IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 42202/16

9/5/18

In the matter between:

ALUWANI ENGINEERING SERVICES CC	PLAINTIFF
And	
PC UDINGO VENTURE (PTY) LTD T/A PCU CONSULTANTS	DEFENDANT

JUDGMENT

MTATI AJ

[1] This is a claim for payment of outstanding fees and disbursements arising out of a verbal contract entered into between the Plaintiff and Defendant. The existence of a valid contract is not in dispute and the only issues to be determined is entitlement of Plaintiff to his claim.

[2] At the commencement of these proceedings, an application to amend the particulars of claim was made on behalf of the Plaintiff. The application consisted of an intention to amend the total amount of the claim as per paragraphs 7.2, 7.3, 8 and in prayer 1 of the relief claimed by substituting the amount of R2, 282, 032.21 and replacing same with an amount of R2, 327, 845.55

[3] The Plaintiff further intended to remove annexure **"B2"** in its totality and replace same with a new schedule attached to the notice of amendment. The effect of this annexure would result in the total amount claimed being the same as the amount referred to in paragraph 2 above.

[4] The Defendant objected to this amendment on the basis that they will suffer prejudice and would need to consult with witnesses to clarify the new schedule and that the intended amendment was done very late and at the time when the matter was confirmed to be ready for trial.

[5] In deciding the application for amendment, the court looked at the provisions of Rule 28 (10) of the Uniform Rules of Court, which provides that:

> *"The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit".*

[6] It was argued on behalf of the Defendant that the Defendant will be prejudiced if this amendment was granted since it introduced a revised amount to the Plaintiff's claim when in fact their case is that Plaintiff is not entitled to the amount claimed.

[7] The court was not convinced that there will be any prejudice to the Defendant especially since this application was introduced before any evidence was led. At any

rate, this Court, in terms of Rule 28(10) referred to above, has a discretion to accept any amendment before judgment.

[8] The court in coming to its decision also considered the case of **Myers v Abramson**[1] where Van Winsen AJ, as he then was stated that:

> *"This rule is in the widest possible terms and does not envisage any period before judgment during which the possibility of making an application for amendment is precluded. On the contrary, the use of the word 'any' qualifying the word 'stage' seems to specifically exclude the possibility of there being some 'closed' period during which, before judgment, such applications cannot be brought".*

[9] The court accordingly allowed the amendment whereafter the trial proceeded.

[10] Before the testimony of Mr. Takalani Gladwell Tshivhase, an application was made that the Defendant's witnesses be seated outside Court whilst the Plaintiff testified. This request by Counsel for the Plaintiff was heeded to. It later transpired that they came back to Court and when this point was raised, Counsel for the Defendant objected that they be excused and the Court permitted them to remain inside Court and indicated that this may affect the probative value of the evidence, which will be addressed during judgment. I will return to this point when analysing the credibility of the witnesses.

[11] On behalf of the Plaintiff, two witnesses testified, the one being Mr. Takalani Gladwell Tshivhase and the second was Ms. Reaoleboga Kgware. On behalf of Defendant four witnesses testified whose testimony is dealt with extensively below.

Plaintiff's testimony

11.1. Mr. Tshivhase testified for the Plaintiff under oath and stated that he is the sole proprietor of the Plaintiff, and has been so trading since 2008. The Plaintiff is an electrical consulting firm registered with the Engineering Council of South Africa, which is the regulatory body.

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[1] 1951 (3) SA 438 CPD at 445 D-E

11.2. He has known the Defendant from previous engagements where they entered into contracts for business ventures.

11.3. In so far as it relates to the matter before Court, he was contacted telephonically by Mr. Kutloano Leballo of the Defendant to meet one Mr. James du Plessis (Mr. Du Plessis) for a business opportunity in the Kwazulu Natal (KZN) area. He arranged and met Mr. Du Plessis at a restaurant where they discussed a number of projects relating to refurbishments of certain schools in the KZN area. In this meeting, it was also agreed that Plaintiff would be entitled to 1% of the project value as a fee and that disbursements will be finalised later. The principal client was Independent Development Trust (IDT).

11.4. The matter before Court relates to work done in twelve (12) schools and I refer to these schools as appears on the annexure to the summons being: Nonhlevu, Ingweni, Mvayisa, Mathiya, Stabo, Mgezeni, Albert, Groutville, Welabasha, Meerensee, Phuthini and Nikela.

11.5. The agreed fees were to be determined per each stage of project completion running into six (6) stages as follows:

Stage 1 consisted of initiation and briefing processes where after completion, Plaintiff would be entitled to 10% of 1% of the project value;

Stage 2 consisted of concept viability also referred to as scope of work, whereafter Plaintiff would be entitled to 10% of 1% of the project value;

Stage 3 consisted of design development, whereafter Plaintiff would be entitled to 25% of 1% of the project value;

Stage 4 consisted of procurement and documentation inclusive of bills of quantities, whereafter Plaintiff will be entitled to 10% of 1% of project value;

Stage 5 consisted of contract administration which would include site meetings, approval of payments, quality control *etcetera,* whereafter Plaintiff would be entitled to 40% of 1% of the project value; and,

Stage 6 is referred to as close out stage which consisted of the project sign-off and compiling of all reports for each project, whereafter Plaintiff would be entitled to 5% of 1% of the project value.

11.6. Mr. Tshivase also testified that the main contractor, being the Defendant, would also be entitled to a 2% fee for disbursements from IDT. Since Plaintiff was one of three contractors for all the projects, an agreement was reached that Plaintiff would claim a percentage of 1% of the total contract amount as a fee and 0.67% of 2% allocated for their disbursements.

11.7. It was also testified that Plaintiff prepared the designs of the projects, developed bill of materials, developed specifications, the tender documents and then also the final accounts as per the agreed stages. It is common cause that the six (6) stages referred to above were not completed for all the schools.

11.8. Payment of invoices submitted by Plaintiff to Defendant were initially paid after a few days after submission thereof, however with time, the Plaintiff started experiencing challenges with payments especially when they got to stage 5 of the projects. These invoices were later inclusive of disbursements and no issue was raised with the disbursements.

11.9. A number of electronic mails (e-mails) were sent to Defendant requesting outstanding payments and the response would normally be that invoices had been submitted but the delay was caused by IDT.

11.10. The evidence of Mr. Tshivhase was that before he submitted an invoice, he was informed by Defendant through an e-mail, on the amount he should provide as an invoice. He complied with this directive but knew that there was an agreement that he is entitled to 1% fee of the project cost on each of the projects excluding disbursements which were 0.67 of the 2% allocated for the project. Plaintiff also asked for reconciliation reports which would have reflected what amount was claimed from IDT by Defendant, so that Plaintiff can also align same with their claims but this information was not forthcoming.

11.11. In cross examination it transpired that the negotiations on the payment of disbursements were finalised between 2014 or 2015 according to Plaintiff. It also came to the fore that, some of the invoices that Plaintiff submitted and that

were paid, did not contain the 0.67% of disbursements. On being confronted about this, Plaintiff testified that he was always informed of the amount to claim and he proceeded to claim as such, but knew that he is entitled to disbursements.

11.12. Plaintiff mentioned in his testimony that there were a number of site meetings that were scheduled and that he attended, to discuss progress on the completion of work done. He conceded that he missed some of the meetings. To clarify the reason for missing some of these meetings, he stated that this was as result of other meetings at other sites, since these projects were running concurrently. In cross examination he in fact mentioned that the project managers (Defendant) also did not attend some of the meetings because of this reason, amongst others.

11.13. Plaintiff further testified that, the invoices for previous contracts with Defendant were structured differently and not the same as in this contract. Plaintiff was referred to the appointment letter of Defendant, which states that there are no disbursements payable for Electrical Engineers. In response hereto, Plaintiff stated that the 2% indicated for disbursements for the Cluster Manager, refers to the same percentage that was agreed to with Defendant, that it will be divided by three between the Civil Engineer, Defendant and Plaintiff. He stated further that, according to the appointment letter, it states that a maximum of 2% shall be allocated for disbursements.

11.14. He stated that Mr. Du Plessis was the Project Manager on behalf of Defendant, who subsequently left their employ but does not remember the date when he left.

11.15. He was informed by Mr. James du Plessis that he will charge his fees and disbursements according to client's (IDT) fee structure. When he was invoicing based on the information from Defendant, Plaintiff did not initially know how this amount was arrived at but sought to comply with the billing structure proposed by the Defendant.

11.16. It also became apparent during cross examination that, construction was conducted according to an agreed plan between the main contractor (builder)

and sub-contractors. This meant various sub-contractors could be at different levels at different times, depending on what had to come first. An example was made of relocation of main electrical wires before construction of a foundation. He could not recall what schools were commenced with first. He confirmed that it is at stage 5, when the main contract is issued and this contract is issued to a builder. He testified that completion of work varies between sub-contractors, depending on the agreed plan, but determination of project completion is all inclusive, which is determined by the Project Managers.

[12] The case was adjourned for a possible settlement by the parties. Settlement negotiations having failed and on the resumption of the proceedings, Plaintiff approached Court with a second application to amend its amended particulars of claim. This amendment sought to further delete an amount of R2 327 845.55 and substitute same with an amount of R2 428 564.14 and accordingly removing annexure **"B2"** and replacing same with annexures **"B2(a)** and **"B2(b)**. The Court having decided and provided its reasoning on the initial amendment, Counsel for the Defendant, correctly so in my view, did not object to this further amendment. This amendment sought to align the exact percentage of work completed with the records that were subsequently received from the principal agent being IDT.

[13] Contrary to the norm, since Plaintiff was still under cross examination, and for fairness, the Court allowed Counsel for the Plaintiff to lead further evidence in relation to the latest amendment to enable Counsel for the Defendant to cross examine based on a full scenario of evidence. The Court was of the view that this process is efficient rather than to engage with Plaintiff on this amendment during re-examination.

13.1. Cross examination thereafter continued. As indicated *supra* that, the second amendment to the particulars of claim sought to bring in line the percentage completion to that determined by Project Managers and specifically IDT. Plaintiff was asked why is it that the percentage completion for Mvayisa appears to be 23% on the IDT minutes when he claims 40%. The response to this question was that at the time when the minutes were taken, it was on 31 March 2015, whereas on the later summary from the same IDT for November 2015, the level of completion

was at 40%. Plaintiff explained that the summary is from IDT, which suggests that they have other minutes in their possession, as he aligned his amended particulars of claim as per their schedule. He could not verify the accuracy of the summary from IDT. He however mentioned that, when a determination of the percentage of completion of work is made at the Project Meeting, all parties are present. The minutes of these Project Meetings are circulated although not all. Some of these minutes, they received at subsequent meetings.

13.2. He re-iterated on a number of occasions that, whilst the sub-contractors may be at various stages of project completion, their claims are based on the determination by the Project Meeting, which is endorsed by IDT. The Court understood him to be saying one sub-contractor may be at 40%, another at 60% and still another at 20%. If the Project Meeting decides that the project completion stage is at 35%, all will invoice based at 35%.

13.3. On a question, why he claimed R44 000 each for Phuthini and Nikela, without indicating project completion, he testified that these amounts are based on an hourly rate of R1100 per hour, since at the time he did not have the project cost, but did do some work like site visits and provide assessment reports. He later pointed out on his bundle of documents, the reports he submitted. He conceded that, he did not claim disbursements for these 2 schools.

13.4. Plaintiff disagreed that, the question of disbursements was never discussed as alleged by the Defendant. He in fact, asserted that at a meeting where he, Kutloano, Peter and the Civil Engineer were present, the three way split of the 2% was agreed to. This meeting was apparently held inside a motor vehicle. He was later referred in re-examination, to an e-mail of February 2015, which was sent to Peter attaching an image reflecting fees inclusive of the three way split, agreed to at this meeting. It was mentioned above that, he stated that, the agreement on disbursements was agreed to between 2014 or 2015, although he did not remember the exact date.

13.5. It was put to Plaintiff that, he was not certain initially, of the exact percentage of completed work, to which he agreed, and mentioned that the minutes from IDT confirmed correctness, as he was using his estimation. He also testified that, if

Defendant suggests that, the percentage of work completed, as he testified is not correct, Defendant will be wrong because all parties were at the Project Meetings, when the determination was made. He was never advised that, he is not entitled to disbursements. He was also never asked to provide a breakdown of his disbursements, nor was he ever paid by IDT directly.

Ms. Reaoleboga Kgware's Testimony

[14] The next witness who testified on behalf of the Plaintiff was Ms. Reaoleboga Kgware whose evidence can be summarised as follows:

14.1. She is a Project Manager employed by IDT since 2003. Her basic duties are to monitor infrastructure projects on behalf of clients, being government departments.

14.2. In this matter, they (IDT) were appointed by the Kwazulu Natal Department of Education, to monitor construction projects that were to take place in the KZN area.

14.3. She formed part of most meetings, (Project Meetings) where progress of construction stages was discussed. Part of the attendees to the meetings, were both Plaintiff and representatives of Defendant. Her role in these meetings, was to receive reports on progress on completion of each project, and compile reports for further submission to the client being Department of Education (KZN). Based on her reports, Defendant would then file claims for payment for work done. These reports were based primarily on the information received from the Defendant and minutes of meetings.

14.4. Her evidence is that, Defendant was the Project Manager responsible for the completion of the projects. As per the appointment letter, Defendant could appoint consultants to assist in facilitating completion of the projects.

14.5. A summary of all project completion stages was compiled by her, using information received from reports from Defendant and the minutes of meetings. This summary contained a percentage completion of each project. On this summary, she made an example on Nonhlevu, which was depicted to have reached 99% completion. Her evidence was that, 99% completion effectively meant that the construction of the school was complete, but part of stage 6 (close out stage) which consisted of the project sign-off and compiling of all reports) was not finalised. They would have

also received final accounts, for the construction of the school from the main contractor at this stage.

14.6. Ms. Kgware confirmed that the Defendant submitted a schedule listing his expenditure and claimed disbursements.

14.7. On being asked, why the minutes depicted Mvayisa as 23%, when her summary showed 40%, she explained that the date of the minutes is in March 2015, and by November 2015 construction had progressed to 40%. Plaintiff was terminated in November 2015 according to her evidence. She knows that because Defendant introduced someone new.

14.8. Disbursements according to her are only paid to the Cluster Manager, (Defendant) since the contract is between IDT and Defendant. She did not know the agreement between Plaintiff and Defendant, relating to disbursements, but in general disbursements are shared between the Cluster Manager and consultants.

Defendant's Testimony

[15] The Plaintiff closed his case and the Defendant called Mr. Kutloano Leballo (Defendant) and his testimony was briefly the following:

15.1. He is the Director of PC Udingo, the Defendant in these proceedings and knows Plaintiff since 2008 from a previous project where they were constructing a school in Sebokeng.

15.2. Whilst on site at Sebokeng, he informed Plaintiff that, they (Defendant) were appointed as Principal Consultants (Project Managers) for some projects in the KZN area, and sought to establish, if Plaintiff would like to join the team, whereupon Plaintiff agreed. He then introduced Plaintiff to Mr. Du Plessis, and directed him to work with Plaintiff on the KZN projects.

15.3. According to him, he understood all the time that, the terms of the agreement were as the per appointment letter. It is important to mention the appointment letter, as this becomes of importance in deciding whether Plaintiff was entitled to disbursements or not. The interpretation of the portion of this letter is in dispute.

15.4. Defendant testified that, there was no agreement on the payment of disbursements. In fact he demonstrated that, since 2011 to 2013, they were never invoiced for disbursements. Whilst the issue of disbursements was raised by Plaintiff from time to time, he explained that, there are no disbursements payable, and further that they never claimed disbursements on behalf of Plaintiff from IDT. Defendant testified that, he has no recollection of an agreement on disbursements in a car. He was later steadfast on this, and stated that, in fact, there was no such meeting.

15.5. Mr Leballo testified that Plaintiff would be informed by Mr. Peter Namingona, (working with Defendant) on how much to invoice for his claim. This, however strange, will only take place after Defendant would have received payment from IDT and thereafter Defendant would process payment of Plaintiff's invoice. This I say strange because the Courts understanding of PFMA[2] is that Defendant would have had to pay based on invoices received.

15.6. Whilst it was suggested that, Plaintiff did not complete a number of snags in schools during his cross-examination, Defendant conceded that in his letter of cancellation of the contract with Plaintiff, most schools had reached completion stage.

15.7. Defendant could also not testify on the stages of completion in respect of electrical work, which was the responsibility of the Plaintiff.

15.8. Defendant was also questioned on an e-mail dated 1 February 2015, where Plaintiff would have given him the breakdown of fees, which were inclusive of the percentage payable for disbursements. To this, the Defendant responded by saying, he does not recall same and stated further that he would have submitted same to Peter Namingona to deal with. This e-mail was never responded to by Defendant. At this stage, the Court cautioned Defendant to think carefully of what may have taken place, as the e-mail was not refuted. To this Defendant responded by saying that he responded the following day by asking for a reconciliation statement.

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[2] Public Finance Management Act 1 of 1999

Mr. Peter Namingona testimony

[16] The next witness called on behalf of the Defendant was Mr. Peter Namingona, (Mr. Namingona) who worked for the Defendant since 2011, and was in charge of Quantity Surveying and Project Management. His testimony can be summarised as follows:

16.1. He knew Plaintiff whilst he was working elsewhere. When he met him at PCU, Plaintiff had already been appointed for the projects in the KZN area. Mr. Du Plessis was dealing directly with Plaintiff and he would get involved only on issues of payments.

16.2. The Defendant's office would tell him, how much has been paid by IDT and he would in turn advise Plaintiff to prepare an invoice of a particular amount. The fee structure is different for each consultant. He stated that, disbursements were only claimed by the cluster manager (Defendant). He stated further that, there were no negotiations with Plaintiff on payment of his disbursements. According to him, no other consultants were paid disbursements who were part of the project.

16.3. Mr. Namingona's testimony was further that, the issue of disbursements was only raised by a Civil Engineer, when he approached them about the losses he was making, and made a proposal that the fees should be split by 0.67% for each consultant including Defendant.

16.4. He also testified that, Plaintiff did not complete all the stages of electrical work, and he and Defendant sat and determined the percentage of electrical work that was completed, and they established that Plaintiff was actually overpaid. His testimony was further that, in relation to Phuthini and Nikela schools, Plaintiff only completed the initiation stage, which amounts to 5%. (Not the 10% that was alluded to by Plaintiff for stage 1).

16.5. In cross-examination, he was adamant that he knew the terms of the contract, notwithstanding that, same was negotiated and agreed to before he commenced working for Defendant.

16.6. He dismissed the statement put to him that, invoices were paid inclusive of disbursements and stated that *"...the structuring of invoices is neither here nor there. I did not even have to look at the invoice".*

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Ms. Popi Vincentia Dlamini's Testimony

[17] The third witness for the Defendant was Ms. Popi Vincentia Dlamini (Ms. Dlamini) whose evidence can be summarised as follows:

17.1. She was appointed by Defendant as a consultant responsible for health and safety together with environmental assessments in the KZN projects. She is based in KZN and never discussed the aspect of disbursements in her contract. She is not privy to the agreement that Plaintiff had with Defendant.

Mr. Siyabonga Mpinda's Testimony

[18] The fourth witness was Mr. Siyabonga Mpinda of Onke Consulting Engineers whose evidence was that:

18.1. He was appointed as a consultant by Defendant responsible for civil and structural engineering in the KZN projects. He testified that, there was no formal arrangement with Defendant in respect of disbursements, but he together with Plaintiff indicated that they will file their claims for disbursements. He said that, he together with Plaintiff tabled a proposal in January 2015, where the disbursements will be split by the three of them (Plaintiff, Defendant and himself) each receiving 0.67%.

18.2. He testified that Mr. Du Plessis was aware of the payment of disbursements and that it is standard practice that disbursements are shared on projects of this nature. He confirmed further that, he also submitted claims inclusive of disbursements, however the disbursements were not paid. He knew that Ms. Dlamini was not paid

for disbursements, but was of the impression that her company was appointed by IDT directly.

Issues for determination

[19] In my view there are only two issues to be determined by the Court the first being, whether Plaintiff was entitled to payment of disbursements determined at 0.67% and, secondly, the stage of completion of each of the projects at the time when the agreement between Plaintiff and Defendant was cancelled.

Entitlement to disbursements

[20] The evidence of the Plaintiff was that an agreement was reached initially with Mr. Du Plessis on payment of disbursements, who mentioned that the disbursements will be paid as per appointment letter. As indicated above, this appointment letter allocates 2% for disbursements. This evidence is not disputed, rightly so in my view, since Mr. Du Plessis was not called to rebut this evidence.

[21] Also, Defendant initially testified that, he does not recall a discussion of disbursements in a motor vehicle and later denied that this discussion ever took place. Mr. Mpinda's testimony is that, this discussion could have taken place, but of importance is that, he testified that, he made a presentation to Mr Leballo and Mr Namingona where the 0.67% split was discussed. In his presence was Mr Tshivase. This evidence was never disputed.

[22] A further anomaly is that, the Defendant did not respond to the e-mail dated 1 February 2015. This email contained a fee structure inclusive of the 0.67% disbursements. This failure to reply to this e-mail, containing material allegations in respect of payment of disbursements cannot, in my view, be left merely at the vague response that, it was handed to Mr. Namingona to deal with. Mr. Leballo is the Director of PC Udingo and the value of disbursements is running into millions of rand. How then, does a person in his position, leave the matter unattended to or even give it to someone else to deal with.

[23] In the matter of **McWilliams v First Consolidated Holdings**[3] the Court had the following to say:

> *"I accept that 'quiescence is not necessarily acquiescence' and that a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and in the final determination of the dispute. And, an adverse inference will the more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject matter of the assertion."* (See also **Benefit Cycle Works v Atmore**[4]**; Seedat v Tucker's Shoe Co**[5].

[24] As indicated *supra* the e-mail was directed to Mr. Leballo and of interest is that, he responded thereto the following day, by not challenging the assertion by Mr. Tshivase on the fee structure, but instead asked, *"Where is your recon?"* By this, the Court was made to understand that he was referring to a reconciliation statement.

[25] The next anomaly that came to the fore during the evidence, is the admission by Mr. Leballo that, he was entitled to 2% of the project value as disbursements but according to him, it was at his discretion to decide if he pays other consultants anything in respect of disbursements. This is however, in contrast with paragraph 2.2 of the appointment letter which state that: *"A maximum of 2% of the project cost is to be*

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[3] 1982 (1) All SA 245 (A); 1982 (2) SA 1 (A) 10 D-H

[4] 1927 TPD 524 532

[5] 1952 (3) SA 513 (T) at 517-8

allocated for disbursement for the entire professional team on this project. Only the disbursement charges in respect of the approved travel plan will be reimbursed."

[26] The Court has observed that, Mr. Mpinda and Mr. Tshivase were the only consultants coming from Gauteng Province hence, it will make sense that, they discussed their disbursements. I do not accept as rational, the fact that, only one person can claim disbursements at the exclusion of others, when all have incurred disbursements. It just does not make commercial sense. Further, Ms. Kgware confirmed that in her knowledge, parties share disbursements on projects, although she was not committal on the agreement between Plaintiff and Defendant.

Project completion stage

[27] During the cross-examination of Mr. Tshivase, an impression was given to the Court that Plaintiff did not complete all the stages of work as claimed in the particulars of claim (as amended). Whilst it was not specifically put to him what exactly he did not perform, the nature of questions were suggestive of non-compliance as per his claim. At the end of cross-examination, Counsel for the Defence Defendant was asked, if he does not want to put the version of the Defendant to the Plaintiff, and in response he stated that the Pleadings are clear on what the Defendant disputes. I shall revert later to this aspect.

[28] Surprisingly, when Mr Leballo testified, he agreed with the schedule of the completion stages presented by Ms Kgware as a reflection of work completed. In fact on his own annexure reflecting the percentage of work completed, he indicated Nonhlevu School as 100% complete, when IDT showed 99% on their schedule. There is no document that was filed of record reflecting work of sub-standard nature relating to electrical works, except a letter of termination dated 2 November 2015.

[29] Mr Namingona could not tell the Court much on the level of sub-standard work delivered by the Plaintiff. All he mentioned was that, he and Mr Leballo sat and prepared a document reflecting the stages of completion in each project. He could not detail what exactly was not done. It should be noted that the agreement between the parties was entered into on 25 September 2011. At the time of writing the termination letter, relations had already been strained between the parties, since Plaintiff had already sent various modes of communication to Defendant in relation to payments. In his letter, Plaintiff mentioned six schools which were all but one at final stages as they were awaiting final accounts. The one school had *"outstanding information and approval and delay in upgrade application"* as per the termination letter.

[30] As mentioned above, there is no evidence or documentary proof that Plaintiff did work of sub-standard nature. The termination letter cannot be supportive of Defendant's case, but instead demonstrates that Plaintiff was at final completion of the projects but for the dispute relating to payments of disbursements.

Analysis of the law

[31] It is trite that the Plaintiff bears the *onus* to prove his entitlement to the amount claimed. The principle that the one who claims something from another in a court of law, has to satisfy the court that he is entitled thereto was well established in the case of ***Pillay v Krishna***[6].

[32] The Court in this instance is faced with two versions that are mutually destructive. The Plaintiff testified that he was entitled to re-imbursements and these were discussed with Mr Du Plessis and later with Mr. Leballo on the one hand. Mr. Leballo together with Mr. Namingona deny that there was ever any such arrangement. Also, Plaintiff testified that he had completed the projects as per his amended particulars of claim and again Defendant disputes this.

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[6] 1946 AD 946 at 951

[33] The correct approach to be adopted when dealing with mutually destructive versions was succinctly set out in the case **of *National Employers General Insurance Co Ltd v Jagers***[7], where Eksteen AJP said:

> *"... Where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities.*
>
> *The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."*

[33] The Supreme Court of Appeal, in the case of ***Stellenbosch Farmers Winery Group Ltd and Another v Martell Et Cie and Others***[8], approved this approach saying:

> *"The technique generally employed by courts in resolving factual disputes of this nature may be conveniently summarised as follows. To come to a conclusion on the disputed issues the court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn*

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[7] 1984 (4) SA 437 (E) at 440E-G

[8] 2003 (1) SA 11 (SCA) at 14I-15E

will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established facts or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it." (See also ***The Pietermaritzburg Society for the Prevention of Cruelty to Animals v Junaid Peerbhai[9]; City of Johannesburg Metropolitan Council v Ngobeni[10]*** and ***Prinsloo v The State[11]*** *)*

[34] The following I find to be common cause in the analysis of evidence:

34.1. There was an agreement entered into between Plaintiff and Defendant on or about 25 September 2011;

34.2. The Plaintiff was represented by Mr. Tshivase and the Defendant by Mr Du Plessis;

34.3. The agreement entailed that Plaintiff should provide electrical consultancy services in Projects in the KZN area;

34.4. Plaintiff would be entitled to 1% fee of the total of the project cost; and,

34.5. That each project consists of six stages up to completion stage.

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[9] 2007 SCA 66 at para 6 and 9

[10] 2012 ZASCA 55

[11] 2014 ZASCA 96

[35] I will not repeat the issues in dispute as they form part of this judgment.

[36] In evaluating the evidence, the Court found Mr Tshivase to be a reliable witness. He did not go out of his way to find an answer to each question that was asked of him. When asked on the stages of completion for each School, he was ready to concede when he could not find a specific document in approximately 2000 pages that he had to peruse during cross examination. He however stuck to his version on the agreement that had taken place on two occasions when disbursements were discussed. The one incident was when he held the initial discussion with Mr Du Plessis and the second incident was when he was inside a vehicle with Mr Leballo, Mr Namingona and Mr Mpinda.

[37] He easily conceded that in respect of two Schools he only completed stage one and that the fees claimed were based on hourly rates which did not form part of the agreement, instead he should have claimed the 10% allocated for that stage which is less than what he claimed. There was also a justification on why his determination of each percentage completion for the Schools was not the same as the schedule from DTI. His response to this was that, he made his own assessment since he did not always receive minutes of meetings from DTI. The Court must indicate that the variance between his schedule and that of DTI was very miniscule.

[38] Plaintiff's evidence was further corroborated by Ms Kgware. This witness was served with a subpoena *duces tecum* and appeared to be very independent as she made concessions where it was necessary to do so. For example, she was asked in cross-examination if she would dispute that there was no agreement to pay Plaintiff disbursements, and she easily admitted that she was not privy to the contract and would not deny same. However and of importance to the Court is that, she testified that in all the years she has been working as a project manager for DTI (since 2003), her knowledge is that disbursements are shared among consultants.

[39] Mr. Mpinda who was a witness for the Defendant actually corroborated the case of the Plaintiff by stating that he, together with Mr Tshivase made a presentation to the Defendant on the payment of disbursements. Whilst he could not remember the actual

discussion and agreement on the disbursements in the vehicle, he did not rule this out since *"...we travel together in the KZN area almost every two weeks"* he said. Further, like Plaintiff, he also provided an invoice that is inclusive of disbursements after February 2015.

[40] On the other hand, Mr. Leballo's evidence is riddled with a number of loopholes that could not be sufficiently explained. I must at this stage also mention that, he was seated in Court together with Mr. Namungona during the evidence of the Plaintiff. The Court on an application by the Counsel for the Plaintiff, to remove them from the Court for the second time (for some moment in the morning session they excused themselves upon request) and having heard an address from Counsel for the Defendant, I decided that there is nothing in law that prohibits their presence although the Court will be entitled to critic their evidence where necessary based on their continued presence in Court.

[41] I found it strange for Mr. Leballo to accept the schedule presented by DTI as it is, when his Counsel was cross-examining Mr. Tshivase on stages of completion as though this was disputed. As mentioned, he was seating in Court during this cross-examination period and not once was it clarified that the direction taken by his Counsel was not correct. Counsel was in other words busy on a *"fishing expedition"* in an attempt to find cracks in the testimony of the Plaintiff.

[42] On a number of occasions, he became argumentative with Counsel during cross-examination. The Court had to, at some stage intervene and request him to focus on questions and respond thereto. This warning by the Court did not offer much help. He could not provide a satisfactory response to the Court, on why he did not respond directly to an e-mail that contained a break-up of fees and disbursements. He initially testified that he does not have a recollection of a meeting where disbursements were discussed and later suddenly remembered that no such discussion took place.

[43] His case was not assisted by Mr. Namingona who testified that, the schedule of IDT was correct and that the schedule attached in the Plea is relating to electrical work done by Mr. Tshivase. He could not explain why he and Mr Leballo just sat in an office and determine the stage of completion by Plaintiff only. He further could not explain why

there was no document discovered indicating completion stages by Plaintiff except this schedule.

[44] He was not an impressive witness at all to the Court. The fact that he was sitting in Court during the cross-examination of Plaintiff did not help him. On a question whether he knows if Mr. Du Plessis and/or Mr. Leballo discussed the payment of disbursements, he responded by contesting that such a discussion ever took place. Strangely, he was not yet employed by Defendant when the contract commenced. On being confronted with this, he merely responded by saying Mr. Leballo would have told him if such a meeting ever took place.

[45] In evaluating the evidence in totality, I am convinced that the Plaintiff has succeeded in proving his case on the balance of probabilities. I accordingly reject the version of the Defendant and accept the version of the Plaintiff.

[46] The next aspect to be considered is what amount Plaintiff is entitled to. The Court is aware of the second amendment to Plaintiff's particulars of claim. However, even on the second amendment Plaintiff claims an amount of R44 000.00 each for Phuthini and Nikela Schools which is above the 10% completion stage for each School. In my view, the evidence being that stage 1 was completed for these Schools, it is appropriate to award 10% to the Plaintiff for each of these Schools which is less than R44 000.00 for each School. Plaintiff acceded to this summation when confronted by the Court.

[47] The last question is that of costs. Counsel for the Plaintiff argued that the Court should award costs on an attorney and client scale. This argument is premised on the basis that, Defendant unnecessarily prolonged the case when in fact they did not have any defence on the matter. Whilst it could be argued that this matter may have been resolved through settlement had the parties been *bona fide* to each other, it cannot in all instances be said that this punitive costs order is justified. The courts should be weary of awarding costs at this scale unless clearly evident that the other party was irrational, inconsiderate and reckless in pursuing the matter to court. This is not one of the cases, in my view, where such a punitive cost order should be granted. The Defendant in this matter has at least requested an adjournment of the matter to consider settlement negotiations and these were not successful.

[48] Having regard to all the evidence, I make the following order:

Order

1. *Defendant is ordered to pay to Plaintiff an amount of R2 373 244.15;*

2. *Defendant is ordered to pay costs on a party to party scale*

V.T. MTATI AJ
Acting Judge of the High Court
North Gauteng High Court

Appearances: On behalf of the Plaintiff: Adv L. Uys
Instructed by: Gildenhuys Malatji

On behalf of the Defendant: Adv C. Cremen
Instructed by: Paton J Dennison Inc.