THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: 320 / 2016

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

15 October 2019
DATE

…………………………..
SIGNATURE

In the matter between:

INZUZO PROJECT ENGINEERS CC	**FIRST PLAINTIFF**
SIPHO MHLANGA	**SECOND PLAINTIFF**

and

DEPARTMENT OF AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS – MPUMALANGA PROVINCE	**FIRST DEFENDANT**
MEC FOR AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS – MPUMALANGA PROVINCE	**SECOND DEFENDANT**
HEAD OF DEPARTMENT: AGRICULTURE, RURAL DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS – MPUMALANGA PROVINCE	**THIRD DEFENDANT**

Summary:

Civil Law – Law of Contract, claim for damages based on repudiation of a contract. The application of principle of pacta sunt servanda. The First Plaintiff signed a contract in terms of which it was placed on the panel of service providers to the First Defendant. Projects were allocated to it and later withdrawn due to poor performance. The contract provided for steps to be taken in case of breach or cancellation of contract. First Defendant not complying with the contractual provisions in terms of the contract when withdrawing the projects claiming, this applied to cancellation of a contract signed to be in the panel, not the withdrawal of projects awarded when in the panel.

Quantum – No separation between quantum and merits. The duty for Plaintiff to prove quantum.

Held – the contract cannot apply in vacuum without project it was signed to govern.

Held further – When merits and quantum are not separated and party is unable to prove quantum, proving merits is a futile exercise.

J U D G M E N T

RATSHIBVUMO AJ:

1. **Introduction**.

   This is a claim for damages based on a breach of contract. The parties did not agree to separate merits and the quantum pursuant to Rule 33 (4) and as a result, the trial dealt with both the merits and the quantum. The Plaintiff's claim is for an amount just over R26 million.

2. On 18 December 2014, the First Plaintiff and the First Defendant entered into a contract (Service Level Agreement – the SLA) which was to run for 36 months. This agreement followed the First Plaintiff's appointment as "professional consulting engineers to assist in planning, designing, implementing, monitoring and evaluating various departmental infrastructure projects" on 03 November 2014. Based on the SLA, projects were allocated to the First Plaintiff as an Engineering Contractor for the First Defendant.

3. For the duration of the SLA, four projects were allocated to the First Plaintiff. Three of these were allocated around the same time not long after the signing of the SLA. Of these three, two were withdrawn by the First Defendant on 20 April 2016 following a dispute, and one was allowed to run its course to the end. The fourth project was allocated to the First Plaintiff several months after the withdrawal of the two projects. The two projects that ran their course to the end are not in issue. It is the two that were withdrawn that are subject of the claim.

4. The First Plaintiff claims that in withdrawing the two projects, the First Defendant breached the SLA in that it did not adhere to its terms and conditions when it comes to cancellation of the contract. It was averred that the First Defendant cancelled the contract making it impossible for the First Plaintiff to perform its part of the SLA. Specifically, the Plaintiff was aggrieved in that the projects were withdrawn without the 5 days written notice provided for in the SLA in case of breach by either party; or the 7 days' written notice in case of a cancellation of a contract. The claim by the Plaintiff was as such not based on work done, but the breach of the contract as a whole.

5. The First Defendant disputed the First Plaintiff contention, saying the contract was not terminated, but it ran its course for 36 months. The signing of the SLA according to the First Defendant did not guarantee the allocation of projects, and if they are allocated, the First Defendant reserved the right to withdraw them in case of non-performance.

6. According to the First Defendant, the SLA was an agreement signed when the First Plaintiff was appointed into a panel of service providers who get allocated projects for the duration they serve in the panel. It contends therefore that the withdrawal of the projects was done in accordance with the SLA because of the First Plaintiff's poor performance. This was done after a series of complaints and warnings that were given to the First Plaintiff in writing as provided in the SLA and the First Plaintiff failed to remedy the defects or non-performance complained about.

7. As for the quantum, the First Defendant argued that the pleaded case was to the effect that the Plaintiff's claim was based on work done and there was no work done for which the First Plaintiff was not paid. Once the projects were withdrawn, no work was performed by the First Plaintiff.

8. **Issues for determination:**

   The court is called upon to determine whether in withdrawing the projects initially awarded to the First Plaintiff, the First Defendant breached the contract and/or whether the act of withdrawing the projects in question, resulted in the cancellation of the contract and if so, whether the said cancellation complied with the SLA pertaining to the cancellation.

9. **Case for the Plaintiff**

Mr. Sipho Samuel Mhlanga: He is the Second Plaintiff, the Director and sole owner of the First Plaintiff. He is a professional Engineer who qualified with a B Tech in Civil Engineering and Masters in Business Administration. He testified that he submitted tender documents on behalf of his Close Corporation (CC) – the First Plaintiff and it was awarded the tender. He knew nothing about being appointed into a panel; for his CC was appointed to provide services stipulated on paragraph 5 of the SLA. His understanding of paragraph 17 of the SLA was that in case of breach by the First Plaintiff, the First Defendant would issue a 5 days' notice in which details of the breach are elaborated. Paragraph 18 of the SLA regulates the termination of the contract which should be preceded by a 7 days' notice if such termination takes place prior to 16 November 2017, which is the last day of the contract.

10. After the SLA was signed, the First Plaintiff was awarded three projects. First one was the Broiler House, the second was One Stop and the last one was the Mushroom project. He received two letters from the Third Defendant by way of email dated 20 April 2016. The first one was titled "First Warning Letter" and the second letter was titled "Revised Allocation of Projects for 2016/2017". According to him, the first warning letter contained no warning since it merely complained of the First Plaintiff's performance and concluded by informing him that for those reasons, the First Plaintiff has been withdrawn from the two projects. The second letter repeated what is in the first letter and concluded by informing him that the First Plaintiff will be allowed to continue with the Mushroom project under close monitoring by the First Defendant who will review the project after six months. No warning

letter or 5 days' notice was given to him about the breach by his CC or the 7 days' notice for termination of the contract.

11. Prior to these letters being sent to him, meetings were held on site in which he or the First Plaintiff would be represented, but his representatives did not inform him of the outcomes of these meetings. He denied that the relationship between the First Plaintiff and Atile Investments, the principal contractor hired by the First Defendant to construct at the Broiler project, had been eroded as alleged in the "warning letter". Even if the relationship was eroded as such, he questioned the involvement of the First Defendant as a client. The First Plaintiff was never called into a meeting with Atile Investments by the First Defendant.

12. He denied that he allocated persons with no skills to provide the engineering consultant services to Atile Investments saying he provided only skilled professionals. He insisted that he was not made aware of any performance challenges as averred in the two letters from the First Defendant withdrawing the projects previously allocated to the First Plaintiff. Aggrieved by the turn of events, he wrote a letter to the Third Defendant on 26 June 2016 demanding reasons for withdrawing the projects. He also threatened legal action over the withdrawal of these projects. He received no response. The One Stop project was supposed to run for 16 months while the Broiler project was allocated 7 months as it was small. It is these periods for which he claims that the First Plaintiff should be compensated.

13. Under cross examination, the following came to light. The First Defendant pleaded that the First Plaintiff was appointed into a panel of service provider for a period of 36 months, a fact that the Plaintiff

"noted" in replication. The Second Plaintiff conceded that in noting he meant that he was aware. He was also aware that they could only do work that is pre-approved by the First Defendant.

14. His tender documents that formed part of the SLA provide that professional fees would be paid on time and cost basis only for work done to a maximum of 15% of the project value / budget. Prior to the projects being withdrawn by the First Defendant, the First Plaintiff had submitted multiple invoices for the work done in respect of these projects, and the First Defendant paid. He could not provide information on how much was paid without the bank statement that unfortunately he did not have with him. The value of the Broiler project was R12 211 174.24 of which 15% was R1 831 676.11. R5 482 964.00 is the amount claimed in this action for unpaid fees in respect of the Broiler project. This is more than the 15% in the tender documents because given the estimated time of completion; he would have approached the First Defendant and asked for fees to be increased from the maximum of 15% to a higher tariff even though it is not provided for in the SLA.

15. One Stop was a far bigger project the total value of which was in excess of R180 million. The First Defendant did not have this budget and as such, the project was done in phases over the years. The value of the phase for which the First Plaintiff was appointed was R12 143 066.51 of which 15% is R1 821 459.09. R18 102 272.00 was however claimed in this action for professional services that would have been rendered over a period of 16 months. This was because he had expected the First Plaintiff to work on the One Stop Project until the end of all the phases and his calculations were based on that.

16. R7 200 000.00 was claimed for disbursement, travelling and miscellaneous expenses for the same period. He however only incurred R12 000.00 in expenses on stationery of which he did not have the invoices. The rest of the expenses were what he expected the First Plaintiff would have incurred had the project proceeded. The SLA however allowed him to claim only the actual expenses plus 5%. The R7 200 000.00 was the estimated expense that would have been incurred had the whole project run to the end on R182 million value, plus the 5%.

17. He admitted that the VAT calculations in the particulars of claim in respect of the two projects were wrong in that the correct amounts calculated on 14% should have been higher than what is reflected. As for the R7 million and R875 000.00 general damages claim, this was for the cancellation of the contracts he had entered into with various institutions when he knew the projects were awarded to the First Plaintiff. These are the institutions that were meant to provide services to the First Plaintiff. He however was not charged a cent by any of these institutions and he also did not pay them anything, other than the R12 000.00 referred to above for stationery he was forced to take by the supplier. The SLA continued to govern the relationship between the First Plaintiff and the First Defendant in respect of the Mushroom project even after the two projects were withdrawn.

18. He acknowledged the email exchange in which he was either copied or sent directly coming from various employees of the First Defendant and from an employee of the site contractor, Atile Investments. He also acknowledged the minutes of the meetings held between the First Plaintiff and Atile Investments and that Mr. Nkosi represented the First

Plaintiff in these meetings. Mr. Nkosi however did not report back to him as to what was said or reported in the meetings. I will deal more with these meetings and emails later.

19. By the time the projects were withdrawn, the One Stop Project was already suspended because it was impossible for work to progress due to the community protest against any work being conducted on site. The community claimed the site as theirs and that only RDP houses could be built there. He had no issues with this suspension. He however took issues with the First Defendant withdrawing the that project based on the slow progress on Broiler Project since these were two separate projects with separate challenges.

20. Case for the Defendant:

Mahlatsi Aaron Mamabolo: He is a qualified engineer who at all material time was an employee of the First Defendant. He represented the First Defendant in a number of meetings of the stakeholders involving the First Plaintiff and Atile Investments pertaining to the Broiler project. At the time of the signing of the SLA, he was a candidate engineer. He explained that due to internal lack of capacity in the department, the First Defendant would sign the SLA with external engineering consultants to serve on the panel of engineering service providers for two to three years at a time. The SLA was for services in planning, designing, implementing and monitoring and evaluation of various departmental infrastructure projects.

21. Being in the panel did not guarantee consultants that projects would be allocated to them. Once in the panel, the Departmental Chief engineer would allocate various projects to them and also have internal

individuals allocated to supervise each allocated project. At the time the First Plaintiff signed the SLA, there were about seven other consultants in the panel. The Broiler project was allocated to the First Plaintiff and he was the internal person appointed to supervise it. The SLA was signed in order to regulate all the projects that could be allocated for the duration that the consultant would be on the panel.

22. The provision contained in the First Plaintiff's tender documents to the effect that the fees payable for their services would not exceed 15% of the project value is standard with all other consultants and it is in line with ECSA, DPSA and Public Works regulations. Under no circumstances would this figure be altered since it would be in contravention of the regulations.

23. Testifying about the Broiler Project, he gave evidence that after it was handed over to the contractor, there was a period of two weeks during which he was on sick leave. He was puzzled to realise on his return that throughout the two weeks he was away, the First Plaintiff failed to call a meeting of the stakeholders. This meeting was necessary in that through it, the consultant is able to assess the progress, identify problems if any, prepare minutes and report back to the First Defendant as the client. He wrote an email to the Second Plaintiff raising these concerns. He is the author of a number of other emails that will be dealt with in some details later. According to him, the emails sent to the First Plaintiff and its representatives suffice to be notices in writing as provided in the SLA and these were given to it providing more than the 5 days' notice; but several months' notice.

24. He chaired a number of meetings between the First Plaintiff and relevant stakeholders. He also took the minutes in these meetings. The Second Plaintiff was constantly absent, sending apologies through his representatives. He was disappointed that even when issues were out of hand and the Second Defendant decided to call a meeting, an indication that the problem was now escalated to the highest office in the department, the Second Plaintiff did not attend the meeting. He sent people who were not capable of taking decisions on behalf of the First Plaintiff.

25. Amongst the concerns raised by him with the First Plaintiff's representatives are issues surrounding the drawings he received from Wandile (an employee of the First Plaintiff) which were irrelevant for the Broiler Project in that they were meant for 40 000 beds whereas the Broiler Project specifications were for 25 000 beds. Again, the drawings which had to be provided to the contractor in order to start with the project were not forthcoming from the First Plaintiff. A due date by which the drawings had to be in was set, but the date came and passed with no drawings from the First Plaintiff. When the technical foundation plan and steel design were finally made available, the spacing specification was wrong and the steel had to be altered which was at an extra cost paid by the constructor. This led to hostile relationship between Atile Investments and the First Plaintiff.

26. A day before the projects were withdrawn from the First Plaintiff, a meeting was held it, the First Defendant and Atile Investments in which a breakdown in relationship between Atile Investments and the First Plaintiff was exposed. This was due to the latter's failure to provide the required technical skills. Once the meeting was over, he, together with

the First and the Second Defendant remained to discuss the way forward, and it was decided that the projects should be withdrawn from the First Plaintiff with exception of the Mushroom project.

27. Even after these projects were withdrawn, another project was allocated to the First Plaintiff several months later.

28. Israel Leonard Silinda: He is an employee of the First Defendant who holds a position of a Chief Director. He has been on this position with effect from 2018. He has been an employee in the same department from 2011. Much of his evidence centred on procedures followed by the First Defendant leading into the signing of the SLA or appointment into a panel of service providers for the department. His evidence is in line with that of Mr. Mamabolo and as such I see no reason to repeat it in details. He was able to enlighten the court regarding the progress of One Stop project currently of which the phase that the First Plaintiff was allocated to do is now complete. According to him, failure by a consultant to deliver in respect of the project allocated, cannot impact on other projects meaning each project has to be evaluated based on performance on that project.

29. Common facts

It is common cause that the SLA was signed long before any project was assigned to the First Plaintiff. The SLA was applicable in respect of all the projects assigned to the First Plaintiff and it continued to be the regulator of further allocation of projects to the First Plaintiff by the First Defendant even after the Broiler and One Stop projects were withdrawn. Out of each project, the First Plaintiff would be entitled to pocket an amount not exceeding 15% of the project value. Claims were made and paid by the First Defendant in respect of the Broiler and One

Stop projects the value of which was not disclosed to the court. Before these two projects were withdrawn, the First Defendant made it clear in a series of meetings and emails that it was displeased with the expertise, professionalism and general services rendered by the First Plaintiff in respect of the Broiler project. No such displeasure was displayed by the First Defendant in respect of the One Stop project.

30. Issues in dispute:

There is dispute as to whether there was a breach of the contract by the First Plaintiff and if so, whether the First Defendant acted in accordance with the SLA. Again, there is dispute on whether the First Defendant, in withdrawing the two projects repudiated or cancelled the SLA entitling the First Plaintiff to claim for damages incidental thereto. The court also would have to determine if the First Plaintiff managed to prove the damages it suffered as a result, and if so, the value thereof.

31. Records of emails and meetings.

In a meeting held on 05 November 2015 between the First Plaintiff, the contractor and the First Defendant, the First Defendant recorded a number of deficiencies in how the First Plaintiff was adducing its responsibilities. These were later reduced into minutes of the meeting. Amongst these was failure to timeously call for the stakeholder's meeting.

32. The other concern was the changes in the foundations which meant that the contractor would have to change the columns and that the steel frames would have to be altered. This would have additional financial costs that the First Defendant could not afford. Other concerns were the

failure by the First Plaintiff to prepare payment certificates; failure to revise and review the BOQs to be in line with clear design specifications.

33. The First Plaintiff was advised by the First Defendant to engage a qualified structural engineer to do design and correct specifications, and to send monthly reports and prepare agenda and minutes for the next meeting. The First Plaintiff’s representative, Mr. Nkosi apologised and promised to improve since he would capacitate Wandile and a qualified engineer.

34. A report prepared by the First Plaintiff on the Broiler Project dated July 2015 reflects that the project was already allocated to it during the period of the report. In an email from Mr. Mamabolo to Mr. Jiyane (a person who was allocated to the First Plaintiff as the contact person on behalf of the First Defendant), the author complains about the report from the First Plaintiff which was inadequate in format and information. This email was copied to the Second Plaintiff and he did not respond thereto.

35. In another email dated 29 October 2015, sent to the Second Plaintiff, Mr. Mamabolo complains that the First Plaintiff missed the deadline of 23 October 2015 to provide the construction drawings or approved design drawings in line with the construction contract laws, CESA and ECSA regulations. The First Plaintiff was as such asked to attend to these issues urgently. The Second Plaintiff again did not respond to this email or remedy the cause of complains. Several other emails were sent to the Second Plaintiff with various concerns to be rectified by the First Plaintiff, without which Atile Investments, could not commence or

continue with the construction work. These emails triggered no response from the First or the Second Plaintiff.

36. <u>Legal position.</u>

GB Bradfield[1] quotes with approval the phrase by Lewis J in in *Schlinkmann v Van der Walt*[2] where he said,

> Repudiation is in the main a question of the intention of the party alleged to have repudiated. As was said by Lord Coleridge LCJ in Freeth v Burr (1874) LR 9 CP at p 214: "the true question is whether the acts or conduct of the party evince an intention no longer to be bound by the contract", a test which was approved by the House of Lords in Mersey Steel Co v Naylor (1884) 9 AXC 434. In Re Rubel Bronze and Metal Co and Vos [1918] 1 KB at p 322 McCardie J said as follows: "The doctrine of repudiation must of course be applied in a just and reasonable manner. A dispute as to one or several minor provisions in an elaborate contract or a refusal to act upon what is subsequently held to be the proper interpretation of such provision should not as a rule be deemed to amount to repudiation… But as already indicated, a deliberate breach of a single provision in a contract may under special circumstances and particularly if the provision be important, amount to repudiation of the whole bargain... In every case the question of repudiation must depend on the character of the contract, the number and the weight of the wrongful acts or assertions, the intention indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered and the general circumstances of the case." To this I would add only that the onus of proving that the one party has repudiated the contract is on the party who asserts it.

37. Applying facts to the law, it is important to note that the contract between the First Plaintiff and the First Defendant existed long before any project could be allocated to the First Plaintiff. This signifies that the existence of the contract was not dependent on projects being

[1] "Christie's Law of Contract in South Africa" 7th Edition, 2016 at p. 610-611.
[2] 1947 (2) 900 (E) 919.

allocated. Furthermore, the fact that no new contract had to be signed with each project being allocated to the First Plaintiff signifies that the allocation and withdrawal of projects did not have direct impact of the SLA. But the SLA did not operate in vacuum. In other words, without projects to be regulated, the SLA would just be a worthless piece of paper. There are two important aspects I wish to zoom into provided for in the SLA: the breach of contract and the termination thereof.

38. The reference to breach of contract clearly refers to works performance hence it provides for a period for each party to rectify the breach. This could not have been a reference to a contract of being in the panel without any project being allocated since there is nothing to perform or remedy in the SLA in the absence of projects. While it is true that the contract was signed upon being appointed into a panel of several contractors, the fact that no other contract was signed with the allocation of projects reflects that this SLA was a major or umbrella contract that applied to all projects allocated and those to be allocated in the future. In practice that implies that every project would be defined, guided, governed and interpreted by the SLA as if it was designed for that project.

39. I am satisfied that the First Defendant was not happy with the performance of the First Plaintiff in respect of the Broiler Project. The First Defendant further considered this to be in breach of the contract and it acted to show its dissatisfaction. The First Plaintiff was given several opportunities to rectify its breach by way of meetings and emails which was several weeks and months prior to the withdrawal of the projects.

40. As for the termination, the First Defendant argues that the provision on termination in the SLA refers to the termination of the SLA and not the project. For this reason, there was no need to give notice to the First Plaintiff since no agreement was terminated. If the argument to the effect that the termination of the contract provided for in the SLA refers to termination of the agreement to be in the panel, it would entail that there is no provision in the SLA on what happens when a party breaches the contract and constantly fails to remedy the breach. But that would be absurd in that it would render the agreement toothless and therefore irrelevant.

41. Common sense dictates that when a party is given time to rectify and fails, the other party would be entitled to cancel the contract and it follows that the termination of the contract referred to in the SLA must have been in reference to projects allocated. While the First Defendant complied with the part referring to the breach, it appears it was impatient and thereby failed to comply with the notice required when terminating the contract. It should be noted that the SLA makes no provision for the withdrawal of the projects which in my understanding is just another reference to cancellation of the agreement to allocate the project to the particular consultant, and in this case, the First Plaintiff. In failing to adhere to the notice requirement, the First Defendant displayed the intention not to be bound by the contract any longer.

42. The First Defendant's intention not to be bound by the terms of the agreement is laid bare when it comes to One Stop Project where it decided to withdraw the project without any breach on the part of the First Plaintiff. The Supreme Court of Appeal held the following in respect of the doctrine of *pacta sunt servanda*,

"The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract. Taking into considerations the requirements of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract. This court in *Wells v South African Alumenite Company* 1927 AD 69 at 73 held as follows: 'If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice.' Parties enter into contractual agreements in order for a certain result to materialise. The fact that parties enter into an agreement gives effect to their constitutional right of freedom to contract, however, the carrying out of the obligations in terms of that contractual agreement relates to the principle of *pacta sunt servanda*. In *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (2002 (12) BCLR 1229; [2002] 3 All SA 363; [2002] ZASCA 35) Cameron JA held that judges must exercise 'perceptive restraint' (para 94) lest contract law becomes unacceptably uncertain. Cameron JA noted that the judicial enforcement of terms, as agreed to, is underpinned by 'weighty considerations of commercial reliance and social certainty' (para 90). In the majority judgment in *Barkhuizen*, Ngcobo J endorsed Cameron JA's broader conception of the law of contract as reflected in *Brisley* and affirmed that the Constitution requires parties to honour contractual obligations that were freely and voluntarily undertaken. The court further went on to say: 'While it is necessary to recognise the doctrine of *pacta sunt servanda*, courts should be able to decline the enforcement of . . . a clause if it would result in unfairness or would be unreasonable. . . .'"[3]

43. <u>Quantum</u>.

[3] *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA) at para 23-24.

The First Plaintiff has a duty to prove its case on both the merits and the quantum since the two were not separated. From the pleaded case, the First Plaintiff claims to have performed its part and that the First Defendant failed to make the payment. No evidence was led on what work it performed. The case of the First Plaintiff would therefore stand or fall on damages suffered as a result of the repudiation of the contract by the First Defendant. There was a concession by the First Plaintiff that there cannot be damages suffered in circumstances where the contract provided for actual expenses while there was no expense at all. Equally, when damages pertain to a calculation of what the plaintiff would have earned had the defendant honoured the contract, it is apposite for it to prove the rands and cents of what it was entitled to, what was paid and the balance is.

44. The predicament the First Plaintiff sits with is the fact that in respect of all these projects, claims were made and paid for. I have no clue on what the claims and the payments made entailed and what the figures are. The Second Plaintiff was equally in the dark as to the exact value of the projects in particular, the One Stop Project, giving the court just estimates. The exact figures are necessary because the court would allow a claim not exceeding 15% thereof as provided in the SLA. The court finds it difficult to award any amount without indications of the amounts paid by the First Defendant so the same is deductible from the amount claimed. Counsel for the First Plaintiff conceded that the court is in a difficult predicament when these figures were not quantified. I agree, save to say it is the Plaintiffs in such a predicament. When a plaintiff

merely alleges that it suffered damages without being able to quantify them, on that ground alone, the claim shall fail.[4]

45. On this aspect alone, this case could have been disposed of without much consideration of the merits. This is because it is pointless to prove the merits of which the quantum cannot be proved or quantified. For plaintiff's failure to prove the quantum, the claim stands to be dismissed.

46. As for costs, I do not see any reason why costs should not follow the outcome. As agreed in the SLA, costs shall be on attorney and client' scale.

47. Consequently, the following order is made.

The Plaintiff's claim is dismissed with costs; costs payable on attorney and client' scale jointly and severally, the one paying the other to be absolved.

TV RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

FOR THE PLAINTIFF : **ADV MJ MPSHE SC**

INSTRUCTED BY : **ANTON RAMAANO ATTORNEYS**
C/O SWANEPOEL & PARTNERS
MBOMBELA

[4] *Marion Smith v Mountain Oaks Winery (Pty) Ltd & another* (1171/18) [2019] ZASCA 123 (26 September 2019) at para 18.

FOR THE DEFENDANT : **ADV AE AYAYEE**

INTRUSCTED BY : **MAJAVU INCORPORATED**
C/O NYAKATYA INC
MBOMBELA

DATE HEARD : **26-29 AUGUST & 10 SEPTEMBER 2019**

JUDGMENT DELIVERED : **15 OCTOBER 2019**