IN THE REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA

CASE NO: 3740/2009

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.

8/05/2015 ....
DATE SIGNATURE

8/5/2015

In the matter between:

RAFT CRETE CC Plaintiff

And

NETCOM CONSTRUCTION CC First Defendant

TSHIFHIWA MATODZI Second Defendant

J U D G M E N T

N V KHUMALO , J:

INTRODUCTION

[1] The plaintiff instituted an action against the 1st and 2nd Defendants for payment of an amount of R180 451,17 ("the amount") for the design and

construction work it carried out at Erf 591, Eagle Canyon Golf Estate, Honeydew Manor, ("the property") a property owned by the 2nd Defendant.

[2] The 1st Defendant is a close corporation whose sole member one A W Nethengwe ("Nethengwe") signed on its behalf a building contract with the 2nd Defendant on 25 September 2007 for the construction of a house at the property for an amount of R1 944 572.00.

[3] On 24 April 2008 Nethengwe signed a subcontractor agreement with the Plaintiff, a close corporation (represented by its sole member J G Ehlers) that designs and constructs waffle rafts as its main business, in terms of which the Plaintiff designed and constructed the waffle raft foundation at the property on June 2008.

[4]] According to the pleadings, it is common cause between the parties that on 18 June 2008 a telephone discussion took place between the 2nd Defendant and an employee of the Plaintiff, Chantelle Maree ("Chantelle") regarding the payment of the amount of R180 451.17 that Plaintiff invoiced the 1st Defendant for the construction of the waffle raft at the property. 2nd Defendant requested Chantelle to forward the invoice to him. The amount was not settled.

[5] Plaintiff thereafter issued summons against 1st and 2nd Defendants. 2nd Defendant is defending the action.

[6] In its summons the Plaintiff alleges that:

[6.1] On 18 June 2008, during the telephone discussion with Chantelle, the 2nd Defendant undertook to pay the amount in the invoice before 31 July 2008.

[6.2] At the special request of the 2nd Defendant, specifically after he made the undertaking to pay, Chantelle sent the 2nd Defendant the invoice of the outstanding amount.

[6.3] On 2 August 2008 during a telephonic discussion with Plaintiff's J G Ehlers, the 2nd Defendant undertook to pay the amount on or before 30 August 2008.

[6.4] Notwithstanding making the undertaking the 2nd Defendant had failed to pay the amount.

[6.5] That the 1st and 2nd Defendants are jointly and severally liable to the Plaintiff for the payment of the amount together with interest at the rate of 15.5% payable from 30 June 2008 till date of final payment.

[7] In his Plea, 2nd Defendant denies any knowledge about the terms of the subcontract that the Plaintiff concluded with the 1st Defendant and any liability for the payment of the amount claimed by the Plaintiff. He admits that Chantelle called him on 18 June 2008 and demanded payment. He then requested a copy of the invoice from her so that he can convey it to the 1st Defendant. He denies making an undertaking.

[8] He pleaded further that he has no contractual relationship with the Plaintiff that can form the basis of the Plaintiff's claim but it is the 1st

Defendant that is liable to pay the Plaintiff on the basis of the signed subcontract between them. He avers in the alternative that he has discharged all his contractual obligations between him and the 1st Defendant and has therefore not been unjustifiably enriched. He alleges to have paid whatever was due in terms of the building contract to the 1st Defendant with whom he had a contract. He was also not a surety to 1st Defendant's debts.

[9] The main question that arises in this matter is whether or not 2nd Defendant made an undertaking to pay the amount owing to the Plaintiff. Is there evidence of such an undertaking? If so, whether such an undertaking had a legally binding effect such that a contract came into existence with the Plaintiff deriving a right therefrom to claim performance, (as creditor) whilst creating a legal obligation on 2nd Defendant to pay? In other words is (did) the 2nd Defendant (become) indebted to the Plaintiff?

THE LEGAL FRAMEWORK

[10] The burden of proof is upon the party who alleges the existence of a contract. He or she must establish facts that prove on a balance of probabilities that there was an intention that there be an agreement that gives rise to legal relations, a contract; *CGee Alsthom Equipments at Enterprises Electriques v GKN Sankey (Pty) Ltd* [1987] 3 All SA 619 (A), 1987 (1) SA 81 (A) 90. Where they may be a matter of dispute, it is necessary to plead the offer and acceptance, although it however may be incorrect to argue that because there has been an offer and acceptance there necessarily must be a

contract. As not all agreements have a legally binding effect. There must be a meeting of the minds (consensus) as a basis of a contract. Without conscious consensus between the parties there can be no contract.

[11] The agreement between the parties must be about the legal consequences or results they wish to create. In respect of the rights and obligations that flows from the contracts. See *Dilokong Chrome Mines (Edms) Beperk v Direkteur –Generaal, Depalowwrtement van Handel & Nywerheid* [1992] 2 All SA 209 (A), 1992 (4) SA 1 (A). So there may be no contract for one of three reasons: Either the parties did not intend to make a contract, lacking *animus contrahendi; see Aficar Solar (Pty) Ltd v Divwatt (Pty) Ltd [2002] 3 All SA 369 (SCA) 2002 (4) SA 681 (SCA) para. 33* or the law denies the status of contract to the agreement; or the courts, with the best will in the world, have to treat as a nullity what the parties thought was a contract when they made it.; see Van der Merwe, Van Huyssteen, Reinecke and Lubbe's *General Principles of Contract* (*"*General Principles*")*.

[12] According to the Will's theory in the General Principles, a contractant is legally bound to his contract because, and in so far as, there is an actual meeting of the minds, in the sense of coinciding intentions, between him and his co-contractant. However the intention of the contractants is, however, not the only factor which can serve as the reason for binding parties in terms of the agreement. Considerations like legal certainty, good faith, protection of reasonable expectations, and creation of undue risks can also be accepted as binding elements, even to the exclusion of the will. Prominent amongst the

theoretical alternatives to consensuality are the declaration theory and reliance theory. The declaration theory in its widest form is said to seek to base a contract on the presence of coinciding declarations alone. The theories in the General Principles p 22 are said not to be so advanced in South African law of contract as complete alternatives to the will theory. They are still linked to the expression of a will with the contractants that still have to agree (consensus) on the consequence they wish to create and to which they intend be legally bound.

[13] In construction the principal contractor is not legally bound to give undertakings to their subcontractors on the debts of the major contractor. However once an undertaking has been given, it must be honoured. The parties must still **intend** their undertaking to be legally binding. However what is the status where there is an undertaking to pay without an admission of liability? If a contractant does not intend to be legally bound by the agreement it cannot be a contract since there is no consensus; see Wilkins N O v Voges 1994 (3) SA 130 (A). Therefore an expression of will, which is made without the intention of becoming legally bound by its eventual acceptance, can accordingly not even qualify as an offer which may lead to the creation of a contract; See CF Mondorp Eiendomsagentskap (Edms) Bpk v Kemp & De Beer 1979 (4) SA 74 (A); Aficar Solar (Pty) Ltd v Divwatt (Pty) Ltd 2002 (4) SA 681 (SCA) 698B.

EVIDENCE ON HISTORICAL FACTS

[14] According to the minute of their pre-trial conference, the Plaintiff was to commence to lead evidence. Chantelle, Ehlers and Nethengwa led evidence on behalf of Plaintiff whilst 2nd Defendant was the sole witness of the 2nd Defendant.

[15] According to Chantelle, **2nd Defendant telephoned the Plaintiff's office on 18 July 2008 and** identified himself to her. He told her that 1st Defendant was no longer working with him, so he was going to pay the subcontractor directly. 2nd Defendant requested a copy of the invoice. At the time she had already issued the invoice in the name of the 1st Defendant on 18 June 2008. So she changed the details of the 1st Defendant on the invoice and substituted it with those of the 2nd Defendant, without changing the date when the document was created. She thereafter telephoned Ehlers and told him about 2nd Defendant's call and request. No payment was received. 2nd Defendant.did not say anything to her about sending the invoice to 1st Defendant otherwise she would not have changed the particulars to those of the 2nd Defendant. She denied that she called the 2nd Defendant on 18 June 2008 or that the telephone discussion took place as alleged in the particulars of claim. She persisted even when it was put to her that 2nd Defendant did not have Plaintiff's particulars so why would he phone its office. She was adamant that it was the 2nd Defendant who phoned their office not vice versa alleging that she never phones clients. She only does the invoicing and Ehlers will then phone the clients. She alleged that only Ehlers phones the debtors.

[16] Ehlers testified that according to the terms of the contract they will invoice client within 7 days after completion of the work. He only got to know the 2nd Defendant after he completed the project and after he had issued the invoice. He was at a site meeting with another client when Chantelle called and informed him that 2nd Defendant undertook to pay the money. 2nd Defendant asked Chantelle to change the invoice as he will be paying the subcontractors directly. On 1 August 2008 he phoned the 2nd Defendant to follow up on the payment. 2nd Defendant told him that he paid the money to 1st Defendant. He phoned Nethengwe, who denied that a payment was made. He, as a result after the conversation sent a letter by fax to 2nd Defendant on 1 August 2008 asking for proof of payment. A meeting was arranged on 5 August 2008 that was attended by 2nd Defendant, Nethengwe and himself. They, *inter alia,* discussed payment. 2nd Defendant said he will pay by the end of August 2008. At the end of August he decided to pass the matter on to the attorneys who then sent a letter to 2nd Defendant in September 2008. The attorney's attempt to arrange a round table meeting with the 2nd Defendant failed as he did not attend. They also received a letter from Nethengwe informing them that they were not paid for the foundation.

[17] Under cross examination Ehlers indicated that either **Chantelle or he would phone the customer 5 to 7 days after sending the invoice**. The invoice to 1st Defendant was sent on 18 June 2008. He could not remember what Nethengwe said when they phoned him. During that time 2nd Defendant phoned them out of the blue and mentioned that he has parted ways and kicked 1st Defendant out of the site, so **he will be continuing with the work**

and paying subcontractors directly. He at the same time stated that 2nd Defendant received a call from Chantelle on 18 June 2008 looking for payment. 2nd Defendant told her to send the invoice, he will address it with 1st Defendant.

[18] Ehlers pointed out that his attorney made a mistake in the particulars of claim. He did not phone the 2nd Defendant on 2 August 2008 as stated therein but on 1 August 2008 and 2nd Defendant told him that he paid the money for the foundation to the 1st defendant so he must follow up with Nethengwe for payment and again gave an undertaking to pay by the end of August 2008. On 5 August 2008, 2nd Defendant told him that he will pay the money by the end of August 2008. He disagreed with the contents of Paragraph 11 and 13 of the particulars of claim stating that the invoice was sent to 1st Defendant on 18 June 2008. They got a call from Defendant on 16 July 2008. On 01 August he went to the 1st Defendant, enquiring if he received payment, thereafter he telephoned the 2nd Defendant who alleged that he paid 1st Defendant. He called Nethengwe who said he had still not received the payment. On the same day he sent a letter to 2nd Defendant. In the letter he did not mention the conversation he had earlier with 2nd Defendant because he only spoke to him briefly and actually 2nd Defendant spoke to Chantelle not him. The acknowledgement that 2nd Defendant made to him as pleaded was not referred to in the letter because he wrote what he thought he heard.

[19] He further stated that according to him 2nd **Defendant's guarantee** that he will pay the money was good enough to him. **2nd Defendant undertook to**

pay him even though he said he had paid 1st Defendant. He also went back to 1st Defendant to try and get the money nonetheless. He said he did not take a deposit because 1st Defendant told him he functioned on draw downs. They had an arrangement that an engineer will certify the work and issue a certificate which will be handed to the bank to confirm that work is completed by a qualified person for the bank to release the payment. He scheduled meetings with 1st and 2nd Defendant to get clarity on who had the money to pay and only 1st Defendant attended. They even went to look at the foundation and <u>2nd Defendant said he will sort all that out which he understood to mean that 2nd Defendant was going to do the payment.</u> <u>On 16 July 2008, 2nd Defendant specifically said he will do the payment.</u> At the time he was not aware that 2nd Defendant had already paid 1st Defendant for the foundation. He alleged that 2nd Defendant was not frank with him because when he asked him to fax proof of payment to he didn't. He admitted that 2nd Defendant did not have a contract with the Plaintiff, <u>but pointed out that 2nd Defendant had a benefit so he must pay for it.</u>

[20] Nethengwe, Plaintiff's third witness, was subpoenaed by the Plaintiff. He confirmed that the foundation formed part of the main quotation as trenches however anything other than that was not quoted for in the contract. He pointed out that the contract therefore did not include a raft foundation. The price in the contract was only for normal foundation. He stated that when he established that a raft will be required he subcontracted the Plaintiff. 2nd Defendant was going to be liable for the raft. **After he had paid the Plaintiff, 2nd Defendant was going to pay him less the amount he loaned him.**

According to him his relationship with 2nd Defendant came to an end in 2008 without notification. He heard about it from people outside although he is related to the 2nd Defendant. He through his business then issued a summons against 2nd Defendant for breach of contract claiming payment of an amount of R600 000. They settled the action on the basis that 2nd Defendant said he had already paid Plaintiff in February 2009 so he was going to pay him only the balance of R241 000.00.

[21] Under cross examination he stated that he was not served with the summons. He heard about the matter two weeks ago when subpoenaed. The R160 000 paid to him by 2nd Defendant was not part of the contract but a loan to him, so no deposit was paid in the agreement. They instead agreed that he will build a house for 2nd Defendant. He was supposed to start building in 2007 and complete by 2008. The loan was the brought into the contract. 2nd Defendant was not supposed to pay him direct but the bank was going to pay after evaluating the house. 2nd Defendant was only going to be liable for the difference. After 2nd Defendant received an invoice from Plaintiff, he came to him with it and they put in a claim. Plaintiffs also could not have phoned him because they had an agreement. After concluding the contract he went with Ehlers to the property to show him the land that was the last time he saw him. He was on site before they finished. After that he never heard from them. The foundation was completed in 4 days. After the job was done he spoke to 2nd Defendant about the raft and a meeting. 2nd Defendant did not attend the meeting, he dealt with Ehlers directly. He started working on site preparing the land first in 2008. **He had a contract with Plaintiff they were supposed to**

notify him when they finished but they did not contact him. He **wrote to them but Ehlers never phoned him.** He never had a site meeting with him. When he told 2nd Defendant he said he had an agreement to pay Plaintiff directly and he believed 2nd Defendant as no letter was written to him. 2nd Defendant paid him R240 000 in terms of the settlement. The money was over by R73 000.00 because 2nd Defendant needed his signature for the bank to pay the R1,5 million and he gave it to him. 2nd Defendant phoned him to come and fetch R73 000 and told him to go and drink beer. The money was for settlement of their own private debts using 1st Defendant. He was not paid the R642 000.00 because the work finished was only less than 33 %.

[22] 2nd Defendant's evidence was that he contracted 1st Defendant to build him a house on his vacant stand. Their deal was that he was going to advance 1st Defendant a loan in the amount of R160 000 which he did in December 2006 and he was going to be repaid on the 1st draw down from the building bond. He had a loan from FNB for R4 million and R2,5 million was a building loan from which there was to be a draw down and progress payments made on completion of 33% of the work. He was going to deduct the loan amount and pay Nethengwe the difference. Nethengwe delayed the construction and started only in February/March 2008 instead of in 2007. He subcontracted the Plaintiff to do the foundation. He became aware that the relationship between the two entities ended in July after the construction of raft foundation. He kind of expected 1st Defendant to continue building but there was no material on site. Instead Nethengwe informed him of an additional amount of R73 000 required to top up the cost amount. He paid

R73 000 to 1st Defendant on 9 June 2008 as shown in exhibit "A", his statement of account. There being prove that an amount of R160 000 was also paid to him. The invoice from Plaintiff to 1st Defendant was issued on 18 June 2008, the same day that Chantelle called him wanting to forward him the invoice. He gave her his phone numbers and told her that he will forward the invoice to 1st Defendant. He then called 1st Defendant to his office to finalise the progress payment. The progress payment was never done because when the valuators came on site to check on the state of the construction they found that only 10 % of the 33% work agreed upon was completed. The bank refused to pay the draw down. On 16 July 2008 he spoke to Ehlers who wanted payment from him. Again on 1 August 2008 Ehlers called him and told him that they were waiting for payment. He told Ehlers that it was not his debt. On 5 August 2008 they had a site meeting. Nethengwe was at the time banned from the site. They discussed the invoice. He reiterated to Ehlers that the invoice is not his debt. Ehlers told him that he was going to issue summons so he met with 1st Defendant at KFC Hillfox. He proposed a settlement and Nethengwe agreed to it. They went to the police station and both made statements under oath confirming the settlement. He thereafter made three payments to the 1st Defendant. Pages 27 paragraph 10 is not correct.

[23] 2nd Defendant's evidence under cross examination was that the loan of R160 000 he gave Nethengwe was tied up with the building of the house. Nethengwe was supposed to buy cement and bricks. That agreement was oral and agreed upon before the building contract was signed. Nethengwe

was going to repay him on his first draw down. The building contract price would then have been reduced by R160 000. The loan amount from the bank was not intended for the raft but for the building contract with 1st Defendant. 1st Defendant proposed to him that whilst they were on site that it be used for payment for the raft. The need for the special foundation was established after the excavations. At the time there was no material on site. He averred that Nethengwe was supposed to issue a special quote for the raft and for any other additional or special costs as an extra expense which he was obliged to pay separately. The building contract mentioned only R80 000 or R90 000 for a normal foundation, that is why he had to top it up by R73 000 that Nethengwe told him to pay. Nethengwe told him he owed him only R73 000 for the raft. If the cost was for him, 1st Defendant should not have signed with Plaintiff. The amount for R160 000 was initially not intended for foundation. He believed Nethengwe when he told him that is the amount of the top up as he is not a contractor. He paid the R73 000 on 9 June 2008.

[24] 2nd Defendant went further and refuted Nethengwe's allegations that the R73 000 paid to him was a token of appreciation for signing the documents so that the bank can release the money. He reiterated that Chantelle called him and told him about the invoice due to be paid. His assumption was that they would call Nethengwe. He then asked her to forward the invoice to him. They had not signed the progress payment at the time and he needed to. He did contact Nethengwe to speak about the invoice. At the time he was responsible for progress payment to 1st Defendant. The decline from the bank for the draw down was received verbally and it was

conveyed the same day. The R73 000 top up was already paid. When Ehlers called him on 1 August he made it clear to Ehlers that 1st Defendant owed the money not him. He then called for a meeting on site that Ehlers agreed to. He received the letter from Ehlers on 1 August 2008 after the conversation with him. He told Ehlers that there was a potential dispute with 1st Defendant and he did not want to be involved. Ehlers told him the invoice was sent to him as 1st Defendant had still not paid. They arranged to meet on site on 5 August 2008. He disputed the preparation of the invoice for one party and later substituting another for payment and did not undertake anything to Ehlers. He thought they were clear that is why on 4 September 2008 he did not say anything to his attorney. He also indicated that it was to Ehlers from the stance he took in the meeting, letter plus his bank statement reflecting payment to Nethengwe that there was no such undertaking. He settled with 1st Defendant for R240 000 that 1st defendant later received. The invoice he received on 18 June 2008 was directed to 1st Defendant not to him. The one he later received on 16 July 2008 was addressed to him. When Nethengwe came for the R73 000 top up he simply told him it is over and above the foundation costs on the contract.

[25] There were a few incongruences between the evidence of the Plaintiff's witnesses and the pleaded facts in the particulars of claim. Chantelle was adamant that she spoke to the 2nd Defendant on 16 July not on 18 June 2008 as stated in the particulars of claim. However notwithstanding her being so resolute and Ehlers partly corroborating her in his evidence in chief even though he later changed, the Plaintiff did not seek to amend its particulars.

The evidence led by the Plaintiff was therefore contrary to its particulars of claim.

[26] Furthermore Ehlers alleged, in his evidence in chief that he called 2nd Defendant on 1 August to follow up on the payment and 2nd Defendant told him that he paid 1st Defendant so he must phone 1st Defendant for payment. In the meanwhile the particulars of claim state that he had a telephone discussion with 2nd Defendant on 2 August 2008, 2nd Defendant again made an undertaking in favour of the Plaintiff to pay the money on 30 August 2008. When Ehlers was quizzed about the discrepancy on the two statements he was resolute that he actually phoned the 2nd Defendant on the 1st of August not on the 2nd August 2008 as stated in the particulars of claim. Yet again the particulars of claim were not amended. Ehlers continued to testify on what happened on 1 August 2008 contradicting the pleadings.

[27] There are other inconsistencies and contradictions in the Plaintiff's evidence, specifically on what was precisely said by 2nd Defendant at the time and on who between Chantelle and 2nd Defendant initiated the telephone call between Chantelle and the 2nd Defendant. In the particulars of claim Plaintiff only alluded to a telephone undertaking made by 2nd Defendant to Chantelle in favour of Plaintiff without indicating the initiator of the call. Whilst the Admission made by 2nd Defendant in his plea that Chantelle telephoned him on 18 June 2008 was not disputed nor was a reply filed by the Plaintiff. Only during the trial did Chantelle then dispute that she made the call whilst Ehlers testified in the contrary that it was 2nd Defendant who received a call from

Chantelle asking for payment. Ehlers also stated that 2nd Defendant called both of them out of the blue. With the inconsistency left unexplained, the Plaintiff's evidence on who made the initial telephone call cannot be relied upon.

[28] In respect of what 2nd Defendant said, according to Chantelle, 2nd Defendant called her and informed her that 1st Defendant was no longer working with him, so he will be paying the subcontractor directly. According to Ehlers, what was reported to him by Chantelle on 16 July about 2nd Defendant's call was that **2nd Defendant undertook to pay the money** and asked Chantelle to change the invoice. Ehlers in the same vein stated that **2nd Defendant received a call from Chantelle on 18 June 2008** looking for payment and 2nd Defendant told Chantelle to send the invoice, **he will address it with 1ST Plaintiff.** It is also his testimony that_2nd Defendant phoned them out of the blue. Consequently on this issue regarding what precisely transpired during the telephone call between 2nd Defendant and Chantelle, the evidence presented on behalf of Plaintiff' cannot be relied upon due to it being inconsistent and contradictory. It therefore cannot be relied upon to decide whether or not the 2nd Defendant made an undertaking.

[29] Once more on the issue of what was said between the 2nd Defendant and the Plaintiff, it was alleged in the summons that 2nd Defendant made an undertaking to Chantelle and Ehlers to pay the amount in the invoice. Chantelle's evidence was that 2nd Defendant told her that he was going to pay subcontractors directly, whilst Ehlers on one hand confirmed that. On the

other Ehlers also confirmed that 2nd Defendant asked for a copy of the invoice so that he can address it with the 1st Defendant. On 1 August 2008 he phoned the 2nd Defendant to follow up on the payment. 2nd Defendant told him that he paid the money to 1st Defendant. The word undertaking was not mentioned in their evidence except in the summons. Ehlers went even as far as also confirming that he agrees that there was no contract between Plaintiff and 2nd Defendant but as the latter benefitted he must pay. He never claimed that 2nd Defendant bound himself to the Plaintiff or that a contract or an agreement was concluded or that 2nd Defendant admitted liability. Plaintiff has not succeeded to prove on a balance of probability that an agreement was concluded between 2nd Defendant and Plaintiff from which an obligation arose for 2nd Defendant to pay the amount claimed.

[30] Ehlers attempted to explain away the discrepancy by alleging that 2nd Defendant on 1 August 2008 told them to follow up with 1st Defendant to whom 2nd Defendant had paid the money but also undertook to pay by the end of August 2008. His explanation for not mentioning in the letter the undertaking that he alleged 2nd Defendant made to him shortly before he sent the letter that, it was because he only spoke briefly to 2nd Defendant who actually spoke to Chantelle, and also that he wrote what he thought he heard and could remember, does not make sense and is suggestive of evidence that is likely to have been contrived. The Plaintiff has based its claim upon such facts and therefore it is expected that they would play a prominent role in Plaintiff's evidence. Ehlers evidence is therefore in that regard, unreliable.

[31] Finally on Chantelle and Ehlers, when she substantiated her allegation that she did not phone 2nd Defendant, Chantelle vowed that she never phones clients, she only prepares invoices and only Ehlers would phone the debtors. However Ehlers' testified that either Chantelle or him would have phoned the customer, 5 to 7 days after sending the invoice. He was not sure if Chantelle phoned 1st Defendant. So the court cannot have confidence in Chantelle's evidence that she did not phone 2nd Defendant as Ehlers' evidence on that fact is contradictory, a possibility that she phoned 2nd Defendant cannot be ruled out.

[32] I find both Chantelle and Ehlers's evidence unreliable due to the contradictions and inconsistencies on the material facts that determine the key issues between the parties. So, both are not credible witnesses.

[33] Plaintiff's other witness Nethengwe was in a serious predicament having been brought to court under a subpoena. He believed to have received a raw deal from both parties. According to him he never saw Ehlers after signing the subcontract and showing him the property. As he **had a contract with Plaintiff, he expected Ehlers to notify him when they finished. He alleges to have written to Plaintiff but Ehlers never phoned him, whilst** 2nd Defendant also ended their relationship without notification. He however corroborates 2nd Defendant's allegation that 2nd Defendant came through with the invoice and they both signed and put in a claim on 18 June 2008, corroborated by the Request for Progress Payment on Building loan that is Exhibit "A". His evidence is also that he expected that after he paid the

Plaintiff, 2nd Defendant was going to reimburse him less the R160 000 he loaned him. So Nethengwe was to pay the Plaintiff which is understandable because he had a contract with the Plaintiff. It is therefore strange that Plaintiff never contacted him. Nethengwe also agrees that 2nd Defendant did pay him the difference of R73 000 although he says it was paid to him so that he can sign the claim form on 18 June 2008. So by the time the invoice was issued, 2nd Defendant had paid Nethengwe enough money to pay the Plaintiff. The 2nd Defendant had no reason to undertake to pay the Plaintiff. He was within his right to advise Ehlers to contact Nethengwe. It is therefore unlikely that 2nd Defendant would have voluntarily phoned the Plaintiff and undertook to pay the debt.

[34] Nethengwe's evidence was not wholly credible, understandably, he is a bitter. He was subpoenaed by the Plaintiff who at the same time is suing his company and did not bother to bring that fact to his attention or that on the date of trial it will seek default judgment against him as well. The summons was purportedly served upon the 1st Defendant at the registered address on 10 February 2009. According to the Plaintiff the matter was set down for trial but in closing argument it purportedly requested a judgment against 1st Defendant as well, albeit by default, 5 years after summons were purportedly served by fixing a copy to the principal door at the registered address, without effecting service of the summons again or the notice of application for default judgment on the 1st Defendant.

[35] In the High Court Practice Manual of the Gauteng Division Pretoria, provision is made for the Defendant to be made aware of continuing proceedings against him if default judgment is proceeded with six months after the date of service of summons for a notice of set down to be served informing the Defendant that such default judgement will be sought on a given date, which date should not be less than 5 days. The Application must be considered from that perspective.

[36] The 2nd Defendant's evidence was clear, sensible and logical. As it has been indicated he admitted that he received a phone call from Chantelle asking about payment and he asked for the invoice so that he can discuss it with 1st Defendant the person Plaintiff contracted with, who was never called by anyone from the Plaintiff's office demanding payment. At the time he confirmed as evidenced by the 1st Defendant as well that he had paid the 1st Defendant an amount of R233 000, so it would be expected of him to assume 1st Defendant to be in a position to pay the Plaintiff. It would therefore not make sense for him to make an undertaking to personally pay the debt himself, without having spoken to the 1st Defendant. As he also indicated, by then 1st Defendant had not bought the cement or bricks that he was supposed to have bought at the time. Ehlers also could not explain the surrounding circumstances of the alleged second undertaking. In his letter to 2nd Defendant written immediately after 2nd Defendant had allegedly made the second undertaking to him, Ehlers referred to an undertaking in the letter but failed to mention the one made directly to him of which he had first-hand information. On a balance of probabilities it could be because it never

happened. The court therefore accepts 2nd Defendant's evidence that he did not make any undertaking to Ehlers. It would not make sense as well that 2nd Defendant would advise Ehlers that they must follow up with Nethengwe for payment for the foundation and at the same time give an undertaking to pay by the end of August 2008.

CONCLUSION

[37] As it has been indicated the onus is upon the Plaintiffs to establish credible evidence that proves the existence of an undertaking with a legally binding effect. After consideration of all the evidence in the context of all the circumstances I find that the Plaintiff failed to establish credible facts from which a determination can be made if an undertaking was made, failing to discharge the onus cast upon it, as a result the other questions that relate to the legality thereof do not even arise.

[38] As with the 1st Defendant, besides the challenges mentioned above regarding a summons served 5 years ago, there was no formal written Application filed for default judgment as prescribed by Rule 31 (4) and (5) or service thereof or of the summons again on the 1st Defendant. The default judgment Application was made spontaneously made from the bar. Therefore the judgment sought against the 1st Defendant cannot be considered.

[39] Under the circumstances I make the following order:

[39.1] Plaintiff's claim against the 2nd Defendant is dismissed with costs;

[39.2] Application for Default Judgment against the 1st Defendant is struck off the roll, for failure to effect service of the summons or Notice of the Request for default Judgment in compliance with the High Court Practice Manual.

N V KHUMALO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

FOR THE PLAINTIFF	:	G F HEYNS
INSTRUCTED BY	:	DAY INC Tel No: 012 – 362 3280 Ref: C Krone
FOR THE DEFENDANT	:	A P DEN HARTOG
INSTRUCTED BY	:	STRAUSS DALY INC Tel No: 011 442 4250 Ref: