THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No:765/2010
Not reportable

In the matter between:

NELSON MANDELA METROPOLITAN MUNICIPALITY	**Appellant**
and	
NGONYAMA OKPANUM HEWITT-COLEMAN	**First Respondent**
HARLECH-JONES ARCHITECTS	**Second Respondent**
RAJ MAHARAJH & ASSOCIATES	**Third Respondent**
BHAM TAYOB KHAN MATUNDA	**Fourth Respondent**
COTTERELL DAVIES MAZWANA PEIRSON	**Fifth Respondent**
SCHOOMBIE HARTMAN	**Sixth Respondent**
LOUW STRYDOM CONSULTING ENGINEERS	**Seventh Respondent**
SKC & NIEMANN CC	**Eighth Respondent**
ELDRED BOONZAAIER CONSULTING ENGINEERS	**Ninth Respondent**
BERGMAN-INGEROP (PTY) LIMITED	**Tenth Respondent**
MAKALIMA JOHNSTON ASSOCIATES CC	**Eleventh Respondent**
METROPLAN	**Twelfth Respondent**
BOPITE ENGINEERING GEOLOGISTS CC	**Thirteenth Respondent**
HEMSLEY & MYRDAL	**Fourteenth Respondent**

Neutral citation: *Nelson Mandela Municipality v Ngonyama Okpanum Hewitt-Coleman* (765/2010) [2012] ZASCA 11 (14 March 2012)

Coram: Brand, Malan, Bosielo, Majiedt JJA and Boruchowitz AJA

Heard: **20 February 2012**

Delivered: **14 March 2012**

Summary: ***Condictio indebiti – mistake – excusability – overpayments made by Municipality to professional consultants – reasonableness of mistake***

ORDER

On appeal from: the South Eastern Cape High Court, Port Elizabeth (Mhlantla J sitting as court of first instance).

(1) The appeal is upheld with costs including the costs of two counsel;

(2) The order of the court below is set aside and replaced with the following order:

'(a) The first, second and third respondents are ordered to pay the sum of R401 252,69 to the plaintiff jointly and severally;

(b) the fourth, fifth and sixth defendants are ordered to pay the sum of R151 676,18 to the plaintiff jointly and severally;

(c) the seventh, eighth and ninth defendants are ordered to pay the sum of R153 107,80 to the plaintiff jointly and severally;

(d) the tenth defendant is ordered to pay the sum of R7 896,47 to the plaintiff;

(e) the eleventh and twelfth defendants are ordered to pay the sum of R75 069,38 to the plaintiff jointly and severally;'

(f) the fourteenth defendant is ordered to pay the sum of R21 478,66 to the plaintiff;

(g) the defendants are ordered jointly and severally to pay interest on the respective amounts to the plaintiff at the prevailing prescribed interest rate *a tempore morae*;

(h) the defendants are ordered to pay the plaintiff's costs of suit jointly and severally.'

JUDGMENT

MALAN JA (Brand, Bosielo, Majjiedt JJA and Boruchowitz AJA concurring):

[1] This is an appeal against the order of Mhlantla J dismissing with costs the plaintiff's action against the defendants for the repayment of fees that were allegedly not due. The action was dismissed on the ground that, although the amounts paid were in excess of what was due, the plaintiff when making payment was grossly negligent. The appeal is with the leave of the court below.

Introduction

[2] The Nelson Mandela Metropolitan Municipality, formerly known as the Port Elizabeth Transitional Local Council, instituted action against the respondents, all professional consultants, for the sum of R1 073 818,41, alternatively R810 481,19, which it alleged was paid in excess of what was due to them in respect of their professional fees. I will refer to the plaintiff, the appellant, as the Municipality and to the respondents as the defendants or consultants.

[3] The Municipality owned the Matthew Goniwe Hostel in Kwazakhele, Port Elizabeth. The hostel was overcrowded, derelict and in a state of decay for a long time. The services in the hostel had collapsed: water pipes were broken, sewers blocked and overflowing, and some residents lived in communal toilet blocks. Electrical reticulation had collapsed and cables were disintegrating with illegal connections crossing from one building to another. Some 16 000 people at one stage lived in the hostel.

[4] The community had put considerable pressure on the Municipality to resolve the problems and upgrade the hostel. In 1995 Mr Alan Zeiss, a qualified attorney, was the chief estates officer and acting director of the Municipality's housing department. The Provincial Housing Board (the PHB) provided funds in the form of housing subsidies pursuant to their Hostel Redevelopment Programme. The Municipality's budget and administration committee considered its 1994/5 operating budget and requested a report on the future of the hostel. Mr Zeiss prepared a memorandum and the committee resolved that the hostel be upgraded and that funds to this end be obtained from the PHB. The proposed undertaking, which became known as the Matthew Goniwe project, involved the upgrade of the hostel, the construction of houses as part of the Greenfields development and the infill of additional land situated at the hostel. The Municipality did not have the required funds to embark on the project and resolved that it be funded entirely from funds made available for that purpose by the PHB.

[5] Moreover, the Municipality had neither the capacity nor the expertise to prepare and motivate an application for funding and to supervise completion of the project. It was therefore resolved that a managing agent be appointed. His appointment was followed by the appointment of the defendants as architects, quantity surveyors, consulting and electrical engineers, land surveyors and town planners as the primary consultants. The first to twelfth defendants were appointed in July 1996. Other defendants were appointed by the managing agent. The consultants were required to and did conclude joint venture agreements for each discipline involved in the project. The managing agent had to consult with the local community, the consultants and interested parties, prepare an application for funding and co-ordinate and manage the implementation of the upgrading proposals. The managing agent's fees and appointment were to be approved by the PHB and were subsequently approved.

Appointment

[6] The initial letters of appointment of the primary consultants were in similar terms and signed by Mr Zeiss, on behalf of the Municipality, following a resolution of the Municipality's executive committee. They were dated 15 July 1996 and read as follows:

'UPGRADING OF MATTHEW GONIWE HOSTEL

I wish to advise that the Council's Executive Committee, at a meeting held on 21 May 1996 agreed that, subject to the provision of the required funds by the Provincial Housing Board, Messrs [name of consultant] be appointed as [eg Quantity Surveyors or Civil and Structural Engineers] for the above project.'

[7] In the course of 1996 and later various other agreements, the client-consultant agreements, were signed by the defendants. They were signed by Mr Zeiss on behalf of the Municipality in mid-1997 under circumstances to which I shall refer later. The consultants first had to secure funding for the project from the PHB and had to draft and submit a funding proposal to the PHB in the manner prescribed in the Implementation Manual of the Hostel Redevelopment Programme. This was done and a preliminary amount for the funding application, that is R625 000, was approved by the PHB on 29 November 1996. Funding for the entire project and the fees of the defendants were approved much later under circumstances to which I will refer.

Termination of the project

[8] After work on the project had commenced, a dispute between the Municipality and the defendants arose leading to the termination of the agreements and the suspension of the project in mid-1998. The Municipality ascertained that the consultants had charged and were paid fees that were higher than those approved by the PHB. Action was instituted for the amount of the overpayment based on the *condictio indebiti*.

Particulars of claim

[9] The Municipality's particulars of claim contains the allegation that the first to the twelfth defendants accepted their appointments during July 1996, and the fourteenth defendant its during June-July 1997. Their appointments entailed the rendering of services to the Municipality for the design, tender and construction phases of the Matthew Goniwe project. The total amount payable to all the defendants was to be restricted to such amount as was approved and made available by the PHB. Both the appointment of the defendants and the amount of their fees were to be subject to the final approval of the PHB. The defendants were obliged to allocate among themselves no more than the total fees and disbursements payable to all of them as was approved and made available by the PHB. It was pleaded in the alternative that, in respect of each discipline the defendants forming part of the relevant joint venture, were obliged to, and did, allocate among themselves, no more than the fees payable in respect of that discipline, having regard to the total of the fees available to such discipline. The ratios in which the fees available for each discipline stood to the total of the fees were set out in a schedule to the particulars of claim. The plaintiff's alternative claim is based on the client-consultant agreements. It was the plaintiff's contention that on the basis that these agreements constituted the basis for the defendants' fees they were overpaid.

[10] The PHB ultimately approved the appointment of the defendants but restricted the total amount of fees and disbursements to (a) 7,5 per cent of the total amount approved and to be made available in respect of the Greenfields development and infill sites and (b) 9,2 per cent of the total amount approved and to be made available by the PHB in respect of the upgrading of the hostel.

[11] The Municipality specified the total amount made available by the PHB for the project and the amount available for payment of the defendants' fees and disbursements which sum had to be divided among them in accordance with the ratios agreed by them. However, to quantify the overpayment it was also

necessary to have regard to the amount of work done at the time the Municipality instructed the defendants to cease work.

[12] The Municipality alleged, and this was not disputed, that during the period 1996 to 1999 substantial sums were paid to the defendants. Having regard to the nature and extent of the work actually executed, the nature and extent of the services provided and the maximum amounts permissible in accordance with the agreed ratios the defendants were overpaid by substantial amounts. The alternative claim was based on the client-consultant agreements and consisted of a claim for an overpayment, being the difference between the amount paid to the consultants and the fees permitted under these agreements at the time of work stoppage. The amounts overpaid were calculated by Mr D Elliot, the Municipality's expert witness and, during the course of the trial, recalculated by him, taking into account certain propositions put to him in cross-examination. His calculations were set out in exhibits L and M. His conclusion was that an overpayment in the amount of R810 481,19, the amount claimed in the alternative, had been made.

[13] The Municipality alleged that all the defendants were jointly and severally liable for the total amount of the overpayment. In the alternative, it claimed payment from the defendants forming part of each joint venture the amount overpaid to such joint venture, jointly and severally.

Defences

[14] The defendants denied that the amounts paid to them were not due or, if due, were paid by mistake or, if paid in error, that the mistake of the Municipality was bona fide and reasonable. All the elements of the *condictio indebiti* were therefore put in issue. In addition, certain specific defences were pleaded. The defendants also took issue with the allegation that any liability they may have was joint and several or joint only. Generally, all the defendants pleaded that the amounts paid to them were due in terms of their respective client-consultant

agreements and that their appointments and fees were not subject to the approval of the PHB. Any attempt by the PHB, some specifically pleaded, to restrict their fees was 'irrelevant to the rights and obligations of the parties to the client customer agreement'. Some of the defendants counterclaimed but these counterclaims were not persisted with. Others pleaded oral variations of the client-consultant agreement while some relied on separate agreements relating to specific work to be done, such as the emergency electrical intervention. In addition, the first defendant pleaded that the managing agent had informed the defendants on 9 February 1998 that the PHB had approved the application for funding, the appointment of consultants and the fee structure. I will deal with these defences in due course.

Evidence

[15] The Municipality called Messrs Mzimkulu Msiwa, Alan Zeiss and Dicky Elliot as witnesses. The defendants relied on the evidence of Messrs Timothy Hewitt-Coleman (on behalf of the consortium of architects), Thembinkosi Matunda (on behalf of the fourth, fifth and sixth defendants, the consortium of quantity surveyors), Richard Boonzaaier (on behalf of the ninth defendant, the civil engineer), Peter du Toit (on behalf of the tenth defendant, the electrical engineer), Ndabezitha Ndzombane (on behalf of the eleventh and twelfth defendants, the consortium of town planners) and Robert Hemsley (on behalf of the fourteenth defendant, the land surveyor). At the trial Mr Maharaj, the third defendant's representative, stated that its defence was fundamentally the same as that of the first defendant and closed its case without calling any witnesses. The action against the thirteenth defendant was not proceeded with.

Judgment of the court below

[16] The court below found that the evidence established that the defendants were appointed subject to PHB approval both in respect of the terms of appointment as well as the fee structure and fees of the defendants. The approval of the PHB limited their professional fees to 7,5 per cent in respect of

the Greenfields development and infill site and 9,2 per cent for the hostel upgrade. That, the court below found, included all work from inception including the preliminary planning, funding applications, emergency electrical intervention, fees and disbursements. The defendants' reliance on the purported client-consultant agreement, it held, was therefore misplaced. The court also found that some of the defendants had signed their client-consultant agreements knowing that both their fees and the continuation of the project were subject to PHB approval.

[17] The court below, however, held that the Municipality failed to discharge the burden of proving that it had not been negligent when it made the payments and that its error was excusable. The Municipality should, it found, before making payment of the claims submitted by the defendants, have advised them that their claims exceeded the amounts approved. The only explanation offered was that the Municipality had relied on the managing agent to verify the claims for payments made. That explanation was found to be inadequate and not sufficient to render the mistake of the Municipality excusable.

[18] The evidence supports the finding of the court below that the consultants' fees were subject to PHB approval and that it was a term of their appointment. Mr du Toit, who testified on behalf of the tenth defendant, agreed in so many words that the preliminary fees were included in the total cost of the project and that the PHB had to approve the fees of the consultants. Mr Boonzaaier, who testified on behalf of the ninth defendant, conceded that their appointment as well as their fees had to be approved by the PHB. During cross-examination, Mr Matunda, testifying on behalf of the fourth, fifth and sixth defendants, conceded that the 'whole of the funding was subject to the PHB … and obviously the fees being part of that'. He admitted that the consultants were working at risk, pending such approval. Mr Ndzombane, on behalf of the twelfth defendant, understood that all fees had to be approved by the PHB and that the Municipality was not incurring any liability beyond the fees approved. This was

also conceded by Mr Hewitt-Coleman, testifying on behalf of the first defendant. The conclusion of the court below that all the defendants were working at risk pending approval by the PHB of both their fees and appointments is justified.

History

[19] In order to understand the circumstances under which the Municipality paid the fees of the defendants a review of the history of the project and, particularly, the numerous applications made for funding by the defendants and their negotiations with the PHB concerning fees is necessary. Mr Zeiss testified that the city engineer's department was not involved in housing matters at the time the project was considered. Nor was the Municipality able to establish a body, to be known as the Local Negotiating Group (the LNG), through which the community and the residents of the hostel could participate in the upgrading process. It was at that time government policy that a formalised body be established for the implementation of housing projects to facilitate communication between the developer, the consultants and the hostel community.

[20] The executive committee, with the subsequent approval of the PHB, resolved in August 1995 to appoint a managing agent, the H-J Studio Trust, controlled by Mr Elwyn Harlech-Jones, to 'facilitate the successful implementation of the project' (clause 3 of its appointment). This entailed the establishment of a local negotiating group (phase 1), assisting the 'social compact' to appoint a professional team, the submission of an application to cover preliminary planning costs, the 'workshopping' of all proposals, the submission of an application for development funding (phase 2) and the co-ordination and management of the upgrading proposals (phase 3). Mr Harlech-Jones was associated with the second defendant. Clause 6 of the managing agent's appointment provided that –

'[i]n executing its functions as Managing Agent, the Trust shall comply with all directives of the Council, in its capacity as the local authority, and all policies, guidelines and directives of the Provincial Department of Housing and the PHB, as specifically set out in

the publications entitled, “Policy for the Upgrading of Public Sector Hostels and Hostel Initiative Operations Manual” and “A Guide to use the Implementation Manual” of the Department of Housing.’

In terms of clause 8 the managing agent acknowledged that it was to be paid from funds approved by the PHB and undertook, other than at its own risk, not to proceed with the work until the PHB had made such funding available. It also had to prepare the budget for the project and submit an application for its funding.

[21] A ‘social compact committee’ which eventually became the LNG was formed. It was a consultative body that had no executive powers and facilitated meetings between the stakeholders in the project. Mr Zeiss attended the meeting of the LNG on 17 November 1995 where it was minuted that he had said that the Municipality –

‘would play a caretaker role in the overall managing of the project which he felt should be community driven involving a broad cross section of the beneficiary community. The day-to-day running of the hostel would continue and the Council will provide the necessary secretarial support i.e. recording the minutes of meetings and the supply of a venue for meetings. He concluded that the common objective was the upgrading of the hostel and the Managing Agent was expected to play a leading role in such upgrading.’

[22] It was the managing agent’s responsibility to assemble a team of consultants. The Department of Housing had also placed considerable pressure on the Municipality to ensure that marginalized professionals and consultants be involved and it was decided that a lead consultant for every discipline be appointed to head a joint venture of those professionals within each discipline.

[23] The managing agent produced a document entitled Guidelines for Appointment of Consultants, the final draft of which was dated 23 February 1996, setting out the organizational network of the project. It stated that the managing agent ‘will be responsible to obtain the budget approvals from the L.N.G. and negotiate, on behalf of the [Municipality], the project finance and subsidies from the [PHB]’. It dealt with the goals and aims of the ‘social contract’ involved: the

consultants were expected to be accountable at all times and to bear the community's interests at heart when carrying out their professional services. The social contract emphasised the importance of providing low-cost, high-quality housing with community involvement, and to engender community work by the professionals. As far as the professional consultants were concerned it was provided that they –

'will be contractually responsible to the [Municipality] . . . Contractual Documentation will be required to be signed by the participating Consultants to formalise professional appointments.'

The different roles of the consultants were set out. Their professional fees were to be calculated on the standard fee regulation 'for every profession, altered by negotiation in accordance with the Scope of Work'. Moreover, it is provided that '[t]he financing and subsidy policy of the Provincial Housing Board should be considered within the overall budget allocation for the Project'. As far as the financial control for the project was concerned it was specifically provided that –

'11.1 The financial obligation of the [Municipality] is limited to the funds approved by the P.H.B.

11.2 All claims for Professional Fees will be certified for payment by the Managing Agent, payment to be effected with the prior approval of the L.N.G.'

The professional consultants were required to enter into –

'Joint Ventures with other emerging Consultants and should be prepared to work on a bi-partisan level to ensure upliftment of the Professionals, who have in the past been marginalised and denied opportunities of Professional advancement.'

[24] In a further document dated 19 March 1996 the managing agent dealt with the appointment of consultants and noted that '[a]ppointments will only be finalised once the Provincial Housing Board approves the funds for Preliminary Planning . . . '. The preliminary planning concerned the entire project and its costs formed part of the costs of the total project although the Municipality might have had to provide some bridging finance. On 12 April 1996 the PHB approved further fees of the managing agent, the appointment of a liaison officer and the

running costs of the LNG. It required the managing agent to exercise proper control over the funds awarded.

[25] An advertisement was placed in the *Eastern Province Herald* calling interested persons to come forward before 24 April 1996 to be considered for appointment as consultants. A meeting of the consultants appointed, the so-called primary consultants, was held on 7 May 1996. The *Guidelines* referred to were read at the meeting and copies were also handed out. It was minuted that –

'[e]ach Primary Consultant accepted the contents of the Guidelines, as it was confirmed that the Guidelines would form part of the appointment contract with the [Municipality].'

The formal appointment of the consultants was discussed and it was stated that the agreements would be between them and the Municipality. The first action would be the formulation of a preliminary planning budget after approval of which the appointments would be formalised. A letter was written to the managing agent, with copies to the LNG and the architects and quantity surveyor, emphasising that the Municipality, and not the LNG, had to make the appointments –

'this being subject to the necessary finance being made available by the Provincial Housing Board for the payment of Professional fees.'

[26] The executive committee of the Municipality resolved on 21 May 1996 to appoint the primary consultants. The resolution made it clear that their appointment was subject to the provision of the required funds by the PHB. This led to the letters of appointment referred to being sent to the defendants. It is not disputed that all the defendants had accepted their appointments.

[27] Numerous meetings were held by the defendants. At the meeting of 7 May 1996 the managing agent confirmed that once a team of consultants had been selected and approved, all consultants would be equal and the designation of 'primary' consultant would no longer be used. At one meeting the cost of the preliminary study was determined in an amount of R625 000. It was minuted at

the meeting of consultants on 3 July 1996 that the preliminary budget in the said amount had been approved by the PHB. It was further agreed that consultants would make available to the managing agent copies of their standard contracts to be used by the Municipality when formalising their appointments. The executive committee of the Municipality resolved on 23 July 1996 that application be made to the PHB for approval of the R625 000 preliminary planning budget subject to there being no financial implications for the Council.

[28] Concern was, however, expressed by the managing agent in his report of 4 August 1996 that funding of the project had not been finalised. This concern was repeated at the meeting of 15 August 1996 and it was stated that the question of financing be addressed as a matter of priority. An outline for the funding application was presented to consultants on 9 October 1996. It was minuted at the task group meeting of 10 October 1996 that preliminary fees by the consultants had been processed and presented to the Municipality. The managing agent's report of 15 October 1996 envisaged that the funding application to the PHB would be made in November 1996.

[29] It was only by letter dated 3 December 1996 that the Municipality was informed that the appointment of certain (primary) consultants had been approved and that a preliminary fee of R625 000 was allowed by the PHB at its meeting on 29 November 1996. As a result of this approval the Municipality commenced making payments to the consultants for services rendered. At this time, however, the fees of the consultants had not yet been approved by the PHB.

[30] The PHB resolved at its meeting on 31 January 1997 to approve the amount of R22 343 332,50 for the hostel upgrade and R16 867 500 for the construction of housing for the Greenfields development giving a total of R 39 210 832,50. All previously approved funds, with the exception of the managing agent's fees, were to be part of the development cost. The amount of R625 000

thus formed part of the total grant. As far as the upgrading and infill units were concerned the PHB provided that any shortfall between the development costs and the grant be funded by the Municipality. The Municipality, however, never accepted liability for any shortfall in the funds approved. The PHB also specified that the costs of the emergency electrical intervention, to which I will refer again, formed part of the total grant. A further 15 per cent 'top up' grant in respect of dilapidated buildings and infill sites due to conditions of the soil in respect of the Greenfields development and infill units was also allowed.

[31] On 17 February 1997 the managing agent reported that the grant had been approved. He added that the amount of R39 210 832,50 also included the fees of the consultants. From the minutes of the consultants' meeting of 21 February 1997 it appears that a copy of the grant was given to each consultant for circulation to each of the associates. It was also resolved that application be made for approval of the 'top up' grant in relation to the Greenfields development. The managing agent was mandated to clarify the fee of R625 000 with the Department of Housing and Local Government (the Department) which, it was stated at the meeting, should have been regarded as an once-off payment not forming part of the main grant. The consultants were requested to finalise their fees by 10 March 1997. There was some discussion of the fees at the meeting and it was again questioned whether the R625 000 should be seen as an additional grant. It was also debated whether the total fees should be 7,5 per cent of total cost but not exceeding 10 per cent. Further discussions about the fees followed on 13 March 1997 and it was noted that the matter should be discussed with the Department. A further meeting was held on 10 April 1997 where the managing agent reported that the fee of 7,5 per cent was calculated for the Greenfields development with standard fees for the hostel. The latter fees, however, had not been approved by the PHB at that time. The managing agent wrote to the Department on 10 April 1997 stating that fees of 7,5 per cent for the Greenfields development was acceptable but that the standard tariff for the hostel should apply. The managing agent wrote to the Municipality on 17 April

1997 stating that total fees would amount to 12 per cent of the funds granted. Mr Zeiss testified that the Municipality was in no position to validate the fees suggested and would only have forwarded the suggestion to the Department.

[32] This debate on fees culminated in a meeting of the managing agent with the Department on 18 April 1997. Mr Zeiss as well as the chairman of the PHB attended. At that time the defendants were threatening to stop work unless a decision on fees was taken. The fees suggested by the managing agent in his letter of 17 April 1997 were acceptable to the consultants. The managing agent reported to the consultants what had transpired at the meeting and requested Mr Matunda, one of the quantity surveyors, to finalise their fees and brief in terms of the suggested parameters for submission to the PHB. His proposal, containing details of the work and fees, was to form the basis of a further meeting with the Department. The PHB, however, was not in favour of the standard tariff of fees and it was agreed that a revised document be furnished.

[33] The PHB resolved on 25 April 1997 to approve professional fees of 7,5% for the Greenfields development and infill sites, and to 'negotiate the professional fees for the alterations to the existing hostels, with the consultants to an acceptable norm'. This resolution again led to a flurry of activities. The consultants attended the meeting of the task team on 8 May 1997 and agreed that a further meeting be held with the Department. At that time the detailed design for the project had virtually been completed. Agreement had to be reached with all the roleplayers for the submission of a fees proposal to the PHB. On 15 May 1997 the managing agent informed the meeting of the LGN that the consultants' brief and fee structure 'was a difficult process because all the key role players had to be satisfied.' With regard to the breakdown of fees he noted that not all the information had been received from the consultants. He remarked, however, that he was not happy with the apparent arrangement between the province and the consultants as he wanted a detailed breakdown and requested deferment of the item for a period of seven days to extend the negotiating

process. A meeting with the Department was arranged for 26 May 1997. Further proposals followed which were discussed at the meeting of the LNG but the fees suggested were higher than the ceiling set by the PHB at the meeting on 26 May 1997. The Municipality supported the proposals of the defendants. At the LNG meeting on 28 May 1997 it was resolved that the consultants would supply the managing agent with a breakdown of fees costed per activity, a revised scope of work and a new 'proposed fees structure to cover any additional functions as well as alternative suggestions which would be subject to the approval of the Department . . .'.

[34] The lack of clarity on fees was delaying the project. A new fee structure was approved at the meeting of the LNG of 5 June 1997 and it was resolved that it be submitted to the Department for approval. The Municipality's housing committee recommended on 7 July 1997 that the fee proposals put forward be accepted and submitted to the PHB. The managing agent was requested by Mr Zeiss on 9 July 1997 to call for tenders and submit the consultants' brief and fee structure to the PHB for approval. There was still no finality on fees as appears from the minutes of the consultants' meeting of 31 July 1997. Further meetings followed. A meeting with the Minister was called for. It was noted that the consultants were performing at risk. The chief executive of the Municipality on 8 August 1997 wrote to the Minister that the delays –

'have now resulted in the Managing Agent being instructed to advise all professionals working on the planning and design of the project to cease all further work until finality has been reached by the Board on the appointment of the professional team and their respective fee structure.'

[35] The Municipality was informed on 12 August 1997 of the 25 April 1997 resolution of the PHB and of the further negotiations between the Department and the consultants. It was stated by the PHB that –

'negotiations took place and the consortium of consultants agreed to reduce the fees to an acceptable norm of 9,2% for alterations to the existing hostel . . . . It should also be noted that an average of 7,4% fee structure has been achieved for this development

through negotiations when both the upgrading of the existing hostel and the Greenfields project are combined. This was achieved notwithstanding the fact the Housing Board anticipated an average fee of 7,5 %. A contract document for the employment of consultants has also been drawn up by the Managing Agent . . .'.

[36] The PHB resolved at its meeting on 26 August 1997 that –

'(a) A standard tariff of fees of 9.2% be approved in principle for the alterations to the existing hostel and that the fees be reviewed on submission of the final detailed designs

(b) The involvement of professionals such as Architects, Electrical Engineers, Quantity Surveyors in the Greenfields project must be clarified

(c) The previous decision in respect of professional fees for the Greenfields portion of the project must be made available . . . to the Board.'

This resolution did not explain all the issues relating to the professional fees and a clarification, particularly in view of the earlier decision of the PHB, was requested by the Municipality. The managing agent reported to the consultants on 14 October 1997 that the PHB had approved the appointment of consultants and the fees for the hostel. They were requested to separate their fees for the hostel and the Greenfields development. It was anticipated that the fees for the hostel would be paid. At that time problems with the size of the houses that was built on the Greenfields development occurred, leading to the PHB refusing to subsidise houses that did not comply with their specifications. The managing agent was not satisfied with the fee of 7.5 per cent imposed for the Greenfields development and moved for a 'realistic' fee of 12 per cent. By November 1997 neither the architects nor the quantity surveyors for the Greenfields development had been approved by the PHB. On 18 November 1997 the managing agent requested the consultants to submit claims for the balance of their fees for the Greenfields development in order to discuss their payment with the PHB at their meeting on 11 December 1997.

[37] At their meeting on 29 January 1998 the PHB resolved to allow a 12.5 per cent variance allowance in respect of the Greenfields development and also

approved the appointment of architects, electrical engineers and quantity surveyors. At the meeting of 24 April 1998 a further sum of R6 586 125, subject to the availability of funding, was approved. The Municipality was informed of the resolution of 29 January 1998 on 20 May 1998. The managing agent notified the consultants on 9 February 1998 that the PHB had approved at their meeting of 29 January 1998 –

'the comprehensive application for funding and the appointment of consultants for the construction phase of the project. The fee structure as set out in the fee schedule was also approved.'

[38] In June 1998 the Municipality established a housing department within the city engineer's department. It was decided to reduce the number of consultants active on the project, hence a series of letters were sent to them during June 1999 terminating some of the appointments. The city engineer took over management of the project. There were complaints about the non-payment of fees by the consultants. Mr Zeiss responded to the managing agent on 29 September 1999 that in terms of the agreement –

'fees as approved by the Provincial Housing Board are payable to you. It appears that there has been a considerable over payment of fees not only to you, but to other consultants, all of which payments were authorised by you. These payments have all been referred for audit and until such time as agreement is reached as to what fees have been approved and these compared with the amounts paid to determine the accuracy or otherwise of such allegations no additional fees will be paid to you or any consultant.'

The managing agent responded by stating that '[a]ll fees which were claimed were paid in terms of the Client Consultant Agreement signed between the Trust and the [Municipality] dated 7th August 1997'.

[39] On 31 January 1999 the PHB confirmed the total grant with specific reference to the redevelopment of the existing hostel with the conditions that the grant replaced all previous grants resolving inter alia that '(vi) all previously approved funds with the exception of the facilitators fees be accepted as part of

the development cost' and that '(ix) the emergency intervention form part of the total grant'.

Payment process

[40] The Municipality alleged that some 102 payments were made over the period from 21 November 1996 to 1 July 1999. The court below found that 45 authorisations were signed by Mr Judd (an official of the Municipality), three by Mr Zeiss and eight by an unknown official. Twenty two claims were accompanied by statements that the claims were made in terms of the respective client-consultant agreement. Nine contained statements to the effect that they were in respect of preliminary expenditure and one that it was payable in terms of the managing agent's instruction.

[41] The payment process involved Mr Judd's processing of the claims submitted and certified by the managing agent. The Municipality would thereafter submit a claim to the Department for a refund. As Mr Zeiss said: 'If the managing agent signed it off, we passed it for payment.' The managing agent was responsible for the financial administration of the project and the Municipality assumed that he had done his job. The city treasurer did not undertake any investigation as to whether the fees were payable or not but simply verified whether the paperwork was in order, ie whether the claim submitted was certified by the managing agent. As I have said, the payments were made from November 1996. The same payment procedure was followed both before and after the notification by the managing agent to the consultants on 9 February 1998, relied on by the first defendant. There is no evidence that this notification in any way affected the standard procedure the Municipality followed when making payments. Nor is there any suggestion that the defendants in any way relied on it in preparing their claims for payment. The 'tariff' referred to in the notification is a reference to the fees schedule forming part of the client-consultant agreements. The schedule, however, contains no tariff but set out maximum amounts payable.

Client-consultant agreements

[42] The client-consultant agreements were prepared pursuant to a resolution of the LNG on 5 June 1997. They consisted of four parts and it was recorded in each that it constituted a contract between the consultant and the Municipality to perform certain services against payment of professional fees. It set out the consultant's mandate and the respective fees in a schedule. It also contained the scope of the different services to be rendered in addenda to the agreements. This draft document was formulated because, according to Mr Zeiss, the Department wanted to ensure that there was no duplication of work among the various consultants and to curtail fees. The draft was approved by the LNG on 26 June 1997 and the consultants resolved to submit it to the Department for formal approval at their meeting of 27 June 1997. The Municipality's housing committee approved the fees and scope of mandate as well as the terms of the client-consultant agreement on 7 July 1997 subject to approval by the PHB. Mr Zeiss explained that his signature on the agreements meant that the agreement was approved subject to approval by the PHB. If the PHB did not approve the draft agreements or the fees specified, he continued, they would have had to either renegotiate fees or reduce the scope of work. It is clear that the appointment of the consultants and their fees were both subject to the approval of the PHB. The evidence shows and the court below correctly found that the approval of the PHB formed part of the appointment of the consultants and, hence, a term of the client-consultant agreements relied upon by the defendants. The fees set out in the client-consultant agreements were never approved by the PHB.

Quantum

[43] The extent of the work completed was largely common cause. Mr Elliot, a quantity surveyor, whose expertise was not disputed, made his own assessment of the work completed. He also verified the ratios in which the fees applicable to each discipline stood to the total amount of fees payable. He met with the defendants to clarify those areas where he had been required to make assumptions. After he gave evidence he was recalled to present further

calculations taking into account issues raised by Mr Matunda when the latter testified. In the new calculations, set out in exhibits L and M, he accommodated the views of Mr Matunda that the fees should be calculated as a percentage of the grant rather than the contract value and also that the fees for the hostel upgrade and the Greenfields development and infill sites be separated and looked at individually. VAT was further added to the final figures. He also brought into account R56 033,79 paid to the quantity surveyors that had been left out of his earlier calculations. The amount of the overpayment arrived at was R810 481,19 and was calculated on the basis that the fees, including disbursements of the tenth defendant for the emergency electrical intervention, formed part of the total fees to be paid from the funds granted and were not to be regarded as a separate item. He also disallowed the fees and disbursements claimed by the ninth defendant for an additional thirteenth month of supervision, the fees and disbursements of the fourth, fifth and sixth defendants in respect of firm bills of quantities and the fees and disbursements of the fourteenth defendant in respect of additional work and further disbursements made as a result of an increase in the fees of the Surveyor General. As I will show, there is no reason not to accept his calculations and it was hardly contended otherwise.

[44] As far as the fees for the emergency electrical intervention is concerned, I am satisfied that there is no evidence that the Municipality undertook any liability for the fees of the tenth defendant for the intervention. It is correct that the managing agent wrote to the Department on 15 October 1996 that he had been requested to co-ordinate the emergency electrical intervention 'with funding approved by the [Municipality]' and that he had to submit an application for additional funding to the PHB. Mr Judd thereafter approved payment of the tenth defendant's fees. It does not follow, however, that the Municipality had accepted any liability for these fees. The PHB on 3 December 1996 resolved specifically that the cost of the emergency electrical intervention be deducted from the total amount of the grant. This was confirmed by their subsequent resolution of 31 January 1999. Mr Msiwa's unchallenged evidence is that the electrical

intervention was part of the whole project and that, by reason of the bad condition of the electricity supply to the hostel, the work was merely performed earlier than it would have been in the normal course of events. There is thus no room for the contention of Mr du Toit, who testified on behalf of the tenth defendant, that the emergency intervention fees were to be treated separately from the fees payable in respect of the entire project.

[45] There is also no basis for allowing the fees of the ninth defendant in respect of supervision for a thirteenth month and the increased fees and additional disbursements of the fourteenth defendant. Their increased fees and disbursements were simply not part of the scope of work envisaged in the respective client-consultant agreements.

[46] It was further submitted that, as far as the fees of the quantity surveyors for final bills of quantities were concerned, the managing agent had requested final, and not provisional, bills of quantities. Mr Matunda, who testified on behalf of the fourth, fifth and sixth defendants, could not demonstrate that the agreement he relied upon had been varied to provide for the drawing up of firm bills of quantities. As appears from his cross-examination, it was highly unlikely that an agreement to call for firm bills of quantities would have been concluded at a time when the whole project had practically come to a standstill.

Condictio indebiti

[47] The *condictio indebiti* is the enrichment remedy by means of which the *solvens* recovers from the *accipiens* money paid or property transferred in intended payment or performance of a debt that is not due.[1] The *condictio indebiti* is available against the *accipiens*. Who the latter is is a legal question because the person physically receiving the performance may in law not be regarded as the recipient of the performance, such as an agent or a conduit or a

[1] *Frame v Palmer* 1950 (3) SA 340 (C) at 346D-G; *Le Riche v Hamman* 1946 AD 648 at 656 and see J G Lotz 'Enrichment' 9 *LAWSA* (2ed) para 211 ff (updated by F D J Brand).

person nominated for payment.[2] The payment or transfer must have been *indebite* in the widest sense, that is, there must have been no legal or natural obligation to pay or perform.[3] The payment or performance must further have been made in the mistaken belief that the debt was due. Generally, if the plaintiff knew that the debt was not due or doubted whether it was due recovery may be excluded.[4] In the past it was required that the mistake be one of fact or mixed fact and law and not of law only,[5] but in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & another*[6] the distinction was done away with and it was held that an error of law could also give rise to the *condictio indebiti*.

[48] Generally, as in the case of a mistake of fact, the mistake must be excusable, that is the ignorance of the *solvens* must be *nec supina nec affectata* – neither slack nor studied.[7] No precise formulation of the circumstances when a mistake would be excusable is possible since it calls for a value judgment. In *Bowman, De Wet & Du Plessis NNO & others v Fidelity Bank Ltd* [8] Harms JA said:

'It is a general requirement for the *condictio indebiti* that the error that gave rise to the payment must not have been an inexcusable error, that is inexcusable in the circumstances of the case . . . . There have been many attempts to lay down rules or formulations in this regard in order to circumscribe what is excusable and what is not . . . Since one is concerned with the exercise of a value judgment, it seems inappropriate to refine the test of whether judicial exculpation is justified . . .'.

Similarly, in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & another*[9] Hefer JA remarked:

'It is not possible nor would it be prudent to define the circumstances in which an error of law can be said to be excusable or, conversely, to supply a compendium of instances

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[2] *Phillips v Hughes; Hughes v Maphumulo* 1979 (1) SA 225 (N) at 229B-D. See further Daniel Visser *Unjustified Enrichment* (2008) at 282-285.
[3] Lotz and Brand para 212.
[4] Lotz and Brand para 212.
[5] *Rooth v The State* (1888) 2 SAR 259; *Miller & others v Belville Municipality* 1973 (1) SA 914 (C).
[6] *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & another* 1992 (4) SA 202 (A).
[7] Voet 12.6.7 and see *Rahim v Minister of Justice* 1964 (4) SA 630 (A) at 634A-B. For the history of the rule see Visser *Unjustified Enrichment* at 320.
[8] *Bowman, De Wet & Du Plessis NNO & others v Fidelity Bank Ltd* 1997 (2) SA 35 (A) at 44C-E.
[9] *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & another* at 224E-H.

where it is not. All that need to be said is that, if the payer's conduct is so slack that he does not in the Court's view deserve the protection of the law, he should as a matter of policy, not receive it. There can obviously be no rules of thumb; conduct regarded as inexcusably slack in one case need not necessarily be so regarded in others, and vice versa. Much will depend on the relationship between the parties; on the conduct of the defendant who may or may not have been aware that there was no *debitum* and whose conduct may or may not have contributed to the plaintiff's decision to pay; and on the plaintiff's state of mind and the culpability of his ignorance in making the payment.'

An excusable mistake is not required in all cases for the *condictio indebiti* to be available. It is not necessary where the plaintiff acts on behalf of others, such as where he is an executor claiming an overpayment,[10] or a person making payment in a representative capacity.[11]

[49] The requirement that the mistake be excusable has often been criticized, and proposals for its reformulation have been made.[12] In view of my conclusion that the mistake of the Municipality in making payment was excusable, it is not necessary to question this requirement and venture into a consideration of the historical roots of this rule.[13]

Excusability

[50] The court below found that the mistake of the Municipality was not excusable and said that '[i]f they [Judd and Zeiss] knew there was no approval or there was a limit, they should have advised the defendants accordingly and rejected the claims which fell outside the ambit of the approved tariff'. However,

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[10] *Bowman, De Wet & Du Plessis NNO & others v Fidelity Bank Ltd* at 44G-45G; *Rulten NO v Herald Industries (Pty) Ltd* 1982 (3) SA 600 (D) at 608B-C.

[11] *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* 2009 (1) SA 196 (SCA) para 29.

[12] See eg J C van der Walt 'Die *Condictio Indebiti* as Verrykingsaksie' (1966) 29 *THRHR* 220; Visser *Unjustified Enrichment* at 301 ff; Helen Scott *Unjust Enrichment by Transfer* (2005) (dissertation Oxford) at 257 ff and her 'The Requirement of Excusable Mistake in the Context of the *Condictio Indebiti*: Scottish and South African Law Compared' (2007) 124 *SALJ* 827; J C Sonnekus *Ongegronde Verryking in die Suid-Afrikaanse Reg* (2007) at 245 ff; Jacques du Plessis 'Towards a Rational Structure of Liability for Unjustified Enrichment: Thoughts from Two Mixed Jurisdictions' (2005) 122 *SALJ* 142.

[13] See Reinhard Zimmermann *The Law of Obligations Roman Foundations of the Civilian Tradition* (1990) at 834 ff; Daniel Visser in Reinhard Zimmermann and Daniel Visser *Southern Cross Civil Law and Common Law in South Africa* (1996) at 528 ff.

there was no approved tariff. What the PHB in the end approved was that the defendants' fees be limited to 7.5 per cent and 9.2 per cent of the total funds available for the Greenfields development and infill site and the hostel upgrade respectively.

[51] It was simply not possible for the Municipality, even if they had the required expertise, to have known at any one time during the course of the project what the approved fees would be and that the payments of fees exceeded the amount of the percentages approved. The approval of the PHB was given in stages: The first resolution was taken on 25 April 1997 and related to the Greenfields development and infill sites and limited those fees to 7,5 per cent. The second resolution was passed on 26 August 1997 following a period during which the consultants were involved in negotiating their fees. This resolution limited the professional fees for the upgrading of the hostel to 9,2 per cent of the funds granted and called for the involvement of certain of the consultants to be clarified. This resolution again led to further negotiations. At their meeting on 29 January 1998 the PHB resolved to allow a 12.5 per cent variation allowance and approved the appointment of certain of the consultants. This resolution also affected the amount of the defendants' fees. At the 24 April 1998 meeting a further amount was made available by the PHB. The final resolution of the PHB was passed only on 31 January 1999. It was only after an analysis of the work completed by Mr Msiwa after the establishment in June 1998 of a housing department within the city engineer's department and supervision of the project by him that the fact of the overpayments could be established.

[52] The actual quantification of the amounts overpaid required complex calculations by Mr Elliot, calculations he had to revise after extensive cross-examination. The Municipality lacked the capacity and expertise during the period payments were made to ascertain the extent of their liability and the extent of the consultants' entitlement. It relied on the managing agent. While it is correct that the latter was the agent of the Municipality, the managing agent was

also involved with the second defendant. But, moreover, in certifying the claims of the defendants and presenting them for payment, he also acted as their agent. The defendants were at all times aware of the need for the PHB to approve their fees and, accordingly, knew that their fees were limited. They knew that pending approval they were working at risk. They nevertheless submitted claims pending approval in terms of the client-consultant agreements that were in excess of the amounts that were eventually approved. They were indeed in a much better position than the Municipality to have ensured that their fees were kept within the limits that were acceptable to the PHB. As I have found, the notification by the managing agent on 9 February 1998 played no role in the payment procedure followed by the defendants and the Municipality.

[53] The Municipality made payment relying on both the claims submitted and the managing agent's certification. The latter was, as I have said, the agent of both the Municipality and the defendants. While the Municipality was aware that the defendants' fees had to be approved it made payment in anticipation of such approval. It cannot be said that it intended to pay the claims submitted whether or not they were due. Payment without further verification does not mean that the Municipality was indifferent or reckless. Nor can the defendants, who knew that their fees had to be approved, suggest that they were under the impression that they were entitled to the amounts claimed. As I have said, the Municipality did not have the means of verifying the true facts. Its failure to do so cannot be construed as an indifference as to whether the money was due or as an intention to pay whether it was due or not. In the circumstances the Municipality has demonstrated that its mistake was excusable.

Joint and several liability

[54] Joint ventures were in fact established by the defendants for every discipline. The civil and structural engineers formed a joint venture consisting of the seventh, eighth and ninth defendants. The quantity surveyors formed a joint venture consisting of the fourth, fifth and sixth defendants. The first three

defendants were a joint venture of architects. The eleventh and twelfth defendants acted in a joint venture of town planners.

[55] The remedy relied upon, the *condictio indebiti*, lies against the *accipiens*, the person receiving the undue performance. There is no evidence to suggest that all the defendants incurred liability to the Municipality jointly and severally.[14] They were appointed, initially, on an individual basis and accepted their appointments as such. It was only later that joint ventures were formed. These joint ventures undertook the work pertaining to the particular discipline and undertook that the fees due to them did not exceed the fees approved of by the PHB. Payments were made in the mistaken belief that the amounts were due and owing either to the individual consultant (as in the case of the fourteenth defendant) or to the particular joint venture. It follows that the *accipiens* is either the individual consultant or the particular joint venture. The relationship between the parties to a joint venture is that of partners.[15] Partners are liable jointly and severally *in solidum*.[16] It follows that the members of each joint venture are liable jointly and severally *in solidum* to the Municipality. The division of the fees payable to each joint venture was a matter to be determined by the partners in each joint venture. Should any of them have recourse to any of the others that is a matter based on the agreement between them. Any order made should therefore be against the partners in the particular joint venture concerned. The amounts due by them were calculated by Mr Elliot and are reflected in the order made.

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[14] See *Tucker & another v Carruthers* 1941 AD 251 at 254. Also Schalk van der Merwe, L F van Huyssteen, M F B Reinecke and G F Lubbe *Contract General Principles* 3ed (2007) at 247 ff.
[15] *Joubert v Tarry & Co* 1915 TPD 277 at 281.
[16] *Joubert v Tarry & Co* 1915 TPD 277 at 281.

Order

[56] In the result the following order is made –

(1) The appeal is upheld with costs including the costs of two counsel;

(2) The order of the court below is set aside and replaced with the following order:

‘(a) The first, second and third respondents are ordered to pay the sum of R401 252,69 to the plaintiff jointly and severally;

(b) the fourth, fifth and sixth defendants are ordered to pay the sum of R151 676,18 to the plaintiff jointly and severally;

(c) the seventh, eighth and ninth defendants are ordered to pay the sum of R153 107,80 to the plaintiff jointly and severally;

(d) the tenth defendant is ordered to pay the sum of R7 896,47 to the plaintiff;

(e) the eleventh and twelfth defendants are ordered to pay the sum of R75 069,38 to the plaintiff jointly and severally;

(f) the fourteenth defendant is ordered to pay the sum of R21 478,66 to the plaintiff;

(g) the defendants are ordered jointly and severally to pay interest on the respective amounts to the plaintiff at the prevailing prescribed interest rate *a tempore morae*;

(h) the defendants are ordered to pay the plaintiff’s costs of suit jointly and severally.’

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F R MALAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	R G Buchanan SC and E A S Ford SC Instructed by: Rushmere Noach Inc Port Elizabeth c/o Webbers Attorneys Bloemfontein
For Respondent:	R P van Rooyen SC and O H Ronaasen Instructed by: Pagdens Port Elizabeth c/o McIntyre & van der Post Bloemfontein