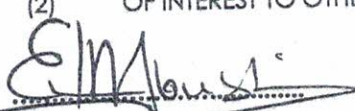


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 59854/2011

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	17/4/2019
E.M. KUBUSHI	DATE

In the matter between:

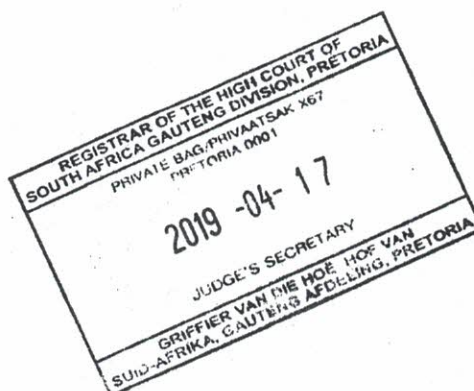
TSHWARISANO TRADING CC

and

SIBONGA INTUTHUKO CONSTRUCTION CC

PLAINTIFF

DEFENDANT



JUDGMENT

KUBUSHI J

INTRODUCTION

[1] The defendant obtained a contract with the Lekwa Municipality ("the municipality") to do certain water works and it sub-contracted some of that work to the plaintiff in terms of a letter of appointment dated 31 August 2010. The plaintiff in this action seeks payment from the defendant in the amount of R304 702, 72 (three hundred and four thousand seven hundred and two rand and seventy two cents) plus 14% value added tax ("VAT") *in lieu* of services rendered in terms of the said letter of appointment. The defendant admits the appointment of the plaintiff as sub-contractor but denies that the plaintiff performed the services/work it was appointed to do and that it is entitled to payment.

[2] The letter of appointment is attached to the particulars of claim and was also read into the record. It reads as follows:

"CONTRACT: UPGRADING OF WATER NETWORKS IN MEYERVILLE

You are hereby appointed as a subcontractor by Sibonga Intuthuko Construction on the abovementioned project.

Your task will be trench excavation, house connection and trench backfilling. Safety will be your first priority on the project. You are appointed for an amount of R304 702, 72 excluding VAT as *per* the bill of quantities. Material will be supplied by the main contractor.

Sub-Total	R304 702, 72
VAT @ 14%	R 42 658, 38
TOTAL	R347 361, 10"

[3] At the commencement of trial I was informed that the plaintiff had made certain concessions in its response to the defendant's pre-trial questions, namely:

- 3.1 that the works were carried out from 31 August 2010 to 16 September 2011;
- 3.2 that the employees of the plaintiff who attended to such work were: Khehla Mokoena, Nurse Mashinini, Rosina Pillow, Lucky Kunene, Johannes Twala, July Nkosi, Bhuti Dhlamini, Sphiwe Nkosi, P.N. Nkabinde and Z.E. Vilakazi. It, however, became apparent during evidence that Nurse Mashinini, Johannes Twala and Bhuti Dhlamini

were actually contracted to the defendant, that is, they were employed by the defendant;

- 3.3 that the full details of all the work/services the plaintiff undertook on behalf of the defendant in terms of the agreement were: trench excavation, house connections and trench backfilling;
- 3.4 that on the request of the plaintiff, the defendant attended to the excavations with TLB machinery and operator, at its cost at the project site;
- 3.5 that the plaintiff transported the defendant's employees to attend to the project site and that it was remunerated for same on a monthly basis; and
- 3.6 that the defendant attended to the payment of salaries of the plaintiff's employees in the amount of R118 800 (one hundred and eighteen thousand eight hundred rand).

[4] At the end of the plaintiff's case the defendant applied for absolution from the instance which was opposed by the plaintiff. I ruled that the plaintiff has made a *prima facie* case which the defendant ought to answer to. I reserved the reasons and undertook to provide same when giving this judgment.

THE PLEADINGS

[5] The salient terms of the plaintiff's claim in the amended particulars of claim are formulated as follows:

- "3. On or about 31 August 2010 and at Standerton, Mpumalanga, the Plaintiff and the Defendant entered into a written agreement, a copy of which is attached as Annexure "A". Defendant was represented by Mr L Banda duly authorised.
4. In terms of the said agreement the Plaintiff was appointed as a sub-contractor in respect of the upgrading of the water network in Meyerville, Standerton ("the works").
5. The Parties furthermore in terms of the written contract, agreed:
 - 5.1 That the Plaintiff would undertake the trench excavation, house connection and trench backfilling with respect to "the works".
 - 5.2 That the Plaintiff would be remunerated in an amount of R304 702, 72 plus VAT on completion.

6. The Plaintiff duly completed the works on 31 July 2011 and in doing so fulfilled its contractual obligation towards the Defendant. The contract price thus became due and payable.
7. In the premises the Plaintiff is entitled to payment of R304 702, 72 plus VAT."

[6] The defendant in its plea admits the averments contained in paragraphs 3, 4 and 5 of the plaintiff's amended particulars of claim. The defendant, however, denies the allegations in paragraphs 6 and 7 of the amended particulars of claim and puts the plaintiff to the proof thereof. In particular, the defendant specifically pleads that although the parties entered into an agreement as stated in paragraphs 3, 4 and 5 of the plaintiff's amended particulars of claim, the plaintiff at no stage attended to any work in terms of its contractual obligations or rendered any service contemplated and described in the contract between the parties.

[7] What emanates from the pleadings is that the contract itself is not in dispute. It is also not in dispute that the work/services as *per* the contract have been completed. The crux is who between the parties performed the services. It is thus, apparent that, for the plaintiff to succeed in its claim it must, on a balance of probabilities, prove that it performed the work/services as stipulated in the contract.

THE EVIDENCE

[8] In proving its claim that the work was performed by the plaintiff, the plaintiff tendered the evidence of two witnesses, namely, Mr Malan Abraham Mokoena ("Mr Mokoena"), one of the members of the plaintiff who was responsible for the performance in terms of the contract and as, alleged, was at all material times present when performance was undertaken; and, Mr Thomas Francis ("Mr Francis"), the Community Liaison Officer ("CLO") appointed by the municipality to liaise between the contractor and the employees on site.

[9] In summary, the evidence of Mr Mokoena is that he together with Mr Francis sourced the plaintiff's employees who were to perform the work on behalf of the plaintiff from the Sakhile Township ("the location"). His role, amongst others, was to transport the employees from the location to the site of the construction ("the site") and back. He also, made sure that the excavation

job, that is, what is written in the contract, is done. Certain of the salaries of the employees who did the house connections, was according to Mr Mokoena, paid directly to them by the defendant.

[10] Mr Mokoena's further evidence is that he requested the defendant to pay the plaintiff some of the money due during the contract period, but the defendant, at the instance of Mr Banda, the sole member of the defendant, refused to do so. His explanation is that Mr Banda refused to pay the money to him because of what he referred to as the question of trust. Mr Banda was afraid that if the money was paid to the plaintiff that he would disappear without finishing the remainder of the work in terms of the contract.

[11] Mr Mokoena testified that he did not do the work but employed people from the location who physically did the work. He testified about the physical labour that was done by his workforce starting from exposing telephone cables, exposing electrical cables, exposing water and sanitation pipelines and so on. He even wanted to explain the reason why ultimately, when backfilling has to be done there was what he referred to as, the bedding of the soil. This to him is what constituted the excavation and backfilling. He also accepted that the defendant provided the TLB (machinery used to excavate) which was used for the excavation by the plaintiff's employees.

[12] Mr Francis' evidence was very short. His testimony was that in terms of the rules of the municipality, 25% (twenty five percent) of the labourers on the site were to be sourced from the location. He confirmed Mr Mokoena's testimony that he together with Mr Mokoena, sourced people from the location to work on the project as required by the municipality. He also confirmed that some of the people sourced were simultaneously employed by Mr Mokoena to do work on the project for the plaintiff.

[13] On the other hand, the defendant called two witnesses to give evidence, namely Mr Bhuti Lawrence Banda ("Mr Banda"), the sole member of the defendant and Mr Nhlanhla Godwel Kanye ("Mr Kanye"), the defendant's foreman whose evidence was tendered by affidavit because he was deceased.

[14] Mr Banda's testimony is that the defendant was appointed by him to work on the site by doing excavation, laying pipes, house connection and backfilling of the trenches. According to the appointment on the sub-contract the plaintiff was supposed to get its own employees separately from the employees of the defendant. The plaintiff was supposed to do the trench excavation on its own, and pay for the excavator or whatever tools it was using to excavate the trenches. To his knowledge all the people on site were employed by him for the defendant through the CLO.

[15] According to Mr Banda the plaintiff never worked on site, it never excavated even a single metre. As far as he was aware, what Mr Mokoena did on site, was to transport the labourers from the location to the site and that some of the labourers were hired from the local residence which is Meyerville. Mr Mokoena was transporting about ten or twelve workers to the site. Some of the workers resided closer to the working place, and he used to pay him (Mr Mokoena) R20, 00 (twenty rand) a day for the transport of each labourer at the end of each month. Even the pipes that were stored in Mr Mokoena's yard were transported in Mr Banda's bakkie.

[16] Mr Banda testified further that the defendant had contracts with the workers which they signed before they start work, because the municipality does not allow people to work without contracts. The people were sourced through the CLO for the project where after he (Mr Banda) would nominate and employ the people he wanted. He insisted that none of the workers were ever sourced by Mr Mokoena.

[17] Mr Banda's evidence is that the defendant's employees did the excavation, they made the bedding, they laid the pipes, closed the trenches, drilled the pipes and put what is called a saddle in the pipes;

none of this work was done by the plaintiff. According to him, if Mr Mokoena had done this work, he would have either claimed fortnightly or on a monthly basis as required by the municipality rules but there was never a claim from him. Mr Banda admitted under cross-examination that he was not always on site but that he relied on his foreman, Mr Kanye, to keep him updated on what was happening on site.

[18] Mr Kanye's evidence read from the affidavit into the record was briefly that the plaintiff or its employees never did the house connection. And further that Mr Mokoena only transported their employees and was paid for the transportation on a monthly basis.

ARGUMENT

The Plaintiff

[19] In argument the plaintiff's counsel contends that the admissions made by the plaintiff were understood in the wrong context. The admissions, according to counsel, do not form evidence of non-performance. To the contrary, the admission made in regard to the material to be supplied by the defendant meant to the plaintiff that the defendant was to supply the machinery necessary for the excavation whereas for the defendant, it excluded the machinery. Secondly, the transportation admission does not advance the defendant's case and is immaterial. Whereas the admission of the payment of the amount of R188 800 (one hundred and eighty eight thousand eight hundred rand) directly to the employees does not support the notion that it was part of the capital amount.

[20] The further argument is that the interpretation and/or understanding of the contract by Mr Banda do not take the case any further. The crux is whether the contract has been completed or not. And it is common cause that it has been completed. What remains to be determined is whether the work was done by the plaintiff or the defendant. The defendant's argument is that by bringing the TLB to the site the excavation was done by the defendant whilst the plaintiff's evidence is to the contrary. The house connections were confirmed by the evidence of the deceased and the plaintiff's evidence that it did the trench backfilling is unchallenged, so the argument goes.

[21] The contention is that an enquiry into the probabilities is required. Counsel referred me to the judgments in *Stellenbosch Farmers' Winery Group Ltd and Another v Martel et Cie and Others*¹ and *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality*² as to how a court would deal with two conflicting versions.

[22] It is, thus, contended on behalf of the plaintiff that the probabilities favour the plaintiff and that the matter should, as such, be determined in its favour.

The Defendant

[23] The argument by the defendant's counsel is that all work done by the plaintiff, for instance, sourcing people from the location and transporting the employees, does not fall within the terms of the contract and was in any event paid for. A further argument is that the plaintiff's evidence that there was a contract and employees were sourced is not what is in the contract or what is pleaded in its papers. The plaintiff was supposed to prove that it performed its obligations in terms of the contract by leading evidence that show that the plaintiff, through its own employees, physically fulfilled these obligations. There is also no evidence that the plaintiff employed and paid employees to do the work. The contention is that it is highly improbable that the defendant would have undertaken to pay the plaintiff the amount in the contract just for sourcing the employees.

[24] Counsel argued that the evidence of Mr Kanye should be admitted into evidence in terms of section 3 (1) to (7) of the Law of Evidence Amendment Act³ because the plaintiff had admitted in its response to the defendant's pre-trial questions, that Mr Kanye was deceased.

[25] Consequently he applied for the dismissal of the plaintiff's claim with costs.

¹ 2003 (1) SA 11 (SCA).

² 2018 (1) SA 391 (SCA) at paragraph 176.

³ Act 45 of 1988.

THE ISSUE

[26] The issue indeed is which of the parties performed the work/services stipulated in the contract. Is it the plaintiff or is it the defendant?

THE LAW

[27] The proper approach by the courts when dealing with mutually destructive versions has been laid down in the judgment in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* where Nienaber JA at para 5 of that judgment reported as follows:

"[5]...The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a 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 the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's 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 fact 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's 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. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

DISCUSSION

[28] It is common cause that there are two mutually destructive versions before me. According to the plaintiff's version the performance was done by the plaintiff whereas the defendant's version is that performance was by the defendant.

[29] On the rationale of the judgment in *Stellenbosch Farmers Winery Group* this matter can be easily decided on the probabilities.

[30] It is common cause that the project as stated in the contract at issue in this matter has been completed. The question is who completed the project? Was it completed by the plaintiff or was it completed by the defendant? The parties are agreed that in order for the plaintiff to perform the work stated in the contract it had to employ people who would physically do the work. The defendant's evidence is that the plaintiff did not physically do the work and that the work was done by the defendant's employees. At the end, I was faced with two contradictory versions.

[31] I do not understand the plaintiff's claim nor the evidence tendered in court to mean that the plaintiff's main object on the project was to source people from the location to work on the project, as is suggested by the defendant. I might also say, even though this was the argument pushed consistently by the defendant's counsel, it was, however not what the defendant testified. In his evidence, Mr Banda was adamant that Mr Mokoena did not source people from the location as this was done by Mr Francis.

[32] The plaintiff's case to me is clear. The evidence establishes that there was a contract between the parties. The plaintiff employed people sourced from the location to physically do the work. The salary of the employees who did the house connection was paid by the defendant. The work was done *per* specification of the contract. The employees of the plaintiff, with the assistance of the TLB provided by the defendant, did the excavation – they started by exposing telephone cables, exposing electrical cables, exposing water and sanitation pipelines; they did the backfilling – they started by doing the bedding of the soil in order to protect the pipes; they did the house connection which is confirmed by the payment they received from the defendant for their salaries. The contradictions about the date of the contract as against the time the work commenced which the defendant seeks to rely on, are to me immaterial. In any event, the dates had already been admitted in the plaintiff's response to the defendant's pre-trial questions. There was no need to prove the dates again.

[33] The evidence of Mr Mokoena is corroborated by the evidence of Mr Francis who confirms that Mr Mokoena sourced, together with him (Mr Francis), employees from the location to work on the site for the plaintiff. Mr Francis' also confirms that the employees so sourced worked for the plaintiff at the site. The evidence of the two witnesses is unchallenged. It was neither challenged in cross examination nor was a version challenging that evidence put by the defendant when Mr Banda tendered his evidence.

[34] The evidence of Mr Banda on the other hand is uncorroborated. The only evidence that sought to corroborate Mr Banda's evidence is that of Mr Kanye which was proffered on affidavit because it is alleged that he is deceased. I have no problem to accept the affidavit of Mr Kanye into evidence. The problem I have with this evidence, however, is that it was never put to the plaintiff's witnesses and can as such not be confirmed as the truth of what actually happened. I, as such, am not going to delve into its admissibility or otherwise as hearsay evidence. Without, this evidence, the defendant's version falls flat because the evidence shows that Mr Banda was not always on site and cannot for certain testify that all work on site was done by the defendant's employees instead of the plaintiff's employees.

[35] On the probabilities: on what basis would the defendant hire employees to do the excavation work when in Mr Banda's own testimony such a duty fell squarely on the shoulders of the plaintiff. Probabilities are that since the plaintiff did not have the requisite money to pay the employees as Mr Banda had not paid him, in order to have the work done he allowed the defendant to pay the employees' salaries.

[36] It was never put to Mr Mokoena during his testimony that Mr Banda would dispute that he never said he has trust issues and as such not pay the plaintiff until the work is done. Therefore, Mr Mokoena's testimony that Mr Banda indicated to him that he will not pay him before the work is done because of trust issues remains unchallenged.

[37] The following evidence of Mr Banda was never put to Mr Mokoena to answer to, namely:

"if you are working faster you can claim fortnightly from the municipality or else you can claim once a month, so in this case there was no claim from Mr Mokoena each and every month to say I have done this job, let us go and check, and if he has done a job he must call me, let us go and measure the job that is done before we make a payment because now this payment was supposed to be made punctually, partly, partly because of what has been done during that specific month or on those specific weeks. It was not a payment that is going to be made after the job is finished."

[38] Mr Banda also consistently denied that Mr Mokoena sourced the labourers yet this is the angle that was pushed by his counsel during cross examination and particularly, during his application for absolution from the instance.

[39] It was never put to Mr Mokoena that his company did not do the exposing which Mr Banda denies in his evidence.

[40] The evidence of Mr Kanye was never put to Mr Mokoena to dispute. It can, as such, not be said that the plaintiff did not do the house connections.

[41] Mr Francis' evidence that he sourced the employees together with Mr Mokoena from the location and that the municipality required 25% (twenty five percent) of the employees to come from the local community was never challenged.

[42] Mr Banda conceded under cross examination that other than the three employees whose contracts with him were discovered, there were other employees on site. According to his testimony some of these employees were contracted to him but their contracts did not form part of the evidence before me. As a result, I cannot accept that those employees were contracted to the defendant. It was also not put to the plaintiff's witnesses that, except for the three employees who had contracts with the defendant, the other employees who were mentioned by Mr Mokoena and Mr Francis as the employees of the plaintiff, were not the plaintiff's

employees. I have therefore to accept that other than the employees that were contracted to the defendant there were other employees on site which on logic could only have been those of the plaintiff.

[43] Besides, Mr Banda's evidence did not impress me at all. He was most of the time evasive and refused to answer questions put to him to the extent that I had to step in. His demeanour left much to be desired bordering on arrogance.

[44] He denied under cross-examination that the TLB did not form part and parcel of the equipment that was to be used on site whilst it was his counsel's argument that the TLB was equipment not material.

[45] Although under cross examination he was not ready to accept that Mr Mokoena was part of the people who sourced the employees, he, however, conceded that the project would not have been completed without the labourers sourced by Mr Francis and Mr Mokoena. His evidence that it was not Mr Mokoena who sourced people from the location would, in any event, not stand since it was never put to Mr Mokoena. And as I have said, this was the line pushed by his counsel when cross-examining Mr Mokoena and in argument in the application for absolution from the instance.

[46] He conceded that Mr Mokoena could not have physically done the work but his company, through its employees should have done so, but was unable to show that the work was not done by the plaintiff's employees.

[47] On a question from the bench why he employed the people if they were supposed to have been employed by the plaintiff, Mr Banda replied as follows:

"I employed the people because the main work there was allocated to me to do the job, about 90 percent of that job was allocated to me, so I was the one to

employ more people on site to finish the work."

[48] The answer, to me, is loaded. In my own interpretation it means that Mr Banda employed the bulk of the employees on site because he was the main contractor. But the answer does not say Mr Mokoena had no employees on site who were doing part of the work contracted and/or outsourced to the plaintiff. The answer was further amplified by Mr Banda's answer to a question from the defendant's counsel when he said that it would still have been necessary for the defendant to hire its own employees to do the defendant's part of the work even if the plaintiff had its own employees on site.

[49] The initial impression I got was that the defendant hired the employees, to do the work that was outsourced to the plaintiff, that is, the excavations, house connection and backfilling. But what this answer reveals is that the defendant had its own employees on site which were doing work other than the work outsourced to the plaintiff. In the sense, the three employees who Mr Banda referred to in his evidence might not have been employed to do the work outsourced to the plaintiff. In actual fact no such evidence was led to show that the three employees or any other employee who Mr Banda alleges to have employed did the work stipulated in the contract. The fact that Mr Banda had people on the site, or that he employed people, whether sourced by Mr Mokoena or not, is no conclusive proof, to me, that those employees are the ones who did the excavation.

[50] As regards the issue of whether the TLB constituted part of the material, as stated in the contract, and as suggested by the plaintiff or equipment which does not form part of the material stated in the contract, I am inclined to align myself with the defendant's version. The TLB, as it has been explained by the witnesses, is equipment which is required to assist in the excavation. I am as well inclined to accept the defendant's evidence that the excavation would not have occurred without such machinery. I further accept the defendant's version that the TLB was supposed to have been provided by the plaintiff because it is the plaintiff who was to do the

excavation and not the defendant. Having said that though, it does not mean that due to the defendant providing the TLB, it is conclusive proof that the excavation was done by the defendant's employees. Mr Mokoena's evidence that it is the plaintiff's employees who used the TLB to do the excavation is not controverted. It was neither challenged under cross examination nor did the defendant's witness proffer evidence to the contrary. I have in that vein to accept that the excavation was done by the plaintiff's employees, of course, using the TLB provided by the defendant.

[51] The plaintiff's claim against the defendant is for the amount of R347 361, 10 (three hundred and forty seven thousand three hundred and sixty one rand and ten cents) for services rendered. The plaintiff has also admitted that the defendant paid an amount R118 800 (one hundred and eighteen thousand eight hundred rand) as salaries to its employees. I accept the defendant's version that the responsibility to pay the salaries sourced by the plaintiff to do its outsourced work, rested on the plaintiff. The plaintiff cannot claim this money from the defendant. It cannot be expected that the defendant would pay the salaries of the plaintiff's employees and still pay the full amount as *per* the contract.

[52] There is evidence by the plaintiff that the amount was paid to the employees because of the work they did in the house connection but the evidence also show that the house connection work forms part of the work outsourced by the defendant to the plaintiff. This evidence supports the plaintiff's version that in fact this work was done and counters that of the defendant that the house connections were not done by the plaintiff. It does not, however, support the plaintiff's proposition that this amount was not part of the capital amount.

CONCLUSION

[53] I am satisfied that the plaintiff was able to prove on a balance of probabilities that it performed the work/services stipulated in the letter of appointment. In the circumstances, it is my view that the plaintiff was only able to prove the amount of R228 561, 10 (two hundred and twenty eight thousand five

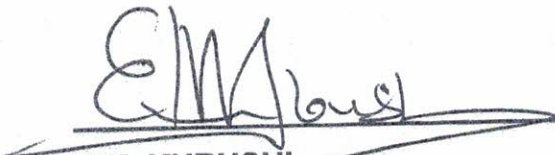
hundred and sixty one rand and ten cents), being R347 361, 10 (three hundred and forty seven thousand three hundred and sixty one rand and ten cents) less the amount of R118 800 (one hundred and eighteen thousand eight hundred rand) together with interest thereon at the rate of 15, 5% *a tempore morae*.

[54] On the decision I have reached, I do not think it necessary to dwell too much into the reasons why I refused absolution from the instance at the close of the plaintiff's case. It is, however, safe to say that the plaintiff's evidence, at the close of its case, provided a *prima facie* case which the defendant had to reply to.

THE ORDER

[55] I make the following order:

1. The plaintiff's claim succeeds with costs.
2. The defendant is ordered to pay the amount of R228 561, 10 (two hundred and twenty eight thousand five hundred and sixty one rand and ten cents) to the plaintiff.
3. The said amount is payable with interest at the rate of 15, 5% *a tempore morae*.


E.M. KUBUSHI
JUDGE OF THE HIGH COURT

APPEARANCES:

Plaintiff's Legal Representative:

Instructed by:

Counsel for Defendant:

Instructed by:

Date heard:

Date of judgment:

Mr L. Monnakgotla

Maphoso Mokoena Attorneys

Adv. A. M. Smit

Johan Nysschens Attorneys

11 October 2018

17 April 2019