

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 2482/2009

In the matter between:-

BENTEL ASSOCIATES INTERNATIONAL (PTY) LTD Plaintiff

and

LOCH LOGAN WATERFRONT (PTY) LTD 1st Defendant

TRUSTEES OF THE N GEORGIU TRUST 2nd Defendant

CORAM: KRUGER, J

HEARD ON: 3 – 21 NOVEMBER 2014

DELIVERED ON: 11 DECEMBER 2014

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2. THE PARTIES

- [1] The plaintiff is a firm of architects where 70 architects and architectural technicians work. The first defendant is a private company that owns the Loch Logan Waterfront shopping Mall, having purchased it as a going concern from the second defendant on 20 October 2005. The second

defendant is the N Georgiou trust. The sole shareholder of the first defendant is according to Mr M Georgiou, the Michael Trust. Mr M Georgiou is a director of the first defendant.

3. THE ISSUES

- [2] Plaintiff caused summons to be issued against the defendants wherein it claimed from the first defendant, alternatively the second defendant R6 133 136,89 being the balance due for professional architectural services rendered and disbursements incurred in respect of the Loch Logan Extension project in Bloemfontein. Plaintiff's claim is set out in its interim fee claim dated 10 June 2008 (annexure LLW 1 to defendants' plea) and has three components. They are, firstly, the fee claim. Then there are claims for additional works relating to Mr Price, Rooftop parking zone 1-4, Exterior cladding to façades, Zone 5 parking and Speed ramps. The third component of plaintiff's claim is one for disbursements. Defendants denied liability on the basis that plaintiff's claims would be extinguished by the first defendant's counterclaim if not found to be premature. The claim in reconvention alleges that the plaintiff failed to perform its obligations in a professional and workmanlike fashion and without negligence, as a consequence of which the first defendant suffered damages in the amount of R33 903 077.

4. SEPARATION OF ISSUES

- [3] Quantum of the first defendant's counterclaim was separated as an issue to be determined later.

5. INSPECTION IN LOCO

- [4] An inspection in loco was held at the request of the first defendant on the first day of the trial, lasting about two hours. The proceedings were filmed and a DVD containing audio and visual material of what was said and pointed out, mainly by Mr Gautschi, counsel for the defendants was handed in as an exhibit. The inspection assisted in comprehension of evidence concerning specific places at the shopping complex. The main points seen at the inspection and dealt with at the trial were the Woolworths off-loading yard ingress and egress, the parking congestion on the mezzanine 1 level leading to the exits onto Kingsway, the eastern façade concrete slabs and the Pick 'n Pay delivery yard. During the trial a very short video was also shown of a truck backing into the Woolworths off-loading parking area. No minute was drawn of the inspection and no findings are coupled to what was seen during the inspection or the video shown in court.

6. ADMISSIBILITY OF EVIDENCE

- [5] Summons in this case was issued on 14 May 2009. The trial eventually ran from 3-21 November 2014. Because there were so many delays in this trial, I took the view that it was important to get the proceedings going without interruptions caused by argument and rulings on the admissibility of evidence. The risk of wasting time caused by the hearing of evidence which could later be found to be inadmissible appeared to be less than the risk involved in the time that would be taken up by hearing argument and considering rulings, which may later have to be revised, on the

admissibility of evidence. The record thus contains evidence which is inadmissible. In view of the findings that I have arrived at, the inadmissible parts of the evidence (particularly to be found in the testimony of Bray and Koupis) are of no significance. I have tried, as far as possible, to leave out the inadmissible evidence that is in conflict with the pleadings in the summaries below. I have taken account of the time spent on inadmissible evidence in my ruling on costs as appears under that heading below.

- [6] Two specific items relating to inadmissible evidence are the question of interim or cash flow payments, and the on risk basis. As to the allegation relating to interim account or cash flow payments, nothing turns on this distinction for present purposes. As Abrahamsohn said during cross-examination:

“My Lord we can talk about interim payments forever and a day. The fact of the matter is that whatever interim payments were due and whatever interim payments were made and whatever issues arose during that period, at the end of the day the project cost is the project cost and the fee basis is the fee basis and to air all of these documents here is I am afraid I have to believe it is not relevant.”

- [7] The question at this stage is not how payments were made, but what moneys are due. There may have been arrangements from time to time that the defendants pay certain amounts, as Mr Gautschi said during cross-examination of Abrahamsohn: “it is not in dispute that

payments were often late”. The defendants’ attempt to amend their pleadings to allege that payments were due on a cash flow basis, was disallowed. The defendants cannot now allege that they only need to pay on a cash flow basis. As Abrahamsohn said the provision in their standard agreement (clause 12 of annexure B, clause 14 in C and D) is supplementary, it does not replace the obligation to pay interim accounts.

- [8] As to the “on risk” basis alleged by the defendants in their other attempt to amend: The question in relation to items (2) – (5.3) in plaintiff’s claims is whether the plaintiff achieved stage 4. The question is whether there was substantial completion of the working and detail drawings. In other words, whether the drawings it produced were capable of being given out for construction, including having co-ordinated the documentation with the work designed by consultants and specialists (clause 2.4.1 of the client/architect agreement).

7. DOCUMENTS

- [9] More than 30 lever arch files were handed in. Below is a summary of the contents of these files.

A – Court Files

Volume 1

1. Pleadings
2. Notices
3. Expert notices

Volume 2 (Amendments)

1. Defendants' amendments - p1-450
2. Plaintiff's amendments - p1-130

Volume 3

1. Transcriptions
2. Trial Bundle's index
3. General
 - Heads of Argument – 2nd Resp lack of locus standi – Adv v Rhyn

Volume 4 (Pre-trials)

Volume 5

1. Application for separation – Adv Zidel – p1-107
2. Summary judgment – p1-46
3. Application Rule 37(8) – pre-trial conference - Jordaan J Application Amendment 28 July 2014

Volume 6

1. Defendants' Application to amend - 20/9/2014
2. Jordaan J Judgment - 20/9/2013
3. TK Annexures
4. Defendants' notice to amend plea - 12/9/2014
5. Objection to amend - 19/9/2014

Volume 7

1. Exhibits 1 and 2
2. Opening Address & Defendants' Response

3. Inspection in Loco documents prepared by Defendants
 4. Jordaan J – Judgment of 2013.
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Plaintiff's size A3 plans

DVD of Inspection in Loco

B – Plaintiff's Trial Bundles

Volume 1 - Plans

Volume 2 - Plans

Volume 3 - Plans

Volume 4 - Minutes of meetings

Volume 5 - Minutes of meetings

Volume 6 - Minutes of meetings

Volume 7 - Disbursements travel expenses

Volume 8 - Plan printing disbursements

Volume 9 - Brochures and Sundries

C – Plaintiff's Expenses Bundles

Volume 1 - Plan Printing Ledger

Volume 2 - Disbursements – Brochures and Sundries

Volume 3 - Disbursements – Brochures and Sundries

Volume 4 - Travel Expenses

Volume 5 - Travel Expenses

Defendants' Trial Bundles

Volume 1 - Plans - p1-31

Volume 2 - Plans - p32-59

Volume 3 - Minutes of meetings - p60-488

Volume 4 - p489-1023

1. Minutes of meetings - p489-747
2. Contract instructions - p748
3. Remedies to tiling - p749-755
4. Request information - p756
5. Sketch – SA passenger design Vehicle - p757
6. Sketch plan – World of Window - p758
7. Minutes - p759-760
8. Staircase screens - p761
9. Letters - p762-944
10. Photos - p945-1023

Volume 5 - p1024-1520

1. Geometric parking guidelines - p1024-1038
2. Directorate economic Dev & Planning - 4/2003 - p1038-1064
3. Project report - 8/2005 - p1065-1094
4. Letter – p1095-1100
5. Floor plans – p1101 & p1102
6. Joint building contracts committee – p1103-1154
7. Letters – p1155-1163
8. Report Andrew Dekker –p1167-1174
9. Sketch entrance nr 16 – p1175
10. Letters / Extract SABS 0107 / council's comments / drawings / plans / Provisional Bill of Quantities June 2005

Volume 6 - p1521-1981

1. Minutes / Letters / Plans / Service Agreements / Deed of Sale / Account / Tax Invoices / Payment Reconciliation / Payment Schedule / Principal building agreement.

Volume 7 - p1982-2676

1. Agreements / Letters / Tax Invoices / Statements / Plans
2. Independent Engineer Report - p2233-2259
3. Photos - p2260-2676

Volume 8 - p2677-3451

1. Photos - p2677-2904
2. Agreements / Letters

Volume 9 - p3452-3549

1. Pick & Pay Building Details

Volume 10 - Building drawings

Volume 11 - Rob Bray, sub-divided into Bray 1, Bray 2, Bray 3.

Volume 12 - Dr Rankine

Volume 13 - T Koupis

Volume 14 - Van Rensburg

Volume 15 - Dries Nel

D – Defendants' DIY Kit

Volume 1

1. Correspondence

2. Minutes of meetings
3. Plans/drawings
4. Photos/videos
5. Defendants' Expert Reports ("DER")
6. Plaintiff's Expert Reports ('PER')
7. Other

Volume 2

8. Stair 9 Design
10. Main Atrium Columns
12. Tiles
13. Tiles
14. Council's Approval Documents
15. External Concrete Façade
18. Deep Transfer Concrete Beams & Lost Parking Bays
19. Deep Transfer Concrete Beams & Lost Parking Bays
20. Walk-Off Carpets
21. Pick & Pay Delivery Yard
22. Lift Door Openings

8. **LITIGATION HISTORY**

16 September 2008 Section 345 Companies Act letter of demand by Plaintiff to first defendant.

19 May 2009 Summons issued.

4 June 2009 Summary Judgment Application issued.

19 June 2006	Affidavit opposing summary judgment.
25 June 2009	Summary Judgment Application removed from roll by agreement, leave to defend granted.
2 September 2009	Plea filed.
2 September 2009	Counterclaim filed.
18 September 2009	Plaintiff's plea to First Defendant's Counterclaim.
2011	Matter set down for trial, postponed to October 2012.
26 May 2011	Application to separate quantum and merits, removed.
14 June 2011	CJ Musi J: Postponed <i>sine die</i> .
15 October 2012	Intent to Amend by defendants, objected to. Trial postponed. Costs reserved.
October 2012	Application for leave to amend filed, and opposed by plaintiff.

November 2012	Defendant withdraws application for amendment.
August 2013	Fresh notice of amendment filed by defendant, objected to.
5 September 2013	Application for leave to amend filed.
September 2013	Supplementary notice of amendment filed.
9 September 2013	Trial set down for ten days.
20 September 2013	Judgment Jordaan J: Defendant's application for amendment refused, trial postponed <i>sine die</i> .
13 May 2014	Defendant's Notice of Intention to Amend plea and counterclaim.
23 May 2014	Notice of objection filed.
20 June 2014	Notice of motion: Defendant's application to amend plea and counterclaim.
8 August 2014	Plaintiff's Answering Affidavit to defendant's application to amend.

15 August 2014	Defendant's replying affidavit.
28 August 2014	Jordaan J: Application for amendment: condonation refused, matter struck off roll.
3-21 November 2014	Trial.

9. KEY DATES

23 June 2003	Agreement – Plaintiff and Trust (Appointment).
10 December 2003	First Invoice.
30 June 2005	Murray and Roberts Main Contract signed.
12 July 2005	Murray and Roberts on site.
20 October 2005	Sale of property as a going concern by second defendant to first defendant.
2 December 2005	Change of Name of shelf company to First Defendant.
10 May 2007	Last Invoice.
17 August 2007	Last payment by defendants.

23 August 2007 Certificate of practical completion by
NBA Studio.

29 April 2009 Revised "E" Invoice on which claim
is based.

10. DEFENDANTS' AMENDMENTS

[10] The defendants tried to amend their plea and counterclaim on a number of occasions. The first attempt was on 14 October 2012, after Mr Gautschi came into the matter. According to the judgement of Jordaan J that application was withdrawn in November 2012. On 13 August 2013 a notice of intention to amend was filed. The plaintiff objected on 23 August 2013. A notice of motion seeking leave to amend was filed on 4 September 2013, which was also objected to. After that a supplementary notice to amend was filed. The matter was on the trial roll for 9 September 2013, and came before Jordaan J. The application to amend was argued before him. He allowed certain paragraphs and refused others. The amendments sought by the defendants are set out below. The ones in brackets were refused by Jordaan J.

(1) (Plea: paragraph 4.4)
Deleting this paragraph and replacing it with other paragraphs (p179-194).

(2) (Plea: paragraph 5.3 - 5.10)
To be replaced (p194-199).

3. Counterclaim: Paragraph 7 of the annexure LLW 3
The amount of R377 425 to be replaced by R2 912 739,09 and adding the words: “and caused the unnecessary additional cost of reconstructing a suitable vehicle ramp according to a different design a breakdown of which costs appears in annexure LLW3a” after M1 level to exit.
4. Counterclaim: Paragraph 10 of the annexure LLW3
This concerned the Atrium columns.
5. Plea: Prayers
Insertion of words at the end of the prayers (p200).
- (6) (Counterclaim: paragraph 3)
Deletion and substitution of words.
7. Counterclaim: Deletion of claim 1 and the alternative.
The balance of the relief sought in paragraph 7 concerns the amounts.
- (8) (Defendants’ reply to plaintiff’s request of particulars)
These affect the amendments requested.
9. Counterclaim: paragraph 13 to Annexure LLW3
This concerned the floor tiles, and added a complaint about the movement joints.

[11] Thus four amendments were disallowed, namely those requested in paragraphs 1, 2, 6 and 8. As set out in the judgment of Jordaan J, the amendments essentially concerned two aspects:

- (1) In the first place the defendants now wanted to allege that the agreement was that interim payments would not be pro rata performance based as envisaged in the written agreements, but based on agreed cash flow.
- (2) Secondly, that the plaintiff's services would be on a risk basis, and not as set out in the terms of the written agreements. The amendment of paragraph 2 sought to extensively amend the defendant's plea to paragraph 9 of the particulars of claim, resulting in an alleged overpayment, and furthermore alleging that certain works itemised as particular premises on the property, were not done by the plaintiff and in some instances the plaintiff was not entitled to remuneration. The request in paragraph 6 depended on the request in paragraph 1. This request depended on the success of the other amendments sought.

These requests for amendments were disallowed.

11. EVIDENCE

[12] In order to save time expert witnesses did not read out their reports and curricula vitae but merely confirmed the correctness thereof in their evidence in chief, save to highlight the important aspects thereof.

Abrahamsohn

- [13] Abrahamsohn was the main protagonist of plaintiff's claim. He has been associated with the plaintiff since 1969 as employee, shareholder and director. He retired as director in 2014. In cross-examination Abrahamsohn said he became directly involved in this project in mid-2006. Richard Leighton who was in charge of the project on behalf of plaintiff departed for Australia in November 2006. Then Richard Gardiner took over, and Abrahamsohn took over to oversee and become involved in the project. Roger Gardiner re-joined the plaintiff company in mid-2006, Bray appointed him. Abrahamsohn denied that Leighton was an arrogant person and his attitude made it awkward for the council to deal with him. Abrahamsohn said he had no knowledge of the council's alleged difficulty to work with Leighton.
- [14] Abrahamsohn agreed that the last invoice was on 10 May 2007. He also agreed that the last payment by defendant was based on cash flow, on 17 August 2007. Abrahamsohn said the invoice dated 10 December 2003 for R879 293,40 was based on an estimate of the fee, of which a portion was then charged. In answer to the statement that this was a fast-track project, while one part of the building could be in phase 1, another could be in phase 3, Abrahamsohn agreed that that was possible.
- [15] The Quantity Surveyor gives an estimate of the final cost. That was on what Bentel based its accounts. If the final account is less than the estimated amount, there will have to

be an adjustment. Abrahamsohn stressed that all payment were not made timeously. It was put that every invoice for interim fees was paid. Abrahamsohn said the practice of the plaintiff's company is to charge fees on the scale applicable on the date of the letter of appointment.

[16] In re-examination Abrahamsohn was asked what his view was on clause 10 in the letter of 8 November 2008, where the last sentence was added. Abrahamsohn responded that the conceptual work is broad-brush. That is a fairly volatile stage of the project, where there are changes in concept, and sketches identify the final concept. That concept will then become a drawing. At the drawing level changes were quite unusual. In the free flowing stages of the architect's work many changes take place. The plaintiff has not charged defendant for the development of the concept. Drawings prepared in a stage of completion are fee-worthy in stage 4. Even when the drawings are ready for construction there may be changes needed also by the developer, or the tenants. The drawings of plaintiff were completed sufficiently for construction, and if not used are fee-worthy. From time to time the client would ask for additional features to be added. The adding of those features is a fee-worthy exercise.

[17] The claims identified by the plaintiff comprise substantial completion of stage 4, with reference to clause 3.3, and in the Architects Standard Agreement in Court Bundle 4 page 28 paragraph 5.3.

Mr Fee

- [18] Mr LRM Fee is a qualified architect who is a past president of the South African Institute of Architects. He was involved in the design of the Carlton Centre in Johannesburg in the 1960s. His curriculum vitae appears at page 51 of the Expert Bundle. His report on the counter claim appears at pages 256-264 of the Expert Bundle. He saw the Loch Logan Shopping Centre for the first time on Wednesday 7 August 2013 in the company of Abrahamsohn and based his report and evidence on what he saw on that day and what he was told. The certificate of practical completion was issued by Nel of NBA the stage 5 architects on 23 August 2007. The issuing of the certificate of practical completion brings the project to an end and means that the building is fit for the purpose for which it was intended, and is capable of being taken over by the owner.
- [19] Fee said that when designing a large shopping complex like this one, on a fast track basis, compromises have to be made. Decisions need to be made by the architect quickly because the project cannot be delayed. With the benefit of hindsight some decisions taken in the heat of the moment appear to be incorrect. Whatever has been done due to the fast-track nature of the project, has to be corrected then.
- [20] The question at the end of the day is, where the requirements have not been complied with, what is the outcome? Are there negative results caused by the non-compliance? In the final analysis the question is whether the

mall failed because of failure to adhere to the requirement complained about.

- [21] Payment for stage 4 is due on substantial completion of working and detail drawings.

Robert Reginald Bray

- [22] He testified for the Defendant although he worked for the plaintiff at the time of the project. He is an architect. He joined the plaintiff in 1987. In 2007 he was in the Design Department at plaintiff. He was the joint senior partner and the director in charge of client relationships. He handled the three Georgiou projects, and conducted most of the business without reference to the partners. He met Tony Koupis in 2003, and wrote a letter about the proposed endeavour at the Loch Logan Waterfront dated 23 June 2003. (Annexure “A” to the Particulars of Claim) The principal contractors Murray and Roberts came on site in 2005. Bray left Bentel because he did not agree with the manner the company was run. He called a shareholders’ meeting in August 2007 at which he proposed that performance rewards be given to staff. Two partners, Mr Abrahamsohn and Steve Roberts, refused to vote on the proposal and left the meeting. Bray resigned there and then. He had a six month notice period. His departure from Bentel was acrimonious.

- [23] The Loch Logan Waterfront Shopping Centre opened in August 2007. There are three court cases concerning the three Georgiou projects – Cedar Square, Fourways Mall

(where Bray also testified against Bentel), and where nothing has been built yet.

[24] The job captain for the Loch Logan project was initially Richard Leighton, who left for Australia in November 2006, whereafter Roger Gardiner took over. Bray testified that many letters were written at an early stage of the project which he had hoped would be superseded by a contract. The letters were preparatory work. In this case no agreement was ever signed. Bray has been involved in more than 100 shopping centre building projects. He explained that the problem with these projects is that the client does not want to accept the risk before finance is in place. The initial work is “on risk” to the architects.

[25] In December 2003 Bray was stressing about payments, because staff salaries and bonuses had to be paid. Bentel had an overdraft of R6 million. He sent an invoice to Tony Koupis for payment. He got no payment. In February 2004 he sent another invoice, claiming three payments of R200 000 each. Bray phoned Michael Georgiou who told him this was a family business, and that they were funding the project out of their own resources at that stage. Bray knows that a developer gets no money from the bank until builders move on to the site, the work is at risk.

[26] The letter Bray sent out on 9 February 2003 formed the basis of the final agreement he anticipated would be signed. Bray hoped that the client would sign the letter of 9 February

2003, but no client ever did, and no client ever accepted the provisions of clause 8/10, as to payment for concept work. On 8 November 2008 Bray sent a further letter to Koupis. The contractor, Murray and Roberts, was now on site. Bray added a sentence to clause 10, because he hoped to get the agreement in place. But this clause never came into effect. In his experience of working with shopping centres, Bray said that there can be up to 180 shops. The shops change on a regular basis, and also change their position. You are constantly shuffling the shops around in this huge puzzle. The tenants change right up to the end, even in the final stages of the development.

- [27] The Loch Logan project was not straightforward. The developer wanted 70 000 square metres of retail space adjacent to the water. The parking was moving around from the roof to the stadium. The tenants were not firm. The project grew from the initial R150 million to R350 million. Bray was the senior partner at Bentel and was quite happy to do changes on this project without charging fees.

T Koupis

- [28] Mr Tony Koupis testified for the defendant. He joined the Georgiou Family Business 20 years ago. He has completed more than 50 major developments. At the moment he is involved in a one-and-a half billion Rand development of a hospital in Cape Town. The Georgiou family wanted to develop the Waterfront in Bloemfontein further to make it a regional shopping centre. They found Bentel on the internet

and saw that Bentel had done architectural work for such developments, and Koupis invited Bray to come to Bloemfontein to discuss the project. Bentel was at that stage the architects for Pick 'n Pay, and Pick 'n Pay was one of the tenants targeted by the defendant. They had just completed the Kloppers extension to the Waterfront in 2002. Bray wanted Koupis to sign a contract, but Koupis was unwilling to do so.

- [29] Annexure 0.3 in Defendant's Bundle 11 (Bray 3, page 81 of Bundle 11) was the first invoice sent by Bentel on 10 December 2003. Bray wanted money, but Koupis did not agree that he could be paid. The discount at that stage was 15%, but the Georgious felt that because it was such a large project, they should be entitled to 17½%. At that stage Bentel had done a substantial amount of work. Soon it appeared that the project was much larger than initially anticipated, about R100 million more. They were getting to the Council approval stage, the tenants had not yet been secured. Koupis testified that the biggest risk they as developers have is that information is not given to contractors on time. At that time the market was building up for the World Cup, to be held in 2010. There were many occasions when Bentel would delay matters because of late delivery of plans. Koupis discussed this lateness with Bray, and they made an arrangement on payment. Leighton wrote to Koupis, it was clear to Koupis that Leighton did not agree with Bray.

[30] In the Defendant's Bundle 13 the invoices are at pages 49-103, and the reconciliations of payments appear at page 104-112. The main contractor was on site on 12 July 2005, but the working drawings had not been completed at that stage. Round about 8 October 2005 post dated cheques were given to Bentel to provide some comfort on their side. The normal procedure is for an architect to value his work off-site, but here the architects were busy with stage 4 drawings, while some building was taking place, and other drawings were at stage 1 and 2. It was not possible to determine the stage of the work as a whole. In April 2005 there were some R400 000 payments and some R215 000. Some of these were catch-up payments. The major part of the work still had to be done.

[31] With reference to annexure LLW 8 a letter from Leighton to Koupis dated 10 April 2006 Koupis testified that at that stage the project, in his words, was going backwards. Koupis then decided to bring Project managers, SIP on board. SIP took over the administrative role of the architects, Bentel, and SIP co-ordinated the process. If the architect gets assistance from a project manager, the developer is usually entitled to a 10% discount. Koupis told Bray that they were reducing the work of the architects, and they agreed that the plaintiff would in future give a discount of 20%. That is not mentioned in any letters, but appears from the invoices, in particular in LLW 1 where a 20% discount is shown.

- [32] In constructing a shopping centre, one deals with a critical mass, which means that you want the shopping centre to be overwhelming, so that there are just no other alternative to other tenants than to come to you. There were many changes to this project as it went on.
- [33] Koupis negotiated with Murray and Roberts about their fees. They were nine months behind schedule. Murray and Roberts wanted to add other work, so that the penalty for lateness would be absorbed. Similarly, Koupis did not want to give them additional work, because then he could not claim the delay penalty.

Lamprechts

- [34] Mr H A P Lamprechts is an architect who has been practising for 30 years. He has worked as urban and regional planner and project manager. There is no such thing as conditional approval of plans. The plans are returned by council with a form, which sets out what has to be done before the plans will be approved.

Johann Jansen van Rensburg

- [35] Johann van Rensburg is an architect who works for NBA studios in Bloemfontein. His CV appears at page 92 of the expert bundle, and he supports the opinions of Nel with reference to items 1, 2, 3, 4, 5, 11, 14, 17, 19 of the counterclaim. He also supported the report of lost parking, which he and Nel drew up together, which report appears at page 334-350 of the expert bundle. Mr Zidel cross-examined

Nel, who testified after Van Rensburg, on this report. Van Rensburg testified that he handled stage 5 of the project together with Nel. Van Rensburg was on the site full-time. After 2007 he remained involved, up to the present. He has been called out on numerous occasions because of tiles that popped.

A. C. P Nel

[36] Andries Carel Stephanus Nel is one of the two members of NBA studio, the stage 5 architects for this project. His CV appears at page 147 of the Expert bundle, and his reports are the following:

- (i) 27 May 2011 (p149-192) dealing with all items in the counterclaim
- (iii) 26 August 2013 (agrees with Hennie Lamprechts at 296-301)
- (iv) 28 August 2013 (updated report on lost parking (305-309))
- (ii) 17 October 2014 (p334-350) on item 19, lost parking
- (v) 29 October 2014 (supplementary report on item 8 (stair 9 design), item 9 (Pick 'n Pay internal staircase), item 21 (Pick 'n Pay delivery yard) item 22 (lift door openings) at pages 368-371.

[37] In cross-examination Nel confirmed that NBA studio was the principal agent on the entire project. He said the provision of “as built” drawings is an obligation of the stage 4 architect, Bentel. The appointment of NBA studio as stage 5 architect was an oral appointment during 2003. Nel confirmed that

NBA studio have been paid for their work. They had an agreement to be paid on an agreed cash flow basis. They are still busy on the project.

12. MEETING OF EXPERTS

- [38] The experts on behalf of plaintiff and defendant had a joint consultation on 30 October 2014 and prepared a joint minute that was filed in court at the end of the case. The persons who participated in the joint consultation were Alf Abrahamsohn, Robin Fee and Roger Gardiner. On behalf of the defendants: Dries Nel, Tony Koupis, Hennie Lambrechts, Rob Bray and Johann Jansen van Rensburg. Lamprechts was appointed as chairperson by the meeting. The meeting lasted from 09h00 to 15h00. The minute of the meeting of experts is dealt with under the heading of each claim and item of the counter claim below.

13. THE NATURE AND CONTENTS OF THE CONTRACT BETWEEN THE PARTIES

- [39] The particulars of claim allege that on 23 June 2003 the plaintiff and first defendant, alternatively second defendant entered into an oral agreement in terms whereof the first and/or second defendant appointed the plaintiff as architect for the project known as the Loch Logan Extension. In the plea defendants admit that an oral agreement was entered into between plaintiff and the second defendant on 23 June 2003 appointing plaintiff as architect for the project. Plaintiff alleges that the terms of the agreement were reduced to writing and recorded in a letter dated 23 June 2003. The

letter is signed by Bray who was at the time the joint senior partner (as he described himself when he testified) of the plaintiff, and states inter alia:

“Thank you for meeting with me on Wednesday and for your invitation for Bentel Associates International (Pty) Ltd to undertake the architectural commission for the proposed extensions at your Loch Logan development.

...

As also discussed, the involvement of the local architect who has already done some planning and has a longstanding relationship with you, could be accommodated in the following manner:

- Bentel Associates International (Pty) Ltd would undertake Stages 1-4 of the work as defined in the ‘Terms of Appointment’ of an Architects and the local architectural firm would perform the functions of Stage 5 – Contract Administration and Inspection.
- Included in the fees for Stages 1-4 we would provide the attendance of our job captain at two week design co-ordination meetings to ensure that documentation flow was maintained and that design decisions were made with Bentel Associates International’s involvement. This would ensure that 25% of the total architectural fee was available for the local architectural firm. Whilst this is a normal situation in many architectural associations it implies that the ‘Principal Agent’, in terms of the building contract, would have to be the local firm who administer the contract.

.....

We are prepared to discount our fee to you by 15% and to perform the work required to secure the major tenants on a ‘risk’ basis, i.e. no fee would be chargeable unless the project were to proceed. Disbursements including travel and brochure printing would be chargeable during this ‘on risk’ phase. Fees would only become

chargeable once leases had been signed by the major tenant, Pick 'n Pay and one other.

.....

We attach our standard appoint of Architect's letter for your signature based on the above discount."

[40] It is not clear what standard letter was attached to Bray's letter of 23 June 2003. A letter dated 9 February 2004 is attached as annexure "B" to the particulars of claim which set out the varied terms of the agreement between the parties whereby the discount was amended from 15% to 17½% (clause 3). Plaintiff alleges that the "terms of the varied agreement were incorporated in letters addressed by the Plaintiff to the Second defendant on 9 February 2004, 8 November 2005 and 19 April 2006", being annexures "B", "C", and "D" to the particulars of claim. In the plea the defendants admit the plaintiff's allegations "in so far as they are in accordance with the terms and conditions of annexures "A", "B", "C" and "D" to the Particulars of Claim".

[41] Although the letters attached as annexures "B", "C" and "D" are largely the same, there are some differences. In clause 3 the amount increases from R150 million for the project in annexure "B" to R350 million in annexure "D". Clauses 5 and 6 of annexures "C" and "D", dealing with Consultants and Site details and development control do not appear in annexure "B". Those two clauses were added for the first time on 8 November 2005 in annexure "C". A more significant difference is the last sentence added to clause 10

on 8 November 2005 in annexure “C”, the letter dated 9 February 2004.

- [42] The clause headed “Changes in Scope of Works and Substantial Changes to Drawings” (clause 8 in the letter of 9 February 2004 (annexure “B”) reads:

“8. Changes in Scope of Works and Substantial Changes to Drawings

If, after completion of working and/or detail drawings, any changes in scope of work or any substantial changes to or alterations of such drawings are required at the instance of the Client or a particular Tenant, the work involved in effecting the necessary changes will be charged for in terms of the applicable regulations and codes of practice in terms of the Government Gazette No. 4805, Volume 319 No. 13707 dated 3 January 1992 and any applicable amendments thereto which may be promulgated from time to time. Time charges shall be based upon the Private Sector scale for time charges.”

- [43] In the letter of 8 November 2005 the following sentence is added to the end of this paragraph:

“Changes to the plans during the normal course of developing the concept will not constitute an extra fee.”

- [44] In the letter of 9 February 2004 (annexure “B”) clause 13 deals with “Supplementary Services” and reads as follows:

“13. Supplementary Services

Associated Companies within our Group structure have the expertise to provide supplementary services in respect of Interior Design, Graphic Design, Corporate Identity, Centre Signage, Logo Design and other related design requirements. The scope of these

services and the fees chargeable for these will be discussed in respect of each project as appropriate.”

- [45] In the letter of 8 November 2005 “Supplementary Services” are dealt with in clause 15:

“15. Supplementary Services

Associated Companies within our Group structure have the expertise to provide supplementary services in respect of Interior Design, Graphic Design, Corporate Identity, Centre Signage, Logo Design and other related design requirements. The scope of these services and the fees chargeable for these

Included in the aforementioned scope of works will be:- Mall Design / Theming of Shopping Centre; Standard Shopfront Designs; Wayfinding Signage; Centre Logo and Name . Tenant layouts and signage will be by tenant designers but approved by our office. Layout of external tenant signs will be co-ordinated and planned by our office.”

It will be noted that the last sentence of the first paragraph of clause 15 ends abruptly.

- [46] The letter of 19 April 2006 contains the identical clause 15. As in the previous letters, after the last clause, the following three paragraphs appear:

“We trust that we have covered all aspects of our Appointment, but request that you advise us in the event of there being queries.

We enclose 2 copies of this letter and request that you indicate your acceptance by initialling each page and signing in the space indicated below on one copy of the letter. Please return the signed copy to us for lodging in our files.

We again express our appreciation for the appointment as Architects for this Project and assure you of our best attention at all times.”

[47] The second defendant sold the property to the first defendant on 20 October 2006. Clause 9.2.1 reads as follows:

“9.2.1 save as I disclosed in the title deed relating to the Property, there are and will be no material agreements in respect of the Property to which the Purchaser will become bound on obtaining transfer of the Property.”

Clause 11.4.1 reads:

“11.4.1 It is recorded that it is the intent and purpose of the parties that the Purchaser should be enabled to continue the rental enterprise conducted from the Property as far as possible in the same manner as it was conducted by the Seller up to the date of transfer and that to that end the Purchaser shall be substituted for the Seller in respect of each of the contracts in respect of the said rental enterprise insofar as the terms of such contracts individually allow. It is specifically agreed that, as far as it may be necessary, the Seller shall enter into such Agreements as may be necessary to assign its rights and obligations (but does not warrant the other party will consent to the delegation) in terms of the contracts referred to above to the Purchaser.”

Clauses 14 and 15 read:

“14. WHOLE AGREEMENT

This Agreement constitutes the whole Agreement between the parties as to the subject matter hereof and no Agreements, representations or warranties between the parties regarding the subject matter hereof other than those set out herein, are binding on the parties.”

“15. VARIATION

No addition to or variation, consensual cancellation or novation of this Agreement and no waiver of any right arising from this Agreement or its breach or termination, shall be of any force or effect unless reduced to writing and signed by all the parties or their duly authorised representatives.”

[48] In the standard client/architect agreement the following clauses are relevant:

Clause 2.4 defines Stage 4:

“2.4 STAGE 4: TECHNICAL DOCUMENTATION

- 2.4.1 Prepare construction documentation and co-ordinate the documentation with the work designed by consultants and specialists
- 2.4.2 Obtain approval from the relevant authorities
- 2.4.3 Review the estimated costs of the works in relation to the budget
- 2.4.4 Prepare documents to procure offers for the execution of the works”

Clause 4.6 provides:

“4.6 CHANGES OF STATUS OF THE PARTIES

Neither party shall assign, sublet or transfer its interest in this agreement without the written consent of the other, which consent shall not unreasonably be withheld”

Clause 10 deals with the payment of fees and disbursements.

“10.0 PAYMENT OF FEES AND DISBURSEMENTS

10.1 The architect shall be entitled to render interim accounts on a monthly basis which are payable on presentation.

10.2 Accounts shall be based on an assessment by the architect of the professional services rendered to date. The aggregate of the interim claims is not to exceed the total fee payable.

10.3 Fee and disbursement accounts may be billed separately.

...

10.6 Should the client allege a claim against the architect, a contactor or any other party involved in the project, such claim shall be dealt with in its own right. The client may not withhold payment of fees or disbursements of part thereof due to the architect on this account.”

Clause 11.4 reads:

“11.4 WHOLE AGREEMENT

This agreement, including any annexures hereto, is the whole of the contract between the parties and no variation hereof shall have any effect unless reduced to writing and

signed by both parties. The validity of clause 11.3 shall not be effected by the termination of this agreement.”

[49] The Main contract between the second defendant and the contractor, Murray and Roberts, was signed on 30 June 2005.

Conclusion on nature of agreement

[50] As the pleadings stand, with the admission of the defendant that the written documents are the contract between the parties, it means that the plaintiff is entitled to remuneration for work based on the contract value as determined by the quantity surveyor. The question is for what work the plaintiff is not entitled to remuneration because the drawings were part of the concept drawings, excluded in the last sentence of paragraph 10 on page, and did not qualify as stage 4 work or because the work drawn was not constructed.

14. PAYMENT OF FEES : INTERIM FEES OR CASH FLOW BASIS

[51] The defendants contend that the agreement was that fees were to be paid on a cash flow basis. The plaintiff says it is entitled to render interim accounts.

[52] All the Bray letters, annexures B, C and D state at the outset in paragraph 1:

“Our services will be in accordance with the ‘Client/Architect Agreement’ published by the Institute of South African Architects, a blank copy of which is enclosed herewith.”

The Client/Architect Agreement provides:

“10.1 The architect shall be entitled to render interim accounts on a monthly basis which are payable on presentation.

10.2 Accounts shall be based on an assessment by the architect of the professional services rendered to date. The aggregate of the interim claims is not to exceed the total fee payable.”

[53] The defendants unsuccessfully attempted to amend their plea to withdraw the admission that the contract was as pleaded and to allege that payments were to be made on an agreed cash flow basis. That application for amendment was refused by Jordaan J in his judgment of 2013. There was no appeal against that judgment. The reference to cash flow payments in claim 14 of Annexure D to the Particulars of Claim is supplementary, and is focused on a payment of VAT. Clause 3.3 of Annexure D states:

“Interim instalments of this portion of the fee will be claimed by the Architects as the work proceeds.”

[54] When Bray saw he was not getting any money at the start of the project he agreed with Koupis on certain payments, just so as to get money in for the plaintiff. The contract makes

provision for interim payments as the work proceeds, and that is what the plaintiff is claiming now.

- [55] Mr Gautschi contends that because all the interim payments based on agreed cash flow have been paid by defendants, plaintiff has failed to prove that there is any basis in fact or contract on which it is now entitled to a further interim payment. He says the final account will be due when presented, but it is common cause that the final account has not yet been tabulated and the final cost of the works has not yet been determined. Because all interim agreed cash flow payments have been paid, plaintiff must await tabulation of the final account when the “final cost of the works” will be determined. Clause 3.5 of annexures “B”, “C” and “D” provides:

“The agreed percentage fee based upon the final cost of the works less previous payments payable upon practical completion, subject to final adjustment when the final account has been tabulated.”

- [56] Mr Zidel points out that clause 14 of annexure “C” to the particulars of claim deals with payment of accounts. The parties can agree as to how payments are to be made. They could for instance say, “we have done work, let’s agree you pay us R200 000”. There may be an agreement to pay according to cash flow. It is not in dispute that the defendants were always in arrears. There has to be an estimate of the amount due. That has been done. When the final account has been tabulated there will be a final figure.

At this stage the plaintiff is allowed to claim on the estimated cost (which is what the Quantity Surveyors have done). The plaintiff finished its work in 2007, we are now nine years down the line.

- [57] The point that payment is not due because the final account has not been tabulated is not taken in the defendants' plea. In the plea the defendants attach a recalculation by the Quantity Surveyors of the project, the Verster Berry Partnership, of the amount due to the plaintiff, and the defendants say in the plea that that reflects the total amount due to the plaintiff. The defendants say that payment of that amount must be stayed until defendants' counterclaim has been decided. There is no merit in Mr Gautschi's contention that the claim is premature.

II CLAIMS AND COUNTER CLAIM ITEMS

15. HOW CLAIMS ARE SET OUT

- [58] At all the plaintiff's claims set out below, as well as with all the items under the counterclaim, there are four headings: (i) the formulation of the issues in dispute by the expert witnesses at their joint meeting on 30 October 2014 and the views expressed at that meeting; (ii) the evidence relevant to that claim or item; (iii) the contentions of the legal representatives, and (iv) a conclusion on that item.

16. PLAINTIFF'S CLAIMS

- [59] The first issue was the plaintiff's fee claim:

(1) Plaintiff's fee claim

(i) Experts' Minute

The plaintiff claims payment of outstanding fees due to it in respect of having reached stage 4 on the project. The experts at their pre-trial meeting identified the following issues:

1.1 Whether the plaintiff achieved stage 4

The plaintiff's experts were of the view that stage 4 was achieved because all components were completed and built, and council liaison is stage 5.

The defendant's experts disagreed and were of the view that various aspects were outstanding to achieve the completion of stage 4 e.g. there was an incomplete set of As-built drawings, council approval was conditional and NBA had to partially complete drawings for approval.

1.2 Whether the calculation of the plaintiff's fees is done in accordance with the applicable scale of fees for 2006.

Plaintiff's experts were of the view that the fees were calculated in accordance to the tariff applicable when the agreement was entered into. The fee used as starting-point in the calculations of the plaintiff in annexure LLW 1 attached to the particulars of claim is R1 050 000 + 5.5%. Defendant's experts said the calculation still had to be agreed upon.

(ii) Evidence

[60] According to Abrahamsohn the amount due by the defendants to the plaintiff is as per the invoice, annexure “E” to the particulars of claim, being the amount of R15 869 310,41. The plaintiff’s fees that are due are detailed in annexure “LLW 1” to the plea. The value of the principal contract with Murray and Roberts is given as R336 400 00, but Abrahamsohn accepts the calculation of the Quantity Surveyors Verster Berry in annexure “LLW 2” in the amount of R336 388 862,79, which is slightly less than his figure. In respect of the direct contracts Abrahamsohn also accepts the figure of the Quantity Surveyors, being R12 911 260. The calculations of the plaintiff’s fees is based on the standard fees prescribed by the governing body of the South African Architects, less 20% which was the discount agreed upon between the parties.

[61] According to Abrahamsohn the plaintiff and the defendant agreed that the defendant would appoint a local Bloemfontein architect to do the Stage 5 work. Therefore 25% was subtracted from the calculation of the fees due to the plaintiff. The 25% was allowed for the fees for the Stage 5 architects. The work for stages 1-4, which plaintiff would do, would be 75% of the total fee. Thus plaintiff would be entitled to a total fee of 75% less the discount of 20%. Calculated on the total contract value less the subtractions the fee due to plaintiff is R12 426 007 according to Mr Abrahamsohn’s calculations. Using the figures of the Quantity Surveyors, which Mr Abrahamsohn accepts, the

figure is slightly less. The defendants have to date paid R13 119 165,17. Taking into account plaintiff's additional claims, there is shortfall of some R6 million. According to defendant's calculations, plaintiff has been overpaid by almost R5 million.

(iii) Counsel's Contentions

Plaintiff's claims

[62] The plaintiff contends that R12 293 652,64 is its fee on the contract as calculated in Appendix "A" to the heads of argument dated 20 November 2014. Plaintiff admits that R13 119 165,17 has been paid.

[63] Defendants say, as foreshadowed in the prayer to defendants' plea, that plaintiff's claim for any further fees is premature. All interim cash flow based payments have been paid, and plaintiff must now wait for the final tabulation of the final account, at which stage the "final cost of the works" will be determined as contemplated by clause 3.5 of each of annexures B, C and D. Clause 3.5 reads:

"The agreed percentage fee based upon the final cost of the works less previous payments payable upon Practical Completion, subject to final adjustment when the final account has been tabulated."

[64] Mr Zidel says this is not the final fee plaintiff is claiming. He agrees that the final fee has not be tabulated. This is a further interim payment to which the plaintiff is entitled.

(iv) Conclusion

[65] Stage 4 is defined as follows in the client/architect agreement in clause 2.4:

“2.4 STAGE 4: TECHNICAL DOCUMENTATION

2.4.1 Prepare construction documentation and co-ordinate the documentation with the work designed by consultants and specialists.

2.4.2 Obtain approval from the relevant authorities

2.4.3 Review the estimated costs of the works in relation to the budget.

2.4.4 Prepare documents to procure offers for the execution of the works.”

In the plaintiff's annexures B, C and D stage 4 is defined in clause 3.3:

“Work stage 4 – Approvals and Technical Documentation

A further 40% of the fee, up to a cumulative total of 75% of the fee, based upon the Estimated Final Contract Price payable upon substantial completion of the working and detail drawings. Interim instalments of this portion of the fee will be claimed by the Architects as the work proceeds. Updated as-built drawings including all variations made will be provided at the end of the project prior to payment of the final fee instalment as agreed.”

[66] Abrahamsohn testified that the deduction of 40% from the fee claim by the quantity surveyors in annexure LLW 2 on the

basis that the fee for stage 4 is “only due once done” is totally incorrect and unwarranted. This statement by Abrahamsohn was not assailed in cross-examination. The plaintiff was appointed as stage 1-4 architect. The certificate of practical completion was issued on 23 August 2007. There is no suggestion that plaintiff’s appointment as stage 4 architect was ever terminated. Plaintiff’s fee claim should be calculated using the figures of the works as conceded by the plaintiff including direct contracts up to completion of stage 4, in other works without the deduction of 40%.

[67] All the plaintiff’s work has been done. The certificate of practical completion was issued by NBA Studio on 23 August 2007. The plaintiff has completed stage 4 and is entitled to payment of its main fee up to stage 4.

[68] It is important to note that “as-built” drawings are to be provided at the end of the project. It is common cause that Nel of the stage 5 architects submitted the “as-built” drawings. That was not because of unwillingness of the plaintiff to do so. It was more practical for the stage 5 architect to submit the “as-built” drawings. No criticism was levelled against Abrahamsohn for not doing “as-built” drawings. The plaintiff complied with its stage 4 obligations and is entitled to a stage 4 fee.

(2) MR PRICE

(i) Experts' Meeting

[69] The plaintiff claims payment of the fees due to it for stages 1-4 in respect of Mr Price.

The defendant was of the view that plaintiff achieved only stage 3.

(ii) Evidence

[70] According to Abrahamsohn the original plan was to put Mr Price where the upper floor of Woolworths is now. The drawing of the plans for Mr Price was a late instruction from the defendant. Plaintiff prepared drawings. Defendant then decided that Mr Price would not be included there. According to Mr Abrahamsohn the drawings were completed up to stage 4. According to defendant the work for stages 1-3 was done, but stage 4 was not done or approved. A complete set of structural drawings was made, with one or two outstanding issues. These drawings were ready for construction.

[71] In response to the question in cross-examination that Nel prepared the stage 1 and 2 drawings, Abrahamsohn responded that Nel only prepared a block lay-out after discussions with Mr Price. From that block lay-out the plaintiff would do the drawings. There were problems with the block lay out prepared by Nel, which plaintiff had to modify. Then plaintiff drew the stage 4 drawings. Subsequently defendant decided that the building of Mr Price was not to be in the scope of Murray and Roberts. Almost a

year after plaintiff had done the drawings, nothing had happened. Then the defendant called Gardiner at plaintiff's offices. The plaintiff was then asked to send the Mr Price drawings to Nel in digital format, which plaintiff did. Asked why Murray and Roberts built a parking lot in that area, Abrahamsohn responded it was one of the numerous changes by defendant. 170 vehicles could park there. That was part of the requirement of the municipality. The defendant then decided to use that parking for a retail area. The team was instructed to develop that area as Mr Price. That was discussed at the 10 April 2007 meeting.

[72] Asked whether the plaintiff was at that time of the view that Murray and Roberts could complete the project before August 2007, Abrahamsohn replied that the contractor would be entitled to an extension of time. When it was pointed out that this was a very late stage, Abrahamsohn responded that the plaintiff did the drawings up to stage 4.

[73] Referred to an email of 11 April 2007 from Nel to the Plaintiff, Abrahamsohn responded that he recalled the email, he got an electronic version of the drawings from Nel. He said Nel's were line drawings, marked up on the drawings prepared by the Plaintiff. Abrahamsohn denied that the drawings of Nel were stage 1 and 2, and said that he regarded them as line drawings. Abrahamsohn said the notes of Nel at page 2145 would be addressed and solved at stage 3. Abrahamsohn insisted that all the drawings as a whole comprise stage 4. Referred to the plans on page 123A Abrahamsohn was

asked what changes were made in revision 2 after revision 1, and Abrahamsohn responded that the lay-out changed, the dimensions changed. He agreed that that falls short of what the contractor needs. Abrahamsohn said that there were annotations on plan 120A. It was put that these annotations do not help the contractor, but Abrahamsohn responded that the contractor knows what to do from page 120A. Abrahamsohn said the drawing on page 122A is an addition to the drawing, it updates 124A, it represents the scope of the work. Abrahamsohn insisted that these comprise a comprehensive set of drawings required by the contractor to build Mr Price. Payment for stage 4 is due when the drawings have been substantially completed. This was work in progress. Abrahamsohn agreed that the contractor would need ceiling details. Abrahamsohn agreed that the ceiling details had not been resolved yet. Abrahamsohn said the contractor needs the shop fitting details in due course, those details would all follow. He agreed that there were no tiling details. The roof plan was indicated on the general plan. Details of the structural steel needed were done t by the structural engineer. Abrahamsohn agreed that he did not co-ordinate with the air-conditioning installers. Abrahamsohn insisted that the working drawings were substantially complete.

- [74] According to the expert report of Fee, this work arises from a decision by the defendant to omit certain open roof parking in Zone 6 and to build new tenant space. In Fee's opinion sheets 120A-125G represent the architect's work stage 4

construction documentation and comprise detailed general arrangement drawings, plans and sections together with structural engineer's detailed layouts and sections based upon the architect's General Arrangement drawings and issued for costing and tender. Fee's view was that the plaintiff is entitled to payment for stage 4 in respect of the Mr Price area.

[75] In cross-examination it was put to Fee that a lot more detail is needed for a drawing for construction. Fee responded that the tenant details would be populated later. Fee said the detail of the ceiling, tiling and doors need not all be issued at the same time. As to co-ordination with other consultants, Fee said that was the normal situation. Fee said the Mr Price drawings were extremely simple. The key issue was that the structural engineer had to be brought in. There were many issues as to penetration that could not be made at the beginning. Fee's view was that you deal with those issues at a later stage. In response to the question that there were clouded areas on drawing 125E, Fee responded that the clouded part was only part of the drawing. Even though a portion of the drawing was not ready for construction, the balance as ready and could proceed. Although the drawing was not complete, they could be issued for construction. They would need to be supplemented, but Fee said that that is the reality of the concept.

[76] Bray said his knowledge of Mr Price was limited. It was built in 2008, where Nel, the local architect finished stage 4.

Bray's view was that the Bentel drawings were still phase 3. Bray disagreed with Fee who assumed that because there was an engineer's drawing, stage 4 had been reached. There were no finished specifications, no details of Hand Rails, Bulk Heads, Sprinkler Heads and Ceiling plans. Bentel got into stage 4, but did not complete stage 4.

- [77] Van Rensburg testified that he prepared the drawings in respect of the Mr Price area. NBA studios asked Bentel for electronic copies of the drawings. NBA made a suggestion for a development and presented it to Koupis. Van Rensburg created a new "envelope" indicating the areas to be let. It was a steel structure. Koupis asked Van Rensburg to send the plan to Bentel so that they could complete it for construction. NBA got the drawings back from Bentel and Koupis asked that NBA complete the project. The information received on the Bentel drawings was not complete, for instance there was no tenant information. Van Rensburg had problems with the Bentel drawings and spent about a year trying to resolve the difficulties. There were several problems with the Bentel plans, as indicated by the red numbering on plan 120A. In cross-examination Van Rensburg said that the drawings in Defendant's Bundle 7 pages 2145-2147 were prepared by him. He could not say how many parking bays were lost due to the provision for Mr Price. Van Rensburg said his three drawings were not a bubble diagram, which is the embryo of a drawing. It was put to Van Rensburg that the engineers prepared drawings

based on the Bentel drawings, and he responded that many of the drawings were already in existence.

(iii) Counsel's Contentions

[78] In annexure LLW 2 the defendant admitted that plaintiff completed stages 1-3, and was entitled for fees up to that stage. In argument Mr Gautschi attempted to withdraw this admission in accordance with defendant's notice of amendment which was refused. That cannot be done. The defendant has admitted liability for payment up to stage 3, and that admission stands.

[79] Mr Zidel says the plaintiff's drawings in respect of Mr Price were substantially complete, could be used for construction and constituted stage 4 drawings.

(iv) Conclusion

[80] The drawings for this area were completed by the stage 5 architects. The plaintiff is only entitled to payment up to stage 3, as the Quantity Surveyor allows in LLW 3.

(3) ROOFTOP PARKING ZONES 1-4

(i) Experts' Meeting

[81] The question here is whether the plaintiff reached stage 4. The defendant agreed that the drawings prepared by plaintiff were equal to stage 3. The parties agreed that no additional rooftop parking was constructed, and that the rooftop parking was requested by client should the air rights for the Zone 5 parking garage not be approved.

(ii) Evidence

[82] Abrahamsohn said that initially the parking was planned to be on the site as it is now. At the end of the project there was an urgency to provide more parking. Initially the parking was intended to be in Zone 5, being on the stadium and in the air space over Kingsway. There were delays in acquiring the air rights so as to get approval for the zone 5 parking. In order for the defendant to comply with municipal parking requirements, there would have to be another level of parking above the zones 1-4 parking on the rooftop. On the defendant's instruction plans and structural plans for rooftop parking above zones 1-4 were prepared. At the moment when the construction of the rooftop parking was to proceed with the air rights were approved so that the zone 5 parking could be constructed. This meant that the rooftop parking over zones 1-4 did not proceed, although plaintiff had done the drawings up to stage 4. There were completed drawings. According to the defendant only stage 3 was reached, and stage 4 was not completed. In the result plaintiff subtracts 25%, defendant subtracts 65%. Abrahamsohn insisted that the drawings were ready for construction, and the stage 4 drawings were made. Although this is a steel structure it is mostly built from the engineer's plans prepared by the plaintiff.

[83] In cross-examination it was put to Abrahamsohn that the drawing on page 98 is extracted from drawings 96a and 97A, and 98A is the same as 98, and 99 is a blow-up, as is 100. Abrahamsohn responded that the drawings show the roof

over the rooftop parking that would be the surface of additional parking. The roof on top was added, that was necessary. 103 is the engineer's drawings. On 103B the detail had to be added. The lighting and ventilation details are not shown on the drawings, and the drawings were not co-ordinated with the water requirement, and the water run-off is not shown. Abrahamsohn responded that the water run-off would follow from the floor below. This was a late instruction in a fast-track project. The absent details were not key. In response to the statement that the water proofing details were not shown on the plan, Abrahamsohn responded that the instruction from the client was that the roof was not to be waterproofed. It was concrete and screed laid without waterproofing. No barriers were shown but this parking area would be the same as other parking areas.

[84] According to Fee, Sheets 96A-102A represent the architect's work stage 4 construction documentation and comprise general arrangement drawings, plans, sections and elevations, which were issued for municipal approval and for construction. Sheets 103A and 103B represent the structural engineer's layout plans and section which are based on and co-ordinated with the architect's drawings. These drawings are capable of being issued for construction. In cross-examination Fee said that he felt that these drawings were ready to be issued for tender.

[85] Bray described the rooftop parking as a moving target. Bentel accepted the risk. The amount of work Bentel did

was very limited, it was aborted work. The work done by Bentel was not significant. Dealing with the five stages of Architects' work identified in the standard contract, Bray said stage 1 is not buildable. At stage 3 you check whether the work is feasible. At stage 4 you make accurate and detailed drawings. The initial structural layout does not complete stage 4. The best way to do the stage 2 work, is to do it in Stage 4. In cross-examination drawings of the roof-top parking and Mr Price were put to Bray. He insisted that all drawings have to be complete to reach the end of phase 4, all consultants have to be co-ordinated, not just the engineers. In order to build you need the complete drawings. The Bentel drawings were not complete.

(iii) Counsel's Contentions

[86] Mr Gautschi relies on the finding of the quantity surveyors that stage 4 was not reached is correct.

[87] Mr Zidel says the stage 4 drawings for the rooftop parking were substantially complete. The plans for the zone 1-4 rooftop parking were abandoned once the zone 5 air rights were approved by council. The plaintiff did the work and is entitled to its fee. The fact that the zone 1-4 rooftop parking was not persisted with does not exonerate the defendants from paying plaintiff for the work that it did.

(iv) Conclusion

[88] All consultants were not co-ordinated. The plaintiff's drawings were not complete. The quantity surveyors

expressed the view that plaintiff's work only got as far as stage 3, and for purposes of this claim that view of the quantity surveyors must be accepted.

(4) EXTERIOR CLADDING – EAST FAÇADE

(i) Experts' Meeting

[89] The plaintiff claims payment of the fees due to it for stages 1-4 in respect of the exterior cladding to façades.

The defendant was of the view that the plaintiff's design was not built because it exceeded the original design intent. Defendant did not want to proceed.

(ii) Evidence

[90] This is a large concrete structure facing First Avenue, on the eastern side of the shopping centre. Abrahamsohn said the defendant had said that this should be the most impressive façade in Bloemfontein. Defendant wanted tile cladding for this façade. Union Tiles were sourced and the fitting of the tiles was costed. The drawing was complete as to the stage 4, ready for construction. Defendant did not build the façade. The value of the work is based on the quotation from Union Tiles. The plaintiff's fee should be R192 850,81. Abrahamsohn testified that plaintiff was instructed to complete the drawings for a top-quality finish. There were several possibilities, but the defendant approved the 800x800 porcelain tile. The tiles were sourced from Union Tiles. There is an extract from the minutes dealing with this matter on Plaintiff's Trial Bundle 1 at page 46 and pages 47/48 make reference to a mock-up on 29 May 2007.

Plaintiff's drawings constitute stage 4. The tiling work on the eastern façade was never done.

[91] Abrahamsohn relied on the minute of a design meeting held on 7 March 2007, where Abrahamsohn, Bray and Koupis and Mr Vimercati, the project manager, were present (Plaintiff's Trial Bundle 4 page 584, item 1.11) which reads as follows:

“

	<u>ACTION</u>	<u>DATE</u>
1.11 Façade Cladding Scheme – For the overall scheme, the following was confirmed: -		
• To retain the 400mm offset to the concrete façade. • Proceed with the Union scheme and modify in order to achieve the aesthetics as originally intended under the Africon scheme. • BAI to urgently issue the façade cladding revised scope/specifications, in order to release this for bid purposes.		
	BAI	URGENT”

Abrahamsohn said that the instruction to proceed with the drawings was given orally by the project manager of defendant.

[92] Abrahamsohn said that at the meeting of 26 October 2006 Koupis said that he was prepared to throw as much money at this façade as is necessary. Referred to page 1073 Abrahamsohn said that the minute indicated that the façade

had been approved. There was no further action by anyone necessary. When it was put to him that the minute referred to the mock-up, Abrahamsohn said the mock-up was incidental. The approval was to do the tiling. Referred to the meeting of 12 June 2007 Abrahamsohn said this was a debate on the Western façade, which was overtaken by events. According to Abrahamsohn the essence was that the drawing had been done and completed on the instruction of the defendant. Defendant's decision not to proceed with the tiling does not alter that fact. It was put that Koupis did not approve the tiling because it was very expensive. Abrahamsohn said that may or may not be the case, but the work on the drawings was done to obtain the price. Koupis might have changed his mind and forgotten. The drawings were done and ready for construction. It was put to Abrahamsohn that the plaintiff only got paid for work that actually proceeds, as Bray says, and if the work was not constructed, there was no fee due. Abrahamsohn responded that if one does work on instructions, that is fee-worthy. Abrahamsohn denied that the cladding on the façade should have been a concrete finish. Exhibits 1 and 2, photographs showing holes in the concrete slabs on the eastern façade were handed in to illustrate what was intended, what the contractor should have been told to do.

[93] Abrahamsohn said that it is the experience of plaintiff that buildings which have off shutter concrete, do not perform well. After a few years it becomes necessary to plaster and paint the concrete because of discolouration. It was put to

Abrahamsohn that because the design intended by Bray was not conveyed to the contractor, remedial alterations had to be made, and Bray made 17 drawings for an alternative. Leighton did not convey the instruction to the contractor. Abrahamsohn said the thinking of the plaintiff was contrary to the use of off-shutter concrete.

[94] Bray testified that when Koupis gave an instruction to proceed with the costing of the façade at the meeting of 7 March 2007 it did not mean that the work was issued for construction. Bray said the original drawing to the council showed that the eastern façade would be plaster and paint. Bray said that was not acceptable to the council (although there is a plan on which council approval is noted showing plaster and paint for the eastern wall).

[95] It was then decided to use concrete. Bray convinced Koupis to go with concrete. This was before Abrahamsohn was involved in the project. Concrete would cost a lot more than plaster and paint. Bray discussed the size of the panels with Leighton, who was Bentel's job captain, and Koupis. Bray wanted to create a concrete façade with a curved beam at the top. Leighton had to work with the engineer. The shuttering for the construction of the concrete was bought for R30 million. After the concrete had been put up, Leighton told Bray it looked terrible. Bray then looked at the engineer's drawings with Leighton. It appeared to him that Leighton had not checked the engineer's drawings. Leighton had not given the engineer specific instructions as to how the

panels had to look. Bray wanted to correct the problem and tried to persuade the client to remedy the looks. He made 17 drawings of possibility to cover the concrete.

[96] Bray was of the view that the tiles-drawing was not billable for two reasons:

- (i) It was not constructed
- (ii) The entire design was remedial work from the error of Bentel's architect. If the shuttering had been used correctly, there would have been no claim.

The problem was that the construction of the concrete panels was not co-ordinated by Leighton.

[97] As to the exterior cladding it was put to Bray that Murray and Roberts, the contractor, had agreed to a R1,5 million penalty in respect of that cladding. Bray said he was unaware that Murray and Roberts had done that. Bray said he was probably far more involved in the process of the exterior cladding of the eastern façade than anyone else was. Bray said the fact that the tiling of the eastern façade went on tender does not mean that the decision had been taken to tile. It went to tender to cost it, and then decide whether to proceed. It was put to Bray that the defendants gave an instruction that the façade had to be attractive, and Bray agreed. Bray said the 17 drawings he made were an attempt to try to recover a situation that had been lost. He said because Abrahamsohn only became involved at a late stage, he was not aware of the situation around the concrete façade. Bray said the façade got lost in translation in

Bentel's office. Bray's view was putting tiles on the façade was remedial work, which should not be billed. Bentel was trying to rectify a situation it had created.

- [98] Koupis testified that the plans went in to the council in 2004, so as to get conditional approval. Those plans had very little detail. They got the plans back in 2005. There were comments from the aesthetic sub-committee. They were not happy with the façades. Bray came up with numerous suggestions. Koupis's idea was off-shutter concrete. Koupis had the idea to put steel over the concrete plus a 300 mm pipe with lighting to cover the concrete. For that you need good quality concrete. The defendant bought form work for R34 million, which would provide a very good finish. The quality of the concrete is quite good as it is now, but there are problems in between the slabs, with the holes in between. Koupis testified that Leighton should have realised that something needed to be done about the concrete finish, and about the aesthetical appearance of the concrete. Then, when the concrete was in place, Leighton must have realised that he forgot to change the finish of the concrete, and Leighton wanted to correct the concrete. The concrete façade was part of the initial budget, but the defendant had no additional budget for the façade. Koupis denied that he ever approved Union tiles for finishes.

(iii) Counsel's Contentions

- [99] Mr Gautschi says the final cost of the works did not include the exterior cladding to the façades as the façades were

never built. The façades were not part of the works of the principal contractor on which the architect's fees are based. The drawings were included in the general design scope. The drawings were to be finished so that a quotation could be obtained, or a mock-up staged. There was never an instruction to proceed. The defendant believes plaintiff is not entitled to any fees for this work.

[100] Mr Zidel says the only issue is whether the plaintiff reached stage 4.

(iv) Conclusion

[101] The additional remedial plans drawn by Bray were caused by Leighton's failure to co-ordinate the work. The plaintiff is not entitled to any fee under this heading.

(5) ZONE 5 PARKING

(i) Experts' Meeting

[102] The plaintiff claims payment of the fee due up to stage 4. The experts agreed that the zone 5 parking garage was omitted from the Murray and Roberts JBCC contract and was constructed by Konti Industries in terms of a design and supply contract as a steel construction. The zone 5 parking garage design by plaintiff was a concrete structure. Originally the design contained a tunnel linking it underneath Kingsway to Zone 4 and its design was characterised by a parking ramp design. The defendant disagreed that plaintiff achieved stage 4.

(ii) Evidence

[103] Abrahamsohn testified that this is the parking across Kingsway on the grounds of the rugby union. It was designed as a concrete structure and intended to be part of the project and shopping centre from the beginning. Before the parking could be built, the air rights issue had to be resolved. The obtaining of the air rights caused substantial delays. There was a lot of to- and froing, outside the involvement of the professional team by defendant. Plaintiff did not have any dealings with the Council. Defendant appeared reluctant to allow plaintiff to have interaction with the Council. The stage 5 architect did the dealings with the Council. When the air rights issue was resolved the defendant decided to exclude Murray and Roberts and have the parking built by Conti steel for R67 700 000. The plaintiff's drawings reached stage 4, and plaintiff is entitled to stage 4 fees and plaintiff claims R1.6 million. According to the defendant only stages 1-3 were reached by plaintiff and stage 4 was not done or approved. Defendant subtracts 65% and says that plaintiff was only entitled to R770 000. In cross-examination Abrahamsohn said that 106-117A are speed-ramp drawings for rooftop parking. Abrahamsohn said the speed-ramp design constituted a change to the original concept, page 76A showed the original concept. It was put that co-ordinated drawing were not done, which Abrahamsohn responded that he could not see anything that needed to be done for co-ordination.

[104] In Fee's opinion sheets 76A-94M represent work stage 4 construction documentation and comprise general arrangement drawings, plans, sections and elevations. These drawings were produced for municipal approval and for construction. Sheets 94A-94M are the structural engineer's drawings, predominantly issued for construction based upon the architect's drawings and co-ordination. Fee was of the view that plaintiff was entitled to be remunerated up to completion of stage 4 in respect of the Zone 5 parking.

[105] Bray testified that the zone 5 parking was built from the Bentel plans, which were adapted so that a steel structure could be built. Had Bray been involved at that stage, he would have discussed the construction of the Zone 5 parking and architect's fees for that with the client. Bray said under cross-examination that the plaintiff's plans were utilised in the revised steel construction. Aspects of stage 4 had been done by the plaintiff, but not up to the completion of stage 4. The plans omit details of co-ordination with consultants. A plan that is issued for council approval is not fit for constructions. Stage 4 is a long process; stage 4 can take up to a year or two in the architect's office. As to the Zone 5 parking, Bentel went fairly far down the road, and Bray would say the drawings were well past 60 % complete. Stage 4 was not billable for two reasons (1) it was not built, and (2) the drawing work was partially done, some elevations are shown, but the detail required to construct is not there for a large part. Stage 4 is not intellectual, as are stages 1, 2 and 3, but it is a technical process. The drawings which Bentel

did on Zone 5 were capable to issue for construction, but there was a need to supplement the drawings.

[106] Nel submitted the drawings at pages 86-94 on the parking to the council. The slope is very gentle, 4%, which allows for parking on both sides.

(iii) Counsel's Contentions

[107] In their plea defendants state that stage 4 was not reached, and that plaintiff is only entitled to payment up to stage 3. Mr Zidel points out that the zone 5 parking was constructed by another contractor, Konti Steel. The reason for this was that at the time the zone 5 air rights were approved, Murray and Roberts was behind on its programme. The defendants wanted to avoid a situation where a further instruction to Murray and Roberts to construct the zone 5 parking would provide Murray and Roberts with a concurrent delay which in turn would impact upon the defendants' right to raise delay penalties against Murray and Roberts for its delays. The zone 5 parking was eventually constructed as a steel structure, but using the plaintiff's drawings.

(iv) Conclusion

[108] The view of the quantity surveyors that plaintiff is entitled to payment up to stage 3 must be accepted, because the parking does not form part of the works completed by the main contractor, and a steel structure was constructed by another contractor. Plaintiff is only entitled to payment up to stage 3.

(5.3) ZONE 5 SPEED RAMP

(i) Experts' Meeting

[109] The plaintiff claims fees for stages 1-4.

Issues:

5.3.1 Who designed the speed ramps

Plaintiff says Bentel did the design.

Defendant says the speed ramp concept was given by NBA to Bentel. Defendant was concerned about the possible blocking and hold-up of vehicles and requested NBA to design an alternative.

5.3.2 Whether plaintiff reached stage 3

The defendant agreed that plaintiff reached stage 3. NBA provided design and lay-out drawings.

(ii) Evidence

[110] Abrahamsohn testified that the internal parking was designed on sloping ramps. Defendant preferred a different configuration, in terms whereof the parking slabs would be flat with ramps at the end of the row of parking. Plaintiff's drawings did not reach stage 4, and plaintiff is only charging up to stage 3. R8 million is a nominal fee for that building work. Plaintiff claims R123 000. Defendant says the work was done by engineers, and is not prepared to pay anything for this claim. As to the entitlement to payment for stage 4 drawings, Abrahamsohn said that the building is there, it is standing. It does not make sense to say that stage 4 has not been reached. The certificate of practical completion was issued on 23 August 2007. Thus stage 4 was reached.

[111] It was put to Abrahamsohn in cross-examination that the speed ramps were part of the parking garage, which comprised on-risk design. Abrahamsohn insisted that the speed ramps comprise completely revised parking drawings. Previously there had been sloping parking decks, now there were level slabs for parking and a ramp at one end. That required completely new drawings. Smaller space had to be used. Abrahamsohn agreed that no invoice was issued at that stage. It was a change of design carried out as an instruction of the defendant. It was put to Abrahamsohn that in the Murray and Roberts contract there is an exit clause for the zone 5 parking at a penalty of R1.5 million. Abrahamsohn responded that that was something between the defendant and Murray and Roberts, Leighton was aware of it. With reference to the printing ledger, page 99, at 11 December 2008, the second last category, it was put to Abrahamsohn that the elevations submitted would not have a fraction of the detail required for construction. Abrahamsohn disagreed and said that the drawings submitted to the council were a replication of the construction drawings. Depending on the stage when the drawings are done, the two are often the same. Approval was granted by the council on 2 March 2005.

[112] In Fee's view the inclusion of a speed ramp circulation system emanates from an instruction by the defendant to replace the ramped floor circulations system which had previously been issued for construction. Sheets 106A-117A represent the architect's drawings, which include specific

structural information in respect of column grid layouts and column sizes, which would have been provided by the structural engineer. The architect's drawings were issued for information and represent plans and details. These drawings in Fee's opinion represent work stage 3 design development.

[113] On the speed ramp, Bray testified that he did a rough sketch with Roger Gardiner. Bray designed sloping ramps. The change came from a sketch by Nel, which was a line drawing, which was probably not kept. The sloping ramps were Bray's idea, and that is why he believes that the plaintiff should get fees. Bray agreed that for the speed ramps the plaintiff was entitled to stage 3, which is what the plaintiff is claiming. Lamprechts testified that the ramp protrudes beyond the erf boundary.

[114] Nel testified that the Bentel drawings relating to the speed ramp correspond to Nel's sketch. Bentel marked out the distances and interpreted the drawings of Nel, and Bentel made further notations.

(iii) Counsel's Contentions

[115] In defendants' view the speed ramps form part of the zone 5 parking claim, and the same argument applies in respect thereof. In the plea, and annexure LLW 2 the allegation is made that these were done by the engineers. Mr Gautschi says the steel parking and speed ramps are not part of the works, and for that reason plaintiff is not entitled to any fees in respect of the speed ramps.

[116] Mr Zidel submits that there was no evidence that engineers' drawings were used. The plaintiff produced a complete set of drawings with sloping ramps. There is no dispute that those drawings represented at least stage 3

(iv) Conclusion

[117] This item should be treated in the same manner as item 5, the zone 5 parking. Payment up to stage 3, as allowed by the Quantity Surveyor should be made.

(6) DISBURSEMENTS

(i) Experts' Meeting

[118] This item was not discussed at the meeting of experts.

(ii) Evidence

[119] In his evidence in chief on the main claim, and also when he was re-called later, Abrahamsohn said the vouchers have been given to defendant, he did not personally work with the disbursements, and he could not say whether the amounts claimed are correct or not. He said the disbursements in 2008, at a time when the project was over, were printing payments. It was put to him that the demand for payments goes on up to 2010, and that the claims represent litigation costs. Abrahamsohn said he did not know. As to claims for office copies, Abrahamsohn said the project required the plaintiff to make copies for own use, and those costs are project costs which can be claimed from the defendant as disbursements. His view was that all the prints made in the project are chargeable as disbursements. He agreed that

the practice in the plaintiff's office may be different from the practice in other architects' offices. Abrahamsohn was referred to a claim for travelling to Kimberley, and he could not explain for what those costs were incurred. In response to being referred to the letter contained in Court File 4 page 31, paragraph 9.1.1 which states "excluding internal usage" Abrahamsohn said it has been the practice in plaintiff's company to charge such expenses as disbursements.

[120] Practical completion of the shopping centre was certified in August 2007. In 2008 and 2009 there were further processes to get the plans approved by the council. Lamprechts scanned the claim for disbursements and noticed that there were a large number of documents issued after completion of the centre. In his view it is highly irregular to charge for documents which are issued after completion. Normally after completion an "as built" set of drawings will be filed with the Council. These days a soft copy in PDF format is also provided to the client for the client's internal use. Hard copies of the as built plans are given to the client for reference in the client's office.

(iii) Counsel's Contentions

[121] Abrahamsohn testified that accounts were compiled by plaintiff's accounting staff. In argument Mr Zidel for the first time referred to the Electronic Communications and Transactions Act 25 of 2002, section 15(4) for proof of its disbursement claims. Mr Zidel says print-outs and invoices were sent to the defendants' attorneys.

[122] Mr Gautschi says that defendants requested details of disbursements in requests for further particulars but plaintiff invited defendants to inspect documents at plaintiff's premises. On 18 October 2014 plaintiff's attorneys delivered to first defendant's attorneys the files with computer print-outs, invoices and issue slips. The amounts were not added up and the documents were not accompanied by any explanatory indices, summaries, notes or other narratives. Mr Gautschi points out that in evidence Abrahamson said he did not personally work through the documents. He could not say whether the documents and claims were correct. The data messages referred by section 15(4) require the entries to have been made by a person in the ordinary course of business, and certified correct by such officer. There is no such certification before this court.

(iv) Conclusion

[123] A number of claims which appear to be incorrect were highlighted by Mr Gautschi in cross-examination. For instance, the rental of a car with 2 000 km in a day's visit to Bloemfontein. A further point raising doubt and creating uncertainty about plaintiff's disbursement claim is Abrahamsohn's assertion that the plaintiff is entitled to claim as disbursements the copies of plans made for use in plaintiff's own office. This seems like counsel charging for an opinion and then charging the cost of the paper and printing of the opinion as a disbursement. A further cause for concern is that in the final invoice in 2008 disbursements is for some R300 000, and when summons is issued in 2009,

the next year, after the work had already come to an end in 2007, the claim for disbursements is over R700 000.

[124] The basic rule is that the party who alleges must prove. Disbursements are not proved by giving copies of invoices. Abrahamsohn had no personal knowledge of the claims. They were processed by his staff. There must be some form of narrative to explain what the expense was for, what the nature of the expense was, so that the court can determine whether it falls within what the plaintiff is entitled to claim. As matters stand, absolution of the instance must be ordered in respect of the disbursements claim.

17. LOCUS STANDI OF THE FIRST DEFENDANT

(i) Plaintiff's Contentions

[125] Mr Zidel contends that the first defendant has no *locus standi* to institute the counter claim against the plaintiff because plaintiff's contract is with the second defendant, and the rights and obligations of second defendant have not been ceded or delegated to first defendant.

(ii) The Evidence

Abrahamsohn

[126] In cross-examination of Abrahamsohn it was put that the plaintiff's last invoice, the one at Court Bundle 4, page 143, D 20 asked that payment to be made by the first defendant, the (Pty) Ltd company, and that payment by the first defendant was accepted by plaintiff. It was put to Abrahamsohn that it is defendants' case that that action of acceptance of payment

constituted an acceptance by the plaintiff that the first defendant was now the contracting party. Abrahamsohn disagreed with this statement. Abrahamsohn testified that in May 2004 the defendant's accounts clerk sent a letter to the plaintiff asking that all invoices in future be sent to the first defendant, the (Pty) Ltd Company.

Bray

[127] Bray testified that in virtually every job he was involved, there was a change of the identity of the developer. It is not unusual. Here the developer did not initially have a separate company. The intention is to have a separate entity, which holds the property. That is the (Pty) Ltd Company in this case. Bray was aware from the beginning that a separate entity would be created to own and manage the Loch Logan. It was a matter of course in the process. Bray and his colleagues at Bentel had no objection to the taking-over by the new entity. They knew the bank would lend the money to the (Pty) Ltd, and were happy with that arrangement.

Koupis

[128] As to the creation of the (Pty) Ltd Company, the second defendant, Koupis said that it happens in 90% of their developments that a separate entity is created to ring-fence the risk. The main contractor, Murray and Roberts, did not want to accept the new entity, because they would then have to get new guarantees, and agreed with the Georgious that Murray and Roberts and their sub-contractors would continue to hold the Trust liable, and not invoice the new company.

M Georgiou

[129] Mr M Georgiou is the sole director of the first defendant. The sole shareholder of the first defendant is the Michael Georgiou Family Trust, of which Mr M Georgiou is a trustee. He testified that this development was started by the N Georgiou Trust, the second defendant. This development was started by Mr M Georior's father, Nick Georgiou, who was a trustee of the second defendant. Asked whether this was a successful shopping centre, Mr M Georgiou replied "very successful", he said he owns the property and that the property could be more successful.

[130] In 2006 the parties transferred the property from the second defendant to the first defendant as a going concern. The parties are the N Georgiou Trust and Basfour 3213 (Pty) Ltd, as shelf company which later changed its name to Loch Logan Waterfront (Pty) Ltd (page 45). The deed of sale recorded that the property was sold as a going concern (clause 11.2.1).

[131] According to Mr Georgiou the intention of the parties was that nothing was to be excluded, all the contracts came across to the first defendant, save for the contract with Murray and Roberts, the principal contractor. The contract was implemented, and the first defendant paid all the accounts.

[132] The parties recorded in clause 11.4.1:

“11.4.1 It is recorded that it is the intent and purpose of the parties that the Purchaser should be enabled to continue the rental enterprise conducted from the Property as far as possible in the same manner as it was conducted by the Seller up to the date of transfer and that to that end the Purchaser shall be substituted for the Seller in respect of each of the contracts in respect of the said rental enterprise insofar as the terms of such contracts individually allow. It is specifically agreed that, as far as it may be necessary, the Seller shall enter into such Agreements as may be necessary to assign its rights and obligations (but does not warrant the other party will consent to the delegation) in terms of the contracts referred to above to the Purchaser.”

Mr M Georgiou testified that the intention in clause 11 was that VAT had to be zero rated.

[133] In cross examination Mr M Georgiou said he was not a signatory to the deed of sale. He got his father Nick to sign the contract on his behalf. An attorney prepared the deed of sale. The rights and obligations of the parties are set out in the agreement as the attorney was instructed. If the parties had intended other terms to be contained in the agreement, those would have been put in. He agreed with the “whole agreement” clause and the “variation” clauses:

“14. Whole agreement

This agreement constitutes the whole Agreement between the parties as to the subject matter hereof and no Agreements, representations or warranties between the parties regarding the subject matter hereof other than those set out herein, are binding on the parties.

15. Variation

No addition to or variation, consensual cancellation or novation of this Agreement and no waiver of any right arising from this Agreement or its breach or termination, shall be of any force or effect unless reduced to writing and signed by all the parties or their duly authorised representatives.”

[134] Mr M Georgiou confirmed that there has not been any written variation of the agreement. He agreed with clause 9.2.1 of the agreement dealing with warranties:

“9.2 The seller warrants as at the date of signature of this agreement and on the Transfer Date that:

9.2.1 save as disclosed in the title deed relating to the Property, there are and will be no material agreements in respect of the Property to which the Purchaser will become bound on obtaining transfer of the Property;”

[135] In response to the question that there would be lease agreements with tenants Mr M Georgiou said that the property was sold as a going concern, with specific reference to the liability for VAT. He said that clause 11 was purely for VAT purposes, dealing with all the contracts attached to the property, it was not limited to leases. He agreed that clause 11.4.1 states that there is no warranty that the other party will consent to the delegation, and that the contract refers to all agreements attached to the word “going concern”. He agreed that this is the entire contract.

[136] In re-examination Mr M Georgiou was asked about the position with Murray and Roberts. They wanted to continue dealing with the trust, not the first defendant company. It appeared that Murray and Roberts had guarantees in place, and it would cost them money to get those guarantees re-issued for purposes of the first defendant company. Mr M Georgiou made arrangements with Murray and Roberts that they would continue dealing with the trust, they kept on sending their invoices to the trust, the trust paid them and the trust then debited the first defendant company.

(iii) Counsel's Contentions

[137] Mr Zidel for plaintiff contended that the first defendant does not have *locus standi*. The first defendant's counterclaim against the plaintiff is based upon the agreement concluded between the plaintiff and the trust (the second defendant) which agreement was then, on the first defendant's version "taken over" by the first defendant. Mr Zidel argues that the pleadings do not make out a case for privity of contract between the plaintiff and the first defendant. The contract between the plaintiff and the trust contains both rights and obligations on the part of both parties. As such it could not be ceded by the trust without the consent of the plaintiff (**Hersch v Nel** 1948 (3) SA 686 (A) at 698). A contractual obligation cannot be taken over unless the creditor consents thereto and agrees to accept the third person as the debtor in substitution for the original debtor (**Froman v Robertson** 1971 (1) SA 115 (A)). In evidence Koupis and Michael Georgiou insisted that the agreement of sale was the only

agreement relied upon by the first defendant for purposes of the transfer of rights and obligations from the trust to the first defendant. The plaintiff is not a party to that agreement.

[138] Mr Zidel refers to clause 4.6 in the client/architect agreement which states that neither party shall assign, sublet or transfer its interest in this agreement without the written consent of the other which consent shall not unreasonably be withheld. Mr Zidel says the allegation in defendants' plea in paragraph 4.2 that "the defendant took over all the rights and obligations from the second defendants including the rights and obligations towards the plaintiff" is a conclusion of law without a basis in fact. Mr Zidel says the allegation in defendants' further particulars that the first defendant would be liable to plaintiff for payment in the event of judgment being granted in favour of plaintiff does not mean that it is not in dispute that the parties to the counterclaim are the plaintiff and first defendant.

[139] Mr Zidel says the first defendant makes no allegation that the agreement between the trust and the plaintiff has been varied or ceded to the first defendant. Thus, Mr Zidel says, no triable issue arises on the pleadings. A party relying on a cession must allege and prove the contract of cession (**Lief NO v Dettmann** 1964 (2) SA 252 (A)). The first defendant has not pleaded any delegation, and that is not its case before court. The defendants also pleaded no waiver. The alleged "taking over" of the rights could only be established if there had been a delegation, which is a form of novation, but

this is not pleaded by the defendants. The creditor has to agree to accept the new debtor in the place of the old (**Van Achterberg v Walters** 1950 (3) SA 734 (T) at 745E).

[140] Even apart from the lack of the necessary allegations in the pleadings, plaintiff contends that the first defendant has not established its *locus standi*. Mr Zidel refers to clause 9.2 of the sale agreement between the first and second defendants wherein the parties record that there are no material agreement in the property in respect whereof the purchaser of the property will become bound. No reference is made to the agreement between the trust and the plaintiff in the sale agreement. Further clause 11.4.1 is restricted to lease agreements. The only agreements that would be delivered to the first defendant in terms of the sale agreement were the lease agreements (clause 12.1.1).

[141] Mr Zidel says the expression “going concern” used in the sale agreement is a term of art specific to VAT and section 197 of the Labour Relations Act 66 of 1995 and does not encompass a transfer of the trust’s contracts with the plaintiff.

[142] Plaintiff contends that the contemporaneous documents and evidence do not support the first defendant. The sale agreement was concluded on 20 October 2005, effective from 1 December 2005. On 16 February 2006 Lorenzo Vimercati of SIP informed Leighton that “NGT has requested that all original VAT invoices applicable to all fees AND/OR

invoices to date are to be addressed and couriered to ... N GEORGIU TRUST". On 10 March 2006 Nicky Botha, the creditors clerk for the first defendant, informed Thelma Hadjigeorgi that "this property was transferred to Loch Logan Waterfront (Pty) Ltd on 1 December 2005" and that fees from December need to be invoiced to that company. On 30 March 2006 Vimercati informed Leighton that there were new invoicing details for the project, being those of the first defendant.

[143] Mr Zidel stresses the fact that the letter amending the contract between the plaintiff and the trust (Annexure "D" to the particulars of claim) is dated 19 April 2006, being a date after the transfer of the property to the first defendant, and after the request to invoice the company, not the trust. Mr Zidel refers to the minutes of a site meeting on 25 April 2006 where it is recorded that for contractual reasons the client is to remain as the N Geogiou Trust. (It is however important to bear in mind that the main contractor, Murray and Roberts, requested to remain contracted to the trust because if a new entity was now the client, Murray and Roberts would have to obtain new guarantees, which would have a cost and effort implication.)

[144] The last point made by Mr Zidel to illustrate the lack of *locus standi* of the first defendant is the fact that the first defendant has failed to point to any document that satisfies the requirements of clause 4.6 of the client-architect agreement which prohibits a change of status of the parties unless there

has been written consent by the other party. There was no transfer agreement. There was not even a whisper, Mr Zidel says, that the agreement with the trust was terminated, and unless that agreement was terminated here could be no new agreement. Mr Zidel makes the point that under the main contract between Murray and Roberts and the plaintiff, plaintiff was appointed as agent for architectural works.

[145] It is not in dispute that for Murray and Roberts the contracting party remained the trust, the second defendant. That was so because Murray and Roberts did not want to obtain new guarantees. Mr Zidel says it is untenable to have different employers for the same contract.

[146] The first defendant's contentions of its *locus standi* are as follows:

1. Mr Gautschi submitted that the words "going concern" should be understood by looking at the substance and not the form of the transaction (**Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others** 2012 (1) SA 321 (CC) par [49]). In his view if a party takes over a going concern it would be entitled to continue with any operations which were in progress at the time of the sale for its account (**General Motors SA (Pty) Ltd v Besta Auto Component Manufacturing (Pty) Ltd and Another** 1982 (2) SA 653 (SE) at 657H-658A).

2. The plaintiff sent a letter of demand in terms of section 345 of the Companies Act 61 of 1973 addressed to the first defendant on 16 September 2008 claiming R6 133 136,89. First defendant's attorney replied in a letter dated 14 October 2008. First defendant did not allege that it was the wrong party due to alleged lack of *locus standi*. Plaintiff did not proceed with its threats to liquidate the company. On 11 May plaintiff caused summons to be issued against the first defendant and the second defendant, annexing to its summons an invoice dated 31 May 2008 issued by the plaintiff to the first defendant as annexure "E". Annexure "E" has been replaced by plaintiff with an invoice dated 31 May 2008, which invoice refers to a letter dated 19 April 2006 which is annexure "D" to the particulars of claim, thus linking the first defendant as the party to the contract contained in the 19 April 2006 letter.
3. In evidence Koupis said that he discussed and explained the transfer of the rights and obligations of the second defendant to the first defendant with the representatives of the plaintiff namely Leighton and Roger Gardiner. They had no objections or reservations pertaining to the transfer. Neither testified. On 17 February 2006 the project manager SIP was requested by a certain Androula to ensure that notice goes out to everybody informing them that all invoices are issued in the name of Loch Logan Waterfront (Pty) Ltd. After the change of ownership plaintiff submitted tax invoices for

professional services rendered, by it, to the first defendant. These invoices appear in defendant's trial bundle 13 pages 49-65, addressed to the Loch Logan Waterfront (Pty) Ltd. Mr Gautschi points out that in terms of section 20(1) of the VAT Act 89 of 1991 the first defendant was the recipient of the services, and that plaintiff claimed VAT on amounts due since September 2005.

4. Mr Gautschi submits that the court should endeavour to ascertain the true intention of the parties when the letters contained in annexures "A" to "D" attached to the particulars of claim were written. He refers to **Absa Bank Ltd v Swanepoel NO** 2004 (6) SA 178 (SCA) paras [7] and [8] where it was said that in reading a commercial document the court does not require such precision of language as one would expect in a more formal document such as a pleading drafted by counsel. Inelegance and loose language can be expected in a commercial document purporting to be a contract. Business persons often record important agreements in a crude fashion. The provisions of such letters drafted by business persons must "be construed with an eye to the evident commercial realities" (**Delfante and Another v Delta Electrical Industries Ltd and Another** 1992 (2) SA 221 (C) at 230). The letters must be interpreted within the context and background at the time (**Absa** (supra)).

5. Mr Gautschi says the plaintiff is approbating and reprobating. It sent the notice under section 345 of the Companies Act to the first defendant, it alleged in the particulars of claim that the first defendant, alternatively the second defendant was liable. Plaintiff sent invoices to the first defendant over a long period of time. Now the plaintiff, faced with the counterclaim, is reprobating and contending that the first defendant does not have *locus standi*. This the plaintiff cannot do (**Telcordia Technologies Inc v Telkom SA Ltd** 2007 (3) SA 266 (SCA) par [12]). He contends that the plaintiff is *mala fide* in relying on the alleged lack of *locus standi* of the first respondent.

Conclusion on *locus standi*

[147] The plaintiff and the trust had an oral agreement. That is what the plaintiff alleges and the defendants admit in the pleadings. There could be variations. The evidence shows that the parties accepted variations. Plaintiff was willing to send its invoices to the first defendant, as well as its letter of demand under section 345 of the Companies Act. With reference to Clause 4.6 of the client-architect agreement which states that a new party cannot be allowed save with written consent, the invoices must be seen as written consent. In the light of the undisputed evidence of Koupis that in 90% of shopping centre developments a new entity is created to ring-fence the project, it can be accepted that the first defendant took over the project. Nevertheless it remains strange that there are two employers for the same project –

one for Murray and Roberts (the company) and the other for the plaintiff and other agents working on the project (the trust). Strictly speaking there should have been a formal cession, and it should have been pleaded, but it is clear that by its conduct the plaintiff accepted the first defendant as the contracting party.

18. COUNTER CLAIM

ITEM 1, 2 AND 4 - EXPANSION JOINTS NOT SHOWN:

ZONE 6 TOILETS

(i) Experts' Meeting

[148] This claim is formulated as follows in the minute of the meeting of experts:

“No expansion joints indicated to Zone 6 toilets: because these were not indicated on the architect's drawings, the contractor did not install the Migua joint covers as specified for the other expansion joints in the building (A migua joint is a flexible cover that is installed over the expansion joint).”

And:

“No ceiling expansion joints to entrances 7 & 14 which are cracking. It is worth noting (applicable to items 2, 4 & 4(sic)) that a ceiling expansion joint must be fitted underneath every slab expansion joint above, as designed by the engineer, were not respected by the architect.”

(ii) Evidence

[149] In his expert report Fee states that the repairs done to the expansion joints in the floor and up the wall in the zone 6

toilets appeared to him to be effective. As far as the ceiling joints appeared to have hairline cracks, in Fee's opinion these were readily repairable in the course of normal maintenance. Regarding the ceiling expansion joints, Fee states in his report that he inspected all entrances and no evidence of cracking was identified.

[150] In cross-examination it was put to Fee that the expansion joints should have been shown on the drawings. Fee said that it was sufficient that the expansion joints be shown on the general plan.

[151] Bray said that the architect's drawings should have shown the expansion joints. He referred to one plan where Nel, the local architect, had super-imposed the expansion joints onto the plan. None of the Bentel drawings shows the expansion joints. The contractor does not know where the joint must be put, also in the ceilings. Leighton did not check the engineer's drawings and instruct the contractor accordingly. Bray was referred to the expansion joints which were not indicated on the plans, in the Zone 6 toilets. It was put that the expansion joints were shown on the General Arrangement plan, which Bray could not deny. It was put that there was a general specification for Migua joints. Bray confirmed that Migua is very expensive. His complaint was that there was a failure to give details and explain to the contractor what to do. Bray was referred to the General Notes appearing on the top right-hand corner of all plans, where paragraphs 5 and 7 make it clear that if there is an

error or omission the contractor should report to the architects. It was further put that the stage 5 architect should have inspected the work in progress, to which Bray responded that the stage 5 architect is not supposed to supervise, and it is dark and difficult to see during construction. Bray stressed that it is important for the detail as to expansion joints to be shown on the drawings. The responsibility of the stage 5 architect is to inspect and to see that the work done is in accordance with the drawings. Bray could not advance the claims in item 2, the ceiling expansion joint, and knew no more than he had seen during the inspection in loco. On item 4 Bray could only say that if there is a joint in the concrete floor, you need a joint in the ceiling. He had no personal knowledge of his item.

[152] According to Koupis in Zone 6 the expansion joints were put in the wrong place because they were not indicated on the plans. The expansion joints go through the vanity slabs.

[153] Lamprechts testified that a general note on an architect's plan is not sufficient. Every instruction of an architect needs to be conveyed in drawings. Architects do not write, they draw. The architect cannot put an onus on the contractor to ask him in the case of uncertainty, the instructions must be in the drawings. Expansion joints must be shown on the architect's drawings. Because the expansion joints were not shown on the drawings, the expansion joints in zone 6 went through the vanity slab in the cloakrooms. Because the expansion joints were not shown on the plan, they were

placed in the incorrect places, namely through a vanity slab, which will result in failure. Lamprechts did not want to concede that the expansion joints were visible. He said it might have been dark, and obscured by scaffolding. He said the expansion joints might not have been visible. He agreed that where the expansion joints went through the toilet area and under a door and through a vanity slab, everything was functional now, having been repaired.

[154] Asked whether the contractor could have seen where provision was made for expansion joints, Van Rensburg said he focussed on the finishes, he did not specifically look at the structure. The expansion joints did not line up.

[155] In answer to the statement in cross-examination that the general plans showed the expansion joints, but the specific plans did not, and that NBA studio did not point this out, Nel responded that the expansion joint in the Zone 6 toilets where the expansion joint is incorrectly situated, was not shown or incorrectly shown on the plans. Nel said NBA studio did not have a design responsibility, only an inspection responsibility. NBA studio architects did not point out the incorrect expansion joint to the contractor.

(iii) Counsel's Contentions

[156] The defendants contend that the drawings that plaintiff says contain the expansion joints are general layout drawings of the first floor only. Defendants also say the general layout drawing shows two expansion joints without referencing

whether they are floor or ceiling expansion joints. Mr Zidel says failure to specify the expansion drawings on the detail drawings is not actionable because the expansion joints are shown on the general plan. Plaintiff further points out that this is also an omission by the contractor and the work stage 5 expecting architects. Mr Zidel says defendants presented no evidence of Item 2 and 4 - Expansion joints in Zone 6 toilet and entrances 7 and 14. No case has been made out by defendants. At the inspection in loco no problems reading the ceiling expansion joints were pointed out.

(iv) Conclusion

[157] The plaintiff cannot be held liable for the failure to specify the expansion joints in the specific plans. There is sufficient information on the general plan. The stage 5 architects or the project managers could have seen it. Whatever fault there was has been satisfactorily attended to. There is no basis to hold plaintiff liable under items 1, 2 and 4.

ITEM 5 - THE WOOLWORTHS OFF-LOADING AREA

(i) Experts' Meeting

[158] This claim is formulated as follows in the minute of the meeting of experts:

“Design problem with Woolworths off-loading area: cannot accommodate the trucks inside the loading bay, and the loading bays must be made wider and deeper. The client also had the cost of widening the road to introduce an extra lane because of insufficient turning radius.”

(ii) Evidence

[159] On 13 August 2013 when Fee did his inspection this area had two large trucks occupying this area. The trucks appeared to be quite comfortably located. Recently Fee saw a very large articulated truck emerging easily with a trailer from the off-loading area without difficulty. In cross-examination Fee could not say how big the trucks were. Fee said that compared to the off-loading areas at other shopping malls the Woolworths off-loading area at the Loch Logan Shopping Mall seemed a reasonable and natural operation. In cross-examination Fee said that often the parameters for the design are set by other issues.

[160] Bray had a lot to say about the Woolworths off-loading area. The main point he made was that the angle at which the trucks had to turn into and out of the parking areas, is too acute. The right-hand parking bay cannot be used because of the acute angle. Bray explained that the way this works, is that the architect would give the plans for the off-loading area to the traffic consultant, or traffic engineer, who then applies the turning circle of the truck to the drawing. The traffic consultant will then give feedback to the architect. Bray's view was in this case the wall on the right-hand side had to be moved at the construction stage, so as to be able to give a wider turning circle to the trucks. Bray said the Woolworths architects deal only with the inside of Woolworths. Yet the drawing of the Woolworths architects R & L were put to Bray, on which the off-loading area is indicated. Bray said that the plan only dealt with the internal area, not the exit onto the

road. The external traffic circulation is a co-ordination function of the traffic engineer. Bray agreed that VBP were the traffic engineers, and apparently the council required a flagman to be on duty to assist when trucks were parking or coming out. Bray said he did not know whose fault this problem with the truck turning circle was. His view was that Bentel should be liable only for 50% of the damage under this heading.

[161] Koupis testified that from the first drawing by the Woolworths architects R & L it appeared that there was a problem with the off-loading area, superimposed over the Bentel drawing. Leighton should have been alerted. Leighton ignored the warning from the Woolworths architects. The trucks driving in, tilt against the wall. It was a new area. Leighton did not tell the engineer to move the column. Two buildings in that area were demolished, the Jazz Time Cafe and the OFM Radio offices. That meant that the architects had the freedom to put the off-loading area in the best place. Woolworths makes frequent deliveries. The Woolworths sales are based on the freshness of their products. Now only one truck can get into the Woolworths off-loading area. What needed to be done is that a new column should have been erected.

[162] According to Lamprechts the duty of traffic co-ordination is not on the traffic engineer. The architect is responsible for design and co-ordination. There are consultants involved, but the responsibility for traffic movement is on the architect.

Lamprechts said the question arises why the architects got it wrong. The architect starts with a blank page. At the Woolworths off-loading area there were many alternatives. The architect should have consulted other consultants. The architects had been warned that the drawings did not comply, yet they failed to get the drawings right. The drawings were eventually approved by the council with two medium-sized trucks in the off-loading area. The architect had all the freedom to make a correct design at the outset, but failed to use the freedom properly. There was a difference in levels, of which the architects knew. It is inexcusable that the architects did not design the off-loading area correctly.

[163] Lamprechts testified that large trucks are understood to be a 18½ metre and a 12½ truck. A medium sized truck is 9 metres. In order to park in the off-loading bay, a large truck will have to cross two lanes of traffic, possibly also the median of the road, and in that manner completely block off the road. The effect of the design of the Woolworth ramp is that it is almost impossible to get a second truck into the off-loading zone. The tenant uses the off loading bay only for one truck. Lamprechts agreed that Woolworths opened in 2007, and in 2012 doubled their size by taking up the floor above their store. Lamprechts could not comment on the fact that Fee had seen two trucks in the off-loading area. It was not clear what size these two trucks were which Fee had seen. It was put to Lamprechts that the final proposal for correction of the problem with the off-loading trucks was

contained on the plan at page 86. His response was that the Municipality approved the area for two medium sized trucks, and the owner had to indemnify the municipality against damage caused by trucks using the bays, and that the municipality required a pointsman to be on duty when trucks moved in. Lamprechts repeated his view that the architect could have changed the angle of trucks to enter the off-loading bays.

[164] In response to the statement in cross-examination that the traffic engineers were responsible for ingress and egress of the parking area, Nel disagreed and said that the traffic engineer is not responsible for design. There should have been consultation between plaintiff and BKS engineers. In response to the statement that the traffic engineers were consultants of the defendant, not the plaintiff, Nel responded that the traffic engineers were not responsible for design. Traffic engineers prepare no plans, they only do diagrammatical drawings. The traffic engineer checks turning circles of trucks where needed. Nel agreed that the area of the Woolworths off-loading area was a constrained and difficult terrain. He did not respond to the statement that the off-loading area has been functional for seven years.

(iii) Counsel's Contentions

[165] Defendants say that on completion of the project it was discovered that only one large truck could be accommodated into this bay and would cause major traffic delays and standstills on Kingsway. Defendants say Leighton was

negligent in failing to comply with his co-ordination function in obtaining the necessary input from the traffic engineer. Mr Zidel points out that the site is highly constrained with limited spaces for trucking considering the high gross lettable area achieved with the design. Any changes in design would have led to structural difficulties during the fast-track project. The structural engineers indicated where the pillars had to be. The shopping centre is rounded at the top part where the shops are, but square on the ground where the off-loading bay is.

(iv) Conclusion

[166] The evidence demonstrated that the off-loading bay is fully functional and meets the requirements of Woolworths to the extent that Woolworths have substantially expanded their premises thus their delivery requirements. There is no evidence of dissatisfaction of Woolworths. The off-loading bay has functioned for seven years. There is no merit in defendants' contentions.

ITEM 6 - TRAFFIC CIRCULATION

(i) Experts' Meeting

[167] This claim is formulated as follows in the minute of the meeting of experts:

“10.11 In parking areas it is an accepted fact that cars have to cross driving lanes in order to turn into and out of parking spaces. This will affect traffic momentarily but not adversely.”

And:

“11.12 Plaintiff prepared drawings for a 2-lane ramp to be constructed from the Lower Ground level up to Mezzanine 1 level, in accordance with the traffic impact study stipulations. These drawings were issued for construction and the ramp was constructed early in 2006 in accordance with the drawings.”

(ii) Evidence

[168] Fee found the roadway widths to be normal for parking associated with shopping centres, where there is low speed circulation and some overlap of lanes can be tolerated. The traffic circulation observed by Fee in and out of the mall did not seem to be an inordinately complex situation. It was in line with the process seen at other shopping malls. Fee said that shoppers in malls are creatures of habit and most of them find their way in the traffic on all days of the week. Fee conceded that it is unusual for an architect to design a ramp that protrudes on to council property. He did not concede that such design is negligent, but said such design could be due to an oversight.

[169] Bray testified that the road where vehicles have to turn at the bottom is not wide enough, and they encroach on to the other side which cause traffic blockage.

[170] Koupis testified that the architect's initial ramp design encroached upon the council property. The gradient had to be no more than 1:8. Leighton went to the council, and after

he had been there Koupis got a call from Marcel van der Walt at the council who told him that the people at the council were unhappy. Koupis then said that Dries Nel would handle the plans. Dries Nel then went to the council and dealt with the matter.

[171] Lamprechts testified that when an architect commences work on a shopping centre, the point of departure is the parking. It is essential that there be sufficient parking, and that the area for parking be optimally utilised. At the Loch Logan Waterfront there are many spaces in the parking area which are not used maximally. The general ratio is that there can be 30 square metres of shopping space per parking bay. At Loch Logan the ratio is much higher. Many spaces are too small to accommodate a parking bay, and those spaces have to be replaced with other parking bays. Today the cost per parking bay is about R80 000.

[172] As to the ramps Lamprechts said that the situation is very simple. The architect's design exceeded the erf boundaries. That can never be permitted. All the problems were caused by incorrect design. The traffic department at the council is very strict. The gradient must not be more than 10 degrees, but in this case the original design of the architect did exceed that 10 degrees. The blending of the slope must be into the road, and from 5 metres inside the boundary, the road needs to be level. The Plaintiff's drawings did not comply with the requirements. The council got fed up with the whole situation. It was put to Lamprechts that as in all shopping

centres, one has slow moving traffic underground. Lamprechts insisted that the change of the ramp caused congestion. He said he could personally testify to the fact that when there are sports meetings, traffic at that point is absolute chaos. In re-examination he said the problem also existed on Saturday mornings.

[173] Nel spent a great deal of time explaining the traffic circulation in the parking garage. The plans were put up on a screen in court and he indicated what he was talking about with a laser pen. His evidence was difficult to follow. Traffic became congested because of the absence of an exit from the lower ground floor. On the A3 size plans, plan C6, in the middle, illustrates the conflict point, where the traffic forms a bottle neck. C 7 shows the basis of the suggestion made by Nel to alleviate the problem.

[174] In cross-examination it was put to Nel that all vehicles executed the turn at the congestion point without difficulty, to which Nel responded that small sedan cars could do that, not a typical Free State bakkie. In peak-times there was traffic congestion. Nel's suggested solution to the congestion is to create a double exit ramp from lower ground. This is in line with the analysis of traffic engineers. There are also other possibilities. Nel made this proposal so that a person looking at the plan can understand the problem and proposed solution, he stressed that he is not a traffic engineer. When it was put to him that there is congestion at all shopping centres, Nel said that shoppers in Bloemfontein are spoilt.

(iii) Counsel's Contentions

[175] Defendants say a bottle neck is created and exiting traffic crosses over the median line, and the cars moving in opposite directions have to wait for each other. Plaintiff says the road widths are normal for parking associated with shopping centres. There is low speed circulation. Congestion during peak shopping hours is normal for a busy shopping centre.

(iv) Conclusion

[176] As Fee explained, slow moving traffic encroaching on on-coming traffic, is normal in a shopping complex. There is no merit in defendants' allegations. As Abrahamsohn said, the solution now suggested by Nel could have been constructed at the time, but the defendant was satisfied with the situation as it was constructed then.

ITEM 7 - ABANDONMENT OF VEHICLE RAMP

(i) Experts' Meeting

[177] This claim is formulated as follows in the minute of the meeting of experts:

"Abandonment of vehicle ramp from Lower ground level to Kingsway (ramp was constructed but would not be approved by Local Council, ramp design parameters not followed). Ramp had to be filled it (SIC) and is now used to exit from M1 level to exit and caused the unnecessary additional cost of reconstructing a suitable vehicle ramp according to a different design a breakdown of which cost appears in annexure "LLW3a".

[178] The parties agreed that the vehicle ramp from the lower ground level to Kingsway was abandoned. On the issue as to what the reasons for the abandonment were, the plaintiff said this is a matter for evidence, and the defendant said the ramp did not comply.

(ii) Evidence

[179] Bray testified that the problem with the traffic congestion occurs because the ramps which were initially designed to give access to vehicles from the lower level were closed up because the ramp encroached on to municipal property. The ramps could not be re-designed. Bray thought that the problem here was that the traffic engineer was incompetent or irresponsible, or that the traffic engineer was not consulted. Bray was of the view that the architect caused the problem.

[180] In respect of the basement exits that have to go up to ground level, Lamprechts said that the congestion is so bad that most shoppers exit the centre at the North, at the Kloppers area, that is the most convenient to them. Lamprechts did not want to agree that the parking area was functioning perfectly.

[181] Because there had originally been intended to be two lanes of traffic from lower ground to the street, and those ramps had to be blocked up because the ramp protruded on to municipal property, there was now traffic congestion, because those two lanes from lower ground now also come

to the mezzanine level 1 and are then bottlenecked into one lane, before spreading into three lanes to exit on to Kingsway. Nel proposed an alternative design which forms the subject matter of the claim in item 7. The A3 size plans illustrate his evidence. Plan C3 shows all three exist coming from mezzanine level 1, because the ramp had not been approved.

(iii) Counsel's Contentions

[182] Defendant's case is that the vehicle ramp was abandoned because it was not approved by the council because the ramp protruded onto council property. Plaintiff points out that it was defendant's decision to change the entrance configuration.

(iv) Conclusion

[183] The entrance and exit of the shopping mall has functioned in its present form since opening of the centre more than seven years ago. There is adequate access in an out of the shopping centre. Abrahamsohn pointed out in his evidence that the solution now proposed by Dries Nel could have been built at the time, but the defendant was content to have the parking configured as it is now. There is no merit in this claim.

ITEM 8 - STAIR 9 (FIRE ESCAPE) DESIGN PROBLEMS

(i) Experts' Meeting

[184] Nothing was said about this item at the experts' meeting.

(ii) Evidence

[185] Fee in his report expressed the opinion that the design changes were necessitated by the actions of the defendant arising from the construction of the steel structure spanning Kingsway in respect whereof plaintiff was not involved. In cross-examination it was put that Leighton did not take the street level into account in his design. Fee said that this was a fast track project, and in the heat of the battle in the trenches sometimes someone gets it wrong.

[186] Lamprechts expressed the view that here the architects failed in performing their co-ordination function with the engineers. If the architects had consulted the engineering drawings the architects would have seen the beam.

(iii) Counsel's Contentions

[187] Staircase 9 (a fire escape) is located on the corner of Kingsway and First Avenue and is a fire escape for the zone 4 area, serving all levels. On the staircase as originally designed by plaintiff there was insufficient space for an exit to Kingsway, and an escape passage then had to be made on the eastern side. This resulted in a late revision of the glass façade drawings. By the time the glass sub-contractor installed the glass, the scaffolding had been removed, and defendant had to incur cost to supply additional scaffolding. Plaintiff says the delay in erecting the glazing of the staircase was caused by defendants.

(iv) Conclusion

[188] No evidence was led in support of the claim that the defendants did in fact incur additional cost in respect of scaffolding. There is no merit in this claim.

ITEM 9 – PICK ‘N PAY INTERNAL STAIRCASE

(i) Experts’ Meeting

[189] This item was described as follows in the meeting of experts:

“Pick ‘n Pay internal staircase designed by Bentel was rejected by Pick ‘n Pay, and another staircase had to be constructed.”

(ii) Evidence

[190] In his expert report Fee says that he is satisfied that the need to replace the staircase was as a result of the contractor proceeding with the fabrication of the staircase without the submission of shop drawings for the approval of plaintiff. In cross-examination Fee said the solution of the problem of the sub-contractor making a staircase that was condemned depended on the stage of the project at that time. In his view Pick ‘n Pay did not care whether it was a concrete or steel staircase, because it was going to be cladded with tiles. This was also what Abrahamsohn said. The liability for the construction of the defective staircase lies with the contractor. The staircase was needed urgently, and the contractor must bear the cost. In the circumstances of the stage of the project, the architect decided not to have the steel staircase re-built, but to rather construct a concrete staircase. It was put to him that in such case the architect

had to obtain a variation order (VO) from the client, but Fee said he had no knowledge of that. Fee said that the quantity surveyor should have been brought in to cost the work when the steel staircase was condemned.

[191] Lamprechts found this situation difficult to understand. If the Pick & Pay specification was that a steel staircase had to be built, the architects had to do that. A sub-contractor was instructed to build the steel staircase, but did a poor job. In such case the architect must instruct the sub-contractor to re-do the work. If the tenant, Pick 'n Pay wanted a steel staircase, the architect had to instruct the sub-contractor to make a steel staircase. It was not up to the architect to change it to a concrete staircase, which is more expensive than a steel staircase, without a specific instruction from the developer. The architect needed to consult with the developer and Pick 'n Pay, and get approval from the developer to have a concrete staircase built. It was put to Lamprechts that this staircase episode occurred in February 2007, when the planning was still for the shopping centre to open in April 2007. The staircase had to be cut out and removed. Then Vermacatti, the project manager on behalf of the owners, decided not to replace it with steel, but to do a concrete staircase which was quicker. Lamprechts denied that concrete could be quicker. In his view the architect should have instructed the sub-contractor to make good the staircase.

[192] Nel did not have a full understanding of the position surrounding this staircase and said that as he understood the situation, even if the staircase had been perfect, it would not have been accepted by Pick 'n Pay because they did not want a steel staircase. This was of course not the problem. In re-examination Nel said that he was informed that Mr Gladulitz, a Pick 'n Pay architect, condemned the staircase. Gladulitz is a dedicated Pick 'n Pay architect.

(iii) Counsel's Contentions

[193] The steel staircase was condemned by Pick 'n Pay, and plaintiff then designed a concrete staircase. Defendants say there is no reason why they should bear the increased costs of the concrete staircase over the steel staircase. The sub-contractor who built the defective steel staircase should have been instructed to rebuild the steel staircase. The plaintiff should not have issued the variation order.

[194] For the plaintiff Mr Zidel pointed out that the evidence disclosed that the project supervisor, Vermicatti said that a concrete staircase had to be built.

(iv) Conclusion

[195] As Abrahamsohn said a concrete staircase was built because it was not a simple matter to remove the steel staircase, the concrete columns adjacent to it made the simple solution for the stair to be concrete. It made no difference to Pick 'n Pay whether it was as steel or concrete

staircase, it would be cladded anyway. There is no merit in this claim.

ITEM 10 - MAIN ATRIUM COLUMNS

(i) Experts' Meeting

[196] This item was described as follows in the meeting of experts:

“The 4 main atrium columns were constructed incorrectly because the architect did not specify the tolerances needed to enable the columns to be tiled which necessitated additional unnecessary work in the form of boxing of the columns provide surfaces suitable for tiling.”

(ii) Evidence

[197] In his report Fee said it was explained to him that the offset of the columns was a requirement of the structural engineer. Plaintiff provided for boxed out cladding of the columns to obscure the view of the corbels and to ensure apparent aligning of the columns. Fee's view expressed in cross-examination was that the treatment of the columns per se was a positive.

[198] Bray testified that he was not involved in the decision to box in the columns. He thought that the boxing was added, in response to the statement that the plan was that the columns be boxed in. He said his knowledge of the detail was vague, and said he preferred not to address this item.

(iii) Counsel's Contentions

[199] Defendant contends that plaintiff should have instructed the contractor to remedy the non-alignment of the concrete elements, but instead plaintiff issued an instruction to box the columns. Mr Zidel says it was always the intent to box the columns. Abrahamsohn said it was aesthetically more pleasing to the eye to have slightly more body to the columns as boxing would do.

(iv) Conclusion

[200] The evidence of the defendant does not establish any fault on the part of the plaintiff. The evidence does not clearly establish the case advanced by defendants. It is not entirely clear what the intent was and whether it was the contractor who was at fault.

ITEM 11 - VOID BEHIND THE TOILETS ON GROUND FLOOR

[201] There was no evidence on this claim, and no submissions were made on it by Mr Gautschi.

ITEM 13 - FLOOR TILES**(i) Experts' Meeting**

[202] This item was described as follows in the meeting of experts:

“Quality of specified/approved floor tiles does not meet the required standard. Failure to specify support of the edges of tiles at movement joints to prevent shelling of tile edges and failure to specify adequate movement joints. Tile surface appears to get damaged through traffic.”

(ii) Evidence

Dr Roderick Rankine

[203] Dr Rankine is an engineer and concrete technologist specialising in the field of construction materials. His report appears in the Expert summaries at pages 276-292. He visited the site on 19 July 2013. In his report Rankine says that there appears to be a complete absence of credible evidence to show that the design professionals used any rational criteria for selecting or specifying tiles. On the “tenting” (blow-up) of the floor tiles he says the following in his report:

“The ongoing ‘tenting’ delamination of floor tiles at Loch Logan Waterfront is most probably a result of a ‘perfect storm’ of the following adverse factors working together in opposition to the strength of the tile adhesive:

1. Pre-tensioned reinforced concrete substrate
2. Pumped concrete mix deployed
3. Fast-track construction
4. Construction during a worldwide building boom [when tiles have no opportunity to mature]
5. Use of thick tiles [these were 10mm, other tiles are 6-7 mm]
6. Use of porcelain tiles which have a higher elastic modulus compared with regular ceramic tiles
7. Use of large size tiles
8. Narrow grout joints (tiles spaced close together)
9. Absence of soft perimeter joints
10. Inadequate provision of soft-joints for tile expansion
11. Soft joints and grout joints contaminated with tile adhesive
12. Poor bedding of tiles in tile adhesive.”

[204] According to Rankine, essentially, tiles tent because of differential and opposite movement between the tiles and the concrete substance. Clay products, including ceramic and porcelain tiles have an overall tendency to expand with age, a phenomenon known as “irreversible moisture expansion”. Fired clay products start to expand from the moment they are exposed to moist air after firing. Concrete substrates, on the other hand, have a tendency to shrink, a consequence of the loss of water on drying. Thus tiles expand on the concrete which shrinks. When the concrete has been pre-stressed the risks significantly increase. A minimum of eight weeks is required between casting a concrete slab substrate and tiling. In a fast-track construction, the concrete substratum may be tiled soon after it has been cast (one does not know the period between tiling and the casting of the concrete substrate in this case).

[205] In his evidence Rankine used a number of photographs which had been taken by Koupis. The pagination of his photographs did not correspond with the pagination in the court file, or even in the file used by counsel leading his evidence, Mr Gautschi. Thus reference to the photographs is confusing. However, it is not necessary to refer to the photographs for purposes of this analysis. Rankine referred to the SANS specification on the laying of tiles, the old SANS 10107 and the newer standard. There have to be movement joints, because concrete shrinks and the tiles expand. Large tiled area must have movement joints in both directions. SANS 10107 reflects the best practice. The individual

specifications of the tile manufacturer, the TAL specifications are even more onerous. Rankine said that at the Loch Logan Waterfront in the mall or walkways, as Mr Zidel called them, there are transverse movement joints in one direction but no longitudinal movement joints. That constitutes a contravention of the SANS standards. The designer of the tile lay-out should substitute alternative joints to accommodate the inevitable movement. One cannot just ignore the inevitable movement which will occur. In this case there are no longitudinal movement joints. The photographs show that the failures are mostly in the middle of the walkways.

[206] In cross-examination Rankine was asked about the procurement of the tiles, and it was put to him that Plaintiff recommended Porto Bello good quality porcelain tiles from Brazil, which cost R235 per square metre, but that proposal was rejected by Koupis of defendant who said that he was not prepared to pay more than R150 per metre for tiles, and he then sourced tiles from Marble classics. The technical specifications of the tiles are given by Marazzi (Plaintiff's Trial Bundle 2 page 144C). There the manufacturer says that there must be expansion joints every 5x5 metres. Rankine said that the quality of the tile is the first aspect to consider. He was not convinced that these tiles had been properly tested under controlled circumstances in Hong Kong by the manufacturer.

[207] Regarding the shelling (edge chipping) of the tiles, Rankine said this is a big problem at industrial floors. Joint armouring can be used, which is a reinforcement with metal or hard plastic. An alternative is elastometric sealant that resists edge failure, but that is very expensive. On the allegation that the tile surface appears to get damaged through traffic, Rankine responded that the tiles in the high traffic areas, next to the walk-off carpets looked dull. He expressed the view that the life span of tiles in malls should be 20 years at least. This is contrary to what several other witnesses said, namely that the life span is between 7 and 10 years.

[208] Rankine was asked on the alleged failure by the plaintiff to specify adequate movement joints. He said that 5x5 was the maximum area allowed for movement joints, but 3x3 metres would be well advised. 25 square metres is the absolute maximum. The movement joint must be installed all the way to the bottom of the tile. Poli-sulphate is expensive. A backing cord, which is a flexible sausage that looks sponge-like can be used, and is acceptable practice. The contractor must ensure that all the glue is out between the tiles where the soft joint is to be put in. Use of a backing cord forces the contractor to clean the joint out. That is a construction and supervision responsibility. In response to the statement that at some places 70 mm thick tile adhesive was used, Rankine said that illustrated poor workmanship. If the movement joint is contaminated with glue, that could cause tenting.

[209] It was put to Rankine that at all shop fronts there were perimeter joints. That would mean every area of 7x3 metres was surrounded by a soft joint, being 21 square metres. Rankine responded that one does not just look at the area, and he disagreed that such practice (of 3x7) was proper rational design. It was put to Dr Rankine that the problem was that some of the tenants took out the perimeter joints, or made their floors up to the tile endings, without perimeter joints. Rankine was referred to the report by Truter (Defendant's trial Bundle 7 page 2238-2251). Rankine said he extracted some information out of the Truter report. With reference to the table on page 2245 he agreed that all the items listed by Truter dealing with tile failures at various places in the shopping centre were construction issues. Rankine agreed that Truter made extensive investigations.

[210] In re-examination Rankine said that he could not see longitudinal and perimeter joints in many places. He was told that they had been installed in some places. Soft joints at 3x3 intervals make more provision for movement, and reduce the risk of tenting failure. As to the width of the joint, the specification requires 5 mm, the bigger the joint the better from a point of view of tenting failure. Asked about construction failure regarding perimeter joints, Rankine said that he assumed that there were perimeter joints along the walkway. If there was no soft joint in the middle of the walkway, the risk of tenting failure was increased. Asked about the specification of the tile hardness, Rankine said that

the resistance to scratching was not as great as was claimed by the manufacturer.

[211] Fee visited the mall for the first time on 13 August 2013. He did not see the building when the tiles were laid. Upon his observation he found the tiles generally in good condition, kept clean and they retained their shine. He did notice damage to the sides of some tiles. This damage seemed to occur at the points where the soft joints separated the tiles. The tiles on one side of the joint appeared to be slightly higher than on the other side, which caused a rumbling impact from the wheels of trolleys being pushed over the tiles, similar to the rumbling noise one hears when driving a motor car over rumble strips on the road. The uneven laying of the tiles could be the cause of the damage to the sides of the tiles. Fee also saw some tiles damaged by the impact to something dropped on them. The hard wheel trolleys used with tenant installation could damage the tiles which, according to Fee's observation were not adequately protected during such installation operations from the hard wheels of the trolleys.

[212] Fee's view was that the standards of the SABS and TAL were benchmarks, but there is space for rational attitude, particularly here, where one wants to limit the number of expansion joints from a sight point of view. Soft joints are aesthetically unpleasing, and Fee could understand that one may not want to put a soft joint in the middle of the walkway. Fee further expressed the view that tile manufacturers and

tile layers are well-versed in the issue of laying large areas of tiles, and would be in a position to make rational choices as to the placement of soft joints.

[213] In cross-examination Fee conceded that the aspect ratio of 1:1.5 means that if the transverse joints are at 3 metres, then the longitudinal joints have to be at 4½ metres. He agreed that that 3x7 metres spacing did not comply with the 3x3 metre requirement. He agreed that the architect elected to depart from the ABS and TAL specifications and applied rational design. Fee said the question at the end of the day was whether the floor tiling failed because the prescriptions of the TAL and SABS specifications were not applied. That is the correct question which should be asked. Fee was not prepared to give an opinion on the alleged negligence of the plaintiff.

[214] Lamprechts testified that the architect stipulated polished porcelain tiles. These glazed porcelain tiles that were installed were very new at that time. This was the first shopping centre where such tiles were installed. Because the tiles were so new the architect had to exercise additional care. The architect had to bear in mind the climate in Bloemfontein, which is semi-desert. There are thunderstorms and driving winds in Bloemfontein. The glazed porcelain tiles get wet, and customers can slip on them. In Bloemfontein, because of its extreme temperatures, concrete will expand and contract to the maximum specified in the trade. In a winter's night in Bloemfontein the temperature

can go down to minus 10, and it can easily go to 20 the next day, giving a differential of 30 degrees. The tiles installed on concrete will move. The tiles must be installed in accordance with the best possible standards. There were two specifications for tiling available at the time, the TAL standard and the SABS 0107. It is essential that the architect must comply with these standards, otherwise the architect makes a rational design. The architect cannot deviate from these standards. In the SABS standards porcelain tiles were not even mentioned, they were so new at the time. That should have cautioned the architect. Vast areas needed to be tiled. The joints between the tiles are specified to be between 6-8mm, and the longest line to a soft joint 4,5 metres. In this case the tiles were in a square of 3 x 7½ metres. That does not comply with the specification. The distance between the tiles must be between 6 to 10 millimetres. The tiles in the Loch Logan centre do not comply with either the TAL or SABS standard. The architect used rational design, and if the architect does that, the liability rests with the architect. The architect should have known better. Now there is a failure in the tiling, which failure is the sole responsibility of the architect, due to the non-compliance of the architects with the specifications.

[215] Lamprechts testified that backing cord is placed into the joint, so as to ensure that there is no glue in the soft joint. It is difficult to supervise tiling. In order to try to ensure that all the glue is removed, it is important to ensure that the cord is put in. The cord does not fit in the joint if all the glue has not

been removed. The architect should have specified that the cord must be installed. Asked about the tenant drawings with specific reference to perimeter joints for the tiling, Lamprechts responded that the normal process is for the architect to approve the tenant drawings, so as to see that the tenant lay-outs contain the perimeter joints. If the architect does not check the tenant drawings to ensure that the perimeter joints are in place, the architect is negligent.

[216] Lamprechts's point was that the architects did not take into account all the weather conditions under which the tiles had to serve in Bloemfontein with its extreme climate. It was put that polished porcelain tiles had previously been used in various shopping malls, in particular in Woodhill and George, and porcelain tiles then became popular in shopping centres. Lamprechts insisted that porcelain tiles had not been tested over a long period of time. The complaint stressed by Lamprechts was about the method of installation. He said tiles in the Western side were exposed to weather conditions. Lamprechts confirmed that the plaintiff was also the architect for the Mimosa Mall in Bloemfontein, which is the second most important mall in Bloemfontein.

[217] Dealing with the technical specifications for installation of the tiles, it was put to Lamprechts that Rankine had said that 5mm joints were acceptable, as per the TAL instructions. Lamprechts stubbornly insisted that the SABS 0107 specification required 6 mm, and the architect had not followed the SABS specifications, and had according to

Lamprechts used rational design, for which made the architect personally liable. It is difficult to see how an installer of a product can be held liable if the installer follows the instructions of the manufacturer. Lamprechts said the poor workmanship contributed to the failure. But his main concern was that the architect did not specify backing cord for the soft joints. Lamprechts agreed that the life span of these tiles was 7-10 years, and that the tiles are now reaching the end of their life span, which Lamprechts could not dispute. They have been in for 7 years.

[218] Van Rensburg testified that Ms D Hughes, who worked in the design department of Bentel, together with Roger Gardiner, visited the shopping centre to check the finishes. The omission of the soft joint in the longitudinal direction in the floor tiles was pointed out to her, and she said that they preferred not to put such soft joint in for aesthetical reasons. Van Rensburg inspected the tiling work, and noticed that the joints between some tiles had not been properly scraped out at places where the soft joints were. In cross-examination Van Rensburg said that he would not speak directly to the person laying the tiles, but if he noticed that problems with the tiling were not addressed, he would insist that the tiling be re-done in respect of the error he had pointed out.

[219] In cross-examination Nel confirmed that the tiles became dull within one year, and shelling took place at the joints. There were not longitudinal soft joints. According to Nel the accepted life span of floor tiles in shopping centres is

between eight to ten years, and he agreed that the tiles have been there for seven years. He said the number of tiles that had had to be replaced was unusual. Nel agreed that it is the duty of the tiling contractor to clean glue from the joints before putting in the soft joint. He agreed that NBA studio had an inspection duty, and said they performed that inspection duty. He agreed with the report by Dr Rankine that any two of the 12 factors mentioned could lead to failure of the tiles. Nel said the vast majority of the tiles that had shown tenting, 26 out of the 33, were in the longitudinal direction of the mall. He agreed that there were other factors than the placing of the soft joints which could influence failure of the tiles. Asked what would have happened if they saw that no backing cord had been placed in the soft joint, Nel responded that NBA studio had been given no design specification. They had no obligation to tell the tilers what to do.

(iii) Counsel's Contentions

[220] As to the quality of the tiles, it was not disputed that defendant decided for costs reasons to buy the tile from China. The tile recommended by plaintiff was not used.

[221] Defendants say the failure to specify the correct distances for the movement joints (soft joints) caused the tiles to fail. Mr Zidel points out that the tiles also failed in several other areas. The evidence was that a soft movement joint in the middle of the walkway would be unsightly. There is no evidence that the tile failures were a result of any negligence

on the part of plaintiff. There was poor construction and workmanship.

(iv) Conclusion

[222] As to the quality of the tiles, the tiles were chosen by defendant, against plaintiff's recommendation of a better tile. Rankine was not satisfied that the tiles had been properly tested under controlled circumstances in Hong Kong, and that the tiles complied with the specifications claimed. The tiles have reached the end of their expected life. Any one of the 12 causes listed by Dr Rankine could cause the tenting. Eleven of those causes relate to construction. The claim must fail because defendant has failed to establish that the failing or tenting occurred due to the design of the plaintiff. The design of the plaintiff is not the more natural, or plausible cause of the tenting from amongst the conceivable ones listed by Rankine (Govan v Skidmore 1952 (1) SA 732 (N) at 734C-D; AA Onderlinge Assuransie-Assosiasie BPK v De Beer 1982 (2) SA 603 (A) at 614H-615B). Defendant's claim must fail.

ITEM 14 - STAGE 5 ARCHITECTS:

PROBLEMS TO GET CORRECT DRAWINGS FROM PLAINTIFF

(i) Experts' Meeting

[223] The experts agreed that this was a matter for factual evidence.

(ii) Evidence

[224] Van Rensburg testified that the first Bentel plans were submitted to the municipality during 2004. Van Rensburg was involved on site from 2006. In broad terms the plans were submitted to the municipality five times. In-between he had informal discussions with the representatives of the municipality. The plans were rejected on 17 November 2004 (Kit 14 page 1). There is an internal process in terms whereof the municipality gives commentary on the problems they have. On 2 February 2006 Van Rensburg sent a telefax to Leighton to inform Leighton of the problems. Being a fast-track project, amended plans had to be submitted to council. The same points repeatedly came up:

- (i) Absence of measurements.
- (ii) Parking bays next to walls (where an extra 300mm has to be allowed in terms of the Bloemfontein regulations, in contrast to the regulations applicable in Johannesburg).
- (iii) Absence of chronological numbering of parking bays.
- (iv) Gradient of the ramp (was 1:8, could not be less than 1:10).
- (v) Bridging zones (transfer from ramp to level not indicated or sufficient).
- (vi) Parking bays which did not comply with standards were shown on the plans.

[225] Five parking bays are allowed for every 100 metres of gross leasable area (GLA). Van Rensburg referred to a communication from Roger Gardiner (of Bentel) dated 8

December 2008 requesting a copy of the parking regulations. On 8 December 2008 Van Rensburg sent the parking regulations to Gardiner.

[226] The municipality again rejected the plans on 31 January 2006. Van Rensburg told Leighton to note certain points. The process of submitting plans is that the municipality tell you very clearly what has to be rectified. Upon re-submission the municipality looks whether you addressed the problems identified by them, and if not the plan is returned to you for further attention. The document at Defendant's Bundle 13 page 4 is a general checklist, on which the items requiring attention are marked by the municipality, on 2 March 2005.

[227] The third submission of the plans occurred on 7 July 2006, and on 10 October 2006 the plans were again rejected. The plans were rejected because the parking bays were not numbered, and the dimensions of the bays were not indicated on the plans. This was a repetition of previous problems. The plans were not up to standard. On 25 October 2006 Bentel sent the plans again. During October Van Rensburg spent a lot of time on the plans. He got the impression that Bentel did not understand what the problems were. On 6 December 2006 Van Rensburg received informal comments from the council after the re-submission of the plans in July 2006. The council was becoming impatient because Van Rensburg repeatedly cancelled meetings with them because he did not get the required information from

Leighton. There is an email from Van Rensburg to Bentel about the parking bays which were still not numbered.

[228] Van Rensburg said that on 2 October 2008 the Mangaung Metropolitan Municipality sent a letter to VKE Engineers regarding the traffic impact study. "As built" drawings were submitted, but not approved by the municipality, which plans were again returned by the municipality with comments. On 7 October 2008 Nel sent an email to Roger Gardiner informing him that extensive revisions to the drawings are required. Van Rensburg testified it would take too much time to do the corrections by hand. Until these plans have been approved, no further plans relating to the premises, e.g. tenant drawings, can be submitted. On 10 October 2008 the municipality still had the same problems with the drawings. On 26 November 2008 Van Rensburg wrote to Gardiner explaining the problems and informed him that the plans were not in order. On 8 December 2008 a response from Abrahamsohn was received, as indicated in the wording highlighted in green on pages 94-96 (Kit 14). On 9 February 2009 VKE reported that it would be futile to submit the plans again. NBA studio, the stage 5 architects had to do the alterations on the plans by hand, as the dimensions of the parking bays were still not indicated on the plans.

[229] The additional fees incurred by NBA studio are calculated at 83 plus 10 hours for Van Rensburg and Nel respectively. In cross-examination Van Rensburg said that as architect, you try to get in as many parking bays as possible. NBA showed

Bentel how they could get in more bays but Bentel did not design the parking optimally.

[230] Nel testified with reference to the council check-list and items ticked off there, that they had negotiations with the council regarding the plans prepared by Bentel. At the stage of the initial submission of the plans, there were zoning problems, and for that reason he consented that the second floor could be omitted. They would later apply for that consent, which was done, and that approval was obtained. There were comments from the aesthetics committee of the municipality. The aesthetics committee did not like the big square building, which had too much of a solid and massive appearance, and the aesthetics committee felt that insufficient attention had been given to the aesthetical appearance of the building. Nel told the committee that there would still be considerable changes, this was a fast-track project. The exterior could not be completed before it was known what was going to happen inside the building.

[231] On 30 April 2007 Nel received feed-back from the aesthetics committee that they were satisfied with the proposals and were awaiting the final drawings, which Nel would have to submit. According to Nel, that is where the process is standing now. Regarding the preparation of “as built” drawings, Nel testified that he got a CD from Bentel. The plans were in DWG format which caused Nel problems with the code to unlock the plans. A considerable number of plans were not received from Bentel.

[232] In cross-examination Nel was referred to Plaintiff's volume 5, page 1125, a letter from Nel to Denkar Manga at Bentel dated 6 February 2004 wherein reference is made to the stadium parking. Nel said that stage was a year before the submission of plans. The plans which were the subject of that letter were discussed but never submitted to council. The project was delayed for a considerable time. In response to the statement that Nel was going to liaise with council on behalf of the defendant, Nel responded that Koupis instructed NBA to submit the final plans. This letter was written at the beginning of the project, and at that stage the defendant worked directly with Bentel. The zoning was still a sensitive subject at that stage. There were objections from inside the council that the proposed development was too big, and the council withdrew the written consent that had been given by one of its officials. The arrangement was that defendant would apply for re-zoning. At that stage there was no issue about parking. There were 11 surplus parking bays.

[233] Nel agreed with the statement that the design of the complex evolved in parallel to the construction. He also agreed that NBA studio was the inspecting architect, and that it is the duty of the inspecting architect to query if there appear to be problems with the plans or construction.

[234] In cross-examination Nel was asked whether NBA studio was paid the R80 000 claimed in item 14 in respect of the time spent on the plans, Nel said that would be sorted out

with the defendant later. He said NBA studio had rendered no invoice to the defendant.

[235] In cross-examination Abrahamsohn was referred to Defendant's trial bundle 10, ACD 25 where Nel details the shortcomings. ACD 25.1 shows, marked in yellow, the drawings which have not been received by Nel. Abrahamsohn said a small number of drawings were not received by Nel, they were all handed over on a CD, made from the drawings. 96 drawings were printed, awaiting collection by the defendant. Defendant did not collect them. It was put that Nel had trouble opening the drawings, consulted an expert and the cost would be R50 000 to have the discs converted to PDF format. Abrahamsohn responded that there were various requests for drawing registers and then the revisions for every drawing that had been issued, close to 90 were requested. The 15 CDs that were provided listed every drawing and every revision. There were three further CDs of drawings listed in the drawing register. Abrahamsohn insisted that all the drawings defendant requested were furnished, and the procedure to open them was given. Referred to ACD 88 Abrahamsohn said the IT specialist opened the drawings. Abrahamsohn said the stage 5 architect has the duty to provide the as built drawings. In response to the statement that it is the duty of the stage 4 architect to provide the as built drawings, Abrahamsohn said there is an overlap.

[236] Fee testified that he has been involved in projects where he has been the remote architect, and another architect the stage 5 architect at the place of construction. Such relationship is complex. Fee never saw the drawings that were provided concerning the complaint of non-compliance, and was not prepared to commit himself to an answer as to the conduct of the plaintiff. He did concede that it is the duty of the architect to see what regulations have to be complied with, e.g. traffic regulations.

(iii) Counsel's Contentions

[337] Defendant contends that NBA studios spent several hours to try to rectify errors on the plans made by plaintiff. Leighton had a nonchalant and cavalier attitude.

(iv) Conclusion

[238] No claim has been made or any invoice rendered by NBA studios to the defendants and accordingly no liability exists. This is a conditional claim, which is not possible. NBA can claim from plaintiff if it believes it has a case.

ITEM 15 - EXTERNAL CONCRETE FAÇADE

(i) Experts' Meeting

[239] This claim is formulated as follows in the minute of the meeting of experts:

“Insufficient specifications on external concrete façade finish. Bentel elevation drawings did not specify the finish on concrete required, and therefore the Contractor applied the engineering specification of ‘smooth formwork, degree of accuracy 2’. The

finish, however, allows for a substantial tolerance and does not provide for an acceptable finish that can be regarded as a final finish without further maintenance of application. As per design minutes dated 4 October 2005: 'The Project Team was advised (by the engineers BKS) that the concrete accuracy (as per the bill) would be Class 2, which would be -15 mm and/or +5mm to level deviation.'"

Issue 1: Whether the external concrete façade finish was restricted to the eastern elevation.

The plaintiff says yes, the defendant no.

Issue 2: What the plaintiff's specifications were for external façade finish to the eastern elevation

Plaintiff says plaster and paint, and defendant says off-shutter concrete.

Issue 3: What the second defendant's instructions were in respect of the external façade finish to the eastern elevation.

Plaintiff says: "Refer to meeting (26 October 2006) held at Plaintiff's office where the instruction was issued to treat the eastern façade with top finishes. As a consequence various options were presented."

Defendant says: "All the solutions were to try to solve the problem of the substandard off shutter concrete."

(ii) Evidence

[240] In his report Fee says that he was advised that it was always intended that a finish would be applied to this façade. The drawings submitted to council on 2 March 2005 indicated plaster and paint. Fee was advised that Class 2 concrete had been specified and that there are substantial variances in the finished surfaces, in excess of the specified tolerances due to contractor errors. It was put to Fee that class 2 concrete was specified. Fee said he could not comment, there appeared to be a misunderstanding between Bray and Leighton. It was further put that the contractor used new shuttering, but the concrete panels were out of tolerance. Fee said a credit of R1.5 million was given in respect of this work. Fee said he understood that at the behest of the owner, an alternative design was called for and Bray made 17 drawings, brought down to 4, and the owner selected the 800x800mm tiling finish. This was fully detailed by the plaintiff so as to be able to get an accurate price. Union Tiles got comprehensive detail and were able to give a price. That is where the project was left, as Fee understood.

[241] Lamprechts said that the current façade on the East is concrete, which is not approved by the council. The plaintiff did not co-ordinate the work with the engineer's drawings. Had the contractor correlated with the engineer's drawings, the architect would have made the contractor aware of what was required. The façade was not utilised to its full potential. Concrete is much more expensive than plaster and paint. The concrete was intended as a final finish. As it stands the

concrete façade is a waste of money. The wall on the east could easily have been done with brick and plaster. What one now sees on the eastern façade does not make sense.

[242] It was put to Lamprechts that the Council made a note that the matter was to be approved by the urban and aesthetics committee. Lamprechts said this was a conditional approval of the plans, subject to the aesthetics committee, which approval has not been given. It was put to Lamprechts that the façade has been up for seven and a half years, and remains in place. Lamprechts said a façade had a structural and aesthetic function. According to him the façade fulfils its structural function, but not the aesthetic function. It was put that the façade is now used to put up advertisement banners, which provides an income, and covers the façade, and complies with council requirements. Lamprechts could not comment on this.

[243] In cross-examination Nel agreed that the original design was for plaster and paint for aesthetical reasons. Nel advised Bentel to stay away from plaster and paint, because the sand used for plaster in Bloemfontein is not always of good quality, and is a high maintenance finish in Bloemfontein. Bray wanted to suggest a concrete finish. The eastern façade, facing First Avenue, was the greatest concern, because it has a big impact on the environment.

[244] The aesthetics committee did not explain their concerns on paper. Nel spoke to a member of that committee and

discovered that the large mass of the façade was a problem. Nel told Bray and Leighton, and they both understood perfectly what Nel was worried about. During further design Bray came with better suggestions. There would be a curved element in Bray's concept, but that was never done, because Murray and Roberts was of the view that that would be too difficult to construct. They had to keep the aesthetics committee happy so as to get on with the work. It was put to Nel that Abrahamsohn was told that the defendants were prepared to pay a lot for the eastern façade, but Nel could not comment on this statement. Nel does not know when the municipality will give final approval. Provisional approval was obtained in 2010, when the council said the eastern façade was approved in principle.

(iii) Counsel's Contentions

[245] The defendants claim that new shuttering was bought at a cost of R34 million so as to have a high quality off shutter finish. Leighton failed to co-ordinate the design intent with the drawings of the structural engineer. The cost of the high quality shuttering was wasted. Mr Zidel says that class 2 concrete was specified and badly applied by the contractor, and this is why the contractor agreed to pay compensation of R1.5 million to the defendant.

(iv) Conclusion

[246] The building has remained in its present form for more than seven years with advertising banners extending over the eastern façade. The first defendant has failed to make out a

case against the plaintiff based upon alleged negligence of the plaintiff in its contractual duties.

ITEM 16 - NIGHT WORK RATES

[247] No evidence was led on this item, and no submissions were made by Mr Gautschi.

ITEM 17 - LATE DESIGN CHANGE: FLOOR HEIGHTS

[248] No evidence was led on this item, and no submissions were made by Mr Gautschi.

ITEM 18 - DEEP TRANSFER CONCRETE BEAMS

(i) Experts' Meeting

[249] This claim is formulated as follows in the minute of the meeting of experts:

“Deep transfer concrete beams in Zone 3 area on M1 level has rendered this parking area unusable for parking (these beams are too low for cars (sic) to drive underneath them). As a result this area could have been omitted as a slab was constructed that has no practical use.”

(ii) Evidence

[250] Fee testified that he was advised that the transfer beams were required by the structural engineer. In relation to the deep transfer beams Fee said that when constructing a mall compromises have to be made.

[251] Bray said he dealt with Leighton when this occurred. The parking area was lost. Bray said the problem could be resolved in a number of ways: (i) To allow the columns to go through to the mall, then you have to widen the mall at that place. (ii) Re-locate the column under the parking bay, slide it away. (iii) Narrow the height of the beam, by increase in its width. This would be the first option Bray would attempt. He would ask the engineer to re-design the beams. (iv) The column could be put in the space of two parking bays. Then you lose two bays, and that is all.

[252] In cross-examination Nel confirmed that the beams were provided by the engineer. 29 parking bays are not used, but Nel agreed that those bays are now put to other use, albeit in a prime parking area. Nel agreed that the glass fit and car wash businesses would not do so well if they were not in this area close to the entrance and exit.

(iii) Counsel's Contentions

[253] Defendant says that the curved design of the shopping malls above the basement and lower ground parking required that transfer beams had to be introduced below upper ground level to off-set the structural columns in order to prevent the columns from intruding into the mall space.

(iv) Conclusion

[254] The deep transfer beams were designed by the engineer and are a structural requirement due to different column spacing needed between floors as a result of the curved nature of the

mall structure. Due to their nature these concrete beams have interfered with a minimal number of parking bays directly below the beams. The areas has however been fruitfully utilized as a car wash as well as a glass fit centre and the surrounding area is utilized for parking cars that are in the washing process. Thus the area is being utilised. Plaintiff points out that the 29 bays lost are being utilised for an income-generating business which is well-positioned at the entrance and exit of the parking garage. There is no merit in defendant's claims on this item.

ITEM 19 - PARKING LOST

(i) Experts' Meeting

[255] This claim is formulated as follows in the minute of the meeting of experts:

“PARKING LOST ON ORIGINAL DESIGN: As a result of parkings lost on the original design the client was forced to build an additional parking garage, and he intends recovering the pro-rata cost of the loss of 118 parking bays.”

(ii) Evidence

[256] Bray testified that the situation was that the architects (Bray specifically) were of the opinion that two and a half metre per bay was required. They did not know of the Bloemfontein Council requirement that there where the bay was next to a wall, there had to be an additional 300 mm, and, what is more important, that where there are columns, the parking bay must have seven and a half metre space, excluding the

column. This was an error made in the design from the word go. If the additional space had been left to allow that seven and a half metres could be available for cars to park, there would be many more parking bays. Koupis and Georgiou were unhappy with Bray about this, because he had given the wrong specifications. 49 bays are not sized correctly. Leighton did not take proper care in the design of the parking bays. The ratio is 5 parking bays per 100 square metres of retail space. This was an error, the bays were lost. The parking at the stadium resolved the problem. Leighton did not plan sufficiently. An extra level for parking could be put on the roof.

[257] In cross-examination Nel said that he has no doubt that there is excess parking in the complex at present, although not much. His view was that the parking was lost through ineffective design. He agreed that some bays were lined but not approved as parking bays, but can be used.

(iii) Counsel's Contentions

[258] The defendants say that 118 parkings were lost due to design. This was partly because Leighton did not know, or did not take account of the fact that Bloemfontein regulations for the size of parking bays differ from regulations elsewhere in the country. As late as 2007 Gardiner requested a copy of the parking regulations from Van Rensburg of NB1 studio. Defendants say this shows negligence on the part of the plaintiff.

[259] Mr Zidel points out that the defendants' evidence contends for 47 "lost" parking bays of which 29 relate to the parking bays in the area of the transfer beams. The remaining "lost" parking bays have been demarcated, but are not compliant with the council requirements, but they are being utilised by shoppers who pay parking fees albeit that the bay is slightly narrower than municipal specifications. Mr Zidel says the contention that the defendant was forced to build an additional parking garage is factually incorrect because it was always the defendants' intention to construct parking once the air rights had been approved. There was always going to be further parking.

(iv) Conclusion

[260] As Fee testified, at the end of the project, with hindsight, things could have been done better. There is no shortage of parking. There is no claim.

ITEM 20 - WALK-OFF CARPETS

[261] Practically no evidence was given on this item. Mr Gautschi made no submissions on this item.

ITEM 21 - PICK 'N PAY DELIVERY YARD

(i) Experts Meeting

[262] This item was described as follows in the meeting of experts:

"Pick 'n Pay delivery yard must receive special waterproofing whereas this could have been prevented by means of design, i.e. sloping of floor."

(ii) Evidence

[263] In his report Fee stated that the waterproof zone was sufficient. Fee agreed that according to the Pick 'n Pay specifications, all yards, inside and outside, had to comply with the requirements listed by Pick 'n Pay. Fee agreed that the drawings of the plaintiff in respect of the Pick 'n Pay delivery yard to not entirely comply with the prescripts of Pick 'n Pay. In re-examination Fee said that Pick 'n Pay do not allow drains over shops. That is also not allowed by the municipality, the drains must run in the ceiling. He said that three metres of waterproofing was sufficient. The density and curing of the concrete are important. There are concrete reservoirs that hold water.

[264] Bray testified that it is the responsibility of the architect to make provision for water in the parking area. The wind drives rain in, and there can be spillage at the point where trucks off-load. All concrete exposed to weather must have a 1:50 fall. At the Pick 'n Pay parking area Leighton did not coordinate the drawings of the engineer. Bray testified that the Pick 'n Pay parking yard had to be waterproofed properly, not just the 3 metres up to the gate. The ceiling height had to be 6 metres, and it was put that if the floor sloped, there would not be enough height, on which Bray could not comment, save to say that he was not party to those discussions. Bray said a parking yard is a very dirty place, and the water needs to run off to the outside.

[265] Lamprechts expressed the view that the architects ignored the weather aspect. The architects knew that in a delivery yard, you need to clean it. There are diesel and product spills. It was very easy to solve this problem. This was in his view an outrageous oversight by the architects. There should have been hills and valleys and a slope to make provision for the spillage to run off. It was put to Lamprechts that a cleaning machine could be used to clean the floor, there was no run-off needed. Lamprechts responded that the floor was not water proofed, and cracked. It was put to him that this was a construction problem, and that in seven years there had been no claim from Pick n Pay against the owners.

[266] Nel's view was that the area should slope, and there must be waterproofing.

(iii) Counsel's Contentions

[267] Defendants say that no falls and drainage were specified by the plaintiff as required in the Pick 'n Pay specifications for their off-loading yard. No provision was made for drainage and waterproofing of this yard. Lamprechts suggested that there could be hills and valleys.

[268] This is an internal delivery yard. To the extent that it is exposed to weather plaintiff provided for waterproofing for approximately three metres at the entrance as well as a four metre waterproofing overhang which was reasonable and sufficient to protect the yard from adverse weather. Any

minimal water which does enter the yard from trucks or from cleaning processes can easily be removed by mechanical means.

(iv) Conclusion

[269] It is significant that there has been no complaint by Pick 'n Pay. As Fee said, the proof of the pudding is in the eating. One should ask, when there were severe rain storms, did the water go down to the shop below the delivery yard? He knows that concrete does crack. Most cracks can be readily repaired. Structural cracks create more difficulty. There were cracks in the floor of this delivery yard, and the contractor had to repair them. Whatever leakage there was has been corrected. There have not been serious negative results as a result of the plaintiff's failure to comply strictly with the Pick 'n Pay prescriptions. The evidence showed that a sloping floor could create problems with the height of the area. A machine can do the cleaning of the floor. There is no merit in this claim.

ITEM 22 - LIFT DOOR OPENINGS

(i) Experts Meeting

[270] This item was described as follows in the meeting of experts:

“Incorrect lift door openings: Bentel did not coordinate the revisions to the issue of this information, which led to openings having to be altered on site.”

(ii) Evidence

[271] In his report Fee states that it is in the nature of major retail projects that the achievement of programme dates for tenant occupation is critical and of necessity work is often implemented on site in the absence of fully finalised technical information. Design development is carried out in parallel with construction. By the time the lift shaft drawings to suit the Thyssen lift installation were available, certain lift shafts had been completed and amendments to door openings were required. In cross-examination Fee said this was a fast-track project. One must determine what information was available when the architect made the decision how to construct the lift door openings. It depends on what was happening on the site at the time. It is of paramount importance not to delay the erection of the structural parts of the building, of which the lift door openings were part. A delay in erecting the structural part of the building, in which the lift shafts are housed, could have a critical impact on the project. It would be wrong to delay a decision on the construction of the door openings in the lift shaft, because that could delay the whole construction process. A situation arises on site, and, in Fee's experience, the architect must make the call. The architect will fix it later if necessary. This should be a contingency item in the budget, the door opening can be adjusted later. Asked whether the lift door openings could have been wider, Fee said it depends on the exigencies of the project.

[272] Lamprechts said the lift doors were not big enough for the lifts that were eventually installed. This was irresponsible design of the architects. These refer to the lifts on the Woolworths side. It was put that there was no sub-contractor appointed at that stage, the Otis specifications were used, but a lower tender was accepted. Lamprechts could not comment on this.

[273] In response to the question in cross-examination that it is the duty of the stage 5 architect to rectify the lift entrances, Nel responded that it was a co-ordination function of the architect designing the openings. He said Bentel and the mechanical engineers should have co-ordinated so as to get the correct opening.

(iii) Counsel's Contentions

[274] Defendant says that plaintiff designed the lift shafts and lift door openings and issued their dimensions to the structural engineer. It was a structural requirement that these lift shafts would be constructed in concrete. Plaintiff had to issue these dimensions to the engineers before the lift manufacturers were appointed and therefore used generic specifications. After the tenders came in Thyssen Krupp was appointed, at which stage a number of lift shafts had already been constructed, whose lift door openings differed from the ones having been used by the plaintiff in its drawings. The lift door openings then had to be enlarged by breaking into the concrete shafts. It is the contention of the defendant that plaintiff should have anticipated this delay in information, and

accordingly oversized the lift door openings in its instructions to the engineer with an allowance for brick infill afterwards.

(iv) Conclusion

[275] Plaintiff stresses that this was a fast-track project, where detail evolved in parallel with construction. As the lift door opening were structural in nature, plaintiff was compelled to provide for sizing of the lift door to facilitate construction prior to the defendant selecting the lift manufacturer. To the extent that it is contended that approximately three lift doors had to be resized afterwards, it cannot be contended that plaintiff's conduct was negligent. Whatever problems there were, were resolved at an early stage. There is no merit in this claim.

ITEM 23 - CO-ORDINATION FOR PIPES

[276] No evidence was led on this item, and no submissions were made by Mr Gautschi.

ITEM 24 - CONTRACTOR'S OVERHEAD COSTS OF 10%

[277] No evidence was led on this item, and no submissions were made by Mr Gautschi.

III CONCLUSIONS

19. CONCLUSIONS ON COUNTERCLAIM

[278] An architect must exercise the general level of skill and diligence exercised by other persons exercising the same profession, being skilled and experienced persons (De Wet v

Steynsrust Municipality 1925 OPD 151 at 157). The architect's liability is not absolute in the sense of being liable for whatever occurs. The architect is liable for substantial negligence (**Dodd v Estate Cloete and Another** 1971 (1) SA 376 (ECD) at 379D-G). The architect does not guarantee a perfect plan or a satisfactory result (**Surf Realty Corp v Standing et al** 78 SE (2nd) 901 (1953) cited by the US Court of Appeals, Fourth Circuit, in **Gravely v Providence Partnership** 549 F.2d 958 (4th Cir. 1977); **Coombs v Beede** 89 Me 187 at 188; A 104 (1896). There is no implied promise that miscalculations may not occur (**Coombs v Beede** 89 Me 187, 36 A. 104, 105 (1896).

[279] In his article "The Measure of Malpractice" *Journal of the American College of Construction Lawyers* Vol 5, Nr 2, 2011 John R. Heisse says:

"As construction costs escalate while budgets shrink, there is continuing pressure throughout the construction industry to "do more, faster, with less." With increasing frequency, the initial design is dissected by the contractor's team in an effort to find less expensive means to accomplish the same result—a process known as "value engineering." If done properly, and with adequate input from the design team, value engineering should result in a win-win—the designer's vision is fully realized while the owner's budget constraints are satisfied.

However, these financial pressures affect design as well as construction budgets, and design firms can find themselves sacrificing the "luxury" of many of the back checks and peer reviews that were typically performed in decades past. At the

same time, designers are utilizing new materials and are pushing the envelope to use existing materials more efficiently, all of which increase the risk of design errors that are not “covered” by safety factors, such that a seemingly minor error can result in a design which fails to perform as intended.

Sophisticated owners have also realized that given all of the challenges mentioned above, virtually every project will involve unanticipated changes, some of which result from design errors. Part of this is calculated—an architect can advise a client that its budget for a job with some errors will be \$X, while the budget for an error-free project will be much higher. The owner can do the math and elect to buy less than perfection at the lower price, recognizing that a contingency should be set for the inevitable cost of that imperfection.

In view of these factors, creative attorneys and consultants representing designers have begun to promote a new definition of professional negligence. Building on the truism that professionals are not expected to execute their jobs perfectly, they argue that a designer’s imperfections—her errors—do not constitute negligence unless and until they result in additional costs in excess of some threshold amount. They assert that this threshold amount will vary with the complexity of the project, but may range from a few percent of the contract price to beyond 10 percent.”

(Footnote omitted)

Heisse quotes **Coombs v Beede** in the following context:

“Noting that architects and engineers “deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement,” the court reasoned:

‘The indeterminate nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance.’”

In virtually all the items relied upon by the first defendant in its counterclaim there is at best a risk of future harm. This is not a cause of action for negligence. Heisse quoting Prosser, *Law of Torts* (4th Ed 1971) par 30 at p143:

“The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence.”

[280] In this case no evidence was produced by the first defendant of any tenant or shopper with regard to any defect or deficiency in the shopping centre. This is particularly significant in the case with items in the counterclaim that directly involve tenants, i.e. Woolworths (there is no evidence that Woolworths have a problem with the off-loading bay, on the contrary, they have increased, almost doubled their trading area); Pick ‘n Pay (no complaint about the waterproofing in their off-loading area, or their internal staircase); NBA studios (no invoice sent to the defendants for their additional hours spent).

[281] Apart from the criticism levelled against defendants at each item above, there is a conceptual problem with first defendant’s counterclaim. This was a fast-track project. The first defendant wanted the work completed sooner than

would have been the case with a normal project. The architects together with Koupis and later also with the project managers took decisions to complete the work. Lee, who has many years' experience, says that with the wisdom of hindsight one can at the end of a project, when the building has been completed, often see things that could have been done better. To give an example, Abrahamsohn testified, with reference to the parking congestion, that the solution now proposed by Nel could have been implemented at the time the problem arose regarding the ramp designed by Leighton that protruded onto council property. But a different solution was proposed and accepted then. At the time the defendants were willing to accept the alternative arrangement. There is no evidence that the defendants at that stage informed plaintiff that the incorrect work of Leighton would form the basis of a damages claim. Had the plaintiff been informed of such potential claim at that stage, other solutions might have been considered and implemented. The defendants accepted the work done, and the defendants are using the work. An important point, coming up repeatedly in the evidence, is that defective work should not be accepted, but that the party doing defective work should be instructed to make good the bad work. The owners should have asked the architect to make good its defective planning and design. By accepting the altered work in respect of the ramp the owners waived their rights to claim for defective work. If the plaintiff had not instituted a claim for fees, the counterclaims might never have been made. As has been indicated at the conclusion in relation to

each item above, there is no merit in any of the items claimed.

20. CALCULATION OF PLAINTIFF'S CLAIM

[282] Plaintiff alleged that the principal contract was R336 400 000. Defendant says it was R336 388 862,79. To this amount the direct contracts must be added. Plaintiff says these are R21 163 884, and defendant says that the amount for direct contracts is R12 911 260. Plaintiff is willing to accept defendant's figures. Thus the fees due, using defendant's figures are to be calculated as follows:

1. Both parties agree that the defendant has effected payment of R13 119 167,17.
2. There is no basis to subtract 40%, as the quantity surveyor has done, from the main fee claim because payment for stage 4 is only due once done. All work by the plaintiff to justify its main fee has been done up to stage 4.

Calculation of plaintiff's contract fee:

[283] According to Abrahamsohn and the plaintiff's experts at the joint minute, the rate to be applied is the fee applicable when the agreement was entered into. In the particulars of claim plaintiff claims a base rate of R1 050 000. In argument Mr Gautschi did not attack this base rate.

- | | |
|--|-----------------|
| 1. Principal contract (Murray & Roberts) | 336 388 862, 79 |
| Add: Direct Contractors | 12 911 260,00 |

	<u>349 300 122,79</u>
Base Rate	1 050 000,00
Plus: 5,5% of R349 300 122,79	<u>19 211 506,75</u>
	20 261 506,75
Less 25% (for stage 5)	<u>5 056 376,69</u>
	15 196 130,06
Less 20% (discount)	<u>3 039 226,01</u>
	<u>12 156 904,05</u>
Thus:	
(1) Contract fee	12 156 904,05
(2) Mr Price (stage 3)	274 548,55
(3) Rooftop Parking	496 293,51
(4) Exterior Cladding	Nil
(5) Zone 5 Parking	770 000,00
(5.3) Speed Ramps	Nil
	<u>13 697 746,11</u>
Less Paid	13 119 165,17
Due to Plaintiff	<u>578 580,94</u>

21. COSTS

[284] The plaintiff has not been substantially successful in its claims. The plaintiff's fees claim is allowed, but all plaintiff's claims for additional items have not been allowed. In the light thereof it would be fair to make no order as to costs on plaintiff's claims. As to the counterclaim, a portion of the evidence could possibly have been excluded if I had made a ruling on admissibility of evidence relating to the so-called "cash flow fee basis", and the "on risk" question, aspects which related to defendants' attempted amendments that

were refused previously. In order to make sure that the trial flowed, I allowed all evidence to be led, directing that the ruling on admissibility would be made at the end of the trial. On that basis I believe it would be fair to order first defendant to pay 50% of plaintiff's costs of the counterclaim. The defendants were at all times represented by the same legal team. There is no basis to direct that the plaintiff should pay the costs of the second defendant because of the finding that the first defendant is the party who now has rights and liabilities under the contract.

22. RESERVED COSTS

[285] Mr Gautschi asked that the plaintiff be ordered to pay the reserved costs of Monday 15 October 2012 before Moloi J. He said the letter in Defendant's trial bundle 10 ACD 32 gives the details of why the defendant is entitled to the wasted costs of that day. The letter is dated 14 October 2012, the Sunday before the matter came before Moloi J on 15 October. The letter refers to several telephonic conversations between Mr Gautschi and Mr Zidel dealing with the full set of plans and proposed meetings of the expert witnesses. Mr Gautschi's submission is that the matter was not ripe for hearing on 15 October 2012 because all the plans had not been delivered and because all the experts had not met, and a minute of their meeting would not be ready on 15 October.

[286] Mr Zidel says that the defendants moved major amendments shortly before the trial as well as a further version of their

proposed amendments. The plaintiff's legal representatives objected, and defendants did not at that stage abandon the proposed amendments. There was also a complaint by defendants that they had not been given the "As built" drawings. Those complaints did not constitute a reason why the trial could not proceed on 15 October 2012. Mr Zidel says the reason for the postponement was that the defendants wanted to amend their pleadings. Plaintiff noted an objection. After the trial had been postponed the proposed amendment was abandoned by defendants, as also appears from the judgment of Jordaan J, and the proposed amendments were again raised in 2013.

[287] It appears that the major reason for the postponement on 15 October 2012 was the defendants wanting to amend their pleadings. The record of the proceedings on 15 October 2012 before Moloi J was not placed before me. The trial could possibly have proceeded without the minute of the meeting of the experts, and without the defendant having all the drawings. The defendants should therefore be ordered to pay the wasted costs of 15 October 2012.

23. INTEREST

[288] As to interest, plaintiff claimed 15,5% interest per annum from date of issue of summons. The amount claimed by plaintiff was amended, and the contract between the parties makes no provision for *mora* interest. The clause dealing with payment of accounts (clause 14 in Annexure "D") provides that the plaintiff reserves the right to claim interest

of 2% above the prime rate of interest charged by Nedbank. The contract provides for interim fee claims. The parties were *ad idem* that the works have not been concluded and a final amount has not been determined for the works. There may still be a final calculation of fees due to plaintiff, if any. In those circumstances it seems fair to me to direct that interest only be paid as from date of judgment.

24. ORDER

1. The first defendant is ordered to pay the plaintiff R578 580.94 plus interest at the rate of 9% per annum from date of this judgment to date of payment.
2. Absolution from the instance is ordered in respect of the balance of plaintiff's claims.
3. No order as to costs in made on plaintiff's claims.
4. Absolution from the instance is found in respect of first defendant's counterclaim.
5. First defendant is ordered to pay 50% of plaintiff's costs of the counterclaim, including the costs of two counsel.
6. The defendants are ordered jointly and severally to pay the wasted costs of the hearing on 15 October 2012, including the costs of two counsel, if two counsel appeared for the plaintiff on that day.

A. KRUGER, J

On behalf of plaintiff:

Adv I. Zidel SC
with Adv D.R. van Zyl
Instructed by:
Matsepes Inc.
BLOEMFONTEIN

On behalf of defendants:

Adv J.R. Gautschi SC
with Adv A.J.R. van Rhyn SC
Instructed by:
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