IN THE KWAZULU NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 8262/06

In the matter between:

SPEEDY REPRO & DESIGN **PLAINTIFF**

and

MSIZA LINCON KHANYILE **FIRST DEFENDANT**

JACKSON HADEBE **SECOND DEFENDANT**

ZANELE GLADNESS BUTHELEZI **THIRD DEFENDANT**

JUDGMENT

MURUGASEN, J.

Introduction

[1] This is an action for the payment of the balance of the contract price for the production of textbooks by the plaintiff for the defendants.

[2] The Plaintiff, Speedy Repro and Design CC, has instituted the action against the defendants, Lincoln Khanyile, Jackson Hadebe, and Zanele Gladness Buthelezi alleging that they are in breach of an oral agreement entered into by the parties in December 2003, in terms of which the plaintiff undertook to produce various textbooks for the defendants who traded under the name and style of OBE Publishers at a contract price of R708 085.37, which included the design, layout and printing of the books.

[3] The Plaintiff alleges that it complied with its obligations in terms of the contract as the textbooks were produced and delivered to the defendants by 13 January 2004, but the Defendants had not paid the balance of the contract price in the sum of R553 085.37 within thirty (30) days of the date of the consolidated statement dated 31 January 2004 and were therefore jointly and severally liable for the payment thereof.

[4] The defendants deny personal liability, alleging that a partly oral, partly written agreement had been concluded in December 2003 between the Plaintiff and DBE Publishers CC (Reg No. CK 2003/061257/23). The contract price for the printing, binding and delivery of the books was R213 080, payment of which was due upon DBE Publishers CC receiving payment for the textbooks from the Department of Education. As DBE Publishers CC had already paid R155 000, the balance owing was R58 080.

Summary of Facts

[5] While the principal business of the plaintiff was layout and design, it also accepted contracts which included printing but outsourced the printing.

[6] The sole member of the plaintiff was Ramesh Narungdas ('Ramesh') until he passed away on 25 May 2008. Thereafter his wife Kalawathi Narungdas ('Narungdas') represented the plaintiff initially in her capacity as the executrix of his estate and subsequently as the sole member of the plaintiff. Narungdas was also employed by the plaintiff as an accounts clerk cum manageress from 1 July 1998 to 30 April 2008.

[7] Prior to July 2003 the three defendants traded under the name OBE Publishers. On 23 July 2003, DBE Publishers CC (Reg No. CK 2003/061257/23) was registered with the Registrar of Close Corporations. The three defendants were the members of the close corporation on date of registration, but Khanyile resigned as a member on 29 March 2004.

[8] Prior to December 2003 the plaintiff had undertaken other work for the defendants in the name of OBE Publishers. The parties had also previously shared premises.

[9] Preliminary work in respect of the Outcomes Based Education textbooks began early in 2003 when the defendants supplied the plaintiff with certain manuscripts which had to be designed and laid out as sample or draft textbooks.

[10] By July 2003, the plaintiff produced the sample books and promotional pamphlets published by OBE Publishers for the defendants. Thereafter once the defendants obtained approval from the Department of Education, they marketed the sample books at over 2000 schools in KwaZulu-Natal between July and August 2003. The defendants obtained a final order for the books in December 2003.

[11] It is common cause that in December 2003 the plaintiff, represented by Narungdas and the three defendants entered into an agreement in terms of which the plaintiff undertook to perform certain work in connection with the production Outcomes Based Education textbooks and to have the books printed. The books reflected the name of the publisher as OBE Publishers.

[12] The plaintiff subcontracted the printing of the books to Universal Printers at a cost of R238 750.20 and paid for the printing when the defendants defaulted with payment.

[13] It is also common cause that the plaintiff produced and delivered to the defendants the books as described and in the quantities listed in Annexure A to the summons together with tax invoices on 9 January 2004. The plaintiff thereafter submitted a consolidated tax invoice dated 31 January 2004 for the production of the books to the defendants in the sum of R708 085.37.

[14] The defendants made three cheque payments to the plaintiff in the total sum of R155 000. One payment was effected by way of a cheque dated 9 September 2004 in the sum of R5 000 drawn on DBE Publishers CC.

Plaintiff's case

[15] The plaintiff's version is that the defendants had contracted with it in their personal capacities, as they operated as a partnership and published under the name of OBE Publishers. The plaintiff had done work for the defendants trading as OBE Publishers prior to December 2003. The defendants had not informed the plaintiff that they had registered a close corporation or that the contract concluded in December 2003 was not between the plaintiff and the defendants but between the plaintiff and DBE Publishers CC.

[16] Sample books had been produced by July 2003 to enable the defendants to market their publications. But negotiations in respect of the contract concluded in December 2003 between the plaintiff and the 3 defendants commenced in October 2003, when the plaintiff obtained a quote for the price for printing the books from Universal Printers, to whom they would subcontract the printing of the workbooks. However the defendants only supplied the final specifications in respect of the type and quantity of the books required on or about 18 December 2003 and the contract between the parties was concluded on 21 December 2003, for the design, layout and printing of the books as specified in Annexure A.

[17] The plaintiff thereafter commenced production of the books as per the defendants' specifications and the work was completed in January 2004. The invoices for the books were issued in January 2004 on completion of the production of the books and delivered with the books to the defendants. The plaintiff then prepared a consolidated invoice which was uplifted by the defendants. Despite numerous requests to the defendants in person and per telephone by Ramesh and Narungdas, the defendants failed to effect full payment of the sum due to the plaintiff. When the defendants were approached for payment, they had not at any time denied personal liability nor had they disputed the sum the plaintiff had invoiced OBE Publishers for, until the action was instituted.

[18] Narungdas, Rajen Devipersadh, the production manager of the plaintiff and Natasha Narungdas, the daughter of Narungdas and her late husband testified on behalf

of the plaintiff.

The defence

[19] The defendants have alleged that a partly oral, partly written agreement was concluded on or about December 2003 between the plaintiff represented by Ramesh and the close corporation, DBE Publishers CC, represented by the defendants, and not the defendants in their personal capacity.

[20] The contract with the plaintiff was only for the printing, binding and delivery of the books as the lay out and design had already been paid for. At an agreed cost of R20.40 per book in accordance with the plaintiff's quotation dated 9 April 2003, the contract price was R213 080, payment of which was due only upon DBE Publishers CC being paid for the textbooks by the Department of Education. As DBE Publishers CC had already paid R155 000 by way of three cheques the balance owing was R58 080. No receipts were issued for the payments.

Only Buthelezi testified on behalf of the defendants.

The Issues

[21] The Issues that lay for determination were whether the plaintiff had discharged its onus to prove on a balance of probabilities that :

1 the plaintiff had contracted with the three (3) Defendants in their personal capacities and not with DBE Publishers CC t/a OBE Publishers;

2 the contract price was R708 085.37; and that

3 the contract price was due and payable thirty (30) days from the date of the consolidated invoice dated 31 January 2004.

ARGUMENT

[22] On behalf of the plaintiff Mr Khan submitted that as the plaintiff had alleged that R553 085 was owing and the defendants alleged that they had effected payment for repro

and design, the onus was on the defendants to prove payment. As the defendants had failed to furnish such proof, there was only the evidence of the plaintiff in respect of the contract price.

On the other hand the evidence of Narungdas was corroborated in material respects by Devipersadh and to an extent by Natasha Narungdas.

Only Buthelezi testified on behalf of the defendants; her evidence was unsatisfactory as she had been unable to confirm the total contract price for the layout and design or the amount that was paid and compromised by the contradictions therein. Other material witnesses, Khanyile and Hadebe did not testify although they had a case to answer and it was apparent that they were avoiding crossexamination.

He concluded that although the plaintiff had made out a prima facie case, the defendants had failed to furnish an explanation or answer thereto and an adverse inference therefore lay to be drawn.

[23] In response, Mr Mdladla contended on behalf of the defendants, that there was a dispute as to whether there was only one contract or two separate contracts for layout and design and printing. The printing was not done by the plaintiff as reflected on the covers of the books although in terms of the contract between the parties, the plaintiff was to print the books. As a result of the subcontract the cost of printing was high.

Most of the evidence adduced by the Plaintiff was hearsay. There was no direct evidence from the plaintiff that DBE Publishers CC was not a party to the contract. Therefore the wrong parties were being sued.

[24] Mr Mdladla submitted further that Narungdas had conceded that she was not present when the contract was concluded; she therefore had no direct involvement in the contract and her credibility and reliability of her evidence was eroded. She had also conceded that the repro and design had been paid for.

There was no corroboration by direct evidence for the allegations relied on by the plaintiff.

In support of the defendants' contention that the plaintiff had contracted with DBE Publishers CC, the plaintiff had accepted cheques drawn by DBE Publishers CC and Ramesh Narungdas had known that the contract was with the close corporation.

In conclusion he submitted that it did not make financial sense for the defendant to contract at the price claimed by the plaintiff, considering the discount allowed to the government even with the discount offered by the plaintiff.

Evaluation of the credibility of the witnesses

[25] As the parties relied on two irreconcilable versions, the following excerpt from the judgment of Nienaber JA in **Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others 2003 (1) SA 11 (SCA)** is particularly apposite :

> "On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes where there are two irreconcilable versions before it may be summarised as follows. To come to a conclusion on the disputed issues the court must make findings on *(a)* the credibility of the various factual witnesses, *(b)* their reliability, and *(c)* the probabilities. As to *(a)* , the court's finding on the credibility of a particular witness will depend on its impression of the veracity of the witness. That in turn will depend on a variety of subsidiary factors such as (i) the witness' candour and demeanour in witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, and (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about same incident or events. As to *(b)*, a witness' reliability will depend, apart from the factors mentioned under *(a)* (ii), (iv) and (v), on (i) the opportunities he had to experience and observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to *(c)*, this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues.

> In the light of its assessment of *(a)*, *(b)* and *(c)* the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it. The hard case occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised, probabilities prevail." (Paragraph [5] at H 14I - 15E.)

It is accordingly appropriate to evaluate the credibility of the witnesses before proceeding with an evaluation of their evidence and a determination of the issues.

Kalawathie Narungdas :

[26] Narungdas was not a confident witness; she was obviously nervous and at times became distressed while testifying. Her nervousness increased under crossexamination. Although at times she became confused when faced with the documentation and contradicted her evidence in chief, she testified more coherently under re-examination, explaining some of the contradictions, thereby enhancing her credibility.

[27] It was apparent from her evidence that the business of the plaintiff had been under the control of Ramesh and that Narungdas herself was not familiar with all aspects of the production side of the business, which was evident when she experienced some difficulty in responding to crossexamination on the printing costs.

[28] But under re-examination Narungdas testified without hesitation that although the printing was outsourced, a great deal of work had to be done by the plaintiff, for which the plaintiff levied an additional charge to the cost of the printing. Her evidence to this effect was supported by Devipersad.

[29] However while she initially testified that she was present when the contract was concluded between the parties, it was apparent from her testimony that she was not present on 21 December 2003 when the contract was concluded by Ramesh and the defendants, which she conceded.

[30] Nevertheless her evidence that the contract price agreed on by the parties was per the consolidated quotation which was uplifted from her and the invoices submitted to OBE Publishers, the manner in which she had pursued the defendants for payment, and that they did not query either the contract price or the balance owing had the ring of truth to it as despite her nervousness and the prolonged crossexamination, she remained consistent in her testimony.

[31] Although she was initially confused when asked by Mr Mdladla which document the plaintiff relied on, she pointed out Exhibit B13/14 as the documents which embodied the contract as it reflected the work done by the plaintiff. Although the plaintiff relied on Annexure A to the summons, Narungdas was correct as Exhibit B13/14 also lists all the details of the books produced by the plaintiff as listed on annexure A, except for the prices. Her failure to find Annexure A in the bundles of documents before her does not therefore detract from her credibility.

[32] Narungdas responded very confidently when she was faced with the document alleged by the defendants to be the written portion of the contract between the parties. She declared the document contained quotations for the printing of samples provided at the request of Khanyile, referring knowledgeably to the weight of the paper, the option of the colour of the print and the number of pages of the samples as compared with the books produced at the end of the year.

[33] While Narungdas agreed under crossexamination that the contract was concluded between the plaintiff represented by Ramesh and OBE Publishers, that she and Ramesh communicated with the three defendants as OBE Publishers and that payment was being pursued against OBE Publishers and not the individuals of the company, under re-examination she clarified that OBE Publishers was in effect the three defendants. This is in any event evident as the action has been instituted against the three defendants and not OBE Publishers.

Rajen Devipersadh

[34] Devipersadh was a clear, coherent and credible witness. He testified in a frank manner without hesitation and was obviously fully involved in the operation of the plaintiff's business, and was particularly knowledgeable about the production of the textbooks for the defendants. He was confident about when, how and what textbooks were produced for the defendants, as well as how the contract price reflected on the invoice (exhibit B12) was computed. His evidence remained uncontroverted under crossexamination.

[35] However his evidence that the invoice was uplifted before the repro and design was commenced is incongruent with the details contained therein which presupposes that the production was complete when the invoice was finalised.

Natasha Narungdas

[36] While the evidential value of her testimony was limited because she only assisted the plaintiff on a casual basis, Natasha testified in a frank and coherent manner and her evidence was not undermined in crossexamination. There was no reason to doubt her honesty although her outburst during the course of her testimony indicated that she was deeply upset about her father's death and believed that the financial stress caused by the failure of the defendants to pay adversely affected her father's health.

Zanele Gladness Buthelezi

[37] Buthelezi, who is an educator with a Masters Degree and 20 years experience at the time of the trial, fared very poorly as a witness. She contradicted herself frequently, one example being her initial allegation that the defendants had not received payment from the Department of Education and had made a loss on the contract; but under crossexamination she admitted that only a small sum of the payment due by the Department of Education was still outstanding.

[38] Her credibility was further undermined when she was unable to furnish details in support of her allegations. She alleged that there were two contracts between the parties

but was unable to provide any details of the first agreement, particularly the cost for the work and the payments therefor. Although she claimed that the three defendants had each contributed to the payments made to the plaintiff and that some payments were made in her presence, she had no idea how much her contribution to the payments had been, and was unable to compute her one third share, alleging that payments had been in 'bits and pieces'. Yet she is a businesswoman and she confirmed that the intention of the defendants was to make a profit from the contract.

[39] Her evidence that the defendants were not aware that the printing was outsourced was also not credible. It was common cause that the defendants visited the plaintiff's premises which were laid out in an open plan. Further the defendants regularly checked progress with the production of the books and conducted inspections; the plaintiff had also produced work for the defendants previously and they had also shared premises. It is highly improbable that they would not have known that the printing was outsourced.

[40] Despite her level of education she was unable to testify how the cost of the books was calculated from the quote the defendants relied on. She got herself into great difficulties trying to compute the cost in accordance with the document relied on by the defendants, claiming that the cost was agreed per book despite the discrepant sizes and pages, and later alleging that the cost was computed per page. She was unable to explain how either of those computations was compatible with the books produced per annexure A to the summons (and B12), which was undisputed.

[41] It was apparent that the evidence of Buthelezi was opportunistic and fabricated. Her credibility was seriously compromised and undermined under crossexamination. Her ignorance, confusion and inability to respond directly to questions on the defendants' own version or to furnish support for her answers from the document relied on by them lead the court to conclude that her evidence was unreliable and improbable.

<u>The issues for determination</u>

<u>The parties to the contract</u>

[42] The plaintiff alleges that the three defendants had contracted with it in their personal capacities and are therefore jointly and severally liable for payment of the contract price.

The following is common cause :

1 The three defendants traded as OBE Publishers and published books under that name prior to December 2003. Buthelezi testified that the contract with the Department of Education in 2002 was in the name of OBE Publishers.

2 The defendants were regular clients of the plaintiff prior to 2003 and the plaintiff had produced products for them in the name OBE Publishers. The parties had also previously shared premises. All the sample books and promotional pamphlets for the books which were produced prior to the contract concluded on 21 December 2003, were produced pursuant to contracts with the three defendants in their personal capacities trading as OBE Publishers.

3 The defendants continued to trade as OBE Publishers at all material times even after the registration of the close corporation in July 2003 of which the defendants were advised in mid August 2003.

4 The workbooks produced by the plaintiff pursuant to the contract concluded in December 2003 were published in the name of OBE Publishers. The name of DBE Publishers CC or its registration number did not appear on any of the textbooks.

5 The defendants did not raise any queries in connection with the invoices for the production of the books, the delivery notes and the consolidated invoice dated 31 January 2004 although they were all issued to OBE Publishers, and not DBE Publishers CC (Reg No.CK 2003/061257/23).

6 The specifications of the books to be produced in terms of the contract which were provided by the defendants to the plaintiff (B13 –B14) also reflected the name of

OBE Publishers only.

[43] Narungdas testified that she and Ramesh had always known that the three defendants personally traded as OBE Publishers. The defendants had not informed her to the contrary or about the close corporation when she called them for payment. On one occasion Khanyile had told her that he was not a signatory to the joint bank account and, although he could make arrangements for the payment with her, he could not commit to a date when he would get a cheque from Hadebe or Buthelezi. But she had not queried which joint account he was talking about because to her mind the three defendants had represented OBE Publishers.

[44] Devipersadh, who was the production manager for the Plaintiff since 1998, testified that he knew that the customers referred to as Lincoln, Jackson and Mrs Buthelezi represented OBE Publishers and that they had requested that the name "OBE Publishers" appear on all the workbooks produced for them. While he had only met Buthelezi twice, he knew the other defendants well.

[45] He had no knowledge of DBE Publishers CC, and as far he was concerned the work was done for OBE Publishers represented by the three defendants. Hadebe had provided a list which contained specifications of various books and discussed the production of the books with Devipersadh and other members of the staff. The name of DBE Publishers did not appear on any of the books produced for the defendants.

[46] The evidence of Narungdas and Devipersadh was supported by the facts which were common cause.

[47] In support of the defendant's version, Buthelezi testified that she was part of a 'company' or 'entity' which had a contract with the government. At its inception, the three defendants operated as OBE Publishers. The defendants were upset when they were advised on or about 30 July 2002 that they were unable to reserve the name OBE Publishers, as the name OBE Publishers was popular and catchy and they had already

commenced working under that name. They had already submitted material to the government reflecting the name OBE Publishers, and their contract with the department of Education was in the name of OBE Publishers. Consequently they continued with the attempt to register the name OBE Publishers. But eventually the close corporation was registered on 23 July 2003 as DBE Publishers, of which the defendants were informed by letter dated 30 July 2003 which reached them about mid – August.

[48] Therefore when the defendants secured the contract with the government at the end of 2002 and commenced discussing the layout and design with the Plaintiff in February 2003, the defendants were still operating as a partnership trading as OBE Publishers as the close corporation had not yet been registered. When the layout and design was finalised by the plaintiff, the defendants were still operating as OBE Publishers.

[49] Buthelezi alleged that the change in name was communicated to Ramesh after the close corporation was registered as DBE Publishers, about mid-August but 'because the change of name on the books would have been expensive, Ramesh did not have a problem with the change to DBE Publishers'.

[50] Consequently the meetings held on 19, 20 and 21 December 2003 were held between the plaintiff represented by Ramesh and DBE Publishers CC trading as OBE Publishers, represented by the 3 defendants.
As the design and layout had been completed by the end of June 2003, the contract entered into in December 2003 was for printing.

[51] The Department of Education had been informed of the name of the close corporation, and that the contract with the department was in the name of DBE Publishers CC trading as OBE Publishers. However there was no written agreement with the Department of Education as only certain forms and the manuscripts were submitted.

[52] Under cross examination, Buthelezi confirmed that OBE Publishers was a

partnership of the three defendants, which the defendants ‘owned’ equally.

[53] She confirmed further that there would have been tax payable by OBE Publishers because of the large transaction with the plaintiff. But she was unable to furnish any information in respect of taxes or financial statements of the close corporation or OBE publishers, responding that Khanyile had been responsible for the accounting, nor could she explain how the requirements in respect of taxes were going to be complied with.

[54] By the defendants’ own version they had traded as OBE Publishers prior to the registration of the close corporation and had continued to do so thereafter. Therefore unless the defendants specifically informed parties they had previously contracted with that they were now operating as a close corporation, those parties would remain ignorant of the change in corporate identity. It was accordingly incumbent upon the defendants to advise those that they contracted with that they acted in a representative capacity as members of the close corporation.

[55] Although Buthelezi testified that Ramesh was advised about the change in name, there was no corroboration of her evidence, particularly as the other defendants failed to testify. There was also no corroboration of her evidence to be found in any documents.

[56] Further, the explanation offered by Buthelezi about why the name of the close corporation was not reflected on the books and that ‘Ramesh did not have a problem with it’ makes little sense.

[57] The decision to display the name of the close corporation as the publisher lay with the defendants. It was not for Ramesh to make any decision about the insertion of the name. As the books were not printed until January 2004, it is improbable, even on the defendants’ version that the layout was completed before July 2003, that the insertion of the name would have been expensive or caused the entire layout to be affected materially, as the number of times the name of the publisher appeared on the books inspected by the court was extremely limited, and did not affect the contents of the books,

only the cover and cover page.

[58] A perusal of the invoices indicates that VAT was charged on the contract price. There would therefore have been Value Added Tax (VAT) implications for the defendants. But they had not queried the name on the invoices nor had they requested that invoices in the name of DBE Publishers be issued.

[59] Although payments in the sum of R155 000 had also been effected by way of three cheques drawn on the account of DBE Publishers CC, the reliance of the defendants on Ramesh's failure to object or query the cheque to prove that he was aware that he was dealing with a close corporation and not individuals, is misplaced as the cheques were issued subsequent to the conclusion of the contract on 21 December 2003.

[60] In any event, as Devipersadh testified, even when the defendants paid with a cheque drawn on the account of DBE Publishers CC, it was not unusual or remarkable as payment was frequently tendered by their customers by way of cheques drawn by third parties.

[61] It is noteworthy that a letter dated 13 May 2005 on a letterhead reflecting the name DBE Publishers has been furnished by the defendants. However the name is not followed by 'CC" nor is the registration number of the close corporation or the names of its members reflected anywhere on the letter.

[62] From a consideration of the aforegoing, I remain unpersuaded that the defendants did bring their change in status or corporate identity to the attention of the plaintiff. In the premises they cannot rely on the existence of the juristic entity to avoid personal liability in respect of the contract concluded with the plaintiff as the plaintiff would have continued to contract personally with the three defendants trading as OBE Publishers as it had done previously.

[63] I am consequently satisfied on a balance of probabilities that on 21 December

2003 the contract was concluded between the plaintiff on the one part and the three defendants in their personal capacities on the other. As the obligations of the defendants thereunder include the payment of the contract price, the defendants are jointly and severally liable for the payment of the balance of the contract price.

The contract

[64] The plaintiff has alleged that the contract between the parties was for the complete production of the books including design, layout and printing per annexure A to the summons and the price agreed therefor was R708 085.37. It relies on the individual invoices and the consolidated invoice dated 31 January 2004 issued to OBE Publishers and delivered to the defendants, as well as the evidence of Narungdas, Devipersadh and Natasha.

[65] Narungdas testified that the Khanyile had provided the plaintiff with a document reflecting the books to be produced for OBE Publishers on 18 December 2003 and prices. But the next day Hadebe had taken the price list away from Narungdas. On 20 December 2003, the same document with the prices erased (Exhibit B13-14) was telefaxed to the plaintiff.

[66] Subsequent to the conclusion of the agreement was between Ramesh and the three defendants on 21 December 2003, Ramesh showed Narungdas annexure A, which contained details of the work that the plaintiff had to complete in terms of the contract and the agreed contract price of R708 085.37.

[67] Both Narungdas and Devipersad testified that the design and layout of the thirty one (31) books were commenced after the contract was concluded and that the plaintiff's employees worked long hours both day and night to ensure that the books were produced timeously.

They were both adamant that the only work that had been undertaken for OBE Publishers in connection with its contract with the department of education previous to December 2003 was the production of sample books and promotional pamphlets.

[68] Natasha Narungdas also testified convincingly that she was present in December 2003 when the plaintiff's employees worked night and day shifts and even over the weekends to get the books ready for the defendants. She recalled that one night when she and Devipersadh had both worked late, until 10 or 11pm. She confirmed that the plaintiff had attended to the layout and design of workbooks for approval by the defendants, and proofreading, which she had assisted with. She described how she had proofread a Zulu workbook from the manuscript provided.

[69] If the books were laid out and designed by June 2003 as alleged by the defendants, there would have been no need to proofread the books from manuscript versions in December 2003.

[70] Narungdas testified that although the printing was outsourced, a great deal of work had to be done by the plaintiff, for which the plaintiff levied an additional charge to the cost of the printing. She was also aware that the printer only invoiced the plaintiff in January 2004 and that the plaintiff's invoices were prepared thereafter. Narungdas' evidence was supported by Devipersadh who confirmed that although the printing was outsourced, the plaintiff had to prepare the proofs and check the printed products and therefore debited a charge to the customer for this.

[71] Devipersadh also testified that the defendants knew that the printing was not done by the plaintiff. He was aware that a quote for the printing was obtained as early as October 2003 as the negotiations for the production of the books had commenced then. His evidence accords with the evidence of Buthelezi that the marketing of the books was completed by September and the defendants awaited the confirmed order from the Department of Education.

[72] The evidence of Narungdas and Devipersadh that the three defendants had called on the plaintiff's premises on numerous occasions while the books were being produced to check on the work, was not denied. It would therefore have been apparent that the

printing was not done by the plaintiff.

[73] Although it initially appeared from the questions posed in crossexamination that the defendants were going to deny that the printing was part of the contract, as it was put to witnesses that the defendants had their own printing facilities, this was not pursued. It was in any event incongruent with the allegation by the defendants that the contract was for printing only.

[74] Narungdas also testified that as a result of the failure of the defendants to effect payment, the plaintiff was under pressure for payment from Universal Printers. She eventually used her personal money and took loans to pay off Universal Printers.

[75] Although the defendants received the tax invoices reflecting the cost of the books and the consolidated invoice dated 31 January 2004 reflecting the total contract price as R708 085.37, the defendants did not query the cost on the invoices or dispute the total contract price on the consolidated account, when Narungdas telephoned each of them for payment.

Nor did they query the balance of R553 085.37 when she telephoned them for payment on numerous occasions even after the three payments were made, nor did they allege that the sum owing to the plaintiff was only R58 080. The only response she received from the all three defendants was that they were waiting to collect payment from their own customer. As far as she was aware, the defendants had not disputed the amounts with Ramesh either.

[76] She was adamant that the meetings between Ramesh and the defendants were about payment only and not any dispute relating to the invoices or quotations, as the defendants only response to the repeated requests for payment was that they were waiting for payment whereupon they would pay the plaintiff. Khanyile had also told her that he was not a signatory to the joint bank account and, although he could make arrangements for the payment with her, he could not commit to a date when he would get a cheque from Hadebe or Buthelezi. She had not queried which joint account he was

talking about because to her mind the three defendants had represented OBE Publishers.

[77] Narungdas was nevertheless very confident when she testified that the documents relied on by the defendants as being the written part of the contract between the parties, was not issued in connection with the work done by the plaintiff in December 2003 but were merely quotations for the printing of samples provided in April 2003 in response to Khanyile's request for an estimate of the cost of printing only. The estimate was for printing in one and two colours only.

[78] She referred knowledgeably to the details on the document such as the weight of the paper and the option of the colour of the print to substantiate her evidence. She also pointed out that as the books that were produced in terms of the contract concluded in December 2003 had a differing number of pages, there could not have been one agreed price viz R10.50 for all the books.

[79] Devipersadh testified that the invoice, Exhibit B12, had been prepared by Ramesh but was checked, finalised and printed by him. It was collected by Hadebe from Ramesh in Devipersadh's presence.

[80] The evidence of Buthelezi was to the effect that there were two agreements or contracts between the parties. The first was the agreement in terms of which the plaintiff would do the layout and design for thirty one (31) different types of books. In accordance with the agreement, as soon as the layout and design for a particular set of books was completed Ramesh would give them a price and the defendants would pay him in cash, because the close corporation did not have an account at that time.

[81] On one occasion only did the defendants pay by cheque in the sum of seven thousand eight hundred rand payable to Narungdas, drawn on the account of Mrs Hadebe, the wife of the second defendant. Ramesh had requested the cheque be drawn in favour of his wife rather than the plaintiff because of tax implications.

[82] The plaintiff did not submit any quotations for the layout and design which was finalised by the end of June. Payments were made in cash while the work was in progress and by the end of September all the payments due for the layout and design had been paid in full. Buthelezi did not remember seeing any receipts for the payments. Payments were effected in cash as Ramesh had requested cash. In any event they were unable to pay by cheque as the close corporation had not yet been registered and therefore did not have a bank account from which cheques could be issued.

[83] The plaintiff was thereafter requested by the defendants to design promotion pamphlets for the marketing of the workbooks between the period mid-July to September. The defendants then waited for the orders to be placed so that the quantity of the workbooks that needed to be printed could be ascertained by the government. The printing was done around 21 December 2003.

[84] Buthelezi testified that in terms of their contract the plaintiff was to print the books; she was not aware that the printing was to be outsourced; if the defendants had known, they would have dealt directly with the printers. There was no agreement that the plaintiff was to levy an administration fee, nor had the plaintiff furnished her with any documentation reflecting her indebtedness to Universal printers.

[85] Payment for the printing, binding and delivery of the books in the sum of R155 000 had also been effected by way of cheques drawn on the account of DBE Publishers CC held at First National Bank. No objection to or query about the cheque had been raised by Ramesh as he was aware that he was dealing with a close corporation and not individuals.

[86] Buthelezi testified that the meetings which took place in December 2003 were only in connection with the printing and the quantity of the textbooks to be printed. She declared that it would have been impossible to complete the design, layout and printing in ten days, especially as the layout for the mathematics textbook alone took over 2 months. (This was not put to the plaintiff’s witnesses.)

[87] Buthelezi denied that a quote was telefaxed to Hadebe on 24 January 2004, alleging that the printing was done according to the only quotation that they had received from the plaintiff dated 9 April 2003. The contract price was calculated according to that quotation at R20.40 per book. She also confirmed that 21 900 books were produced as reflected on Exhibit B12 – B13.

[88] She also denied that Ramesh or Narungdas had telephoned her about monies owing to the plaintiff. She initially testified that the first time she had become aware of the plaintiff's claim was when she received the summons, but later testified that before she received the summons, Khanyile and Hadebe had informed her per telephone that it was alleged the defendants owed a large sum of money to the plaintiff.

[89] She admitted that the price list which was left by Khanyile with the plaintiff was removed by Jackson because they did not want the plaintiff to know the prices at which OBE Publishers was selling the books. However Ramesh was aware that they had to give the government a 30% discount of the tendered price.

[90] The sum of R58 080 had not been paid to the plaintiff because Ramesh had disputed that balance owing was only R58 000 when the defendants met him to discuss the outstanding debt. The balance had not been tendered to the plaintiff.

[91] The evidence of the plaintiff in respect of the work undertaken and the agreed price is very persuasive.
Although Narungdas was not present when the contract was concluded, she testified convincingly about the telephone calls she had made to the defendants for the payment based on the invoice submitted to the defendants and that her request for payment was not met with disputes or denials that the money was owed, but assurances that the money would be paid in due course. She specifically testified that Khanyile had assured her that payment would be effected once the signatories to the bank account had drawn and signed a cheque. This was not controverted under crossexamination and there was

no evidence to the contrary by the defendants.

[92] Her evidence was supported by Devipersadh who testified that he had frequently heard both Ramesh and Narungdas telephone the defendants for the payment of R533 085.37. Khanyile had also often popped into the office after the delivery of the books to assure them that he was going to effect payments. He had told Ramesh in Devipersadh's presence that they were waiting to receive payment to pay the plaintiff. He was also present when Ramesh told Khanyile that he had only paid R155 000 and they needed to discuss the settlement of the balance of approximately R500 000. Khanyile did not dispute that the amount owed was approximately R500 000, but said that some arrangements would be made about payment.

[93] Narungdas's viva voce evidence that the invoice dated 9 April 2003 was a quotation, is corroborated by the fact that none of the books reflected on the invoices were listed on Annexure A to the summons, which the defendants admitted was proper and complete list of the books produced by the plaintiff. The prices were clearly for printing only as the invoice expressly exclude repro and design costs. Devipersadh also confirmed that a quotation had been provided to the defendants in April 2003, but the books quoted for had not been actually produced.

[94] Further the contract price alleged by the defendants would not have been feasible or profitable for the plaintiff, given the cost of printing and the work that went into the production.
It is common cause that the amount paid to Universal Printers for the printing was R238 750.20. It is highly improbable that the plaintiff would have agreed to a contract price less than that viz R231 080, for printing, binding and delivery as alleged by the defendants.

[95] Furthermore the explanation offered by Narungdas and Devipersadh for the higher price the plaintiff had debited the defendants with was reasonable. Devipersadh evidence was that the price charged by the printer was not the price the plaintiff charged the

customer, as the plaintiff had to provide the printer with the positives for the printing and then check that the numbering sequence and other details were correct. The plaintiff's employees then had to go the printers to check the finish of the book for example the colour, pages size and quality.

[96] On the other hand Narungdas's evidence that the plaintiff waited for the written quote from the printers dated 5 January 2004 before it finalised its own invoices to OBE Publishers is credible. She also testified that when the quotations were completed, they were signed by Khanyile and Ramesh. Narungdas recalled that she had highlighted the signatures in pink on the quotations. But the original quotations had been handed to Khanyile by Ramesh when he was pursuing the defendants for payment, and no copies had been retained.
Her evidence that the quotations had been signed by Khanyile and handed to him was not disputed.

[97] The evidence of Devipersadh that the invoice, Exhibit B12 was uplifted by Hadebe also remained uncontroverted. The contract price on this invoice is the same as the price on the consolidated statement dated 31 January 2004 and annexure A to the summons. But more significantly, this invoice contains a breakdown of the costs for 'repro and design' and 'printing'. This undermines the defendants' denial that the contract included the layout, design printing of the books.

[98] Further, Natasha Narungdas confirmed that when she wrote out a large number of tax invoices to OBE Publishers for repro design and printing in 2004, she had done so with the assistance of her father who had dictated the prices to her from the invoice (Exhibit B12). This supports the evidence of Devipersadh not only that the invoice was prepared prior to the finalisation of the invoices submitted to the defendants, but more significantly, that the prices thereon were the prices that Ramesh had agreed with the defendants.

[99] It is common cause that the all the books produced in terms of the contract

between the parties were delivered with tax invoices and delivery notes. Each set of books had a delivery note and a tax invoice specifying the details thereof inter alia quantity, number of pages, unit price, VAT and the total price. Acceptance thereof was signified on each delivery note by signature on behalf of the company, OBE Publishers. Hence the prices were specified and accepted by the defendants, even on date of delivery. There is no allegation or evidence that the prices were disputed with the plaintiff when the invoices were delivered to them.

[100] Narungdas was not aware that Ramesh had offered the defendants a discount and notes on certain invoices were pointed out to support the allegation that Ramesh had offered the defendants a ten per cent (10 %) discount on the price reflected on the invoices. This is in fact destructive to the defendants' version as such discount would not have been offered if the price on the invoices was incorrect, as the mere ten percent (10%) offered in discount would not have satisfied the defendants who were alleging that the contract price was far less than the amount claimed by the plaintiff.

[101] the evidence of Buthelezi on the other hand was not convincing or coherent but implausible and contradictory.
Her evidence that the payment for the layout and design of thirty one books was effected in cash while the work was in progress because the close corporation did not have a bank account at that time does not accord with the date of registration of the close corporation viz 23 July 2003 and the date that the defendants were notified thereof, mid- August 2003. According to her, the work was finalised by the end of June 2003 and payment for that service was effected in full by the end of September. She later contradicted herself saying that payments were made in cash because Ramesh had requested cash.

[102] Firstly according to the dates relied on by the defendants, the contract for layout and design could not have been with the close corporation but the defendants. Secondly she was unable to provide any documentation or details in connection therewith, be it a quotation or invoice. She relied only on the cheque of R7 800 payable to Narungdas as proof of payment towards the costs of the layout and design. She did not explain why this

payment was by cheque when Ramesh had requested cash. But more significantly, the acceptance of a cheque drawn by a third party by the plaintiff for services rendered to the defendants, confirms the evidence of Devipersadh that customers often paid with third party cheques, and therefore a cheque drawn by DBE Publishers would not have been questionable or remarkable.

[103] However as the defendants had no idea until November as to which books would be ordered, it is highly improbable that they would incur the expense of layout and design of all the books. The version of the plaintiff that the defendants had requested some sample books only is more credible.

[104] Further it is improbable that if payment, even in cash, had been effected that the defendants would have no record of it. They were operating a business, and it would have been essential to keep a record of disbursements in order to run a viable business.

[105] Buthelezi was unable to testify convincingly in support of the defendants' allegation that the contract price of R213 080 was calculated in accordance with the quotation dated 9 April 2003 and experienced serious difficulties with the calculations.

[106] When faced with two books of varying size and dimensions, a numeracy workbook for Grade 1 and a numeracy teacher's guide for Grade 2, she was unable to explain how the contract price was to be calculated from the quotation as there was no quotation for the smaller book; the quotation was only for books of A4 size. She then replied that they had only used the larger size and thereafter claimed to be confused. This was clearly because she could not offer a satisfactory explanation of how the contract price was calculated by the defendants.

[107] Similarly she could not explain how on the defendants' own version the balance owing of R58 080 was calculated. It was common cause that 21 900 books were produced. The defendants alleged that the books were charged at R20.40 each. At that price the total cost would be R446 760, which less the payment of R155 000 would leave

a balance of R291 760, and not R58 080 as pleaded.

[108] When she was asked to explain why the cost of R20.40 was accepted when no books of 148 pages were in fact produced, she then alleged that the defendants had decided to use a flat rate irrespective of the size or dimensions of the book or the number of pages of the A4 mathematics workbook because it had the most pages, although books which were much smaller or had fewer pages would have cost less, and such decision was prejudicial to their interests and would have depleted their profit. They had made this decision as the printing was done in December and the price may have increased since they received the quotation.

[109] When faced with the fact that the book she had relied on to justify the cost of R20.40 had not been produced in terms of the contract entered into on 21 December 2003, she then testified, in contradiction to the defendants' plea and her earlier testimony, that the parties had on 21 December 2003 agreed to cost the pages which was calculated by dividing the quoted cost of R20.40 by 148 pages which worked out at 13.7 cents per page rounded off to 14 cents.

[110] Buthelezi claimed that she had been unable to testify to this effect previously as she did not have the figures and documentation with her. She had no explanation for this failure or why she in fact needed any documentation when the computation could have been illustrated from the quotation.

[111] When asked about the charge for the printing of the covers for the books, she admitted that the covers would have pushed the prices up, which she had not included in her computation but she could not recall what the arrangement was in respect of the covers, nor did she have any notes that to remind her.

[112] When asked to explain why the printing cost of R327 169.01 reflected on Exhibit B12 was not queried as it exceeded R213 080, she responded that the queries had been raised verbally with Narungdas by all three defendants and then embarked on an

incoherent, contradictory and implausible explanation.

[113] There were other inherent improbabilities in her evidence. Buthelezi could not confirm what the total price was for the books supplied in respect of the manuscripts produced by the Plaintiff, saying that there was a price list but she had no idea of even an approximate value for the contract. She alleged that the defendants had made a loss on the contract, but she had no idea what the loss amounted to. According to her version, the defendants were prepared to accept prices which were prejudicial to their interests, in particular the profit to be made by them.

[114] Her dishonesty was also apparent when in response to the proposition that Ramesh had advised them of the full contract price in the sum of R708 085.37 and not just the printing costs to which she replied, "We were not agreeing to the calculation; we disputed everything". When asked when the dispute occurred, she responded that it was after the invoice (Exhibit B12) was telefaxed to them after the printing had been completed; they first had a telephonic discussion and then met to discuss the account; but no agreement was reached. She had prior to this denied that any quote had been telefaxed to the defendants. But she now contradicted herself, admitting that the document which had been telefaxed to Hadebe had reflected a large figure of approximately R700 000 although she was uncertain it was the same document.

[115] Her evidence that the defendants were not aware that the printing was outsourced was also not credible. It was common cause that the defendants visited the plaintiff's premises which were laid out in an open plan. Further the defendants regularly checked progress with the production of the books and conducted inspections; the plaintiff had also produced work for the defendants previously and they had also shared premises. It is highly improbable that they would not have known that the printing was outsourced.

[116] Having weighed the evidence presented on behalf of the plaintiff and the defendants, I am satisfied that despite the contradictions in the evidence of Narungdas, the contract between the plaintiff and the defendant was for the complete production of

the books as specified in Annexure A, while the uncorroborated evidence of the Buthelezi was improbable, implausible and did little to substantiate the defendants' version. I am also satisfied that the agreed contract price was the sum of R708 085.37 as reflected on Annexure A to the summons.

When was payment of the contract price due

[117] The plaintiff has alleged that a material term of the agreement between the parties was that the defendants would collect a statement or statements for work done in terms of the contract from the plaintiff and that payment of the contract price was due thirty (30) days from the date of the statement. The plaintiff alleges further that a consolidated statement of account dated 31 January 2004 was collected on the same day and that payment was therefore due on or about 3 **February** 2004.

[118] The particulars of claim were not a model of clarity, in particular which statement or statements were being referred to therein. This was exacerbated by the date of payment being specified as 3 February 2004. But as the only statement that was collected was the consolidated statement dated 31 January 2004, on the plaintiff's version, the thirty day period in terms of the agreement payment would have been due on 3 **March** 2004.

[119] Narungdas testified that the consolidated statement dated 31 January 2004 was collected by Khanyile on the same day. Her evidence remained uncontroverted under crossexamination and Khanyile himself did not testify. Payment was thereafter pursued in terms thereof.

[120] While the consolidated statement does not state the terms of payment or when payment was due, the tax invoices made to OBE Publishers which accompanied the delivery notes, state 'NB Terms strictly 30 DAYS NETT'.
This inclusion of this term of payment in the invoices lends credence to the plaintiff's allegation that a material term of the oral agreement between the parties was that payment was due thirty (30) days from the date of the consolidated statement, as it would

appear that the plaintiff's usual practice was to allow thirty (30) days for payment by its debtors.

[121] Further the settlement terms on the tax invoices submitted by Universal Printers to the plaintiff state "30 days nett from date of statement". It is improbable that being aware of its own obligations to pay the printers a substantial sum of R 238 750.20 which had been factored into the contract price within thirty (30) days, the plaintiff was unlikely to allow the defendants an indefinite period to effect payment of the contract price. Such a term would be highly prejudicial to the financial stability of the plaintiff, and does not make commercial or business sense.

[122] There was evidence to this effect as Narungdas testified that the plaintiff was placed under a great deal of pressure to effect payment to the printers and eventually she took loans to supplement her personal resources to settle the debt.

[123] The defendants have contended to the contrary that payment to the plaintiff was due only on receipt by DBE Publishers CC of payment from the Department of Education. Buthelezi testified that some payment had been received for the books but was unable to furnish specific figures and alleged that the defendants had not made a profit. But even on the defendants' own version they were obliged to pay the plaintiff the contract price as they had been paid albeit not in full (as alleged). Another anomaly was why three payments had been effected to the plaintiff despite the allegation that the payment was due only on receipt of payment from the department of Education.

[124] The probabilities therefore favour the plaintiff's version that payment was due by the defendants thirty (30) days after receipt of the consolidated statement dated 31 January 2004.

[125] The defendants closed their case without Hadebe or Khanyile testifying, which compromised the defendants' case as they had both interacted significantly with the plaintiff not only in the conclusion of the contract but in the events preceding and following

on the conclusion thereof.

[126] Arising from the aforegoing evaluation of the credibility of the witnesses and the conspectus of evidence, I am persuaded that the probabilities prevail in favour of the plaintiff, and that as the plaintiff has discharged the onus on it a balance of probabilities, it is entitled to the relief sought.

<u>Order :</u>

Judgment is granted for the plaintiff against the defendants jointly and severally, the one paying the other to be absolved, in the following terms :

1 Payment in the sum of R553 085.37

2 Interest thereon at the rate of 15.5% per annum from 3 March 2004 to date of payment.

3 Costs of suit

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Date Delivered: 5 May 2011