respect of such rights, obligations or liabilities of the corporation or of such member or members thereof, or of such other person or persons, as are specified in the declaration, and the Court may give such further order or orders as it may deem fit in order to give effect to such declaration."

[93] In order to succeed with this claim, or the alternative claim, the onus lies on the Plaintiff to prove, in terms of s 64 of the CCA, that:

93.1 the business of the corporation was or has been carried on with gross negligence;

93.2 or with intent to defraud any person or in this case the plaintiff;

93.3 or any fraudulent purpose.

In addition, with particular reference to this matter, the Plaintiff must prove that the First Defendant received from the Defendant payment in respect of invoices the Plaintiff submitted to the First Defendant; that the Second Defendant knowing that such payment did not belong to the First Defendant, recklessly used the said money for purposes totally unconnected with the business of or the corporation.

[94] The Defendants denied the Plaintiff's allegations based on ss 64 and 65 of the CCA. In particular the- First Defendant pleaded that it did not receive from the Department any payment in respect of the invoices on which the Plaintiffs claim is based. Relying on the oral agreement, the First Defendant pleaded that it is accordingly not liable for payment to the Plaintiff until it had received payment from the Department which included payment in respect of the Plaintiffs invoices. Based on the First Defendant's denial the Second Defendant denied that he conducted himself in the fraudulent, reckless or grossly negligent manner that constituted an

abuse of the First Defendant's juristic personality.

[95] Ms Joubert argued, with reference to some authorities, that the Second Defendant abused the First Defendant and that the Second Defendant should accordingly be held liable towards the Plaintiff jointly and severally with the First Defendant. Furthermore she submitted that it has been established that the Second Defendant conducted the business of the First Defendant recklessly and that he disregarded the separate juristic personality of the First Defendant. It is for this reason that Ms Joubert argued that the Second Defendant should be made to pay for the First Defendant's debts.

[96] The most important questions are firstly, whether the Plaintiff has proved that the monies which the Second Defendant withdrew from the bank account of the First Defendant belonged to her and secondly, whether the monies were paid by the Department for her benefit. It is not in dispute that the Second Defendant used the First Defendant as an extension of himself. It must be borne in mind though that the Second Defendant was the sole member of the First Defendant. He was therefore at large to use the money in the First Defendant's bank account at his pleasure. It was argued by Mr Nalane in his heads of argument that the Plaintiff has failed to prove that the monies the Second Defendant used from the First Defendant's bank account belongs to her or that his or some of it was destined to her or that these were monies paid by the Department in respect of her invoices to the First Defendant. In short she has not proved that the Department has paid the First Defendant in respect of the invoices she had submitted to the First Defendant. It goes without saying that in the absence of proof that the Department has paid the First Defendant the aforesaid monies there cannot be a complaint based on s 64 of the CCA simply because of the use by the sole member of the funds of the corporation.

[97] In my view, the Plaintiff has failed to prove:

97.1 the tacit term on which her claim is predicated;

97.2 that the Department has made payment to the First Defendant in respect of the invoices she submitted to the First Defendant;

97.3 that the money in the First Defendant's bank account was money destined to her;

97.4 that the conduct of the Second Defendant was conduct envisaged by the provisions of s 64 of the CCA.

[98] Accordingly the Plaintiff's claim cannot succeed. It is accordingly dismissed with costs.

P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff: Adv I Joubert

Instructed by:

Roelf Nel Inc.

Counsel for the Defendants: Adv J Nalane

Instructed by:

Ntanga Nkuhlu Inc.

Dates heard:

7-9 Feb. 2018, 11-13 Apr. 2018, 25-26 Jun 2018,

8 Oct. 2018

Date of Judgment: 2 July 2019

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