

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 35644/2018

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	
SIGNATURE	10/08/2023
	DATE

In the matter between:

MASSBUILD PROPRIETARY LIMITED

Plaintiff

(Registration number:2004/035206/07)

and

ANDRIES SEHLOHO

First Defendant

RUSSEL STEAD

Second Defendant

TM ECOGLOBAL ENTERPRISE PROPRIETARY LIMITED

Third Defendant

(Registration number:2015/388340/07)

JUDGMENT

Introduction

- [1] The plaintiff instituted an action against the first and second defendants, its former employees, for damages based on the breach of employment contract, and in the alternative against all three defendants jointly and severally, based on delict for payment of R4, 927,750.21 and R57,633,00. For the sake of convenience, and where necessary I shall refer to the first and second defendants as "Andries" and Russel" respectively. The third defendant will from now henceforth be referred to as "Ecoglobal."
- [2] The action arises from a series of breaches of its rules and regulations, as well the code of ethics allegedly committed by both employees. The trial was initially set down for 10 (ten) days, but due to a number of witnesses called to testify it spanned for over 40 days, with the trial bundle running in excess of 4000 pages.

Background

- [3] The relevant background to this matter is as follows: During 2016, a company known as Reatha Acquisition and Management (Pty) Ltd ('Reatha') was awarded a contract by the Development Bank of South Africa (DBSA) to repair and upgrade three storm damaged schools in the Vhembe District, Limpopo Province. On 28 February 2017, Reatha appointed the plaintiff as its sub-contractor at a contract value of R11 442 180.00.¹
- [4] In turn the plaintiff appointed the Ecoglobal to carry the construction work as a "one-time vendor". The plaintiff avers that the appointment of the Ecoglobal, whose sole director is the sister-

¹ Case-lines 082-86. Plaintiff's Particulars of Claim.

in-law to Andries as a one-time vendor contravenes the company regulations and its policies.

- [5] Andries was initially employed by the plaintiff in January 2010 as department manager external yard in its Bedworth Park branch. He was later promoted to a position of a Key Accounts Manager ('KAM'), the position he held up until his dismissal. I will deal with the role of a 'key accounts manager' later in this judgment.
- [6] Russel was employed by the plaintiff in July 2007 in its Edenvale store as an administrative manager. In June 2016 he took over the position as the acting branch manager of Bedworth Park, and he held that position until he left the plaintiff.
- [7] Essentially the plaintiff contends that during their employment, Andries and Russell, unlawfully bound the plaintiff to a construction agreement with Reatha Acquisition and Management (Pty) Ltd ('Reatha') on 28 February 2017. In concluding the said contract Andries and Russel acted in breach of their employment contract with the plaintiff in that they had no authority to enter into such contract.
- [8] In order to properly understand the plaintiff's case against the trio, it is helpful to have regard to the averments made in the particulars of claim.
- [9] In respect of the plaintiff's claim based on the breach of employment contract, the plaintiff alleges in the particulars of claim as follows:
 - "11. The First Defendant has breached the First Defendant's Employment Contract and/or the Second Defendant has breached the Second Defendant's Employment Contract by:

11.1 concluding and implementing the Reatha Limpopo Schools Contract and the amendment thereof, as set out in 8 to 10 (including sub-paragraphs), in that:

11.1.1 the First and/or Second Defendant had no authority to conclude the Reatha Limpopo Schools Contract on behalf of the Plaintiff;

11.1.2 the First and/or Second Defendant had no authority to provide any guarantees on behalf of the Plaintiff;

11.1.3 the First Defendant acknowledged receipt and/or procured that Reatha acknowledge receipt of materials on-site when such materials had not been delivered;

"11.2 purporting to conclude and implement the Alleged Sub-Contract, in that:

11.2.1 the First and Second Defendant had no authority to conclude the Alleged -Sub Contract;

11.2.2 the First and Second Defendant failed to comply with, abused and/or misused the One-Time Vendor Process by:

11.2.2.1 procuring approval of and/or approving the Third Defendant as a one-time vendor for the provision of materials; and or

11.2.2.2 procuring the approval and/or approving the registration of the Third Defendant as one-time vendor when one or more of the directors of the Third Defendant is or are family members of the First Defendant;

11.2.3 the First and/or Second Defendant procured payments by the Plaintiff to the Third Defendant in the absence of compliance with rules, regulations and policies of the Plaintiff and/or in the absence of the Third Defendant rendering the services in terms of the Alleged Sub-Contract."

[10] In respect of the defendants' delictual acts, the plaintiff made the following contentions against the trio:

"16 The conduct of the First, Second and/or Third Defendant, acting individually or in concert, and as set out in 8 to 10.12 was:

16.1 Intentional;

16.2 Wrongful in that the First, Second and/or Third Defendant, acting individually or in concert, had devised and/or implemented a fraudulent scheme in terms of which:

16.2.1 the First, Second and/or Third Defendants utilised the brand, goodwill and systems of the Plaintiff to procure the conclusion of the Reatha Limpopo Schools Contract and the Alleged Sub-Contract;

16.2.2 the First and/or Second Defendant were not authorised to conclude the Reatha Limpopo Schools Contract;

16.2.3 the First Defendant acknowledged receipt and/or procured that Reatha acknowledge receipt of materials on-site when such materials had not yet been delivered;

16.2.4 the First and Second Defendant were not authorised to conclude the Alleged -Sub-Contract."

[11] The plaintiff further contends that the first and second defendants have procured payments from the plaintiff to the third defendant without complying with the rules, regulations and policies of the plaintiff. The said defendants have also procured Reatha to pay the plaintiff an amount of R5 018,474.69 based on invoices from the third defendant that were not in accordance with the reasonable or usual rates for the labour and materials in terms of the BOQ.

[12] The defendants in their respective pleas deny that they have committed any wrongdoing.

- [13] Importantly Andries in his plea contends that as a Key Accounts Manager, his authority to act emanated from Russel's instructions and approval.² He contends that he reported to Russel by virtue of his acting position and in terms of the job description's organisation structure. He further averred in his plea that no implied and tacit terms were agreed upon when he concluded an employment contract with the plaintiff. At all times he acted in good faith. He denies that the one-time vendor policy was applicable to him, and put the plaintiff to the proof thereof.
- [14] In paragraph 24, he denies that the Ethical Code of Conduct alleged by the plaintiff formed part of his employment contract. He, however, concedes that although the ethical code of conduct was mentioned in his initial letter of appointment it was never made available to him. As regards the approval of the contract with the plaintiff, Andries contends that he referred the contract to the plaintiff for approval after he received it from Reatha.
- [15] Regarding the appointment of Ecoglobal as a subcontractor, Andries averred that it was the plaintiff who made that decision. After familiarizing itself with the terms of the contract it issued the appointment letter to Blue Sands Trading as a sub-contractor.³ It did this after appointing Strucktis Engineering who did a site establishment of the three schools. However, Strucktis were removed from site by Reatha, the main contractor who were not happy about its appointment.
- [16] The Second Defendant does not dispute that he owed a duty of good faith to the plaintiff. He contends that he had maintained his loyalty and good faith towards the plaintiff throughout his employment contract. He denies that he had concluded the contract

² Para.7. First Defendant's Plea

³ Para.33. First Defendant's Plea

with Reatha on behalf of the plaintiff. According to him he was tasked at the instance of the first defendant to sign the letter of counter acceptance after the agreement had already been concluded and concluded by the first defendant.⁴

- [17] In response to the plaintiff's allegation to the effect that that the first defendant purported to subcontract its obligations in terms of the Reatha contract, the third defendant pleaded in paragraph 7 as follows:

"...Without derogating from the generality of the foregoing the Third Defendant pleads that it was at all times placed under the impression that the First Defendant had authority to enter into an agreement on behalf of the Plaintiff with the Third Defendant."

- [18] In response to the allegations that it received payment in the without rendering services under the alleged subcontract, the Ecoglobal contends that it was paid after it rendered services and submitted bills of quantities and procured materials from the Plaintiff.⁵

Summary of evidence

Mr Tony Riley

- [19] The plaintiff led the evidence of Mr Riley, the commercial business development manager, who testified that: He was employed by the plaintiff in 2010. The 'limit of authority document' as contained in the record applies to all managers in respect of the decisions which they had to make in the performance of their duties. This includes Andries as a key account manager, and Russel the trade manager at the time. By accepting the position of a key account and trade

⁴ Case lines 082-171. Second Defendant's Plea. "Second defendant pleads that said agreement was favourable to and for the furtherance of plaintiff's business objects of supplying building materials and associated services to client in terms of a "program of works".

⁵ Case lines 082-203. Para 7 of the Third Defendant's Plea.

managers, both had agreed to be bound by the company rules and regulations. These rules and regulations were obtainable from the human resources manager's department.

- [20] On the role of the key account manager, Mr Riley testified that the key account manager, if they have a project with the client, he is expected to visit the contractor on site to ensure that the delivery schedules of the materials are adhered to. If the project involves a large building there would be a bill of quantities compiled by a quantity surveyor and a client would request prices on the material section. The key account manager who normally interacts with the particular clients would pull the prices from the system and approach specific vendors with request for prices. He would then apply a mark up and then puts the quote to a customer.
- [21] According to Mr Riley, the business of Massbuild is that of a building product merchant. They supply stock into the building industry such as a mayor business, and into the retail market as a secondary part. They also do 'supply and fix business' if they buy material outside the normal product mix, like in the case of aluminium windows. Ordinarily, they would supply and the product and the specialised person would come and install the material. In this regard he testified that they also supply wooden trusses for the roof.
- [22] On the Reatha contract, he testified that the plaintiff is not a contractor and therefore they do not issue guarantees nor hold any retention from client. The plaintiff supplies the materials on the 30 days basis. He does not understand what Reatha had contracted the plaintiff to do. One long weekend he received a call from Russel advising him of the financial risk emanating from the contract in question. He told him Reatha wanted to take the contract to someone else. Reatha also wanted to be refunded its deposit of

approximately R3,5 million. He then summoned Andries and Russel to a meeting.

- [23] Subsequently a meeting was held with Reatha in Sunninghill where the latter expressed its dissatisfaction with the plaintiff's performance at the three schools. The renovation and upgrade had to be completed by May 2017, and the school handed over. There was no recovery plan in place.
- [24] The above situation called for corrective measures. He set upon visiting Limpopo to inspect the site of the project. There Mr Riley discovered that the trusses delivered in Hlalelani were non compliant and not fit for purpose. They could not fit because they overhung. There were no corrective measures in place. The value of the work done on site is depicted on the spreadsheet which he compiled. There was no material on sit, roof had to be replaced. Only 10% of the painting work was done. There was no way they could comply with the deadline for handing over the site to the client.
- [25] On the Massmart Code of Conduct which owns 51% of Massbuild, he testified that on commencement of the employment, the employee is furnished with a copy of the Code of Ethics which is displayed in its stores. Massmart encourages its employees not to have social or other relationship with suppliers if such relationship will create an impression that the business influence is being exerted. With to the issue of occupational health as a stated requirement in the Reatha contract he testified that it is not the responsibility of the material supplier such as the plaintiff to keep such files. He remarked that it was inconceivable for Andries and Russel to have signed the agreement of this nature, given the knowledge and experience in their respective roles.

- [26] When it was put to him in cross examination by counsel for the first defendant, that the only signature appearing on the agreement is that of the second defendant, his answer was to the effect that the agreement bears two signatures, which signifies the acceptance of the contract.
- [27] Regarding the appointment of Blue Sands, it was put to Mr Riley that Mr. Frank Rajimakers, the trade manager penned a letter confirming the appointment of the former, and this contradicts his testimony that the plaintiff only supplies building materials. He also questioned the conduct of Massbuild for continuing with the contract instead of terminating after becoming aware that it does not fall within the business of Massbuild. Mr Riley's answer was that the Reatha had paid a lot of money into their account. His immediate reaction was how he can mitigate the loss and withdraw from the contract without incurring penalties.
- [28] When cross-examined by the second defendant's counsel he testified that although the plaintiff's business is to supply building materials, under exceptional circumstances goods or stock can be bought from other suppliers by means of one-time vendor process. Reatha is one of their long standing and sizeable customers.
- [29] He also testified that they deal with contractual clients by way of issuance of purchase orders. They would get a quotation in respect of the particular product, and then issue a purchase order. There would, however, be a service level agreement with regard to listed vendors. One-time vendor is the last option based on the price, locality and the nature of the product. The Reatha contract in question ought to have been escalated to him and then to Chris Lourens because it deviates from the value proposition. Anything above the value of R4,9 million requires the decision of the board.

[30] The third defendant asked Riley why the management did not ask pertinent questions when they noticed a large amount of R5000 000.00 in the Massbuild account. His response was that they would have assumed the money was for building materials, but maintained that they were not aware that the plaintiff was contracted for construction work. Massbuild had no capacity to do construction work. When the complaint came his immediate reaction was to mitigate the loss and retain Reatha as customer. Mr Riley agreed that Blue Sands was appointed as a subcontractor and Frank Rajimaker confirmed their appointment.

[31] When being re-examined, he testified that it was not uncommon for Massbuild to receive the kind of money that Reatha paid. During the financial year end, they would receive money from government departments and would issue a pro forma invoice in that respect. In the case of Reatha they had a 30 days account with them.

Mr John Kyamba

[32] John Kyamba is a qualified Civil Engineer and a former employee of Reatha. He was a project manager in the Reatha contract. According to his testimony he was under the impression that the plaintiff was contracted to supply and fit materials in various schools which were storm damaged in Limpopo. His communication on the project was with Andries and Blue Sands company who were on site regarding the project. He came into the project after the contract was already in place. He took his instructions from Miss Mary Setati the owner of Reatha. She was assisted by Dafney and Benny. He is the one that generated the bill of quantities for the project, and issued same to the contractor who would do the pricing. He had regular contact with Andries via emails and physical meetings. He knew Ecoglobal when he stumbled on some documents.

- [33] He further testified that Reatha was not happy with the performance of Blue Sands on site as some work was not completed in times. Regarding the deposit which was paid into Massbuld by Reatha, he testified that the money remained the property of Reatha until the equivalent value of the work would have been done. Andries told him plaintiff would generate invoice against the job done. On 22 March 2017, Andries sent an email requesting him to sign a Proof of Delivery of the material (POD). There were 15 PODs, all bearing the name of Eco-Global Enterprise addressed to the Plaintiff. Andries told him that was what was required to bring the material on site. He also told him that this was an internal process, and the POD was intended to acknowledge that he had seen the document but as Reatha it cannot serve as a proof that work has been done.
- [34] Although some he acknowledged signing some of the PODs, he testified on others the signatures reflected were not his. Those that he signed were to signify that he had seen the document as advised by Andries.
- [35] Under cross examination, Mr Kyamba testified that the work was not completed when he left the project. During their meetings with Andries he would not commit until he had consulted on the issue. Initially Andries sent him a blank POD and he refused to sign until the other relevant people had appended their signatures.
- [36] Mr Slabbert for the second defendant asked him which projects were commenced when he left. He replied that all projects in respect of all schools were to run concurrently, but they were behind schedules when he left. The delay in the completion were as a result of lack of materials and underperformance.

Mr. Jacobus Visagie

- [37] Mr Jacobus Visagie, the Regional Key Accounts Manager, took to the stand and testified as follows: He was employed by the plaintiff since 2014. In 2017 he was a Trade Key Account Manager responsible for sales at eight construction company customers to whom they sold materials for projects. He knew Andries from the time he worked for Duro Pressings, and they used to supply doorframes and window frames to the projects in which the plaintiff was involved. Russel was an acting branch manager at Bedworth Park Store whilst he was an acting regional manager. He became aware of the Reatha contract when he started in the region. However, he was not aware of the actual contract until one Friday afternoon, around 27 April 2017, when he received a telephone call from Toney Riley. Tony asked him what he knew of the contract appointing contractors to a project for one of their clients. His answer was that he knew nothing, because they do not sign contracts at the Builders Warehouse. They only supply materials through the salesperson to the project site.
- [38] He further testified that he first came to know of the Reatha contract because everyone in the building was talking about it as good news in the business. His understanding was that they received a massive purchase order from a customer to supply materials for the three storm damaged schools in Venda. Around the corridors there was a huge congratulations for Andries who got the deal. Tony informed him that there was a signed contract in terms of which Massbuild was to perform construction work, and that is something completely different from their regular business. They would normally do work like fitting the kitchen cupboards or installing the carpets, but nothing that ends up being a turnkey solution such as what is in the Reatha contract. The key account manager is not allowed to sign contract. His job is to sell and get

orders from customers and ensure that they are delivered to the site. He set about investigating the contract, because at that time the customer had already lodged a complaint. He went to Bedworth store where he collected all orders and the invoices from Andries. He also obtained invoices that they had invoiced client to enable them to establish the extent of the work done, the nature of that work as well as the materials delivered on site. There were purchase orders which the Massbuild had placed on the supplier, TM Ecoglobal, and invoices to Reatha, their customer. Upon collecting the said documents, he visited Blue Sands offices with Andries to verify what work was done and what still need to be done.

[40] According to the information received TM Ecoglobal contracted ENM Trading as Blue Sands for the work and to supply materials on the project. About 4 or 5 May he travelled to the site of the project. The first site was Vele School because it had been prioritised by the client to be handed first. Another objective was to keep the client happy. He discovered that there was a huge disparity of what he had been told and what he found on site. He realised that they were far behind the schedule and will never meet the deadline for the handing over of the site. He compiled a report to this effect. He informed Tony and other relevant managers that there was still more work to be done on site. His report on the progress at the schools has been handed in evidence. It contains a bundle of photographs depicting the work done and what still needed to be done. There is also a schedule of reconciliation on what has been paid and received, and what those payments are meant for.

[41] He describes the process which the key account manager (the salesperson) had to undertake in the course of his dealing with the customers. He will obtain a quotation from supplier for the relevant materials that the customer wants to purchase. Based on the quotation he will add the company profit and margin. Once the

customer is happy with the prices he would order the material on a physical purchaser order as per the quote supplied. Then an invoice will be issued to the customer. Mr Visagie also testified on the bill of quantities, which he says does not tally with the invoices to the customer. Certain amount were overcharged to the customer. This is despite the bill of quantities having been sent to Mr Sehloho and to which he had agreed to. What was unpleasant is that at the meeting with Blue Sands he was told that the work which was reflected in the invoices was done and completed. It turned out that this was not the case.

- [42] According to Mr Visagie an amount of R4.7 million constitute a globular amount the plaintiff had paid to the contractor. In one of his findings when he visited the site it is indicated that there was no ceiling material on site and there was no ceiling fitted in any of the classrooms as reported by the contractor. Some photographs tendered showed classrooms with old paints on the walls, and no painting work done. The amount stated in the bill of quantities is about R315,360, but the amount reflected on the schedule amounted to an undercharged variant of R164,880. The customer raised a query with them upon realising that the amount charged to them as per bill of quantities does not tie up. Reatha also took some responsibility to do the painting work which was not done. A large part of his evidence was concerned with the discrepancies in the amounts charged for the work done or not done, and materials supplied which were not supplied as per the meeting held at Blue Sands offices. When it was brought to their attention that there was an overcharge involved they made about two to three refunds to the customer. For the work not done the refund amounted to R1,2 million plus the overcharging the whole amount refunded amounted to R4,753,475.32. The total amount paid to the contractor, TM Ecoglobal amount to R4,9 million.

[43] On the deposit amount, he testified that Mr Sehloho informed him about it, and it was put into the customer's 30 days account., which had its own credit limit with the plaintiff. According to him Reatha was just subsidising its account in order for the plaintiff to invoice for the materials that needed to go on site. The thirty day account works as a credit facility for the customer, payable in 30 days. He denied that he approved an offer from Reatha, he never instructed Mr Sehloho to sign any contract, was not aware of it.

[44] Under cross examination he was asked if Andries could report to the instore trade manager based on the day to day admin and requirements of his job. His answer was that it would make sense, but ordinarily he should report to him as the regional key account manager at the head office, or Frank Raijimakers, the third line of reporting. There were weekly meetings in the store to discuss the projects or sales orders, and he would imagine that Reatha projects would be discussed because it was a substantial sale. When asked about the Alexander projects, he testified that it was about to end when he joined Massbuild. He denied that he had a knowledge of the Reatha deal since February 2017. He denied that Andries ever discussed the project with him as his reporting line. He also denied that 'supply and fit' can be equated to construction. He explained that the project in Alexander was for fit and supply.

Mr. Frank Urzy

[45] Mr Frank Urzy, the merchandize manager testified that regular suppliers of products have SLA with the plaintiff, while one-time vendors would have a once off relationship in respect of that specific product. The product would go to the article master, the merchandise manager would check the product and sign it off. All products above R20 000.00 would go to Steven Botha. Once the

product has been approved they would arrange with the one-time vendor to deliver it. On 10 March 2017 he received a call from Gladys Sekonyela on behalf of Russel asking him to approve a paint product. She said if they did not approve they would lose the business. According to Russel the approval related to the supply of paint. He did not want to take the gamble of them losing the business, and so he approved it. He denied that he approved the invoice, but the product, paint, because merchandise looks after products. He did that approval in good faith. He is just a small cog in the approval process.

- [46] Under cross examination he testified that the telephone conversation was about paint, and would not have approved a one time vendor, it does not fall under his scope of work. He approved the product based on the discussion held with Mr Stead.
- [47] Mr Slabbert put it to him that evidence would be led to prove that his evidence relating to the approval process of a one time vendor is inconsistent. His reply was that it is the operational process. The fact is merchandise means product. He approves the product and a vendor is listed. "What comes first, is it a chicken or the egg.?"

Mr Radiat Mohammed

- [48] Mr Radiat Mohammed, the accounts manager for Builders testified that there are responsible for ensuring that payments are made to vendors in time and on their own terms. He described the vendor as someone that supplies goods or services to Massbuild, be it stationery or security services and others such as Plascon, PPC, Dulux. Registered vendors are those who have signed contracts with Massbuild and have accepted their terms and conditions. 'One time vendor' are those vendors that the store has sourced a particular product, or the product cannot be found anywhere and is needed by the store urgently for a project. They will be allocated a

vendor number through which they would be paid. What is required to be registered, is SARS registration document; cancelled cheque or bank letter not older than three months, and a tax clearance certificate indicating that the person is in good standing. The product supplied by the vendor has to be listed the Builders master data article. The merchandise team would approve the product to be listed in the order for the store to create the purchase order. He testified that only two payments were made to TM Ecoglobal, R1,760,932.21 on 15 March 2017, and R3 million on 22 March 2017. Although the same vendor was used twice, the approval had to be sought from the merchandise manager.

- [49] Under cross examination, he confirmed that authorisation for the payment of TM Ecoglobal came from Mr Frank Urzy. It was put to him that Urzy testified that he only approved the product not the invoice. His response was that there is a three way match; the purchase order, delivery note and the invoice.

Mr. Frank Raijmakers

- [50] Mr Frank Raijmakers, the branch manager at Builders Warehouse Potchefstroom testified as follows: He was the trade manager at Bedworth Park from 2016. He started off in 2010 as sales manager on the retail side. Andries Sehloho reported to him on dotted line. Russel was an admin manager. In 2016 Andries informed them that he got a customer that is coming through as one-time vendor. The site she was dealing was Alexander where she was revitalizing the hostels and turning them into flats. Her name was Dr. Mary, the owner of Reatha company. The role of Builders Warehouse would be to supply products, such as cements, brick force and bricks. They also had to supply specialised window frames, and had to source them from the company that manufactures them. There was a special order of staircases and that had to be manufactured as well.

[51] In relation to Reatha contract, he testified that he received a call from Dr Mary of Reatha complaining about the lack of progress on site, and the fact that there were no materials on site. Andries was at the time on a trip to China after he won a competition for selling cement. They escalated the complaint to Kobus. Regarding the letter of guarantee, he testified that Andries approached him saying he wanted a letter to confirm that Builders Warehouse were supplying quality material. He trusted him and Kobus said he was happy with the letter.

[52] Nothing significant came out of the cross examination except to corroborate the plaintiff's core business as a supply of building materials. He also denied that Mr Visagie had approved the Reatha contract.

Mr Neil Tavener

[53] Mr Neil Tavener is a regional operational manger of the plaintiff in the Johannesburg West. He held this position since 2004. The branch managers of all the stores report to him. Russel had an ambition to be appointed as a permanent branch manager. Russel also stood a good chance of being promoted. One day whilst returning from Bloemfontein with Pieter Pretorius, the regional admin manager, he stopped by the store and bumped into Russel. Russel asked him if he could come into the store to give Andries 'a pat on the back' for the big sale which he pulled into the business. He went upstairs and congratulated Andries. When he was out in Kruger on or about 29 April he received a WhatsApp communication concerning a meeting that had been called by Dr Mary with a team from Bedworth Park relating to poor performance on the Reatha project. He assumed that they had not delivered the stock to the customers, and she wanted a refund. She demanded about R3,6 million into her private account so she could personally took back

the project. To calm her down he instructed Andries to go to the site to resolve the issues. Subsequently Tony Riley who was in charge of all the key accounts managers had taken over the process. He met with him, and Kobus Visagie after he came back from Kruger. They discussed the issue, and was taken by surprise that they were the project managers in the construction space. He asked Russel if he had signed the contract, and his response was that he did sign. He testified further that Russel did not have the authority. At the minimum it could have been the operations director Chris Lourens. If it was brought to his attention he would have escalated it to Chris Lourens.

- [54] Under cross examination by Mr Ramaili he was asked if the plaintiff takes retention from customers. His response was that they do not do retention, but credit arrangements. Mr Tavener conceded that the second defendant had two jobs as an admin and acting branch manager, and it was challenging for him. On the suspension of the second defendant, he testified that they had uncovered that Russel was involved in the business where the plaintiff was placed at risk, and did not want it to be exposed to further risk.

Ms Daphney Meiring

- [55] Daphney Meiring was an administrator at Reatha company. Her evidence is by and in large corroborates that of Mr Visagie and Mr John Khyamba insofar as the work that was performed and not done on site. She testified that Reatha is a construction and property company, mainly dealing with government clients. On Andries and Dr Mary's relationship, she stated that they were involved in the Sebokeng and Alexander projects. Andries would supply building materials such as bricks, and would get them the best price. When they were struggling to get steel staircases, Andries managed to get them for the Alexander Project. In 2016

Reatha was awarded a tender by the Development Bank of South Africa to repair storm damaged schools in Limpopo, Vembe District. There were nine clusters and they were awarded 4 clusters. After the award they were looking for a contractor that they could rely on, someone to assist with the building, they would do the project management as they were recognised managing contractors according to the NEC. They would act as professional team while Mr Khyamba would be on site to manage the project on their behalf. They wanted only the physical part. Mr Sehloho agreed to fill in the role and oversees whatever subcontractor he got. He advised them that the subcontractor would be through the plaintiff because they have a good reputation.

- [56] She testified about the importance of pricing on the bill of quantities. According to her, once you have reached an agreement on price based on the bill of quantities you would be awarded a contract in the form of a letter stipulating what the project is, the amounts, what is expected of the contractor and other specifications. The contractor cannot exceed the amounts stated in the bill of quantities, and if they do is for their own account. They used to have meetings with Andries once a month, whereas Kyamba, their project manager would have regular meeting with him on site. The final prices as per schools were: *Dzimauli School* R3,515,050; *Vele Secondary School* R1,201,200 and *Hlalelani School* R5,370,750, all of which exclude VAT. With regard to the upfront payment paid into Reatha account held with the plaintiff, she testified that it was for the material in the event materials needed to be sourced. They paid half of the contract amount, R5,018,474. The plaintiff was supposed to issue pro-forma invoices for work to commence on site. She said it was not the final amount, but a deposit.

- [57] On the 10% retention, she testified that the retention amount is kept as a guarantee that work will be done satisfactory according to the contract. The amount of ten percentage would be subtracted from invoice to ensure due performance in terms of the contract. Upon the completion of the contract a snag list will be done and a certain portion of the retention would be released, and usually after a 90 days period after all the snag lists were done the rest of the retention amount would be released.
- [58] Regarding the Occupational Health Requirement contained in the Reatha contract, she stated that there must be a fulltime health and safety representative on site with a valid certificate, valid medical and fitness certificate. Reason being, construction is a dangerous occupation, and this is done to ensure the safety of workers and people in the area. She was asked whether the contract would have been concluded if only Andries' signature was appearing on the offer and acceptance document without Mr Stead signature. Her answer was to the effect that would amount to no agreement. When the plaintiff could not provide the construction performance guarantee, it was decided that they would take 10% of the certified amount. That is the work would be certified and 10% be taken off from every invoice issued. She denied knowledge of the signatures appearing on the proof of delivery. The delivery notes suggests that deliveries were received. The work done can only be certified by the QS (Quantity Surveyor). The items contained in the implicated delivery notes were not actual delivered.
- [59] On her dealings with Andries, she testified that they struggled to get the requisite documents from him, there was a delay in furnishing the safety and health file. The contract was concluded on 28 February and in March there were still waiting for guarantee. John Kyamba was still waiting for the details of the contractor on site. The information had not reached them as at 7 and 15 March

2017. Eventually Andries gave them the details of Blue Sands Trading as a sub-contractor. According to the Blue Sands profile they listed one school in respect of which they rendered repairs and renovations. She became concerned about the company's CIDB as it fell below minimum for the project. The project in question had a 7 CIDB grading. The grading determines the maximum amount of projects that company can handle. Blue Sands had a CIDB grading of 5 as at 2016 when she checked on the website. It means they could only do a contract of R6,5 million based on the grading. However, their grading had expired as you had to send new information every three years of the work you did. She was concerned about the fact that the project in question was for R10 million and involves three schools, and it was far above what Blue Sands had been handling.

- [60] She testified that CIDB speaks also to the financial standing of the company to perform a project of a higher value. You do not qualify for upfront payment. Reatha has a grade 7 CIDB for general building and civil engineering. Which means they can do projects of R40 million in value. They had the tender awarded to Reatha because of the grading. The subcontractor had to match especially if they were going to perform most of the job. Otherwise these would not meet the tender specifications. Reatha entrusted Andries with the contract based in the area of work he does and his exposure to construction company. They assumed he knew about the CIDB grading. They only became aware of the identity of the subcontractor on 17 March 2017. When they became aware Andries was informed of their concern pertaining to the contractor [page 873 of the bundle]. Andries replied to say there would be no issues as the company knew what they were doing, and John Kyamba would be on site to advise them where they were lacking.

- [61] On TM Ecoglobal Enterprises, the third defendant, Miss Meiring testified that she did not know them, she was dealing directly with Andries, and on site they dealt with Blue Sands. An extract of the Construction Development Board website (CIBD) indicates the date of the registration of TM Ecoglobal as being the 7th of March 2017. It is a grade 1 GBPE. The company size project is R200 000.00 in monetary terms. It is something that was not supposed to happen as they cannot contract a grade 1 company for 7 GB project. They lack the expertise and the financial capacity to handle the job of that magnitude.
- [62] On 22 March 2017, Reatha requested for performance guarantee and insurance for the materials that had to be transported to the site in case something were to happen to the goods in transit. They also wanted proof of the schedule of when the materials would be on site, as they were reports from Mr Kyamba that there were no materials reaching the site. Despite Andries confirming that there was 44% of the material on site, John Kyamba denied that there were such materials on site.
- [63] She testified further that Reatha resolved to suspend the contract with the plaintiff after the latter failed to meet the conditions of the contract. In this regard, the program of works have not been complied with, and there were no supervisory staff names. The suspension had to happen in order to mitigate the risk. Each school had to have a supervisory person, and its own labour force. Out of the three schools they did not know who to address their queries with. After the suspension, Andries had a discussion with Dr Setati and the suspension was put on hold to allow them to finish what they were working on. The meeting was agreed upon.
- [64] On 28 March 2017, an email correspondence was sent to the plaintiff requesting amongst other things: The profile of the sub-

contractor, financial statements for the past two years, CV of the experienced personnel, program of works and performance guarantee. Dr Mary needed to evaluate whether the subcontractor will be able to complete the project.

- [65] At the meeting which followed the suspension, they demanded to know what was going to happen on the surface, not another action plan from Andries going forward. In fact they wanted to take over the sites. They had an impression that Blue Sands was unfamiliar with the basic construction processes and regulations. The fact that their grading expired meant that they were not graded at all.
- [66] On Russel, Miss Meiring testified that the appearance of Mr Stead's signature on the documents exchanged between the parties gave them a sense of comfort on the project. This included a letter by Raijmaker. Their understanding was that the plaintiff was supplying the materials. When they were busy with the Alexander project, on 5 April 2017, they received information that their account with the plaintiff was blocked. This took them by surprise as they put a lot of money into the account as a deposit. It was subsequently unblocked.
- [67] On 11 April 2017, Reatha addressed a letter to Andries stating that the project was eight weeks behind, and based on what was happening on sites they were underperforming. Very little materials were delivered, some schools had no delivery. Only about 5% of the materials were delivered in certain schools. This is despite the fact that they already paid for the materials. The response from the Andries was not satisfying in reference to site establishment after a week suspension. There was no new sub-contractor on site and site establishment should not take that long. Andries needed 10 days to deliver the materials which was another delay in the project. On the 12th of April they wrote to Andries informing him that the schedule

he provided was not acceptable, and the material had to be on site immediately. This was due to the fact that the work had to be completed before the reopening of the schools.

[68] On 19 April 2017, Mr Mokoena of Blue Sands sent reports to Reatha on the progress made at the schools. Daphney Meiring went on to testify that the reports were inaccurate in various instances. In some instances it would say that work was completed whereas in actual fact it was not even started.

[69] On 24 April 2017 she sent an email to Andries notifying him that they would take over the works at Hlalelani. She testified that the work there was less 5% since the confirmation of the of scope of work. The email also made reference to the one sent on 11 April 2017 regarding the same issue. The Reatha's client, DBSA had expressed serious dissatisfaction with the progress made in the project. They gave the plaintiff up until the 26th April to attend to some outstanding work at Vele and Dzimauli Schools. In regard to Vele they needed IBR sheeting, doors and ceilings, while in Dzimauli door frames and windows were required. The correspondence also stated that if the requirements were not met, Reatha would take over the entire project. Reatha was worried about its reputation as that would have financial implications. As at the date of trial, DBSA had not given them any work after being rated as the poorest performing contractor. Ultimately they took back the Dzimauli school.

[70] According to Daphney Meiring, the plaintiff was only entitled to payment of its invoice after the certification of works had been performed. No money should have gone anywhere until Reatha had certified the work through a Quantity Surveyor. It took about double the time to complete the works after they took over. They completed the work in November that year, but had to let go of one

school. Consequently a refund had to be made to Reatha by the plaintiff from the R5 018 474.69 which was deposited. In respect of Hlalelani and Dzimauli an amount of R3,5 million had to be refunded (a full refund).

- [71] During cross examination she testified that she was not working for Reatha at the time of the initial negotiations of the contract. She was then asked why did she testified that Andries was told to find a contractor if she was not present during the initial negotiation of the contract. Her reply was that she learned that from the subsequent meeting she held with Andries. She also testified that the retention fee of 10% came about as a result of the plaintiff failing to provide guarantee requirements. On accepting the retention from the plaintiff it was based on the trust relationship they enjoyed with the plaintiff over the years. They had Alexander project in which the plaintiff provided them with staircases, and never disappointed. She also confirmed that the reason they accepted the retention instead of the guarantee was because they were late in the project. She, however, insisted that Andries was the contact person at Massbuild. He was the face of the contract for Massmart.

Mr Tshepo Mokoena

- [72] Mr. Tshepo Mokoena, the managing director of Blue Sands. He testified that Blue Sands is a construction company based in Ormonde, South of Johannesburg. It was original based in the Vaal area. It has been in existence for 15 years. They do general building, fencing as well as civil work. In terms of grades the company has 5 grades in civil work; 6 grades for general building and 7 SE for security fencing. Asked how he became involved in Reatha Project, the witness testified that they were approached by the first defendant. He informed that there was a project in

Limpopo for three schools which needed to be renovated with one to be built, and they were in need of a black company.

- [73] Asked how he came to know the first defendant. He testified that he met the first defendant around 2015 during the Harrismith project. The first defendant was involved in the supply of materials. He gave the witness a business card in case they needed to be supplied with material. He also met Andries during the Alexander project, when Blue Sands was looking for sub-contracting work. The project was installation of staircase for the hostels. He denied having any personal relationship with the first defendant.
- [74] On the Reatha project, Andries wanted them to be sub-contractor to Reatha, the main contractor in the school project. They were requested to supply their profile and DB grading. The plaintiff appointed them once they were happy with their profile. They set about doing site establishment and thereafter organised the team to start the work in Limpopo. On the site they met the project manager named John.
- [75] When asked about Ecoglobal, he testified that he first heard about them when they went to Builders. That was the time the project was becoming sour. They were called by Tony from the Builders who asked them if they knew Ecoglobal people. He replied that he did not know them. However, he knew that there were invoicing them. Andries told that they were the paymaster for the Reatha and Builders. When asked to be specific about the exact period when he was called by Tony for the meeting, he replied that it could be around May or June 2017. He testified that he did not know the director of Ecoglobal Evelyn and Linnah Nhlapo. He confirmed that he received the amount of R1.2 million rands and R2,250 million from Ecoglobal. He further received an amount of R120 000.00. He

testified that all their invoices were sent to the first defendant, because according to him their contract was with the plaintiff.

[76] It was put to Mr Mokoena that at the time when the invoices were paid as at 24 March 2017, the materials were not on site as reflected on the invoices. His response was that not all of them were on site, but it was depended on availability. He testified that he never received any instructions from Ecoglobal to deliver any material. He only received instructions from the first defendant or John.

[77] On Blue Sands 's relationship with TM-EcoGlobal he stated as follows:

"We never had any relationship or communication with TM Ecoglobal. We communicated with Builders, and when we moved out of site, it was from Reatha, and we were told to move out of site by Builders."

[78] Under cross examination by Advocate Matlhanya for the first defendant, he reiterated that he did not have a contract with TM Eco-global and testified further that he was sub-contracted by Massbuild. When asked why he was not surprised that he received a huge amount of money from TM Ecoglobal, he replied that because he was informed that they were the 'paymaster', and he assumed that it was from the plaintiff.

[79] When asked by Advocate Slabbert for the second defendant about the poor workmanship on the site, Mr Mokoana denied that his company rendered work of poor quality as reflected in the reports. Regarding the trusses that were ordered and not fitted because they were prepared for an overhang of 300 mm, instead of 600mm, he testified that it was also not his fault because the trusses were ordered according engineer's specifications. The engineer was from Reatha.

[80] Mr Makobe for the third plaintiff asked him if he gave the first defendant a quotation for the scope of work Blue Sands was supposed to do. His response was that he did not give Andries any quote. He testified that he worked on the estimate of the budget of the project for each school. Andries is the one who came up with the amounts, and was about R5 million. He further testified that about R3.4 million was paid to Blue Sands before any work was done. He conceded that it was not normal in the building space to do work without quotation. However, he trusted Andries because he worked for builders and the letter from Builders appointing them gave him comfort, that their money will be secured given their reputation. He testified further, that there was no signed contract between his company and the first defendant (Builders), however, there is an appointment letter. The only email communication with the third defendant took place after they vacated the site.

[81] Mr Mokoena further testified that he met Mrs Linnah Nhlapo through Andries, but could not remember where he met her. It was put to him by Mr Makobe that Blue Sands were not subcontracted by Massbuild but by TM Ecoglobal. Andries approached Blue Sands to do work for TM Ecoglobal. His response was "That is not correct." He testified that the money was paid to them before they started working on site because they already did site establishment, and that they were informed that more money to buy materials would also be paid in advance. Asked if his company was in Massbuild's data base. He responded that it was not. He could not answer why Massbuild would appoint someone like his company when they were not in the data-base as 'one-time vendor. He also testified about the litigation which they instituted after they were moved out of site. According to him they sought to recover certain amount of money owed to them on the project. They could not finalise the case due to financial reasons.

Mr Theodorous Weyers

- [82] Mr Theodorous Weyers, the National Asset Protection Manager for Massbuild testified on the bank statements relating to the third defendant. It emerged from his testimony that about R4 949 970,21 was received into bank account of TM Ecoglobal. The source of the deposit was the plaintiff. Several withdrawals were made including the R200 000,00 which was transferred to Mrs Nhlapo's personal account on 20 March 2017. After receiving the amount of R1 760 932,21 the amount of R98 057,32 went into car payment. On 24 March a further R500 000.00 appears to have been transferred into Linnah Nhlapo's personal account. There were other cash withdrawals and several purchases in chain stores, such as Makro. On 28 March 2017, an amount of R60 000.00 was made to the first defendant.
- [83] The witness also testified on the first defendant's Capitec bank account statement. The statement revealed a deposit of R60 000,00 from Mrs Linnah Nhlapo. The statement further revealed a transaction of R19 000.00 and R3150 spent at Louis Vuitton, R4700,00 at Dolce and Gabbana in Sandton.
- [84] During cross examination by Adv Slabbert, he testified that he was tasked to analyse the three accounts being of the first, third defendants and Mrs Linnah Nhlapo. The second defendant's account was not brought up for scrutiny. He did not think of the second defendant at the time. Adv Slabbert put it to the witness as to why the plaintiff would choose to settle his labour matter for R95000.00 if it felt the second defendant was defrauding them. His answer was that the settlement are dealt with by the HR and not by his department.
- [85] During cross examination Mr Makobe for the third defendant, he was questioned about the authenticity of the bank statements in

light of the fact that the statements did not have bank logo. His response was that they bore the bank stamps instead.

Mrs Lynna Nhlapo

- [86] Mrs Nhlapo, the director of TM Ecoglobal testified under subpoena issued by the plaintiff. She testified that the other director of TM ECoglobal was her sister, but she seized to be a director in 2019. The main business of TM Ecoglobal is to supply materials for mine and constructions. The business operates from Kriel where she also resides. The company has no employees as the nature of work does not involve labour but purchase orders. She would to supply materials such as layflates and barricades to the mines. When asked if she ever employed anyone to do construction work for TM Ecoglobal, she replied that it was only Blue Sands.
- [87] Mrs Nhlapo further testified that the first defendant is her husband's brother. The first defendant is the one that told her that the plaintiff was looking for someone to supply them with materials, like paint and cement and other building materials. On Reatha project, she testified the first defendant called her and told her about the project. He explained to her that the project was about the renovations of schools and they needed a person who would supply and fit materials. It was to supply and fit materials such as steel trusses to the roof, cement bricks and other building materials. She renovated three houses and her mother's house before in personal capacity, that is how she acquired her renovation experience. However, TM Ecoglobal has never done construction or renovation since its existence.
- [88] Asked why the first defendant thought she would do the job with no experience. She responded that she was not going to the job herself but she would hire other companies to do the work as sub-contractors. Importantly Andries knew that she had the necessary

documents and she was in the business of supplying and fitting, and that she would be able to hire a company to do the construction. She was able to find Blue Sands to do the job. Blue Sands would also source the materials. She is the one who requested the first defendant to find a company which could do the job, and he found Blue Sands. Asked why the first could not just hire Blue Sands, she replied that she does not know. There was no contract with the plaintiff but the purchase order from the plaintiff constituted a contract. There was also no written agreement with Blue Sands. She never met anyone from Reatha, but her support team Blue Sands met with them. She travelled to Limpopo to inspect the site in the middle of the project. She could not recall the dates when she met with Blue Sands, except to say it was somewhere at Nando's, Johannesburg. She communicated with Blue Sands via telephone and emails, however she never gave those emails to her legal representatives. She never received nor copied on emails from John or Daphney of Reatha.

- [89] Mrs Nhlapo further testified that when she compiled TM Ecoglobal's quotation the first defendant informed her about the company which was on site, and he gave her the prices of that company so she could beat them to get the work. He told her to adjust them by 10%, but she ignored his advices and quoted her own way. She testified that she did not see the scope of work that was specified by Reatha, but her subcontractor saw it. By the time she received invoice from Blue Sands she already sent the quotation to the plaintiff. When asked what a clip lock was, she said it was it was part of the door in which you insert the key and hinges. It was put to her that it is in fact a galvanised roofing. Her response was that the people who knew were the subcontractors. She hired the subcontractor because she knew she would not be able to complete the job. In regard to the Bill of Quantities she testified that the

subcontractors are also the ones who knew the figures and did the work.

[90] On the delivery notes, Mrs Nhlapo testified that she prepared the notes after being informed by the first defendant that the products or goods were delivered on site. All purchase orders were sent to her by the first defendant after emailing the plaintiff Ecoglobal's quotation.

[91] In regard to the financial transaction relating to her personal expenditure and that of the third defendant, she testified that she did not want to answer questions which are personal. She, however, confirmed having transferred the sum of R500 000.00 into her personal account on 24 March 2017, after a transaction of R3 166 818 from the plaintiff. This was followed by a cash withdrawal in the sum of R250 000.00 on 25 March 2017. She testified that she withdrew the money to assist her loved ones or family members such as her husband and kids settle their financial needs. She denied ever giving a loan to Mr Sehloho, the first defendant. She confirmed that her company received an amount of R4.9 million from which R3,6 million was paid out. Meaning TM Ecoglobal retained the balance of plus or minus R1,3 million.

[92] When it was his time to cross examine Mrs Nhlapo, Mr. Makobe, who passed on before the trial was concluded, complained that he did not have instructions regarding the further conduct of the matter in that his witness is in the witness box. He would know what to do after the witness had been excused from the witness stand. Advocate Mashimbye was subsequently appointed by the third defendant to proceed with the trial.

Mr Tebego Kganane

[93] He is employed by First National Bank as legal advisor in the Commercial Litigation Department (in the Chief Risk Office). He has deposed to the affidavit after the bank was served with the subpoena dated 19 October 2020 issued at the instance of the plaintiff. Amongst the list of information which were requested from the bank are the documentation relating to TM ECoglobal Enterprises. This includes statements of the TM Ecoglobal Enterprise's bank accounts held with First National Bank from November 2016 to December 2017. He confirmed that the records of statements and transactions in respect of the question raised in the subpoena are authentic. There was no cross examination of this witness by the first and second defendants.

[94] Advocate Mashimbye for the third defendant asked the witness whether he sourced the documents or somebody else did. His response was that the documents were sourced by the Extraction Department and the instructions were as per the subpoena. He could confirm the documents because he has the same extraction that the Extraction Department also have.

Ms Thandi Skosana

[95] She works for ABSA as a Subpoena Consultant. Her job is to provide information that is requested in the subpoena. She deposed to an affidavit on 12 November 2020 in response to the subpoena that was served on the bank. The subpoena was in relation to the account linked to Mrs Linnah Nhlapo for a period between 15 January 2017 to 14 December 2017. She was responsible for the extraction of the information that was requested on the subpoena so she could confirm the authenticity of the documents. There was no cross examination of this witness.

Ms Carolina Petronella Botha

- [96] She is the Forensic Administrator employed at Capitec bank. She had deposed to an affidavit. She is the one who was responsible for extracting information in relation to the saving account held by the first defendant at Capitec bank. There was no cross examination for this witness.

The evidence of the first defendant

Mr Fancos du Pless

- [97] The first defendant led the evidence of Mr Francosis du Pleasis, the director of Stractus Engineering. He confirmed that he had working relationship with Builders Warehouse (the plaintiff). He worked with the latter on two occasions when his company was a subcontractor to Bhukulani Brickworks which was subcontractor to Builders Warehouse. Bhukulani approached them to do staircase at Alexander. Stractus Engineering fabricated staircases and did installation. At that moment Andries Sehloho was representing Builders Warehouse. He also met Dr Mary towards the end of Alexander project (snag list process), but does not know anything about the relationship of Massbuild with Reatha.
- [98] He testified that Massbuild were managing the Alexander project. Because they were subcontracted to Bhukulani Brickworks, the latter paid them direct. Regarding the second project, the first defendant approached Stractus and told them about the project to renovate the schools in Venda. There was no formal agreement in place but because they had the relationship with Massbuild they went to the schools to do assessments. They then submitted the quotations and recommendations on what had to be done to Massbuild. Whilst on site he received a call from the first defendant who showed him a message from Reatha informing him that they

do not want white people in the project. After they left the site a company called Blue Sands approached them to manufacture trusses. However, after a while they were informed that the trusses were too short so they had to do modifications of the trusses. They were not paid for the modification even though they sent the pricing.

Mr Paul Sedooa

[99] He worked for Builders Warehouse as trade manager between 2007 and 2016. In May 2016 he joined Reatha Acquisition after he left Builders Warehouse. He testified about the role of key accounts manager. Builders Warehouse normally has two accounts managers per store. The role of key account manager is to go and source customers outside and brings them into the store, and ensure that they service them. The key account manager would regularly visit the customers in their offices and on site to check if they needed stock and how best he can service them. The key account manager plays a minimal role influencing the decision of the superiors. Once he has sourced the customer the key account managers would submit the application for credit facility of the potential customer to the head office who would make a decision based on the information submitted.

[100] During cross examination by Advocate Mashimbye he testified that he is not familiar with documents which are required to for one to be registered as one-time vendor, because as a trade manager he was only interested in the margins coming into the store. The head office deals with the process of registering a one-time vendor.

Mr Thabo Mokoena

[101] He is currently on pension. He was previously involved in hardware business and manufacturing of bricks, as well as in construction. His

interaction with the plaintiff begun in 2010 when he was approached by a representative of Massbuild looking for business from them. He is the sole owner of Bhukulani Brickyard. His business relationship with Francois du Plessis arose from the Alexander project. He had to do staircases in Alexander and he approached Francois to manufacture the staircases. He was referred to Francois by Stewards and Lloyds after he asked them about the person who could manufacture trusses for the project. Then he hired Francois as a subcontractor because they are specialists in the field. On the relationship between Massbuild and his sons' business, Blue Sands, his testimony was that he does not have intimate knowledge but heard that it existed. He knew about it at a later stage. He testified that he initiated a subcontract for Blue Sands with TM Ecoglobal, the third defendant. He was occupied with other work, and because of his business relationship with Builders he advised his sons to discuss the Limpopo project with all the main contractors with a view to sub-contract. When he heard about the Limpopo project he was busy with the Alexander hostel project. He met with Linnah Nhlapo, the director of TM Ecoglobal in Limpopo to introduce his sons to the director of TM Ecoglobal.

[102] When asked by Adv Matlhanya that his son testified that TM Ecoglobal was a paymaster in the project, his response was that he was not part of that discussion and therefore he is no knowledge in that connection. On how he was appointed as a subcontractor for Massbuild in the Alexander project, he testified that you have to identify the scope of the work, and furnish quotation in writing, then followed by an approval.

In his case he dealt with the first defendant, and the approval was in writing. The approval would, however, come from Andries' seniors.

[103] It was put to him that his son Tshepo testified that he never met the director of TM Ecoglobal. His answer was that he is the one who introduced his sons in the office to TM Ecoglobal to discuss and agree on the construction deal. He testified that Blue Sands have done bigger project before and they have CIBD grading of about 6 if not seven.

[104] Under cross examination by Miss Bosman, he testified that he is the shareholder and director of ENM, which manufacture bricks and supply hardware materials. He is not involved in the running of Blue Sands, because the latter is run by his sons Bobo and Tshepo. He confirmed that the Alexandra project was about the construction for Reatha Asset Management and they were subcontracted to install staircases. He had a directed deal with Massbuild and subcontracted the fabrication and installation of the staircase to Francois du Plessis' company, Structus. The business relationship his company had with Massbuild involved the construction of RDP where he was subcontracted by the plaintiff. Massbuild was represented by the first defendant. In the Alexandra project, Andries was the one who was supervising the project on behalf of Massbuild. He added that the plaintiff was the one who assigned Andries to do the job with him.

[105] The meeting held with the TM Ecoglobal was in Blue Sands offices at Vereening where he introduced his sons, Tshepo and Bobo Mokoena to Miss Nhlapo. Mr Sehloho Andries was also in attendance. Mr Sehloho told him that TM Ecoglobal was awarded a subcontract.

[106] It was put to him that according to evidence Massbuild was not involved in construction. His response was that he has invoices to show that Massbuild was involved in construction. He was doing construction work with Massbuild as a subcontractor. He could not

comment whether Andries had authority to bind Massbuild in a contract, all he knew is that he was dealing with him in the projects.

[107] Under cross examination by counsel for the second defendant, Mr Slabbert, he testified that he held a meeting with Toney Riley and Andries to discuss the issue of Massbuild and Builders after the Limpopo project was terminated. He once met Russel Stead, the second defendant at the Builders Warehouse Bedworth Park after he was introduced by Mr. Sehloho. Andries told him that Mr Stead was his senior.

[108] Counsel for third defendant, wanted to know whether he was surprised that TM Ecoglobal was subcontracted to the Builders Warehouse. He answered that he was not surprised. He testified that he was the one who arranged a meeting between TM Ecoglobal and Blue Sands so he could persuade TM Ecoglobal to give Blue Sands a subcontract. The meeting was attended by him, his two sons, Andries and Linnah Nhlapo. On upfront payments, he testified that it happens that a subcontractor can request that payment be made to him in advance. It is nothing out of the ordinary, as long as the job would be done.

[109] Builders Warehouse had contracted his company before to construct RDP houses. It will be something new if someone were to deny that the plaintiff does do construction.

Mr Sipho Skosana

[110] He was previously employed by the plaintiff at its Bedworth branch, Builders Warehouse. He was employed there as a departmental manager since 2005, and left in 2017. His responsibilities included managing stock on the yard and people working in the yard. He met the first defendant in 2010 whilst the witness was an internal yard

manager. Andries was also employed as a department manager before he was promoted as key account manager. He, Andries, was reporting to the trade manager, Frank Marcus, and the store manager, Derick de Beer. He described a 'once off vendor' as one where their usual vendors do not have an item from their list, and they have to source it from outside vendor. His understanding of the policy of procuring a 'once off vendor', is that the issue will be referred to the expenditure, the procurement department. He would not answer whether the first defendant could be able to influence the process because he was never a key account manager himself.

[111] During cross examination by Miss Bosman he testified that he could not give evidence regarding the contracts which the first defendant and the plaintiff concluded.

Mr Pieter Pretorius

[112] He is a sales manager. He worked for Builders Warehouse before. He started off as a store manager and ended up as regional administration manager, a position he held for almost six years. He looked after a group of stores for administrative controls. He knew Russel Stead as administration manager and when he left Russel was acting store manager at Bedford Park. He was an initiator in Russel Stead's disciplinary inquiry relating to Reatha contract. He recall Neil Tovenor picking him from his house to collect Russel from his home telling him that his suspension was lifted. He did not know the reasons why it was lifted. With regard to limit in authority document, he testified that it was not his role to inform every individual regarding the legal authority limits. Russel's role at the store level would have been that all individuals within the store would report to him as the acting store manager. Russel would at that position acquainted himself with the policies of Massbuild. The way he knew Russel for a number of years, he could not imagine

that Russel had acted in bad faith in signing the Reatha contract. He testified that no one in the senior position at the store knew about the Reatha contract. He also came to know about it when Russel was suspended and the investigations unfolded.

Mr Andries Sehloho

[113] He is the first defendant in the current proceedings. He joined Massbuild (the plaintiff) in or around 2009 as a yard external manager. He held this position for about three years. He was a key account manager when he left Massbuild. His role as a key account manager was to go out and look for customers, and to liaise with the suppliers. He also had to ensure that he met the margins as set out by the plaintiff. Overall, he had to make sure that the customers are happy with the services and stock received from Massbuild. He was managing about 80 customer accounts. He ended up managing these accounts because some customers did not want to be moved to other accounts managers. On his relationship with Reatha Acquisitions, he testified that he was treating all the customers as if they were "A" level. He added that it was the role of a key accounts manager to go on site and meet up with contractors and enquire on their needs. In the performance of his duties, he had to bring back the information to his seniors. He was not expected to make his own decisions without the blessing or instructions by the seniors. He was reporting to the branch manager, Mr. Russel Stead.

[114] He testified that Reatha Acquisitions was one of his clients at Massbuild since 2012. He met Dr Mary, the director of Reatha whilst they were busy building RDP houses in Sebokeng. After they finished with the RDP project, Reatha had to refurbish the hostels in Alexandra, and Massbuild was supplying the material to the project,

and were constructing staircases, but they appointed Bhukulani Brickwork using purchase orders. He described the purchase order as a document that gives the contractor instructions what to do in terms of the scope of work. According to the arrangement with Massbuild, Bhukulani would be paid 50% upfront of the total amount charged for staircases, with the balance to be paid on completion of the work.

[115] On the Limpopo school project. He testified that the project came at the end of Alexandra project. It was in November 2016 when Dr Mary of Reatha called him and asked him not to take leave in December 2016 because she had just been awarded a project for 4 schools, and she need his assistance with regard to material supply. He approached his seniors, namely Russel Stead, Kobus Visagie and Frank Grey and informed them of his decision not to take leave because of Reatha project.

[116] On the contract with Reatha. He begun by acknowledging his signature appended at the bottom of the contract with Reatha dated 28 February 2017. Upon receipt of the document a discussion took place between him, Russel Stead, Neil and Pieter Pistorius after which they gave permission to sign the document/contract. He merely appended his signature as a witness on the contract. The said meeting took place in Russel's office.

[117] In January 2017, a meeting was held in Pretoria with Reatha's project manager, John Khyamba, and Dr Mary's secretary Dafney Meiring wherein Dr Mary asked him to go back to his seniors with a proposal that they run the entire Reatha project as she did not want to get involved. She made it clear that on this project she would make an upfront payment and the seniors needed to be made to understand that contractors would be paid upfront to avoid them failing to perform. He informed Russel about the proposal and the

changes on the initial arrangement. Specifically he told Russel that the client does not only want us to supply the materials but to also do the construction of class rooms. Russel's response was that he would escalate this issue to the seniors as they could not make that call. Three days later Pieter Pistorius and Neil were at the store and he was called in to explain how the project is going to be executed, and in particular how the upfront payment was to be made. The seniors understood clearly what the contract was about, and Mr. Pistorius response was to the effect that as long as it was going to be managed properly. About Mr Pistorius' testimony that he only came to know about the contract during the investigations, Mr Sehloho accused him of having lied under oath. He testified that there was no way that Pistorius did not know about the contract because he reported what was in the pipeline for the business and Russel always reported to them including Frank Marker. There were meetings that used to be held to give feedback on the progress and about potential customers. Russel confirmed that the seniors gave him the go-ahead, and knowing him, he would not lie.

[118] On the settlement of R5 million that Massbuild had to refund to Reatha, Mr Sehloho testified that he could not see any reason why plaintiff would justify that refund to Reatha, regard being had to the scope of work done on site. He could only assume that Dr Mary may have threatened to report Massbuild to the black business council, that they are involved in construction. He testified that the reason why Dr Mary could have approached the plaintiff to do construction work was because of the previous Alexandra project involving the construction of staircases.

[119] With regard to delivery notes from TM Ecoglobal, he testified that it is part of the upfront payment arrangement that they had. According to the instructions of his seniors they needed to get delivery note, tax invoice and send it through to merchandise

control. They must have been signed by him according to Mr Stead's instructions. When he signed one of delivery notes Mr Stead was sitting next to him. He also had to sign 'as per Dafney' because he spoke to her, and Mr Russel needed the signed document for payment to be effected.

[120] The delivery note of 13 March 2017 was signed after the money was paid, that is two weeks later. Mr Russel informed him to sign these documents in order for upfront payments to be released. He also informed him that the head office needed client to sign the delivery so that upfront payment money can be released. The second payment was made as a result of the delivery note dated 20 May 2017, and Mr Russel was also sitting next to him when he signed the document.

[121] Regarding Structus Engineering. He further testified that the Reatha project was behind schedule. Structus Engineering was appointed to do site establishment. He went with them to Limpopo to do the assessment. Dr Mary asked him to send the interim invoices of the contractor they appointed because the DBSA was on her neck. That is the reason he went to Mr Russel, and the site establishment had to be done to make it appear to DBSA that they are making progress. After the site establishment, Dr Mary took pictures to show DBSA that there is progress on site. She also sent him a text message stating that she did not want to work with white people on site. She found out that Massbuild had appointed white people whilst fellow black people are suffering. She gave him instructions to chase them away from site. He took the message to Mr Stead that afternoon who wanted to speak to Dr Mary to establish what the problem was. Mr Stead asked him to get someone to assist before close of business. He told Russel that he could only think of a family member at that moment as they had to hit the ground running. Then Russel instructed him to get the company details and

check whether the plaintiff would accept the proposed entity. He was worried that the selection criteria is not done in the store, but by the head office. Andries then called the director of TM Ecoglobal, Mrs Linnah Nhlapo to inform her of the business opportunity and the urgency thereof. As a commission earner he was glad that TM Ecoglobal had offered the plaintiff a discount on the deal. The profit margin of the business were also going to go up. After obtaining the relevant information required from TM Ecoglobal he passed them through to merchandise controller to do their assessment before sending to the head office. On the following day, the head office had approved TM Ecoglobal as one-time vendor. Mr Frank Uzi would be the person responsible for approving the 'one time vendor.'

[122] On the BOQ, he testified that he sent the document to Structus on 23 February 2017 so they could quote based on it. There was, however, a challenge in using the BOQ as it was not in line with the drawings provided. This was also confirmed by John Khyamba during his testimony. So they had to visit the site to do some measurement in order to get the accurate scope of work. Dr Mary had to give them a new offer from which they would add their makeup as a result of the unworkable nature of the BOQ. The amount on the contract which he signed as witness was a globular figure. Asked if Dr Mary knew Structus Engineering that manufacture the steel trusses before, he responded that he doubted because Massbuild would not reveal the names of each and every supplier to third parties.

[123] With regard to his relationship with the director of TM Ecoglobal, he testified that Mrs Linnah Nhlapo was married to his brother, so she is his sister-in-law. For TM Ecoglobal to deliver the materials on site, there had to be payment upfront to whoever was going to be appointed by Massbuild. Towards the end of Alexandra project, Mr Mokoena senior overheard Dr Mary talking about the urgency of the

Reatha project, so he approached him and requested him to arrange a meeting between Blue Sands and TM Ecoglobal with a view to subcontracting Blue Sands. So he spoke to Linnah and told her about the proposal to sub-contract Blue Sands on the project. He also told that her she knew Mokoena's company as one time vendor at the Builders and he has done most of the projects successfully. So the meeting eventually took place at Blue Sands' offices before the first payment was made. Present at the meeting was Bobo, Tshepo, Mr Thabo Mokoena (their father) and the first defendant. Emails were exchanged and scope of work was discussed. Blue Sands was expected to do the same scope of work Reatha gave to Massbuild. When asked if Blue Sands had appointed the project manager on site, he replied that he does not know, but they were project managers on site. He was the face of the project as per Daphney's testimony in the context that Reatha was his client and had to ensure that the work is done properly.

- [124] In relation to the email sent by Dafney on 11 April 2017, regarding the progress in the project, he testified that Reatha was already behind schedule. He spoke to Russel Stead and Raymaker about the unfairness of the client. Reatha was trying to push them to close the gap. Most of the materials had to be approved by engineers who took time to do so. So he made client aware of these processes, specifically that for the clip lock and trusses to be approved it would take seven working days. Dr Mary, according John Khyamba, wanted the money (R3 500 000.00) held in her account with Builders to be paid into her private bank account as she had another supplier who offered her a better rate. This is the same amount used to procure materials. She discovered that Massbuild was not supposed to be in a construction space, so she was bullying them. They were not at fault, because there was an action or recovery plan in place. Subsequently a meeting was held

in which they informed Massbuild that they no longer want to work with them. She, however, changed her mind (Dr Mary) after the meeting with Tony.

[125] With regard to the communication between Blue Sands and TM Ecoglobal pertaining to the invoices, he testified that he obtained email correspondences from Linnah Nhlapo after the testimony of Tsepo, however, they were not discovered by his legal representatives for the benefit of this Court. Builders Warehouse were not involved on the invoicing part. The usage of BOQ by Kobus Visagie was wrong because the BOQ were invalid according to the him. The prices allocated to Vele school does not correspond with the bill of quantity. The client decided that they would work on the lump-sum instead of the BOQ.

[126] On his way from Free State he received a telephone call from Kobus Visagie requesting Kobus details. He told him to set up a meeting with Tshepo of Blue Sands in order to reconcile the material which was procured, and to assess what was not delivered, and further to determine what was paid. The meeting was subsequently held, and was discovered that there were materials delivered on site and Builders Warehouse and Dr Mary had not paid for it.

[127] It was put to him that Kobus's testimony was to the effect that the Blue Sands sourced materials elsewhere than from Builders Warehouse. In fact Massbuild was not in the game. His response was that TM Ecoglobal was a subcontractor to Massbuild, and they were not going to be controlled by Massbuild to buy from Massbuild after Massbuild bought from them as a supplier or contractor. He also did not generate commission from the sales but from invoices that were generated at Massbuild.

[128] With regard to the financial transaction with Linnah Nhlapo, he testified that Linnah was his sister in Law, he is entitled to ask her for any financial assistance such as the loan, there is nothing wrong with that. On Daphney's testimony that TM Ecoglobal was not capable of delivering on the project in that the job required someone with grade 7, and TM Ecoglobal had grade 1, Mr Sehloho testified that Reatha was supposed to request the CIBD from Builders Warehouse, and this was not an issue when the contract was signed. On programs of work, he testified that when he engaged Structus, the project was already late. Zimahule School was supposed to commence on 27 February 2017, and be completed on 16 May 2017. The revised programme stated that it would start on 18 January 2017 and complete on 28 July 2017. The dates given to DBSA by Reatha on the commencement and completion of the project are not the same with the one that they were given by Reatha to work on.

[129] Under cross examination by counsel for the plaintiff, Mr Sehloho testified that: he accepted the terms and conditions of the contract of his employment with the plaintiff dated 22 December 2009. He denied that he had access to online platform where rules and regulations were published by the plaintiff as per Pistorius' testimony. He did not have a computer as external yard manager, he only had access to do the quotations and to check the stock availability. When he became a key account manager he had a computer or a laptop, and had access to Massbuild network through their 3G. He did not attempt to go through to places being asked by counsel, neither did he have any idea about the information. He also denied ever receiving regular updates on changes to Massbuild policies sent via emails to each employee of Massbuild as testified by Pistorius. He admitted to receiving policies and regulations when he joined Massbuild as external manager. He also confirmed receiving

the document to the existing terms and conditions of his employment dealing with his promotion, as key account manager but it does not say it is an addendum to the existing terms of employment as alleged by the plaintiff. But when pressed by Miss Bosman, he conceded that the only amendment to his employment contract in 2013, pertains to his promotion. He, however, maintained that Massmart did not inform him of the changes.

[130] According to Mr Sehloho, the terms of the lower position as external manager would not apply to the senior position as a key account manager. 'It is not proper...they do not apply.' He conceded that the entitlement to a medical aid and pension fund benefits do not appear in the promotion letter. Miss Bosman put it to the witness that he was being selective by choosing the benefits that come with the contract, and rejecting the obligations that accompany those benefits. He testified that Pistorius testimony that the employees had a duty to obtain the rules and regulations of the company apply to senior positions like that of Russel Stead, not at his level.

[131] It was put the witness that he knew very well throughout his employment that Massbuild was not in the business of construction. His response was that when he started as an external manager, and while still on probation, Massbuild was involved in building 125 toilets in the North West through a contractor that it appointed. He, however, accepted that Massbuild was a building material supplier on paper. It was further put to him that he was supposed to be honest to Dr Mary Setate of Reatha about the business of Massbuild, and not to create an impression that the company would do construction. His answer was that he delivered the message to Massbuild. At that moment what was in his mind was the fact that Massbuild was involved in the construction of toilets in the North West, and the fabrication of steelwork in Alexandra. After the meeting with Dr Mary, he made telephone calls to Kobus and Russel

Stead, but Stead told him to come to the store to discuss. It was in January and sales were slow due to the fact that contractors were closed for holidays. Having discussed the Reatha's request to do the project in Limpopo, Mr Stead told him that the issue had to be taken up with the seniors, referring to Neil Tavenor and Pieter Pistorius. Mr Stead informed them via WhatsApp message in his presence. After the approval, he contacted Dr Mary via telephone to advise her about the positive outcome. A meeting was subsequently held with Russel and seniors in which Mr Sehloho was in attendance. They discussed the issue of upfront payments and the fact that Dr Mary had money in her account which she did not want SARS to get hold of. He said it was not the first time he raised the issue of SARS with reference to the Dr Mary.

[132] Mr Sehloho also testified that he did not have the power to bind Massbuild when he signed the impugned contract. Mr Russel Stead is the one who confirmed the appointment of Massbuild, and signed the contract. He merely witnessed Mr Stead's signature. He denied that he co-signed the contract.

[133] It was put to him that on 3 April 2017, Dafney sent him an email letter relating to the revised contract price which also touched on suspension of the contract and performance guarantee. The relevant excerpt reads: *"Works will be certified as per schedule of quantities per school and at a provisional sum of R9 562 103.20 excluding VAT."* Adding VAT will amount to R10 900 797.68 which accord with the BOQ figures sent by Khyamba on 30 March 2017. His response was that, that was a summary of the lumpsum amount agreed upon. He insisted that they were not working on BOQ, but lumpsum figure. Although he was asked to agree to the BOQ, Khyamba was just sending those emails knowing fully that they were not working on them as they were unreliable. In this regard Mrs Bosman put it to him that work could not be certified

without reference to the BOQ, and it was not John's nor Daphne's evidence that the BOQ were merely sent and were not of any use. He replied that John Kyamba was on site to measure the work done. They worked on actual measurement which they went to do with Structus Engineering on site. Mrs Bosman pointed out that the quotations of Structus were done in January 2017. His response was that there was back and forth on the quotations.

[134] On the upfront payment arrangement, it was put to him that Dafney's testimony was to the effect that the monies held at Builders Warehouse was to be paid out upon certification of the work done on the project. Once there has been an inspection by a quantity surveyor and the project manager has certified that the work has been done. Then Builders Warehouse would render an invoice to allow for payment to be done. He disputed this assertion by Dafney, and testified that he has a proof of email from Dr Mary where she talked about upfront payment.

[135] He testified that the reason he was the only person in receipt of the email correspondences is because he was the only person to attend to the business on site, and was reporting to the superiors like Raymaker about his whereabouts. It is also his testimony that Structus were not officially appointed as a subcontractor when they did the site establishment. He first approached Bhukulani Brickyard but they were too busy, and that is when he appointed Structus Engineering. The latter also do construction. Bhukulani was contracted to do staircases on Alexandra project on fit and supply basis through him, and he built up a relationship with Mr Mokoena senior from there. Asked why he had to choose Bhukulani Ba Make Brickyard who could not do the job and had to find Structus Engineering to fabricate the staircases and install them. For Mr Mokoena to subcontract is nothing new in construction it is a norm in the construction space. It was put to him that finding a middle

person to do the job could not have been in the best interest of Massbuild. His response was that parties would normally send quotations and agree on the figures. In any event Builders are also a middleman they do not manufacture anything they are selling. Miss Bosman put it to him that he always insert a middleman like in the current case where he inserted TM Ecoglobal. There was no need in the Alexandra project to insert Bhukulani, and no need in the current matter to insert TM Ecoglobal. This was, according to the plaintiff his *modus operandi*. Bhukulani was getting a cut, taking a margin in the form of percentage. His answer was that they are appointed by the head office, and they are also in business to make money like any other company. When he brings a supplier to Builders they are not compelled to deal with that supplier. The head office does a due diligence, and he has no access.

[136] Counsel for the plaintiff also asked Mr Sehloho why out of all the construction companies he worked with as key account manager for a period of almost four years he would approach the company owned by his sister-in-law to do the Limpopo project? He replied that it was going to be impossible to ask a Builders Warehouse's client. Builders Warehouse did not have a list of construction companies in their database. His sister's company TM Ecoglobal met the requirements of Massbuild hence they were appointed. In the appointment letter from Reatha there was no specification of an experience stipulated. The issue of CIBD grading was never brought to his attention as requirement from DBSA.

[137] On the reason why the contract was hurriedly signed, counsel for the plaintiff put it to Mr Sehloho that he wanted to have the contract signed because the sales were slow and needed a commission, and Dr Mary was about to deposit the funds on the 28th of February. He replied that it was not his decision and he did not influence anyone to make it. He just went there and said here is

the document and the email regarding payment was shared amongst them including the seniors.

[138] Regarding the 50% paid upfront by Reatha to the plaintiff, Ms Bosman put it to Mr Sehloho that those funds would be available for materials, and to be paid against the actual materials that were sourced and the progress that was certified in terms of the bill of quantities. Mr Sehloho disagreed, and testified that if there was an issue concerning the invoices which were issued before the materials were delivered it could have been raised long time ago because at Builders Warehouse when you touch a customer's account it automatically send the invoice to Reatha. However, Miss Bosman reminded Mr Sehloho that Dafney Meiring raised an issue after realising that invoices were being raised with no visible progress on site. It was her evidence that Builders' Warehouse was not entitled to pay out the money until the progress on site was certified by the quantity surveyor and the project manager from Reatha. About R5 million was paid on the start of the project. The upfront payment was limited to the deposit to the account held with Builders, Reatha never gave licence for the money to be paid upfront to sub-contractors.

[139] Furthermore, counsel for the plaintiff asked him why he would appoint TM Ecoglobal with an exaggerated profile without any experience in construction. His answer was that she was involved in the renovation of her mother's house and he did not make the decision to appoint her, the instruction came from the superiors. On monies that was paid to him by Mrs Nhlapo, specifically the R60 000.00 paid into his bank account on 18 March, he testified that this was a loan from Mrs Nhlapo which he paid back. He was going to China after beating up all the key accounts managers of Builders Warehouse. He needed some pocket money, so he had to

borrow from TM Ecoglobal. Mrs Nhlapo had the right to refuse if she did not want to.

[140] It was put to Mr Sehloho that he benefitted directly from the alleged loan transaction with Mrs Nhlapo for introducing TM Ecoglobal to Massbuild. Mrs Nhlapo did not have money in her account before Massbuild transferred the large amount of money into her account. This is the money which Mr Sehloho borrowed from. His response was he refunded the money. Besides the family of Mrs Nhlapo previously obtained more money from him before. He did not ask Mrs Nhlapo where she got the money from. There is nothing wrong with that.

[141] During cross examination by Mr Slabbert, counsel for the second defendant, he testified that his relationship with Mr Russel Stead was like that of a father and a son. He could trust him with anything. In relation to the Reatha contract, Russel Stead was copied in the emails three times because in some instances he would go to his office to report to him personally. At times, He would phone Russel when he came out of the meetings to report, but due to Russel hearing problems he would insist that he comes to his office to discuss. They would submit weekly reports to the seniors about their whereabouts and interactions with clients.

[142] He also testified that based on his working experience with Russel he would have consulted with his seniors and obtained permission to sign the contract. He stated that Russel, Frank Raijmakers and Neil Tarraina were the senior managers who were aware of the contract. He does not know whether in terms of the actual document Russel could have escalated the contract to them. On the revised one, Cobus Visagie was aware of it, he was in Russel's office when Russel signed it. When asked about the nature of Reatha contract. His response was that he was not expecting the type of a

contract, it was the first time he had come across such contract. The other contracts were the fit and supply contracts based on purchase orders. He had to escalate it to his seniors for approval.

[143] He testified that before the Reatha contract was signed, he had a meeting with Russel, Neil Taran and Pieter Pretorius where he told them about the upfront payment to subcontractors, and they had agreed. Asked whether he received payments from TM Ecoglobal, Blue Sands or Structus Engineering, he responded that he received R60 000 as a loan from TM Ecoglobal, and borrowed about R3000 from Structus when he ran into financial problems. He repaid all these amounts. He also testified that Russel did not have any inputs on the appointment of the subcontractors.

[144] Counsel for the third defendant, Advocate Mashimbye asked Mr Sehloho if he had business interests in TM Ecoglobal, and how they got involved in the Reatha project. His response was that he did not. For TM Ecoglobal to be involved in the project he initiated that via telecommunication to Mrs Nhlapo after Structus Engineering were booted out of site. Mr Stead asked him to find a company which would move swiftly to assist the situation. He informed Mr Russel that the only company that came to his mind was the one owned by his family member, and he instructed him to get their papers and send them to the head office. He denied that the first company that came to his mind after the contract was signed was Bhukulani Ba Make. He testified that it was Structus Engineering. TM Ecoglobal came to save the situation after Structus were chased out of site. Asked if there were requirements put in place by Reatha for Massbuild to do the project, he responded that Reatha gave the work to the plaintiff with the full knowledge that the latter would use its suppliers to execute the job.

[145] In terms of one-time-vendor requirements, no family member was eligible to be appointed. In this regard Mr Sehloho testified that Mr Urzi who is responsible for the approval of one time vendor is to blame for appointing TM Ecoglobal. He further testified that he did not know Mr Urzi personally until he testified before the court. He assisted Mrs Nhlapo in finalizing the quotations because he had quotations from Structus Engineering where he wanted her to have reference to and he also wanted a 15% discount from her. He also gave her a scope of work.

Mr Kuda Kwashe Hakutangwi

[146] He testified that he joined the plaintiff (Builders) as Finance Director in October 2017. His functions include assisting the board in executing the strategies, and ensuring that Builders produce accurate financial results. The Reatha contract was already in place when he joined the Builders in October 2017. He confirmed payments were made to TM Ecoglobal.

[147] He was involved in settlement negotiation involving the Reatha contract. As a finance director from the governance perspective and the delegation of authority he was responsible for the signatures with the assistance of general counsel in Massbuild, to sign off any agreements that were placed on his desk. The Board of Massbuild had delegated that particular authority to him, to sign service level agreements. This would require the general counsel to first check the document and certify it as correct. With regard to the Reatha contract, the Commercial Department had done some reconciliation in terms of the work done and the materials that were invoiced and that had not been invoiced. Those that had not been delivered had to be settled and Reatha wanted to be refunded. His understanding of TM Ecoglobal's role as one-time vendor to Massbuild was that, it was assisting Massbuild to deliver materials in the Reatha project.

On the meeting held with Andries, he stated that they wanted to understand his concerns as he kept sending messages to Massmart CEO in the United States. Andries raised issues regarding the SAPS involvement and the manner in which Builders handled his case.

[148] He testified under cross examination that he is currently employed by Massmart as a Vice President for Finance E-Commerce from 1 February 2022. He testified further that the Key Account and Branch Manager cannot bind Massbuild to a contract. The reason for that is that there are processes Massbuild ought to follow for the contracts which it concludes with third parties to ensure that there is nothing adverse to Massbuild in those agreements.

[149] He testified that in terms of the Delegation of Authority the amounts above his delegation would go to the CEO, or the Chief Finance Officer of Massmart. The plaintiff repaid an amount of R2,9 million for outstanding services to Reatha, and R1 105 782,50 for an amount charged in excess of BOQ. The total came to R4 402 782,52.

[150] Asked by Advocate Mashimbye if any employee who signs a document on the instructions of his superiors would fall within the scope of delegated authority, Mr Hakutangwi testified that the delegated authority is available for every employee on the website and across the organisation, and every employee would refer to that to see if he or she is allowed to sign the contract. In regard to the settlement agreement, with Reatha, he had read document, understood the subject matter and signed it off.

Mr Jerry Mashele

[151] He is a Police Captain attached to the Commercial Crimes Unit. He was assigned the case to investigate from Sandton SAPS on behalf of Massbuild. That is how he had an interaction with the first

defendant. There were allegations levelled against Andries Sehloho in which Mr Theo Weyers was the complainant on behalf of Massbuild. He has been a police officer for 33 years. They service about 35 police stations. They investigate fraud and corruption. The case against Andries was closed in 2018 according to their systems. He took a statement from Andries in which Andries stated that he was the link between Ecoglobal and the subcontractor, Blue Sands. After he conducted his investigations according to the investigation plan, he gave the docket to the responsible prosecutor. The prosecutor declined to prosecute.

Mr Chris Lourens

[152] He was an Operation Director for Massbuild until November 2019.

He reported directly to the CEO. He was charged with the execution of business strategy and operation of the stores, ensuring that they operate efficiently and yield profits. Tony Riley as a trade manager was reporting to him. He relies on the reports from personnel that report to him. He got to know of the Reatha contract when things started going wrong, when they had to start thinking of refunding the money.

[153] He testified that Frank Uzi was a merchant who approves listing vendors or product that is not normally stocked within Massbuild. When asked why Mr Kuda would testify that the settlement agreement with Reatha was based on the fact that the materials were not delivered on site, his response was that they operate in a matrix structure, and Kuda would have carried the responsibility and onus to manage the risk, and would have dealt with the situation the way he felt was necessary as Financial Director. He confirmed that the claim was paid because he had no evidence to prove that the materials were delivered.

[154] Under cross examination by counsel for the plaintiff, he testified that there are limited occasions where Massbuild would be required to supply product and fit it, which include roof trusses or kitchen cabinets or carpets. A third party would be sourced by Massbuild to supply the product and install it. Massbuild would never carry construction work because it is specialised in nature and would be detrimental to its business if something were to go wrong. In signing the settlement agreement Mr Kuda relied on the advice from the legal department and the analysis done by Mr Kobus Visagie. He signed on financial matters. No agreement is signed by Massbuild without that agreement being reviewed by the legal department to ensure that Massbuild is not entering into onerous, unfavourable or unlawful agreement that is not compliant. The legal department is the custodian of the delegation of authority, which authority is delegated by the Board of Massbuild. An agreement such as Reatha cannot be signed by key account manager. A store manager cannot even sign an expense in excess of R1000.00.

[155] Under cross examination by Advocate Mashimbye, he testified that a one-time vendor must be able to fulfil what it undertakes to deliver in the order of goods that are required. Once it has demonstrated the capacity to deliver the accounting department will also register the one time vendor. The merchandize will do the recommendation if all the paper work is in order.

Mr Wayne Slape

[156] He is the Chief Executive Officer of Massmart Group. He was in this position since 2019. He is not well conversant with the dispute between Massbuild and the first defendant to respond intelligently. He does not get involved in detail to understand the job functions of each individual positions. In his position he does not get involved in the businesses of Massmart. Things that fall below a certain

threshold would be taken by the legal department. He would be familiar with significant legal matters which would be reviewed by Ethics Committee and make it to the Board. It is nearly impossible for him to know what about 45 000 employees of Massmart would be doing at a given time.

The evidence of the second defendant

Mr Russell Bruce Stead

[157] He was in the employ of Massbuild for a period of 10 and half years.

As acting Branch Manager he had 10 departmental managers and 134 employees reporting to him. His direct line report was Neil Taren, the regional operations manager. In the relevant period he was an admin and acting branch manager. He assumed the latter position in 2016 until he was dismissed in May 2018. He effectively ran the entire store from operations point to administration level of work. He would regularly report to Neil Taren telephonically so he knew what was happening in his store at all the times. Once the financial statement have been updated they used to have meetings the following month whereby all the branch mangers would present their store performances and concerns.

[158] As recognition for his good work he was nominated as one of the delegates to attend Massmart conference in America. Although it is mentioned in his contract of employment, he was not provided with the rules, regulations and polices of the company during his appointment. The legal limit authority was only obtained by Peter Pretorius during the course of investigation. He only became aware of it when he was given a pack of papers relating to his disciplinary inquiry.

[159] He testified that in about November or December 2016, Andries informed the entire management of Massbuild, including Kobus

Visagie and Neil Taren, that Dr Mary of Reatha has won a tender for three schools that had to be renovated and was considering giving business to Massbuild. The business did not know about the written contract, but knew that the sales were forthcoming. In February they highlighted the business plan and the potential sales coming through. At that time sales were 6% down and margins 5% down. At the end of February the whole regional team knew that R5 million was coming from Reatha.

[160] He testified that if he knew about the legal limit document he would not be sitting in court today. He walks the talk and abide by the rules. He was not involved in the appointment of one-time vendor as branch manager. It was authorised by Franck Urzi at the head office.

[161] According to Mr Stead it was Andries who triggered the kick start of the appointment of one-time vendor process. Andries sourced a one-time vendor and obtained all the supporting documents to send to head office to get approval. His authority as a branch manager is only limited to R50 000.00. He did not see the purchase order before, until he came to court.

[162] It was Russel's testimony that he played no role on the delivery notes, and tax invoices relating to Reatha matter. Andries would have taken these documents to the receiving department who would capture them, and inform the finance department to release the payment for one-time vendor. He had no involvement in these transactions. He was aware that Structus Engineering were chased away from site but Andries never told him about that. It came through his line manager Frank Rodgermakers. Andries had already sourced an alternative supplier. He denied giving Andries any instruction or approval to employ his sister in law's company. TM Ecoglobal came to his knowledge for the first time when his

suspension was lifted, before then he did not know how it was related to Andries. There is no way he could have breached the company's policy by appointing Andries' sister in law's company. Similarly he did not know about Blue Sands until the relationship went sour. When he attended a meeting held in Vereeniging with Kobus he thought EMN Trading was the subcontractor. He confronted Andries about this, who told him that Blue Sands was a sister company of EMN Trading that is busy with the Alexander Project. He did not give Andries any authorisation to appoint his sister in law's company. He still does not understand why Andries would involve a middle man instead of going straight to Blue Sands. He was equally not aware that Structus Engineering had supplied a quotation to Massbuild, neither was he aware that there were subcontracted in the Alexandra project, all that he discovered during the trial.

[163] He testified that Andries approached him with a written contract and told him that Structus Engineering were going to do the fit and supply of the steel roof structure and all the other terms and conditions in the contract will be incorporated in the supply and fit. What surprised him is that Andries knew of Blue Sands before he appointed TM Ecoglobal, why did he select TM Ecoglobal to provide the service. He would have cut out the middleman and helped the business to grow profit. It would have made a business sense. They have a database of preferred sundry vendors. The on-time vendor is not recorded on the data base at all because there is no contractual agreement between a one-time vendor and Massbuild. Andries and Frank Rajimakers could have complied with the business process called third party intermediary to ensure that the contractor fulfils the mandate of the project.

[164] According to Mr Stead, a third party intermediary is a supplier that would provide services and get processed on the database as a

sundry vendor. It is a very detailed checklist application, and it is an application which Blue Sands should have completed, and had to be vetted by the head office. He and Andries went for training regarding the third-party intermediary. They have their own database for the supply of bricks, cement, roof trusses and other products to fulfil the mandate sourced from within the preferred suppliers. There was no reason why Andries could not make use of direct deliveries along with external process. He would have obtained deliveries from the nearest stores next to the site, and he would have benefitted from the sales. He could have liaised with the newest stores to assist with the logistics behind the deliveries. There is a functionality called F8 on the keyboard to flag the delivery of another store.

[165]With regard to delivery notes he testified that he did not give Andries instructions to sign the delivery notes, he would never breach the company policy that he so familiar with when it comes to delivery notes. He first noticed the delivery notes when he met with Kobus, Karabo and Andries at the offices of EMN Trading. Whatever arrangement Andries had with Dr Mary in this regard does not concern him. Looking at the delivery note and tax invoice, it is humanly impossible that the materials were delivered on the same day the tax invoice was generated. When he was asked via WhatsApp on 22 March if there is an issue with POD, he did not know Andries had already signed it. A one-time vendor can only get paid once the delivery note had been signed by the customer. The customer will thereupon print a tax invoice along with the delivery note. In this case Andries was the one dealing with the TM Ecoglobal. It is absolutely incorrect that Andries signed the delivery note in his presence. He would not have known if the materials were delivered on site because he was not involved.

[166] On the issue of upfront payment, he testified that the issue was brought to his attention, Neil Taren and Pieter Pretorius when Andries raised it. At that time Neil and Taren were in his office and he mentioned it to them. The understanding they got from Andries was that Dr Mary wanted to make payment into a trade account, and it was going to be client's money, and we cannot stop client from doing so. The testimony by Andries that the money was meant to pay one-time vendor is incorrect and is new to him. It was never discussed. Dr Mary wanted to pay R5 million into her trade account. She wanted to release it in order to avoid an income tax. On 24 February Dafney emailed a letter to Andries requesting him to invoice Capensis Investment because they wanted to pay the funds into Builders account. The pro forma invoices were generated pursuant thereto.

[167] He testified about the version of events relating to Reatha contract as follows: One afternoon Andries approached him in his office and informed him that Dr Mary, director of Reatha wanted him to urgently sign the Reatha contract (document) so she could arrange payment of R 5 million. As a person performing the role of admin and branch manager he was under pressure and stressed. Andries told him the document related to snag list, and without reading the terms and conditions, and on the basis of the fact that they were going to retain 10% of snag list for fit and supply, he signed the agreement. He signed the document in good faith. He also came back to inform him that Dr Mary wanted him to draft a memo of 10% retention and to confirm that their product met the SABS. His understanding was that they were going to use their own suppliers. He only saw the memo on 10% guarantees written by Frank Raijmakers on 30 March in court, he did not know about it before the hearing. The said memo was sent to Kobus Visagie on 31 March, and implies that Visagie was aware of the contract. Andries

never informed him that he was sourcing Massbuild to become a contractor in the Reatha project.

[168] Under cross examination by Mss Bosman, he testified that he did receive an email from Andries dated 8 March 2017 to Francois Du Plessis in which reference was made to demolishing and site establishment in respect of the school project. It was put to him that the word demolition should have raised a red flag as to the nature of work that Structus Engineering was going to perform. His response was that he had no idea as to technicality of site establishment and demolition would be. When asked about the small profit Massbuild was going to make from the project, his answer was that the forecast was to make a gross margin of 15.16%, which did not happen.

[169] He conceded that the purpose of the entire transaction involving Reatha was to use the systems of Massbuild and its bank account as the conduit for money to TM Ecoglobal. He also could not dispute that the evidence shows it was intended to benefit Andries. He, however, disagrees that if he had not signed or paid attention to the conduct of Andries and emails he received it would not have been possible. According to Mr Stead the business knew that they had an order from Reatha, and that they were expecting a one-time vendor, but did not know who that one-time. Vendor was.

[170] He testified that the emails in question were under his limit of authority, he had no reason to read them. He was aware that Gladys was sending the email. To Frank Urzi for the very same matter before the court. He is now aware that at the end the money was paid to TM Ecoglobal for no return, the schools were not renovated, materials not delivered, and ultimately Massbuild had to pay back the money to Reatha.

[171] Under cross examination by Advocate Matlhanya, Mr Stead testified as follows: They are in court because he signed the Reatha contract. One time-vendor process took place after he signed the contract. He did not know during the transaction who the supplier was, the terminology of fit and supply, and that he was not authorised to sign the contract. There were lots of documents that were not attached to his letter of appointment. He confirmed the statement to the effect that he was aware that in February, that Andries had sourced a supplier that was able to do the project. He insisted that he did not know the names of the supplier. He knew about the fact that Dr Mary was going to pay a deposit of R5 million upfront, but not the 'upfront payment.' He insisted that it was a deposit. Dr Mary was under pressure to commence with the project. According to DBSA report it was supposed to start in January but instead it commenced in February. According to his statement, Andries approached him to look at the contract drawn up by Reatha that highlighted certain terms and conditions between Builders and them.

[172] Advocate Matlhanya put it to him that he could not say Andries gave him incorrect information about the Reatha contract. His reply was that he did not say that, he was happy with the answers Andries gave him. He instructed Andries to be on site to implement a recovery plan when Dr Mary demanded R3,5 million to take over the project due to alleged non performance. He did not give Toney Riley and Frank the information regarding the signed contract. If knew of the implications of the contract with Reatha he would not have signed it. It was not his intention to bind Massbuild as a contractor. However, if the contractor had honoured its part, every one would have been happy about the project.

[173] Under cross examination by Advocate Mashimbye, he testified that: Structus Engineering was on the pipeline to be appointed as a

supplier in the project. He now knows that they started doing the work on site before the actual appointment. Dr Mary aborted the relationship with them at the early stage because she did not want to work with a white company. Evidence shows that TM Ecoglobal was not a party to the Reatha contract, therefore had no role in the conclusion of the Reatha contract. Upon the signing of the contract R5million was paid into the Builders Warehouse business account. Mr Sehloho was praised for bringing the transaction. He had no concern when Structus was booted out of site because Andries was competent in his job, he had contact with multiple contractors and suppliers. He did not know who replaced Structus. He did not know if Blue Sands was ever registered as a supplier or one-time vendor. When things went sour Massbuild decided to appoint Blue Sands without following a third party intermediary process. They have completed Vele School. There was already work done and materials delivered on site when they were reappointed to complete the school. Demolition is part of construction. For one time vendor to appointed one needs a quotation, company registration form, income clearance certificate, company TBI documentation to be submitted for approval. The merchandize manager, Mr Frank Urzi or Steven Botha would authorise the approval. Everything lies with the head office. Mr Urzi's testimony was to the effect that he authorize paint, which is the product, and not the entity. He admitted that he made a mistake which would later come to bite him. Everyone knew that Dr Marry was going to make payment into the customer's trade account. About 13 days later a batch of invoices were debited to the customer's bank account. The money was going to be spent on the project, through sales. Andries told him Dr Mary received the money from DBSA, and it was a financial year end, so she wanted to release the money before the 28th of February so she did not have to declare it as income. There was supposed to be some pro

forma invoices for her to pay the money. Andries and Franco Breedt prepared them, and submitted on the 24th of February.

[174] Reatha should be blamed for what went wrong in the contract, they signed the delivery notes acknowledging receipt of the goods. Massbuild went extra mile to accommodate Reatha as a customer, in order to procure future businesses. Reatha should have been before the court. Andries should have known and informed TM Ecoglobal that the policy does not allow family members as business partners, and TM Ecoglobal should have picked up that they cannot deal with family at Massbuild.

[175] When being re-examined by Mr Slabbert, he testified that he was not involved in the appointment of Ecoglobal as one-time vendor or Blue Sands as a subcontractor. He was not involved in the authorisation of payment to TM Ecoglobal, it was authorised by the head office merchandise manager. When he was suspended Massbuild took over the contract. He was working with CapEx and Sundry Expenses documents which had a limit of authority as admin manager. It was his bible to make sure he complied with business processes. He did not know about the delegation of authority document. If the sundry vendor process had been followed he would not have been in court. Massbuild was in a position to perform this kind of project in terms of the Sundry process. He did not know until today that he was signing a construction agreement. He was merely signing a letter of acceptance. Andries just came to him and said Dr Mary needed them to urgently sign so that she could make a deposit.

Evaluation and discussion

[176] Massbuild's claim is a two-pronged one. Claim 1 is a claim for damages based on the breach of employment contract by both the first and second defendants, whilst claim 2 is an alternative claim

for damages arising from what the plaintiff termed 'a fraudulent scheme devised and implemented by the first and second defendants to procure payments from the plaintiff and paid to the third defendant'.

[177] In respect of both these claims the plaintiff *inter alia* relies upon the allegation that:

- In concluding the Reatha contract the first and second defendants did not have the necessary authority to conclude the contract on behalf of the plaintiff;
- The first and second defendants acknowledged receipt and/or procured that Reatha acknowledged receipt of materials on site when such materials had not been delivered;
- The first and second defendant procured payments by the plaintiff to the third defendant in the absence of an authorised agreement and/in the absence of compliance with the rules, regulations and policies of the Plaintiff and /or in the absence of the Third Defendant rendering the services in terms of the alleged sub-contract.

In essence, both these claims are founded on the contention that the first and second defendants failed to observe the limits of authority applicable to managerial decisions and the Ethical Code of Conduct of Massmart.⁶ In terms of the code of ethics employees of Massmart have responsibility *inter alia* to all stake holders and to make decisions strictly based on Massmart best interests. Further, employees are not to have social or other relationships with suppliers if the relationship would give a perception that a business influence is being exerted.

⁶ Massmart Code of Ethical Conduct: Case lines 082-52-83

[178] The plaintiff's contention that the first and second defendants acted negligently is based primarily on the allegation that the they have devised and implemented a fraudulent scheme: by utilising the brand, goodwill and the systems of the plaintiff to procure the conclusion of the Reatha contract and sub-contract with the third defendant.

[179] It is not in dispute that both the first and second defendants were not authorised to conclude the Reatha contract. It is also not in dispute that in their respective letters of appointment, the two former employees of the plaintiff had declared that they would be abide the rules and regulations of the plaintiff obtainable from the Human Resources Department. In the letters of appointment which I have come across, the employees were urged to familiarise themselves strictly with the contents of thereof. I shall for the sake of convenience only speak of the letter relating to Andries. The relevant portions of the appointment letter titled "CONFIRMATION OF SELECTION AS A MEMBER OF THE BUILDERS WAREHOUSE TEAM" read:⁷

"17 MASSTORES RULES AND REGULATIONS

It is a condition of service that you agree to abide by and comply with the Company's Rules and Regulations, aa copy of which you will receive, or may be obtained from the Human Resources Department. You also accept that the Rules and Regulations may be amended by Management from time to time.

18. LIMITS OF AUTHORITY

Attached please find a copy a document specifying limits of authority applicable to a variety of managerial decisions which you may be required to make in the performance of your duties. You

⁷ Letter of Appointment of Andries 082-23-39

are required to fully familiarise yourself with and strictly apply the contents of the document.

28. ETHICAL CODE OF CONDUCT

Builders Warehouse is serious about its commitment to maintaining the highest ethical standards. These ethical standards apply to the manner in which the company conducts its business and interests with stakeholders and partners.

Builders Warehouse's commitment to the Massmart Ethical Code of Conduct is confirmed by the adoption of Cod, which applies to all employees, directors, agents and other stakeholders, including suppliers, contractors, employee organisations, investors and the communities in which the company carries on business.

Builders Warehouse expects all employees to comply with the requirements of the Ethical Code of Conduct. Failure to comply with the Code will be considered to be misconduct and will result in disciplinary action which could include dismissal."

[180] It was pointed out in *Phillips v Fieldstone Africa (Pty) Ltd and another* [2004] 1 All SA 150 (SCA) as follows:

"[30] The principles which govern the actions of a person who occupies a position of trust towards another were adopted in South Africa from the equitable remedy of English law ... The fullest exposition in our law remains that of Innes CJ in *Robinson v Randfontein Estates. Gold Mining Co Ltd* (supra) at 177-180. It is, no doubt, a tribute to its adequacy and a reflection of the importance of the principles which it sets out that it has stood unchallenged for 80 years and undergone so little refinement.

"Where one man stands to another in a position of confidence. Involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A

guardian to his ward, a solicitor to his client, an agent to his principal afford examples of persons occupying such a position. As was pointed out in The Aberdeen Railway Company v Blaickie Bros. (Macqueen 474), the doctrine is to be found in the civil law (digest 18.1.34.7), and must of necessity form part of every civilised system of jurisprudence. It prevents an agent from properly entering into any transaction which will cause his interests and his duty to clash. If he is employed to buy, he cannot sell his own property; if he is employed to sell, he cannot buy his own property; nor can he make profit from his agency save the agreed remuneration; all such profit belongs not to him, but to his principal. There is only one way by which such transactions can be validated, and that is by free consent of the principal following upon a full disclosure by the agent... Whether a fiduciary relationship is established will depend upon the circumstances of each case... But, so far as am aware, it is nowhere laid down that in these transactions there can be no fiduciary relationship to let in the remedy without agency. And it seems hardly possible on principle to confine the relationship to agency cases."

[181] The fundamental question that arises in this case is whether the plaintiff had adduced enough evidence to constitute a cause of action for either delict or contractual damages based on a breach of contract. The mere fact that the plaintiff might have framed his action in contract does not therefore debar him from claiming in delict. All that he needs to show is that the facts pleaded establish a cause of action in delict. That the relevant facts may have been pleaded in a different manner so as to raise a claim for contractual damages is, in principle, irrelevant.⁸

⁸ *Lillicraap, Wasenaar and Partners v Pilkington Brothers (SA) (Pty) LTD* [1985] 1 All SA 347 (A)

[182] It seems irrefutable, as held by counsel for the plaintiff that that both the first and second defendants had an obligations to protect the business interests of the plaintiff as per the code of ethics which they agreed to be abide by. Their conduct in signing the Reatha contract as shown by evidence is totally inconsistent with the rules and regulations of the plaintiff. It was likewise inconsistent with their fiduciary relationship with the plaintiff. Likewise, unfortunately caused the plaintiff a huge financial loss. Their conduct as submitted by counsel for the plaintiff, have the hallmark of devised to utilize the goodwill and resources of the plaintiff in order to obtain financial benefit by those who are involved in the scheme.

[183] Advocate Mashimbye, on behalf of Ecoglobal argued that "No sufficient evidence was adduced in this matter to show and prove that the Third Defendant conducted itself in any wrongful manner for the procurement of the Reatha Contract, and ultimately resulting in payment of the amount claimed by the Third Defendant.⁹"

[184] In my opinion, once the conduct of the third defendant is factually linked sufficiently to the pecuniary loss incurred by the plaintiff by applying the 'but-for test', liability will ensue.

[185] There is uncontested evidence to the effect that payments were made based on invoices submitted by the third defendant for work that was not rendered or material delivered. There is also uncontested evidence adduced by Mr. Visagie who conducted the investigations that reveal that Reatha was overcharged as amounts charged did not accord with the BOQ. There is further evidence that work would be

⁹ Third Defendant's Heads of Argument. Case lines 054-25 at para 60.

certified before payments were to be made, that did not happen. In my view that is *prima facie* wrongful for the third defendant to have procured payments for work that was not done, materials not delivered or overcharging against the prescripts of the BOQ which underpinned the contract in question. Although the first defendant testified that there were not following the BOQ, there is nothing to suggest the contract was varied to exclude the BOQ. There was no evidence placed before me to suggest that there was an agreement to follow the written contract.

[186] The 'but-for' test has been succinctly explained in *mCubed International and another v Singer and others* [2009] 2 All SA 536 (SCA). para [22],

"...With regard to the element of causation, it has by now become well established in the law of delict, that it involves two distinct enquiries. First there is an enquiry into factual causation which is generally conducted by applying what has been described as the 'but-for' test. Lack of factual causation is the end of the matter. No legal liability can follow. But if factual causation has been established, the second enquiry arises, whether the wrongful act is linked sufficiently closely or directly to the loss concerned for liability to ensue. This issue is referred to by some as 'remoteness of damage' and by others as "legal causation."

[187] In *International Shipping Co Ltd v Bentley* 1990 (1) SA 680 (A), also referred to by counsel for the plaintiff, at 700E-G, Corbet CJ explained the 'but-for test as follows:

"[T]he so-called 'but-for test ... is designed to determine whether a postulated cause can be identified as the *causa causans* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant.

This enquiry may involve the mental elimination of the wrongful conduct and the substitution of hypothetical course of lawful conduct and the posing of a question as to whether upon such an hypothetical plaintiff's loss would have ensued or not. If it would have in any event have ensued, then the wrongful conduct was not a cause of plaintiff's loss; if it would not have ensued."

[188] The evidence adduced at the trial establishes that Andries was not merely a protagonist but was deeply integrated with Reatha, and in carrying out his duties he had a considerable degree of independence reporting to his superiors at his own discretion. As a key account manager dealing with a number of reputable clients, the plaintiff was largely dependent on his judgment and good faith. It was his responsibility as alluded to above that he acts in the best interests of the plaintiff.

[189] In terms of the Reatha contract dated 28 February 2017, Massbuild was contracted to repair and upgrade storm damaged schools in Limpopo for the contract value of R11 442 180. The contract also stated that a retention amount of 10% certified value of work would be withheld with every payment certificate as a guarantee, alternatively a construction guarantee to the value of 10% of the tendered price ought to be provided by Massbuild within 30 weeks following sectional completion.

[190] It was Andries' testimony that he only signed the contract in question as a witness. He denied that he co-signed the agreement as alleged by the plaintiff effectually binding the plaintiff. During argument his counsel also submitted that Andries' signature is not within the designated areas for signatures as depicted in the contract. I have difficulty

accepting this assertion in that there is equally no designated spaces for witnesses in the contract. The evidence further shows, on probabilities, that the contract was marked to the attention of Andries, and copied to Russel Stead. If anything, Andries was the one person who was actively engaged with Reatha. There is no evidence at all to suggest that he signed as a witness.

[191] A further problem which confronted Andries in relation to the conclusion of the Reatha agreement, is the correspondence from Massbuild acknowledging the terms and conditions dated the 28th of February 2017.¹⁰ The relevant portion of the correspondence which was clearly signed by both Andries and Russel read:

"RE: Reference to Your Terms & Conditions:

We acknowledge the terms and conditions prescribed however the alternative to the 10% retention is as follows:

We as corporate company guarantee that all products to be supplied by our Suppliers are SANS compliance.

In addition.

Suppliers will ensure that the workmanship to be provided will meet your satisfaction.

As per the above assurance, you can be rest assured that we will manage the required standard that you truly deserve.

All non compliance related issues will be managed by Builders, (Key Account Manager).

¹⁰ Letter from Builders to Reatha Acquisition and Management. Case lines 082-236

We would like to take this opportunity to thank you for your continues support and understanding. In Addition our partnership to this project will continue to lead us for greater property.

Yours Faithfully

Russell Stead (Acting Branch Manager)

Andries Sehloho. (Key Account Manager)”

[192] As demonstrated by evidence, the plaintiff readily accepted that the first defendant had brought in a huge business which will increase its margins. After the contract was signed on the 28th of the February 2017, Reatha deposited an amount of R5 million into its trade account held with the plaintiff. According to Andries’ testimony the money was meant for upfront payment to the sub-contractors. Subsequently Structus Engineers were sub-contracted through Andries to carry out the construction work at the Limpopo schools on behalf of the plaintiff. At all relevant times Andries was the project manager for the plaintiff whilst John Khyamba was a project manager for Reatha. Following its appointment through Andries, Structus Engineering set about doing a site establishment without any formal agreement. It then provided Andries with the written costs on the project. There is no plausible explanation as to why Structus were booted off site. According to Mr Stead’s testimony he was not aware that Structus Engineering there were no longer on site, until he found out about Ecoglobal. That clearly contradicts Andries’ version that Russel instructed him to find a replacement after Dr Mary told him she did not want to work with white company, which is somewhat contradictory because the plaintiff is run by white people. It raises a question as to why Structus were booted off site after site establishment, and

after they provided Andries with the pricing which was later used to prepare a quotation for Ecoglobal. In the absence of any credible answers that Russel instructed Andries to find another contractor, the only reasonable inference to be drawn from this set of facts is that it was always Andries' intention to appoint his relative as one-time vendor. The fact that Structus Engineering was not appointed as one-time vendor when it did site establishment clearly shows that Andries never had any intention to appoint them for the project.

[193] Russel Stead has refuted most of Andries' version. According to Russel he prepared letters of guarantees on instructions from Andries. As stated above, he denied any knowledge of Ecoglobal or its director. He only met with Mrs Linnah Nhlapo, the director of Ecoglobal at the meeting when the contract became sour. He also refuted Andries' testimony that the money paid by Dr Mary into Reatha's business account at the commencement of the contract was an upfront payment for the subcontractors. He, however, conceded that had he not signed the contract he would not have been in court.

[194] Although the second defendant admitted in his plea that he owed a duty of good-faith to the plaintiff, he denied that he had sight of the limits of authority applicable to managerial decisions referred to under clause 18 thereof.¹¹ It was only brought to his attention during the disciplinary inquiry. As per the declaration, the onus rested upon Andries and Russel to obtain copy of the rules and regulations from Human Resource department. Accordingly this version is unsustainable and falls to be rejected. There is also no substance in the contention that their initial contracts of

¹¹ Case lines 082-10 and 082-170

employment do not apply to the positions which they held when they parted with Massbuild.

[195] As set out above, the project involved renovation and construction of three storm damaged schools in Limpopo, and the contract value is in excess of R11 million. It is difficult to understand why Andries would appoint a company which barely had experience in the construction field, and ignore a number of companies who do business with the plaintiff, some of whom were his clients. It is apparent from the testimony of Mrs Linnah Nhlapo that she lacked the requisite experience to perform a project of that magnitude. The evidence established that Ecoglobal only had 1GBPE-CIBD whilst the project needed someone with a 7GB level of grading. The only experience which Mrs Nhlapo had was when she renovated her parents' house. Andries also acknowledged that she did not have the experience hence he recommended that she should appoint Blue Sands to do the work. He also gave her the quotation from Structus Engineering in order for her to be able to do the pricing on the project.

[196] Mr Tshepo Mokoena, the director of Blue Sands, testified to the effect that he met Andries while doing a project at Harrismith and also during the Alexander project in 2015. His company has 15 years of experience, and possesses a level 5 CIBD grade in Civil work and level 6 in general building. He denied that he was subcontracted by TM Ecoglobal in the Reatha project. The evidence clearly contradicts Mrs Nhlapo's evidence that she appointed TM Ecoglobal as a subcontractor. Throughout the project he never had any dealings with Mrs Nhlapo, only dealt with Andries. According to him he was informed that the Third Defendant was merely a pay master in the project. The probability therefore, is that Blue Sands

was appointed by Andries, and not Ecoglobal. I suppose the plaintiff would have saved a bit of costs if it had not appointed Ecoglobal as a middle person. That much is very clear from the evidence of Mr Visagie, who detailed how much was spent on the project.

[197] The evidence further establishes that the proof of delivery notes contained in the record were not what they purported to be. They were manufactured by the third defendant in concert with Andries in order to procure payments from the plaintiff. The truth is, some building materials were not delivered on site by the third defendant, and that was also the case when the majority of its invoices were paid by the plaintiff. There is no evidence to support Andries' version that Dr Mary instructed the plaintiff to pay the subcontractor in the project in advance. Mr Stead who was close to Andries also refuted this version saying that the money was client's deposit meant to avoid income tax, and also to purchase the materials in the project.

[198] In light of the conclusion that I have reached above, I find it difficult to accept the argument by counsel for the third defendant that the evidence presented by the plaintiff do not show any factual link between any wrongful and culpable conduct on the part of the third defendant, and the alleged loss suffered by the plaintiff. The plaintiff is not required to establish the casual link with certainty, but only to establish that a wrongful conduct (or breach of the contract) was probably a cause of the loss, which calls for sensible retrospective analysis of what probably have occurred, based upon the evidence and what can be expected to occur in the

ordinary cause of human affairs rather an exercise in metaphysics.¹²

[199] It is sufficient for the plaintiff to prove that the defendant's breach was a cause of the loss, even if there was another contributing cause.¹³ It was Andries' testimony that after Stractus Engineering were booted off site, the only company he could think of to take over the project was that of his sister in law, Mrs Nhlapo. This seems to me to be the most improbable version. There is evidence that Andries had met Mr Tshepo Mokoena and his father long before the Reatha project during the Alexander project. It was Mr Mokoena's testimony that when he heard about the Reatha project he orchestrated a meeting with Andries to discuss the possibility of subcontracting Blue Sands. This was at the end of the Alexandra staircase project where Mr Mokoena's company, Ba Bhukulani Ba Make, was contracted by the plaintiff. Having expressed interest in the project, why would Andries only think about TM Ecoglobal which had no experience whatsoever in the construction area. As stated above, Andries is an experienced KAM dealing with a number of companies some of whom buy and supply materials to the plaintiff. A person in his position would have thought of someone experienced and most suitable to perform the job.

[200] In the context of what lied behind the façade of Reatha, I pause to make the following observations. Sometime in the course of the project the plaintiff gradually became aware of the truth of what the Reatha contract was about. One long weekend Mr Riley received a telephone call from the second defendant who advised him that there was an emerging risk

¹² *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) 449

¹³ *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) [66]

emanating from the Reatha contract. Russel informed him that Reatha wanted to take over the contract and demanded a refund of about R3,5 million to be deposited into her account so she could buy the needed material. Her main concern was that there was lack of performance on site. He quickly summoned Andries and Russel to the meeting. A meeting was also arranged with Dr Mary to discuss the issue and Reatha mentioned that the project was supposed to be completed in May 2017, but for non performance. He then visited the site in Limpopo to check what corrective measures can be explored to make client happy.

[201] Mr Visagie, also conducted an investigation on the Reatha contract. His investigation revealed that there was a huge disparity about what was reported to have been done by Blue Sands and what he found on site. There was still more work to be done in the project. In respect of some orders, there was no materials delivered on site to the value of about R1,205.070. About 10% of the work had to be performed in respect of Vele school. He concluded that about R2 343,756.26 should be refunded to the client (Reatha) for the work that had been partially completed in the project. An additional amount of R1 204,642.84 also had to be refunded for overcharging based on BOQ. A total of R5,018,474.69.

[202] It is common cause that the relationship between the first, second and the plaintiff is fiduciary in nature. It involves the duty to protect the interests of another, and not to act in conflict with the interests of the employer. According to Mr Visagie, Massbuild only made a margin of about 16,27% which translates to R43 ,115.34. The evidence revealed that both Mr Stead and Mr Sehloho were not very honest about the nature of the Reatha contract to the plaintiff. They

presented it as a regular business transaction in terms of which Massbuild would supply materials to customers. In this regard Mr Stead testified that the seniors were not aware of the actual contract.

[203] Mr Pretorius testimony is to the effect that a contract in question should have been signed by the Chief Executive Officer and the Financial director of the Plaintiff. This was corroborated by the evidence of Mr Hakutangwi, who testified that such a contract ought to be approved by the legal counsel of Massbuild. Mr Chris Lourens, the former operation director testified in the context of a Delegation of Authority. The General Counsel of Massbuild would examine the nature of document and determine who had the authority to sign the particular document from a legal perspective. It follows that no employee was allowed to sign any document outside the limit of their authority as argued by the plaintiff's counsel.

[204] Mr Russel Stead has experience of over 10 years in Massbuild. Given his role and responsibilities he ought to have known that he lacked the authority to sign the Reatha contract. Even if he possessed no knowledge of the nature of document before him, but when he noticed the 10% retention as condition precedent in the document, he ought to have referred the contract to the legal department. It was apparent from the face of the contract that the contract was for renovation and construction of three schools. He bore the responsibility to familiarise himself with the content of the contract and not to rely on the information provided to him by Andries. Therefore, his version to the effect that he was signing a supply of materials contract is most improbable, and falls to be rejected.

Conclusion

[205] The question of whether a party must expressly plead the essential elements of a contractual or delictual cause of action has been answered in *Lillicrap* above. In *casu*, I think it is clear from Mr Visagie's evidence that the plaintiff had incurred financial losses as a result of the unauthorised construction agreement with Reatha. The contention by Andries and Russel that the rules and regulations of the plaintiff relating to limit of authority in their respective positions did not apply to them, as set out above, have been found to be improbable. Furthermore, they have declared to be abide by those in their respective letters of appointment. What the evidence reveals is that both the first and second defendants have committed several breaches of the code of ethics as well as the rules and policies of the plaintiff in concluding the Reatha contract.

[206] The first defendant further acted in breach of his employment contract when he procured the appointment of TM Ecoglobal which is run by his sister in law without the apparent consent of the plaintiff. His hands is all over the deal. He orchestrated the appointment of his sister in law's company as one-time vendor in violation of the code of ethics; he also gave her descriptions of what to write in the quotations, as well the pricing from Structus Engineering, which conduct is in conflict with his duties.

[207] Andries' evidence did not impress me. For example, he testified that he borrowed money from Mrs Nhlapo, the director of Ecoglobal. He further testified that he borrowed money from Structis Engineering while there were appointed by the plaintiff through Ba Bhukulani in the Alexandra project. This pattern of behaviour makes it apparent that he

disregarded the rules and regulations of the plaintiff. He acted in a very dishonourable manner when he appointed Ecoglobal knowing fully well that the latter could not perform the work set out in the Reatha contract. The inescapable conclusion is that he wanted to benefit his family members, which conduct is in conflict with the code of ethics of the plaintiff.

[208] The evidence further demonstrates that TM Ecoglobal did not perform any work under the Reatha contract, than to render invoices and receive payments. This is supported by Mr Mokoena's testimony that Blue Sands did not have any correspondence nor deal with Ecoglobal. He regarded it as 'the paymaster' in the project.

[209] Taking all of these into consideration, I am of the view that the plaintiff, on whom the onus rests has adduced credible evidence to support its case, both in delict and in contract. In contract the signing of the Reatha contract coupled with the continued issuance of invoices and purchase orders without rendering the requisite services is in itself a wrongful act and constituted a loss to the plaintiff. If it cannot be shown that the loss would not have occurred but for the breach, the plaintiff's claim fails.

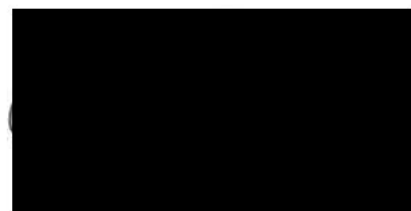
[210] As pointed out by Corbet J in *International Shipping*, if the plaintiff's claim passes the 'but-for test,

"The second enquiry then arises, viz whether the wrongful act [in a contract case, breach of the contract] is linked sufficiently closely or directly to the loss for legal liability or whether, as is said, the loss is too remote. This is basically a juridical problem in the solution of which consideration of policy play a part. This is sometimes called legal causation."

[211] In my view the plaintiff's claim has passed the 'but-for test. It was Mr Jacobus Visagie's evidence that the plaintiff had to refund a total of R5,018,474. 69 to Reatha for overcharging, non-delivery of materials and for work not done but charged. All of these losses would not have occurred if the first, second and third defendants did not act in the wrongful manner described above. In view of the conclusion that I have arrived at above, it is not necessary for me to deal with the special pleas raised by the second defendant, in any event they were never pursued during the trial.

[212] Accordingly there will be judgment for the plaintiff against the first, second and third defendants jointly and severally, the one paying the other to be absolved, for:

- (a) Payment of the sum of R4,927,750.21
- (b) Interest at the prescribed rate a *tempora morae* from date of issue of summons to date of final payment.
- (c) Costs of suit, including costs of the witnesses called to testify under subpoena as well as costs of transcription of the remainder of the proceedings.



P H Malungana

Acting Judge of the High Court

GAUTENG DIVISION, JOHANNESBURG

APPEARANCES:

For the plaintiff : Adv P Bosman

Instructed by	: ENSafrica
For the first defendant	: Adv. M J Matlhanya
Instructed by	: Mahlokwane Attorneys
For the second defendant	: Adv F Slabbert
Instructed by	: David Meyer & Partners
For the third defendant	: Adv GG Mashimbye
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