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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 58654/2012

Reportable: YES / **NO**

Circulate to Judges: YES / **NO**

Circulate to Magistrates: YES / **NO**

Circulate to Regional Magistrates: YES / **NO**

In the matter between:

DEPARTMENT OF PUBLIC WORKS

PLAINTIFF

and

MVELA PHANDA CONSTRUCTION (PTY) LTD

FIRST DEFENDANT

NCHUAPE SOLOMON MALEBYE

SECOND DEFENDANT

MPELO CONSTRUCTION CC

THIRD DEFENDANT

TEBOGO ORIGINEOUS MOLOISANE

FOURTH DEFENDANT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by e-mail. The date and time for hand-down is deemed to be 15h30 on 20 May 2025.

ORDER

It is ordered that:

1. The first and second defendant, are liable for payment of the sum of R33 726 705.90 plus interest at the prescribed rate of interest, from 11 October 2012 (date of service of summons) to date of payment, jointly and severally, the one paying, the other to be absolved.
2. The first and second defendant shall pay the costs of suit, which costs shall include the costs of two counsel, where so employed.

JUDGMENT

PETERSEN J

Introduction

[1] The plaintiff, the Department of Public Works ('the DPW') instituted action against the first defendant Mvela Phanda Contruction (Pty) Ltd ('Mvela Phanda') and the second defendant Nchuape Solomon Malebye ('Mr Malebye') on 10 October 2012, claiming payment of the sum of R33 726 705.90 plus interest from date of summons to date of payment. The third defendant Mpelo Construction CC ('Mpelo Construction') and the fourth defendant Tebogo Origineous Moloisane (Mr Moloisane) were cited but no relief is sought against them.

[2] The DPW advances four main claims, with alternatives. The claims against Mvela Phanda (Claims A, B, C and the alternatives) is essentially based on the *condictio indebiti*. The claim against Mr Malebye (Claim D with an alternative in delict) is based on his contract of employment with the DPW. Having regard to the nature of the claims it is emphasized that the claims for purposes of this matter have nothing to do with corruption or fraud.

Background

[3] When South Africa won the right to host the 2010 Soccer World Cup a plethora of contracts, pursuant to successful tenders, were awarded to upgrade

infrastructure in anticipation of the influx of visitors from across the globe. The Skilpadshek Border Post at the South Africa-Botswana port of entry formed part of such infrastructure upgrades.

[4] Mvela Phanda was awarded two tenders relevant to the Skilpadshek Border Post. The first contract involved the upgrading of the border post itself. The second contract involved the upgrading of accommodation or housing for the staff - the Skilpadhek Border Post Residential Contract. The present matter turns on the second contract concluded between the DPW and Mvela Phanda on 27 August 2008 by way of a standard Joint Buildings Contracts Committee (JBCC) agreement ('the contract').

[5] The DPW handed over the site to Mvela Phanda on 22 October 2008. On 3 November 2008, the Health and Safety Consultant of Mvela Phanda stopped any further operations at the site following the discovery of tunnels and holes caused by previous manganese mining around the site. The construction site was deemed unsafe, and construction was rendered impossible. Mvela Phanda duly informed the DPW.

[6] On 10 February 2009 a meeting was held between the DPW and Mvela Phanda at the offices of the DPW. A letter from Mvela Phanda to the DPW of 12 February 2009 records that a "*Mr Molebe*", informed Mvela Phanda at the meeting that the DPW intended cancelling the contract and that Mvela Phanda should submit "*their cost for cancellation*" to the DPW. "*Mr Molebe*" was said to be Mr Malebye on instructions given to his Counsel by Mr Malebye himself. Mr Malebye, would later, however, dispute that he was present at the meeting of 10 February 2009. Mvela Phanda forwarded its 'cost of cancellation' as requested by the DPW in an amount of R46 711 019.39.

[7] On 19 February 2009, Mr Mabuso, the Deputy Director: Project Management Support, and Project Manager on the contract informed Mr Potgieter that he had "*presented a draft request for cancellation to the COO*" who happened to be Mr Malebye. Mr Malebye as with his belated denial that he was at the meeting of 10 February 2009, initially sought to deny that such request was submitted to him.

[8] The DPW ultimately cancelled the contract on 13 March 2009. Mr Malebye, as the Chief Operations Officer, following line authorisations in the DPW, signed in support of the recommendation to cancel the contract. Mr Moroka of the DPW, on even date, duly informed Mvela Phanda of the cancellation of the contract by the DPW by way of letter, confirming in no uncertain terms that: “Claims for damages are to be dealt with strictly in accordance with the clause referred to above [39.2]. The Department offers to honour its obligations to settle any proven claims in the form of damages and/or loss of profit as provided for in the Conditions of Contract.”

[9] The cancellation fee had to be determined in terms of clause 39.2 of the contract which provided that:

“39.2 The employer shall be entitled at any time to unilaterally terminate or cancel this agreement or any part thereof. Save for the following the contractor shall not be entitled to claim any other amounts whatsoever in respect of such termination or cancellation of this agreement. The employer shall be obliged to pay the contractor as damages and/or loss of profit the lesser of:

39.2.1 An amount not exceeding ten per cent (10%) of the contract sum;

39.2.2 Ten percent (10%) of the value of incomplete work;

39.2.3 The contractor's actual damage or loss as determined by the employer after receipt of evidence substantiating any such damage or loss.”

[10] The essentialia of the sub-clauses of clause 39.2 is to be interpreted as follows. In terms of clause 39.2.1 a cancellation fee not exceeding 10% of the contract sum of R374 392 624.62 was provided for. This sum could not however be paid without having regard to clauses 39.2.2 and 39.2.3, which could only be determined upon proof from Mvela Phanda of the value of incomplete work; or evidence substantiating such loss which was at the discretion of DPW; and determined by DPW upon receipt of such proof. The proof could include loss of profit by Mvela Phanda. The contract could not be circumvented and therefore No other

amounts could be claimed for that matter agreed upon, other than those calculated in terms clauses 39.2.1. to 39.2.3.

[11] On 12 October 2009, Mr Malebye, the then Acting Director-General of the DPW, approved payment of the '*cancellation fee*' purportedly in lieu of the damages or loss that Mvela Phanda suffered because of the termination of the contract. The '*cancellation fee*' was paid to Mvela Phanda on 13 October 2009.

The claims against Mvela Phanda

Claim A

[12] The DPW alleges in Claim A that it paid Mvela Phanda an amount of R33 726 705-90 on or about 13 October 2009, in the *bona fide* and reasonable, but mistaken belief that it was owing to Mvela Phanda. The DPW further alleges that the amount paid as a cancellation fee was not owing as Mvela Phanda had not furnished the DPW with evidence substantiating any actual damage or loss as required by clause 39.2.3 of the contract because of the cancellation of the contract by the DPW.

[13] Mvela Phanda asserts the DPW, submitted, without basis, its annual financial statements for its previous financial year and argued that its profit percentage for the entire company for that year, and not only its construction component, would have been repeated on the contract. The DPW therefore claims that it could not determine, the actual damage or loss suffered by Mvela Phanda as required by clause 39.2.3; and resultantly the requirements of clause 39.2.3 were never met.

[14] The case for the DPW is that, since one of the three amounts required to apply the formula in clause 39.2 was missing, no amount could be determined in terms of clause 39.2 as being '*the lesser of*' the amounts calculated in terms of clauses 39.2.1, 39.2.2 and 39.2.3. No amount could therefore be determined as the amount the plaintiff was "*obliged to pay the contractor as damages and/or loss of profit*".

[15] In terms of clause 39.2, Mvela Phanda was therefore not entitled to claim, “*any other amounts whatsoever*”, or to be paid any other amounts by DPW, save for an amount calculated in accordance with clause 39.2. The payment of the cancellation fee of R33 726 705.90 the DPW asserts was therefore in breach of clause 39.2.

Claims B and C

[16] The DPW made two well-founded concessions in relation to Claims B and C at the close of its case. Nothing more needs to be considered in respect of these claims.

[17] At most it should be noted that the DPW in relation to Claim B accepts that Mvela Phanda submitted its valuation of work done to the project quantity surveyor on 10 February 2009, which puts an end to claim B.

[18] In relation to claim C, the DPW accepts Mr Potgieter's concession that the amounts claimed for insurance and security were, as per the bill of quantities, based on price, not cost which puts an end to claim C.

The claim against Mr Malebye

Claim D and its alternatives

[19] Claim D is based on the contract of employment of Mr Malebye with the DPW, for the duration of his occupation of the position of Acting Director General of the DPW. In general, it is averred that he was required to observe the utmost good faith towards the DPW and in so doing to refrain from doing anything that might prejudice or detract from the rights, assets or interests of the DPW. He is said to have been bound to observe all legislative provisions applicable to the position of Director-General, including the provisions of the Public Finance Management Act 1 of 1999 (‘the PFMA’), with specific reference to subsections 38 to 42.

[20] In specific it is alleged that Mr Malebye by 12 October 2009 knew, or ought reasonably to have known, that the cancellation fee was not owing, as Mvela Phanda had not furnished the DPW with evidence substantiating any damage or loss it may have suffered following the cancellation of the agreement by the DPW, as required by clause 39.2.3. The DPW asserts that by approving the payment of the cancellation fee by the DPW to Mvela Phanda, Mr Malebye acted wrongfully and intentionally, or negligently by contravening section 38 of the PFMA, committing an act of financial misconduct and/or permitting unauthorized, irregular, fruitless and wasteful expenditure. The approval of the payment by Mr Malebye to Mvela Phanda therefore constituted a contravention of section 38 of the PFMA and a breach of Treasury Regulations 12.2.1(e) and 12.2.2 (National Treasury Regulations (March 2005)), read with section 76(1)(h) of the PFMA, in breach of his employment contract with the DPW.

[21] The DPW concludes that Mr Malebye is therefore liable either in contract or in delict whether jointly or severally with Mvela Phanda, to make payment to the DPW the sum of R33 726 705-90.

The defence of Mvela Phanda and Mr Malebye and replication by the DPW

[22] Mvela Phanda and Mr Malebye plead that an agreement was concluded, at a meeting in September or October 2009, to bypass the requirements of clause 39.2.3 of the contract. As a result of this agreement, and the subsequent payment certificate incorporating the agreement, they plead that the cancellation fee was lawfully approved and paid.

[23] The DPW replicates that the agreement between the DPW at instance of Mr Malebye is invalid and of no force and effect, and that the resultant final payment certificate is invalid and of no force and effect. The DPW pleads that Mr Malebye had no authority to bypass clause 39.2.3 of the contract. In particular, the DPW pleads that Mr Malebye was faced with a conflict of interest in dealing with Mvela Phanda and was thus legally incapable of concluding a settlement agreement with Mvela Phanda, because of the commercial relationships between Mvela Phanda, Mpelo Construction, and Messrs Moloisane and Malebye.

Synopsis of the evidence

[24] The evidence of the DPW is premised predominantly on an investigation by the Special Investigative Unit ('the SIU') and rests primarily on the evidence of three witnesses, Mr Marinus Giani ('Mr Giani'), Ms Carin de Bruin ('Ms de Bruin') and Mr Frans Johannes Potgieter ('Mr Potgieter').

[25] Mr Giani and Ms de Bruin were seconded to the SIU to investigate the cancellation of the contract, and their investigation and observations are premised, amongst others, on documents obtained from TransUnion ITC and bank statements and invoices of the first, third and fourth defendants' respectively. Ms de Bruin is the author of the SIU Interim Report. Mr Potgieter who was employed by the DPW as its Director: Quantity Surveying Services and his evidence is premised on his involvement, amongst others, in the issue of the determination of the cancellation fee.

[26] Mvela Phanda in defending the action actively participated in the trial until the close of the case for the plaintiff. Following an appeal by the DPW against the granting of absolution from the instance and the appeal to the Full Court being upheld and the matter referred for further trial, Mvela Phanda absented itself from the trial. In the absence of an appearance by Mvela Phanda, no evidence was adduced on its behalf in defending the claim against it. Mr Malebye was the only witness who testified in support of his defence of the action.

The evidence of the SIU investigators and commercial relationships of Mr Malebye with roleplayers in the contract

[27] Mr Giani describes himself as a fraud investigator/forensic investigator. He was seconded to the SIU from October 2010 to March 2012. The scope of his investigation in a nutshell was "*to profile the individuals that took part in the meeting that was held on 5 October 2009 to determine whether there was any undisclosed interest.*" He was instructed not to contact any of the said individuals during his investigation. In compliance with his specific mandate he relied, amongst others, on

the database of TransUnion ITC to compile a diagrammatic representation of links between the aforesaid individuals (spider diagrams).

[28] Ms de Bruin, who was likewise seconded to the SIU, is the author of the Interim Report of the SIU, a forensic accounting report, which forms the basis of the claims in this matter. Ms de Bruin as with Mr Giani was instructed not to consult with any of the individuals who attended the meeting of 5 October 2009. Ms de Bruin had regard, amongst others, to the report of Mr Giani, and invoices and bank statements of the Mvela Phanda, Mpelo Construction and Mr Moloisane defendants in drawing inferences from payments made between links identified by Mr Giani.

[29] Mr Malebye does not dispute the correctness of the spider diagrams demonstrating the links between entities in which he and family members and more specifically Mr Moloisane, had an interest.

[30] The mandate of Mr Giani and Ms De Bruin was nothing more than establishing any corruption or fraud involved in the payment of the cancellation fee. The overall picture emanating from their evidence together with the evidence of Mr Malebye reveals the following. Mr Malebye was employed as Acting Chief Director: Transportation of the North West Department of Transport and Roads ('the North West Department of Transport') from 2004 until April 2005 when he was promoted in May 2005 to Chief Director. He held this position until June 2007.

[31] Mr Malebye and Mr Moloisane are cousins and had a symbiotic business relationship since 2006. Mr Moloisane was the sole member of Mpelo Construction. Mr Malebye was the sole member of a close corporation, Malebye Business Enterprises CC ('Malebye Business'), which was registered on 22 November 2001. Malebye Business traded in livestock and meat. Towards the middle of 2008, Malebye Business purchased a filling station trading as Merli Motors. Merli Motors falls under the Malebye Business umbrella. According to Mr Malebye he waited until July 2009 before he applied for a licence to trade. Merli Motors, however, having been purchased as a going concern continued trading in 2008 with the previous owner remaining to transfer skills to the new station manager.

[32] Mpelo Construction was party to successive service contracts with the North West Department of Transport from November 2006 to November 2007, a fact which Mr Malebye conceded he was aware of, but denies that he had a hand in the approval of those agreements. He downplayed the fact that his cousin Mr Moloisane was doing business with the Department of Transport of which he was the Chief Director as pure coincidence. He, however, readily conceded that Mr Molisane and himself were constantly on the lookout for lucrative business opportunities between 2006 and 2010.

[33] Mr Malebye was appointed the COO of the DPW on 20 March 2008. Mr Moloisane having been very successful in securing successive contracts under the tenure of Mr Malebye at the North West Department of Transport enjoyed the same level of success at the DPW where his cousin Mr Malebye was now the COO.

[34] In July 2008, Mpelo Construction to start with, was appointed by Mvela Phanda as a domestic subcontractor for the Skilpadhek Residential project. The following month, in August 2008, Mr Moloisane secured with the DPW, through another one of his businesses, Mpelo Property Investments CC ('Mpel Property Investments') of which he was also the sole member, a very lucrative contract for the procurement of a lease of property for nine (9) Cuban professionals. Mr Panaotis Andrea Gerolemou ('Mr Gerolemou') the chairman and a director of Mvela Phanda, who was part of the negotiations related to the cancellation agreement features in this agreement.

[35] On 18 August 2008, Mr S Vukela, purporting to sign as the "*Acting*" Chief Operations Officer of the DPW, recommended that the Director General approve the procurement of the lease of a house situated at 1[...] H[...] B[....] Street, Groenkloof ('1[...] H[...] B[....]') for the nine (9) Cuban professionals. Mr Malebye could not furnish any cogent explanation why Mr Vukela would sign the recommendation as aforesaid, when he, Mr Malebye was the COO, save to state that he may not have been around that day. The offer to lease 1[...] H[...] B[....] was ultimately approved on behalf of the Director General on 1 December 2008. The lease, which was to run from 1 September 2008 to 31 August 2011, was concluded between the DPW and Mpelo Property Investments at a starting rate of R22 971.00 per Cuban professional

per month. Mr Malebye, as with his tenure at the North West Department of Transport, pleaded ignorance about this lucrative contract which his cousin Mr Moloisane had secured with the DPW. He professed that whilst he knew Mr Moloisane conducted business with government, he was unaware of his business dealings with the DPW.

[36] The interest of Mr Gerolemou in 1[...] B[...] Street was discovered by Mr Giani during his investigation. He discovered that ownership of 1[...] H[...] B[...] was transferred before Mr Moloisane became involved. The property 1[...] B[...] Street was registered in the name of an entity P Gerolemou Construction in 1994. In 2008, the property was registered in the name of Mr Gerolemou, the chairman, and a director, of Mvela Phanda. The property would in 2009 come to be registered in the name of Flouspec Investments (Pty) Ltd, a company owned by Mr Moloisane.

[37] As pointed out by the DPW, it is extremely peculiar that when the DPW began paying rent for the lease of 1[...] H[...] B[...], the rental payments were made to one of Mr Moloisane's entities, while the property was owned by Mr Gerolemou. Again, pleading ignorance, Mr Malebye testified that, even though he was COO of the DPW at that time, he knew nothing about this agreement.

[38] Mr Malebye was appointed Acting Director General of the DPW on 2 April 2009. From 11 June 2009 to 7 July 2010, for some 13 months, Mpelo Construction CC paid various amounts, totalling R1 264 361.60, to Mr Malebye, mostly through Malebye Business. Mr Malebye claimed that Mpelo Construction purchased diesel for its trucks from one of his businesses, Merli Motors. This he claimed was the reason for these payments which were made from at least July 2009 to August 2010. Invoices for these payments starting on 27 July 2019 and ending August 2010 were discovered by Mr Malebye on the eve of the commencement of the trial. Whilst purporting to be "Tax Invoices", the documents fail to reflect VAT numbers for either Merli Motors or Mpelo Construction.

[39] Mr Malebye could provide no cogent explanation for the invoices save to speculate that it was generated pursuant to a contract between Merli Motors and Mpelo Construction for the supply of, *inter alia*, diesel by Merli Motors to Mpelo

Construction. No contract as alleged by Mr Malebye was discovered and none of the invoices make any reference to purchase of diesel. Mr Malebye was also unable to explain the nature balances brought forward from month to month by Merli Motors.

[40] On 04 November 2009, during his tenure as Acting Director General of the DPW, Mr Malebye and Mr Moloisane became members of Ratsuapa Enterprises CC. Ratsuapa Enterprises which had been in existence since 6 May 2004 was set up as a startup to get family members into business. Mr Malebye's eldest sister was a member of Ratsuapa Enterprises since 2004; his wife Mrs Patience Boitshoko Malebye and brother-in-law were registered as members on 4 November 2009. Mrs Malebye and Mr Moloisane were also members of a business known as Baswiedi Cleaners CC since 17 February 2009.

[41] Several commercial transactions were conducted between Mvela Phanda and Mpelo Construction; and Malebye Business and Ratsuapa respectively. Messrs Malebye and Moloisane have supplied the same address and contact numbers for purposes of CIPC registrations at from time to time. Mvela Phanda paid Mpelo Construction R12 357 201.41 as a subcontractor on the Skilpadhek Border Post Residential Contract.

[42] Mr Malebye was under a duty to disclose, inter alia, his business dealings or financial interests to the DPW. Mr Malebye, admittedly so, failed to disclose many of these interests from time to time. He admitted that he did not any time disclose his relationship with Mr Moloisane and Mpelo Construction.

[43] On his failure to disclose in his Financial Disclosure Form ('FDF') of 19 May 2008 his interest in Merli Motors which dealt in fuel, he explained that since Merli Motors had not been acquired at the time of his disclosure but only around mid-2008, and started trading in 2009, he was only obliged to disclose this from 1 April 2009.

[44] In his FDF of 9 April 2009, however, Mr Malebye as in his 2008 disclosure only disclosed his interest in Malebye Business Enterprise which traded in meat and livestock to the value of approximately R2 million, with no reference to Merli Motors. In attempting to explain his failure to disclose his business interest in Merli Motor

which on his own version was only to be disclosed from 1 April 2009, he claimed that he had made the disclosure “...because Merli Motors is a trading wing of Malebye Business Enterprises and as a result it was disclosed on 09/04/2009 which is from 1 April 2009 – that disclosure was made in terms of Malebye Business Enterprises as the holding company.” He added that the petrol business was “implied” in Malebye Business Enterprises.

The contract of employment of Mr Malebye (Claim D)

[45] The crux of the claim of the DPW against Mr Malebye is his approval of the payment of the cancellation fee to Mvela Phanda. The DPW asserts that Mr Malebye acted in breach of his contract of employment and statutory duties, in circumstances where he, as the Acting Director General of the DPW owed the DPW the utmost good faith and to act solely and exclusively in its best interests. The DPW further asserts that Mr Malebye was responsible for the effective, efficient, economical and transparent use of the resources of the DPW. To this end the DPW maintains that Mr Malebye was required to act in accordance with the terms of the contract between the DPW and Mvela Phanda and to avoid any conflict of interest in the exercise of his duties.

[46] To elaborate on the pleaded case of Mr Malebye by which he is bound, the high watermark thereof is that he did not breach his contract of employment. The rationale for this defence being that the cancellation fee was agreed between the DPW and Mvela Phanda and approved in the final payment certificate. As a further defence, Mr Malebye raises the statutory plea of waiver, thereby disputing the applicability of the statutory duties asserted by the DPW in its claim against him.

[47] The DPW replicated that the alleged settlement agreement is invalid and the payment certificate which is inextricably linked to the settlement agreement is accordingly invalid.

The common law, Public Service Act and applicable Treasury Regulations and provisions of the Public Finance Management Act 1 of 1999

[48] In terms of the common law of contract, Mr Malebye as an employee of the DPW was required in terms of his contract of employment to, *inter alia*, perform tasks diligently, competently and efficiently; to comply with all lawful and reasonable instructions given by the employer; to exercise reasonable care and skill; and to serve their employer honestly, faithfully and in good faith.

[49] Of these duties, the duty of good faith underscores the claim against Mr Malebye. In *Ganes v Telecom Namibia* 2004 (3) SA 615 (SCA) at 626 E-F, para [25], the SCA confirmed the principle that an employee may not “*place himself in a position which gives rise to a conflict of interest as between himself and his employer*”.

[50] Mr Malebye stood in a fiduciary position in relation to access he had to, and the power in relation to the assets and affairs of the DPW. It was therefore incumbent upon him to act in the best interest of the DPW in promoting its interests. The SCA has expressed itself clearly on the principles applicable to persons who occupy a position of trust towards another. In *Phillips v Fieldstone Africa (Pty) Ltd and another* 2004 (3) SA 465 (SCA) at 478E – 482D, paras [29] – [34], the SCA dealt with the principles governing the actions of a person who occupies a position of trust towards another. At para 30, the position is stated as follows:

“Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other’s expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. ... It prevents an agent from properly entering into any transaction which would cause his interests and his duty to clash. ... There is only one way by which such transactions can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent. ... Whether a fiduciary relationship is established will depend upon the circumstances of each case. ... But, so far as I am aware, it is nowhere laid down that in these transactions there can be no fiduciary relationship to let in the remedy without agency. And it seems hardly possible on principle to confine the relationship to agency cases.”

[51] At para 31, the SCA makes it plain that the rule is a strict one which allows little room for exceptions; it extends not only to actual conflicts of interest but also to those which are a real sensible possibility; the defences open to a fiduciary who breaches his trust are very limited: only the free consent of the principal after full disclosure will suffice.

[52] Aside from the common law, the statutory duties and obligations of Mr Malebye as the Acting Director-General of the DPW, and by implication as the Accounting Officer, derives from Part 2: section 38 to 42 of the Public Finance Management Act 1 of 1999 ('the PFMA'). These duties relevant to the matter at hand, include, *inter alia*, ensuring that the department has and maintains effective, efficient and transparent systems of financial and risk management and internal control; the effective, efficient, economical and transparent use of the resources of the department; and the management, including the safe-guarding and the maintenance of the assets, and for the management of the liabilities, of the department.

[53] The Treasury Regulation 12.2 relied on by the DPW in its claim against Mr Malebye, in relevant part, provides:

“12.2 Claims against the state through acts or omissions [Section 76(1)(h) of the PFMA]

12.2.1 An institution must accept liability for any loss or damage suffered by another person, as for a claim against the state, which arose from an act or omission of an official, provided –

- (a) the act or omission was the cause of the loss, damage or reason for the claim;
- (b) ...;
- (c) the official acted in the course of his or her employment and was not reckless, wilful or malicious;
- (d) the official did not fail to comply with or ignore standing instructions, of which he or she was aware of or could reasonably have been aware of, which led to the loss, damage or reason for the claim, excluding damage arising from the use of a state vehicle; and

(e) ...

12.2.2 If in doubt, the accounting officer of the institution must consult the State Attorney on questions of law on the implementation of paragraph 12.2.1.

12.2.3 **Except when an institution has accepted liability in terms of paragraph 12.2.1, an amount paid by the institution for losses, damages or claims arising from an act or omission of an official must be recovered from the official concerned if the official is liable in law to compensate the institution.**

12.2.4 The State Attorney may only obligate the funds of an institution with the prior written approval of the accounting officer.

12.3 Claims by the state against other persons

12.3.1 If the state suffers a loss or damage and the other person denies liability, the accounting officer must, if deemed economical, refer the matter to the State Attorney for legal action.”

(emphasis added)

[54] Mr Malebye basis his special plea of waiver, to absolve him from any liability for the payment related to the cancellation of the contract, on Treasury regulation 12.7.3. He specifically pleads that the claim against him as an official of the state, must be waived by the state in terms of regulation 12.7.3 read with regulation 12.2.1. He “*denies that any of the conditions in regulations 12.2.1 (a) to (g) were met.*” Regulation 12.7.3 provides that “*A claim against an official must be waived if the conditions in paragraph 12.2.1 (a) to (g) are not applicable.*”

[55] The DPW pleads that the approval of the payment of the cancellation fee by Mr Malebye constituted a breach of Treasury Regulations 12.2.1(d) and 12.2.1(e); and that he acted recklessly or intentionally and made an admission that was detrimental to the State without prior consultation with the State Attorney. The DPW and Mr Malebye provide divergent submissions in this regard.

[56] The DPW only contesting regulations 12.2.1 (d) and (e), asserts that Mr Malebye bears the onus of proving that his approval of the payment of the cancellation fee, when it was neither due nor payable, was not reckless or intentional;

and the *onus* of proving that he did not make an admission that was detrimental to the state without prior consultation with the State Attorney.

A comparative analysis of the evidence of Mr Potgieter and Mr Malebye

[57] It would be prudent to deal with a comparative analysis of the evidence by juxtaposing the evidence of Mr Potgieter against that of Mr Malebye, on the common cause and contentious issues.

[58] Mr Potgieter, a Quantity Surveyor by profession who had been in the employ of the DPW since 2003, confirmed that the contract giving rise to the eventual cancellation fee, had to be cancelled to avoid “fruitless expenditure”. This fact was common knowledge to all the officials of the DPW assigned in the financial delegations of the DPW; and the project management delegations assigned at the time. He was not present at the meeting of 05 October 2009 where the decision was reached determining the calculation to be utilised in determining the cancellation fee.

[59] Mr Potgieter testified that Mr Malebye was present at the meeting of 10 February 2009. Whilst the letter from Mvela Phanda refers to a Mr Molebe and not Mr Malebye, cross examination of Mr Potgieter by counsel for Mr Malebye, placed the reference to a Mr Molebe, as a mistake, beyond dispute. It was pertinently put to Mr Potgieter, on instruction of Mr Malebye, that he recalls the meeting and whilst he could not recall what transpired at the meeting, the letter recorded what occurred in relation to the cancellation of the contract and the request for details of the damages suffered by Mvela Phanda.

[60] In a strange twist of events, Mr Malebye, under cross examination, and contrary to the version put to Mr Potgieter that he, Mr Malebye, was present at the meeting of 10 February 2009, denied being present at the meeting. Mr Malebye could advance no cogent reason why his counsel put to Mr Potgieter that he, Mr Malebye, was in fact present at the meeting. Mr Malebye was also present in court when the version was put. Such version was never withdrawn and stands as a true of reflection of the instruction to counsel from Mr Malebye. The evidence of Mr Malebye contradicting this version, must be accepted as recent fabrication. The

belated denial by Mr Malebye evinces a clear impression that he seeks to distance himself from the meeting of 10 February 2009 where the pivotal issue of cancellation of the agreement was first raised. This belated attempt by Mr Malebye to avoid any connection to the cancellation of the agreement as his default response for the period between at least 13 March 2009 and 5 October 2009, save for what transpired on 5 October 2009, becomes more evident below.

[61] Under cross examination Mr Malebye conceded that it was correct that a cancellation fee as recorded in the letter of Mr Morake directed to Mvela Phanda, had to be determined in accordance with clause 39.2. Mr Malebye further conceded that it was strange that the DPW would be requesting Mvela Phanda on 10 February 2009, to submit its “costs” of cancellation rather than substantiating its actual damage or loss, since, on his version, he did not know at that date, that the contract would be cancelled. This concession by Mr Malebye leads to the ineluctable deduction that he, as early as 10 February 2009, had already contemplated the payment of a “*cancellation cost*” to Mvela Phanda, rather than determining the amount due in terms of clause 39.2.

[62] Mr Malebye sought to deny that Mr Mabuso on 19 February 2009, presented a draft request for cancellation to him, in his capacity as Chief Operation Officer. This proverbial second strike against Mr Malebye demonstrates his tenacity to shy away from any involvement in the cancellation of the contract.

[63] With Mr Malebye from 13 March 2009 seeking to distance himself from any involvement in the cancellation of the contract, until the meeting of 5 October 2009; he persisted in his denial of being privy to any of the letters, emails, memoranda, claims and any other documents for that matter, exchanged between the DPW and Mvela Phanda between 13 March 2009 and 5 October 2009. He also denied being briefed during this period on any claims or issues related to the contract.

[64] The evidence of Mr Malebye in denying any involvement in the issue of the cancellation of the contract between 13 March 2009 and 5 October 2009 must be considered against what transpired between 13 March 2009 and 5 October 2009. In this context, despite the evidence of Mr Potgieter being heavily challenged at times,

there is nothing to gainsay the material aspects of his evidence which is borne out by objective facts.

[65] Whilst the DPW decided not to call other witnesses involved in the cancellation process, this is not fatal to its case as Mr Malebye argues. It is indisputable that Mvela Phanda submitted what it terms its “*Provisional Contractual Claim*” in April 2009. Bearing in mind that the clause 39.2 required Mvela Phanda to substantiate its claim for consideration by the DPW, it did nothing more than provide a figure and record that it was for the DPW to determine the amount in terms of clause 39.2.3. This prompted Mr Mabuso to seek the professional advice and recommendation of Mr Potgieter as he was the lead quantity surveyor in the DPW and highly respected for his expertise.

[66] Mr Potgieter obliged and provided a response on 7 May 2009 in which he states the obvious; that the correspondence forwarded to the DPW by Mvela Phanda, does not address the actual damage or loss suffered by Mvela Phanda and it is therefore not possible to determine an amount due to Mvela Phanda, unless it were to be accepted that there was no actual damage or loss suffered. To address this impasse Mr Potgieter suggested a meeting with Mvela Phanda.

[67] As to what substantiation for its claim was sought from Mvela Phanda, Mr Potgieter explained that it was very difficult to be specific since each contractor had their own way of pricing and calculating their damages. It was for this reason that clause 39.2 required of Mvela Phanda to provide evidence (proof) for the DPW to consider. The duty was therefore on Mvela Phanda and not the DPW to substantiate its alleged loss or damage. All that Mvela Phanda did was to disclose its profit on other contracts and other sources of income from the previous financial year.

[68] A broad contention was put to Mr Potgieter that Mvela Phanda from a commercial perspective suffered a loss because of the cancellation of the contract. Mr Potgieter disagreed. Mr Malebye confirmed Mr Potgieter’s contentions as correct. In essence, Mr Potgieter testified that Mvela Phanda could have made a handsome profit from the project, or they could have under-priced or made a mistake in their pricing resulting in no profit being made at the end of the project. For these reasons,

he testified he needed to see the actual documentation of Mvela Phanda; and that one cannot simply accept that a contractor will suffer a loss if a contract is cancelled.

[69] It appears on recommendation of Mr Potgieter that the DPW meet with Mvela Phanda, that Mr Mavuso, on 12 May 2009 invited Mvela Phanda and other officials of the DPW to an urgent meeting on 13 May 2009. The recommendation of Mr Potgieter for obvious reasons had to reach Mr Malebye. This is evident from the recordal by Mr Mabuso, that on instruction of Mr Malebye, the matter had to be resolved before the end of that week.

[70] In this regard, it was put to Mr Malebye under cross examination that he was rushing the process, which he denied. He retorted that the matter was urgent since the DPW *“was incurring damages as a result of preliminaries which I have stated already, and penalties as a result of the contractors standing on site not actually implementing by the Department not to proceed...”*. Mr Malebye remained adamant in his resolve that the DPW was incurring damages and penalties of between R3 and R4 million at the time, despite being confronted with the contention that this was not the case, post cancellation of the contract. When requested to consider the basis of his insistence overnight, he returned to Court the following day, conceding that no clause in the contract provided for the imposition of penalties and that his evidence was therefore not correct.

[71] It is clear, following the recommendation and professional advice of Mr Potgieter, that the DPW at the meeting of 13 May 2009 would insist on Mvela Phanda and the private quantity surveyor Mr Brink to provide *“documents to substantiate actual damages or loss suffered by the contractor if there is any, to enable us to determine an amount due to the contractor.”*

[72] Counsel for Mvela Phanda initially insisted that Mvela Phanda was not present at the meeting of 13 May 2009, but was constrained to later apologise when it was clear from Mr Potgieter’s evidence that Messrs Gerolemou and Cave were present. There is no evidence to gainsay the evidence of Mr Potgieter on what transpired at the meeting. He testified that the third option envisaged by clause 39.2.3 which involved the question of loss of profit, was discussed at the meeting.

[73] There is no need for a detailed exposition of what was raised at the meeting. The documents submitted by Mvela Phanda, and the fact that Mr Gerolamau at some stage was angered and questioned what Mr Potgieter wanted by banging on the table, was overtaken by Mvela Phanda ultimately submitting their revised claim in terms of clause 39.2.3. Titled “*Contractual Claim*” same was forwarded by Mr Mabuso to Mr Potgieter on 27 July 2009.

[74] Mr Potgieter was still not satisfied by the calculations, raising concerns about the profit percentage relied on, which was not project specific, and the addition of substantial amounts to the construction revenue of Mvela Phanda which were not related to the Skilpadhek project or any of the other construction projects of Mvela Phanda in the year under review. He provided a detailed exposition of why he questioned the correctness of the calculation, which stood unchallenged. To exacerbate this, Mr Potgieter highlighted in his report of 29 July 2009 to Mr Mabuso, that the auditors of Mvela Phanda had “*qualified their report stating that the pages (40 to 42) which is the calculation of profit does not form part of the annual financial statements and is presented as additional information. They have not audited the information and [do] not express an opinion thereon.*”

[75] Resultantly, Mr Potgieter recommended that Mvela Phanda be requested to submit audited statements confirming the percentage claimed as loss of profit, on which recommendation Mr Mabuso acted. As at the end of July 2009, it therefore remains clear that the DPW insisted on strict compliance with clause 39.2 and specifically clause 39.2.3.

[76] Mr Potgieter’ was heavily criticised in cross examination for his view that the auditors of Mvela Phanda had qualified their report. This attack was premised on the auditors stating at some point in their report that they are not qualifying their opinion. The contention is, however, contradicted by the fact that the auditors pertinently state in the same paragraph that they had not audited the information at pages 40 to 42 of the financial statements “*and accordingly do not express an opinion thereon.*” Further, they record at page 1 of the financial statements that: “*The following*

supplementary information [at pages 40 – 42] does not form part of the annual financial statements and is unaudited.”

[77] The claimed profit of 11.66% was therefore not without qualification and exacerbated by the follow up letter from the auditors of 4 August 2009. In that letter the auditors state *“Because the above procedures do not constitute either an audit or a review made in accordance with [international standards] (or relevant national standards ...), we do not express any assurance on the calculation of net profit percentage.”*

[78] It is therefore unsurprising that Mr Potgieter was loath to accept the validity or correctness of the claimed profit of 11.66%. Mr Potgieter added that even if the 11.66% figure was correct, it was insufficient as the audited statements needed to demonstrate *“sufficient information”* from which *“to know the construction projects that they were involved in, as well as the profits made on projects that they were involved in up to that point in time. That could have been a good starting point to try and finalise the actual loss for the specific contract in question.”*

[79] As matters stood on 4 August 2009 with the “audited reports” and supplementary letter from the auditors, and the view of Mr Potgieter that Mvela Phanda had failed to satisfactorily produce any evidence of actual loss to the DPW; Mr Potgieter met with Mr Mabuso and Mr Brink on 11 August 2009, in endeavouring to settle the matter. They met to discuss the approach to follow to determine the amount that could be construed as damage or loss. Mr Brink, consequently, seeing eye to eye with Mr Potgieter, sent a letter to Mr Mabuso on 11 August 2009 setting out his calculations in terms of clauses 39.2.1, 39.2.2 and 39.2.3 of the contract. The upshot is that Mr Brink calculated an amount of R20 415 627.04 in terms of clause 39.2.3, on an assumption that the 11.66% profit calculation by the auditors could be proved as actual loss, with the reservation that *“Even if one assume that the 11.66% profit on turnover is realistic for all their work in the 2009 year, this percentage cannot merely be applied to the total contract amount of this project.”*

[80] Since neither Mr Brink nor Mr Potgieter accepted the 11.66% as loss of profit, Mr Brink decided to draw a distinction between the work done in terms of the

contract by Mvela Phanda (determined by him at 45%) as against the work to be done by its nominated subcontractors (determined by him at 55%). Mr Potgieter acquiesced in this approach by Mr Brink. The meeting of 11 August 2009, however ended, with Mr Potgieter still insistent on his request for “*specific information to determine the potential loss of profit and that it was up to the project manager [Mr Mabuso] to obtain the relevant and additional information from the contractor.*”

[81] That Mr Malebye was appraised of this meeting, despite his protestations of not being involved between March and October 2009 is evident from the fact that Mr Potgieter received a telephone call from Mr Malebye. According to Mr Potgieter, Mr Malebye during his call accused him of delaying the settlement of the claim. Mr Malebye resultantly informed him that the matter would be taken further with Mr Mabuso who was seated in front of him. Mr Potgieter was subsequently excluded from any further involvement in the determination of the cancellation amount.

[82] Mr Malebye instructed his counsel to put to Mr Potgieter when he testified in 2016 that he, Mr Malebye could not recall the said phone call and could not comment on it. Memory being fickle, in evidence in 2023, Mr Malebye testified that he in fact recalled the phone call and the circumstances giving rise to the call. Mr Mabuso arrived at his office claiming that he could not find Mr Potgieter. With specificity, Mr Malebye testified that Mr Mabuso informed him of his meeting with Mr Potgieter and Mr Brink on 11 August 2019. Mr Malebye phoned Mr Potgieter and indeed asked him what his problem was, confirming what Mr Potgieter had testified but denying that he accused Mr Potgieter of delaying the settlement.

[83] Following Mr Mabuso’s meeting with Mr Malebye, and the effective exclusion of Mr Potgieter from the matter, Mr Mabuso sent an email to Mr Cave of Mvela Phanda on 24 August 2009. In this email he set out what was termed a “*Proposed Final Settlement by Employer* in the amount of R20 415 627.04. This amount was the amount calculated by Mr Brink which formed the subject matter of the meeting of 11 August 2009. The email was forwarded by Mr Cave to his fellow director, Mr Joosub, with the message “*Please discuss with me*”. Mr Malebye as a default response, disputes being aware of this settlement proposal sent by Mr Mabuso to Mr Cave. He maintains that it was not discussed with him or authorised by him.

[84] The settlement proposal in all probability was not accepted by Mvela Phanda. This much is clear from the fact that a facsimile was sent by Mr Mabuso to Mr Cave of Mvela Phanda on 30 September 2009 headed “*Cancellation Settlement.*” The facsimile referenced an email sent to the DPW by Mr Cave on 29 September 2009, which was not discovered. The circumstances giving rise to this cancellation settlement in September 2009 is shrouded in uncertainty save for the fact that Mr Mabuso in his facsimile recorded that the DPW had elected to apply clause 39.2.3 of the contract, and that Mvela Phanda was requested to furnish the DPW with a tax invoice in the amount of R27 761 273.48 (including VAT) as “...as approved by the Acting Director General...” to enable the DPW to process payment.

[85] Mr Malebye vehemently denied approving the settlement amount of R27 761 273.48 or the sending of the facsimile by Mr Mabuso. He was at pains to explain why Mr Mabuso recorded that he, Mr Malebye, had approved the settlement amount save to suggest that Mr Mabuso had made a mistake. Mr Malebye denied the contention that he had discussed the matter with Mr Cave and increased the settlement amount. In the absence of a cogent explanation from Mr Malebye in the face of a document which speaks for itself, it is unlikely that Mr Mabuso made a mistake in identifying approval of the increased settlement amount at the instance of Mr Malebye.

[86] The clandestine settlement proposal of 30 September 2009 clearly did not come to fruition as a meeting was arranged between the DPW and Mvela Phanda for 5 October 2009. According to Mr Malebye he was invited to the meeting by Mr Mabuso. The DPW was represented by Mr Malebye, Mr Molotsi and Mr Brink. Mvela Phanda was represented by Mr Cave, Mr Gerolemou and Mr Aziz Joosub. Mr Malebye could not explain why Mr Potgieter was not invited to the meeting and testified that he could not remember if he asked Mr Mabuso to call Mr Potgieter to the meeting.

[87] Despite Mr Malebye earlier testifying that it was important that all in the delegations line signed before him and that the Chief Director: Legal Services Mr Ka-Mbonane was required to sign to ensure that the conduct of the DPW was “*in line with*” the provisions of the contract, and that “*we are not doing anything unlawful in*

terms of that kind of cancellation", Mr Ka-Mbonane and Ms Motsisi, the Chief Financial Officer were not present at the meeting of 5 October 2009. Mr Malebye claimed that he had not arranged the meeting and that *"Otherwise I could have invited everybody who was actually in the line of signing the cancellation application from the onset."* Ironically Mr Malebye attended the meeting of 5 October 2009, chaired the meeting which he did not call, and yet failed to raise the absence of these officials.

[88] Mr Malebye went into the meeting of 5 October 2009, in the absence of the expertise of Mr Potgieter, Mr Ka-Mbonane and Ms Motsisi. This in circumstances where Mr Malebye on his persistent version was unaware of what transpired between 13 March 2009 and 5 October 2009. Mr Malebye on his version went into the meeting, not having been briefed and armed only with his memorandum for the cancellation of the contract of 13 March 2009.

[89] Significantly, in evidence in chief Mr Malebye testified that he received presentations in the meeting *"from the department as well as Mr Brink and Mvela Phanda and in the proceedings there was a little bit of a misunderstanding or disagreement and I asked the contractor which is Mvela Phanda to excuse us so that we could have a departmental meeting"*. The discussion in the departmental meeting *"is that we need to implement the contract conditions so that Mr Brink could come with a figure in order to finalise the settlement that will be agreeable to ... the department as well as the contractor."*

[90] In cross examination Mr Malebye confirmed that he asked Mr Brink to explain his figures for the respective settlement options and then gave Mvela Phanda an opportunity to respond to Mr Brink's calculations. He recalled that Mvela Phanda rejected Mr Brink's calculation in terms of clause 39.2.3 and that they were "prepared to resort to legal action". Mvela Phanda's delegates were asked to leave the room to afford the DPW to caucus in private. Later in cross examination, Mr Malebye disputed that he testified in chief that he received presentations from the DPW and Mvela Phanda before he asked the contractor's representatives to leave the room.

[91] At this point in his evidence, Mr Malebye testified that the meeting started with everyone in attendance, and with Mr Brink making his presentation. Mr Brink did not say what Mvela Phanda's position was. When Mvela Phanda was asked to leave the room, Mr Malebye did not know what Mvela Phanda's position was. Mr Brink then presented the facts and figures, after Mvela Phanda left the room, and informed Mr Malebye for the first time that Mvela Phanda had rejected an offer.

[92] When confronted with the letter of Mr Brink of 8 October 2009 regarding the meeting of 5 October 2009, Mr Malebye took another about turn and sought to dovetail his evidence on to the recordals of Mr Brink. Mr Malebye was invited to comment on the recordals in Mr Brink's letter.

[93] When asked to comment on the recordal that *"In conclusion to the discussions that followed, Mr Malebye remarked that in the absence of a suitable template for calculating 39.2.2 and 39.2.3, various interpretations are possible."* Mr Malebye testified that he was concerned that the DPW and Mvela Phanda were using different variables in coming to their figures and *"Given all the history of the matter or whatever the case might be, these are the calculations; these are the basis of the calculations. Hence in this particular meeting I referred the whole matter back to Mr Brink and the team."* This is said to have taken place once Mvela Phanda was requested to return to the room; and when he told the DPW and Mvela Phanda to reach an agreement on what variables they would use to calculate the amounts referred to in the whole of clause 39.2.

[94] On Mr Brink's recordal that *"He [Mr Malebye] was also doubtful whether the quantity surveyor's [Mr Brink's] interpretation would stand up in court."*, Mr Malebye confirmed the correctness of the statement but was unable to furnish a coherent answer why Mr Brink's interpretation would not stand up in court. Notably Mr Malebye has no legal background or legal qualifications.

[95] Mr Malebye further confirmed the correctness of the recordal by Mr Brink that he *"Mr Malebye decided to give the contractor the benefit of the doubt as far as the interpretation of 39.2.3 was concerned."* When pointed out to Mr Malebye that his version differed from what Mr Brink recorded, he endeavoured to reconcile the two

versions by insisting that no agreement was reached at the meeting, once again contradicting his pleaded case. The DPW correctly in my view submit that by applying contorted argument, Mr Malebye was not prepared to admit the obvious: that by giving Mvela Phanda the benefit of the doubt, he had accepted Mvela Phanda's calculations on clause 39.2.3 and had rejected Mr Brink's calculations.

[96] The proverbial nail in the coffin for Mr Malebye with his attempts at explaining away his pleaded case, came when it was pointed out to him that Mr Brink recorded that the option of clause 39.2.3 was no longer considered. This, as it was the highest value of the three and that he Mr Malebye instead opted for the lesser of the options envisaged in clauses 39.2.1 and 39.2.2, based on the quantity surveyor's (Mr Brink's) calculations and with no additional interest payments. Mr Malebye in a turnabout denied the correctness of these records and testified that he was "*absolutely certain*" that what Mr Brink had written is not correct.

[97] The persistent insistence by Mr Malebye that no agreement was reached at the meeting of 5 October 2009 was dealt a death knell when it was pointed out to him that Mr Brink concluded his letter by recording that "*The delegates from Mvela Phanda then rejoined the meeting and the chairman [Mr Malebye] informed them of the decision. They accepted the offer and agreed to forfeit any further claims for P & G and interest. The quantity surveyors [Mr Brink] were instructed to process the final payment which must include the final account and the settlement amount as agreed.*" Again, confronted with the obvious, Mr Malebye disputed what Mr Brink had written and insisted that the parties were to go back "*and find each other so that we have an agreed figure and come back with a proper submission or a motivation.*"

[98] Mr Malebye denied that he instructed Mr Brink to process the final payment with the figure as agreed. According to Mr Malebye, Mr Mabuso and his team went back with Mr Brink, consulted the team from Mvela Phanda and reached an agreement without his involvement, and brought the agreement to him.

[99] When the Court pointed out the anomalies in his evidence to Mr Malebye, he persisted in his version that no agreement was reached at the meeting of 5 October 2009 and contended that paragraphs 6.5 and 6.6 of his plea do not reflect the correct

position. When afforded an opportunity to reflect on his evidence overnight, Mr Malebye returned to Court the following day and insisted that no agreement was reached at the meeting of 5 October 2009. He also maintained that his pleaded case similarly stood and did not contradict his evidence.

[100] After much cross examination by *Adv Burger SC*, Mr Malebye finally conceded that he had provided different versions on what was agreed at the meeting of 5 October 2009; and confirmed that an agreement was reached on the cancellation fee at the meeting of 5 October 2009.

The statutory plea of waiver

[101] The statutory plea of waiver (special plea) raised by Mr Malebye must be considered against the backdrop of the evidence as aforesaid. Since Mr Malebye has raised a special plea of waiver, and bears the onus of proving same, it is apt to consider what evidence if any Mr Malebye adduced in this regard, and the argument advanced on his behalf.

[102] *Adv Phukubje* for Malebye advances the following argument on behalf of Mr Malebye on the special plea of waiver. In what he refers to as the second hurdle (Regulation 12.2.2(e)), he submits that unless the DPW shows that the damages it suffered arose as a result of the circumstances contemplated in regulation 12.2.1(e), then, any claim against Mr Malebye (assuming it existed) is automatically waived in terms of the provisions of regulation 12.7.3.

[103] *Adv Phukubje* contends that the determination whether the condition in Regulation 12.2.2(e) applied to the circumstances of the claim against Mr Malebye depends on an interpretation of the Treasury Regulations. Relying on the unreported judgment in *Minister of Safety and Security v Gardner* (CA 250/2008) [2009] ZAECHGHC 38 (2 July 2009) at para [10] he maintains that it on the plain meaning of its wording, the Regulations in question do not give a remedy or create a debt where there was none before. The Regulations he contends do not prescribe requirements for a cause of action which were not required before. The wording and content of the

Regulations he further contends lays down the procedure for recovering loss or damage or damages in respect of which there is already a complete cause of action.

[104] No issue is taken by Mr Malebye with the two delegations of power in terms of the PFMA are common cause between the plaintiff and the second defendant. With reference to the Financial Delegations and Project Management Delegations, *Adv Phukubje* contends that the DPW's reliance on the provisions of regulations 12.2.1 and 12.2.2 in the circumstances is clearly without merit in that the evidence presented to Court showed that when the decision was taken to terminate the contract, the DPW was made fully cognisant of the financial repercussions in the order of R30 million and which would amount to fruitless and wasteful expenditure; the decision to terminate was signed off by all the relevant officials in the department including the then Director-General, as well as the Director: Legal Services; and there can be no suggestion that the Financial Delegations and/or Project Management Delegations require any input from the State Attorney and/or the Director: Legal Services in respect of the approval of the final payment.

[105] In my view, the submissions that Mr Giani and Ms De Bruin gave no evidence relevant to the second main issue or that Mr Potgieter's evidence was not tendered in respect of the issues arising from regulation 12, does nothing to advance the case for Mr Malebye on whom the onus rests for his special plea of waiver. It is what Mr Malebye tenders as evidence on this score that this Court must consider.

[106] What relevant evidence did Mr Malebye tender in support of his special plea of waiver? The simple answer is none. Tangentially, the case for Mr Malebye on his special plea of waiver is predicated on legal argument predicated on an interpretation of the contentious Treasury Regulations. The argument of Regulations 12.2.1 read with 12.7.3 was advanced as follows. In terms of Regulation 12.1.1 the State is its own insurer; and in terms of regulation 12.7.3 the State's employee is entitled to the benefit of that cover, unless it is forfeited because one of the conditions in regulation 12.2.1(a) - (g) is applicable.

[107] Mr Malebye would forfeit his cover in terms of Regulation 12.7.3 if, in the circumstances pleaded by the DPW plaintiff, the following requirements are met. The

DPW suffered “losses or damages”; the losses or damages must be as a result of (or caused by) Mr Malebye; Mr Malebye is liable in law for the losses or damages; and he “*without prior consultation with the State Attorney, made an admission that was detrimental to the State*”.

[108] *Adv Phukubje* maintains that although regulation 12.7.3 only refers to “paragraph 12.2.1(a) to (g)”, it cannot sensibly be interpreted to exclude the wording in regulation 12.2.2.; and accordingly, the “admission” referred to in 12.2.1(e) must be interpreted to mean an admission made by the official (Mr Malebye) himself; the admission must be made to a third party (who has raised a claim against the State for damages or loss suffered by that third party); it must be made in respect of the claim against the state by a third party for damages or loss caused by the official; and it must be a matter in respect of which the State Attorney has the power to deal with.

[109] *Adv Phukubje* resultantly submits that even if one were to assume that Mr Malebye made an admission (of which no evidence was tendered), the “admission” was not in respect of losses or damages suffered as a result of any conduct or omission on the part of Mr Malebye - the termination of the contract between the DPW and Mvela Phanda was not caused by any conduct on the part of Mr Malebye.

[110] As to the claim under Regulation 12.2.1, *Adv Phukubje* submits that the admission must be in respect of a “claim” raised by a third party against the state. The “claim” he contends does not include claims made under a construction contract which the State Attorney is not responsible to administer; and would mean that any contractual mechanisms regulating claims must be ignored, thereby circumventing the provisions of the contract itself, which requires that the parties to the JBCC contract must deal with the claims raised thereunder themselves. This he submits puts paid to the DPW’s reliance on regulation 12.2.1(e).

[111] *Adv Phukubje* further contends that Regulation 12.2.1(e) has no relation to claims in respect of “*unauthorised, irregular or fruitless and wasteful expenditure.*” And although regulation 9.1.4 provides that the recovery of losses or damages resulting from unauthorised, irregular or fruitless and wasteful expenditure must be

dealt with in accordance with regulation 12, not all the provisions of regulation 12 can apply to a claim to recover such losses or damages.

[112] As to consultation with the State Attorney before settling the claim of Mvela Phanda, Adv Phukubje submits that the relevant regulations are not capable of such an interpretation and no evidence was tendered that it is the law or practice or custom for attorneys to be part of discussions in regard to claims raised by a contractor during the course of a construction contract.

[113] As to the “admission” made by Mr Malebye to the DPW, that “*the admission, that the cancellation fee was owing, was made by the second defendant to the first defendant and to the plaintiff on or before 12 October 2009*”, it is contended that the cancellation fee was automatically payable by the DPW in terms of the provisions of the contract (i.e. *ex contractu*) and Mr Malebye did not make any admission that the cancellation fee was payable.

[114] *Adv Berger SC* for the DPW in relation to the special plea contends that Mr Malebye acted recklessly and intentionally in circumstances where he knew that clause 39.2 of the contract applied to the claim of Mvela Phanda; and that each of the three sub-clauses of 39.2 had to be determined. Failing the exercise envisaged by clause 39.2 Mvela Phanda would not be entitled to be paid any cancellation fee whatsoever. The contention is further that Mr Malebye knew that the DPW could not determine an amount in terms of clause 39.2.3. and therefore, intentionally decided to bypass clause 39.2.3 and opt for a calculation in terms of clause 39.2.2. Clause 39.2.3 is said to have been left out deliberately so that Mvela Phanda could be paid.

[115] The fact Mr Malebye insisted that he had nothing to do with the contract after 13 March 2009, until the meeting of 5 October 2009; and had not appraised himself of developments in the matter, rendered his conduct at the meeting reckless as to the legal consequences of his actions. This is said to have culminated in a deliberate intent to ensure that Mvela Phanda was paid a cancellation fee, whether or not it had submitted evidence substantiating its actual damage or loss as a result of the cancellation.

[116] The undisclosed conflict of interests by Mr Malebye so the argument goes exacerbates the matter. His lack of knowledge as to what had transpired between DPW and Mvela Phanda, Mr Malebye also went into the meeting of 5 October 2009 without the expert assistance of Mr Potgieter, Mr Ka-Mbonane and Ms Motsisi. This too it is argued was reckless as he had no idea what evidence, if any, Mvela Phanda had submitted to substantiate its actual damage or loss, nor whether Mvela Phanda had substantiated its actual damage or loss, nor what legal options were available to Mvela Phanda if DPW could not determine Mvela Phanda's actual damage or loss.

[117] By excluding Mr Potgieter from the meeting of 5 October 2009, Mr Malebye is said to have acted intentionally. Further that the exclusion of the Chief Director: Legal Service and/or the Chief Financial Officer was done deliberately to manipulate and control the meeting to reach a settlement with Mvela Phanda, reckless as to whether his conduct was lawful and/or in the best interests of the DPW. Despite his trust in Mr Brink, Mr Malebye by stating that Mr Brink's calculations would not stand up in court, without legal opinion acted recklessly.

[118] The argument is further that, in offering Mvela Phanda a cancellation fee calculated according to the formula in clause 39.2.2, Mr Malebye, without prior consultation with the State Attorney, made an admission that was detrimental to the state, i.e. that the cancellation fee was due and payable to Mvela Phanda.

[119] The DPW submits that, in approving the payment of the cancellation fee, Mr Malebye failed to declare his conflict of interest, and failed to act in accordance with clause 39.2 of the contract, and in the best interests of the plaintiff. His conduct was deliberate and reckless, ensuring that Mvela Phanda was paid the cancellation fee, despite his knowledge that clause 39.2.3 of the contract had not been complied with and that no cancellation fee was payable.

[120] The DPW therefore submits in this Court that Treasury regulations 12.2.1 (d) and (e) have been met, i.e. they are applicable within the meaning of regulation 12.7.3; and that Mr Malebye has forfeited protection under regulation 12.7.3, read with regulation 12.2.1. and his special plea of waiver must fail.

[121] To my mind the issue in the special plea of waiver, viewed from the perspective of the claim of the DPW, has nothing to do with the cancellation of the contract. It has everything to do with the approval of the payment of the cancellation fee and the circumstances giving rise thereto.

[122] In this regard Mr Malebye indeed acted recklessly when approving a payment outside the terms of clause 39.2, in circumstances where evidence demonstrates overwhelmingly that he was heavily conflicted and should have recused himself from any discussions relevant to the cancellation fee. I am persuaded by the argument of the DPW that the special plea of waiver raised by Mr Malebye must fail.

[123] The remaining question is whether the DPW has overcome the hurdle of its onus to prove that Mr Malebye breached his contract of employment.

Discussion

Claim A

[124] There was no basis for Mr Malebye and Mvela Phanda to circumvent clause 39.2.3 of the contract. Clause 39.2 is clear that no other amounts can be paid in the event of cancellation of the contract, other than as determined in accordance with Clause 39.2. The settlement agreement of 5 October 2009 is in direct violation of clause 39.2. There was no other basis for determining the cancellation fee other than clause 39.2. If any doubt existed in this regard, Mr Malebye who on his version went into the meeting of 5 October 2009 without an inkling of what had transpired since February 2009, he was undoubtedly under an obligation to call on those who knew. On circumventing clause 39.2 with the settlement with Mvela Phanda, outside of clause 39.2, legal advice should have been sought.

[125] The onus in a claim based on the *condictio indebite* is trite. In *Recsey v Reiche* 1927 AD 554 at 556, the court held that the onus in an action based on the *condictio indebite* “lies throughout the whole case” on the DPW. The DPW bears the onus of proving every element of the claim and included in this is the excusability of the error. In *Mabaso v Felix* 1981 (3) SA 865 (A) at 872H, the court stated that

“considerations of policy, practice and fairness *inter partes* largely determine the incidence of the onus of proof in civil cases, and I can conceive of nothing unfair in and of no consideration of policy or practice militating against, expecting of a plaintiff who alleges that he paid an amount of money in mistake of law, to prove sufficient facts to justify a finding that his error is excusable.” It is only once a payment *in debite* has been proved, that the defendant has the onus of proving that he was not enriched by the payment.

[126] “No person” is to be enriched at the expense of another; that is the thrust of a claim for unjustified enrichment - Grotius 3.30.1.3. In *ABSA Bank v Leech* 2001 (4) SA 132 (SCA) paragraph 18, the court reiterated that the payment had to be made in error when in fact it was not owing. Beck’s Theory and Principles of Pleading in Civil Actions, page 256, sets out the general requirements of the *condictio indebite*: 1. the defendant must be enriched; 2. the plaintiff must be impoverished; 3. the defendant’s enrichment must be at the expense of the plaintiff; and 4. the enrichment must because (*sine causa*) i.e. unjustified.

[127] In *Iscor Pension Fund v Jerling* 1978 (3) SA 858 (T) at 861 E, the court in expounding on the elements of unjustified enrichment found that the mistaken belief must have been reasonable; and in *Willis Faber v Enthoven v Receiver of Revenue* [1991] ZASCA 163; 1992 (4) SA 202 (A) at 220i the court found that there must have been no legal natural or moral obligation to have made the payment.

[128] As pleaded by the DPW in its cause of action on Claim A, based on the *condictio indebiti*, there was no legal basis for the payment of the cancellation fee to Mvela Phanda, since clause 39.2 of the contract had not been complied with. Mvela Phanda was therefore enriched and the DPW impoverished at the expense of the DPW, and the payment was therefore made *sine causa*, or *indebite*.

Claim D

[129] The trite position in our law is that the evidence adduced by Mr Malebye must speak to his pleaded case. As a reminder, Mvela Phanda and Mr Malebye pleaded that an agreement was concluded, at a meeting in September or October 2009, to

bypass the requirements of clause 39.2.3 of the contract; and as a result of this alleged agreement, and the subsequent payment certificate incorporating the agreement, the cancellation fee was lawfully approved and paid. From his evidence in chief Mr Malebye made it clear that no agreement was reached at the meeting of 5 October 2009. This indeed as submitted by the DPW, constitutes a fundamental contradiction of Mr Malebye's pleaded defence.

[130] The anomalies and contradictions in the evidence of Mr Malebye, his poor performance as an unreliable witness evident from his tendered evidence, gravely impacts his credibility. No reliance can be placed on any part of the contradictory evidence of Mr Malebye. Mr Malebye failed to inspire any confidence in his evidence which was clearly fabricated to divert attention from the inescapable fact that he ultimately decided to circumvent the contract by unilaterally deciding that clause 39.2.3 should not be considered.

[131] I cannot agree with the contentions on behalf of Mr Malebye that the claims of the DPW against Mr Malebye should fail on the evidence of the DPW. The Full Court in the appeal against the granting of absolution at the close of the case for the DPW in relation to the meeting of 5 October 2009, opined at para 34 of its judgment, that:

“.....partial yet crucial facts of that meeting leading to the impugned agreement were placed before the trial court through the introduction of the memorandum of that meeting. Even if it were not so, the mere realinace by the first and second defendants on the agreement reached in that meeting places on them the burden to give evidence thereof. Considering the terms of clause 39.2 and the evidence of Potgieter, all that remained curious from the meeting of 5 October 2009 was an explanation or justification for the contravening decision, if any lawful one existed. Only the defendants, particularly the second defendant, not the plaintiff, is obliged to give the relevant evidence.”

(emphasis added)

[132] Mr Malebye was under a duty to ensure strict compliance with clause 39.2 of the contract. Neither Mr Malebye; or Mvela Phanda despite its protestations to Mr

Potgieter on what he wanted from Mvela Phanda, could circumvent clause 39.2. Mr Malebye, as early as 10 February 2009 and 13 March 2009 in specific, was clearly acutely aware of what was required in terms of clause 39.2. Mvela Phanda was required to furnish the DPW with evidence substantiating its actual damage or loss as a result of the cancellation of the contract. Nothing else would suffice.

[133] With Mr Malebye on his contradictory version, being unaware of what transpired between 13 March 2009 and 5 October 2009, would have been oblivious to the evidence purportedly provided by Mvela Phanda in support of clause 39.2. He was, however, as the evidence demonstrates contrary to his plea of ignorance, aware at least on 11 August 2009 of the impasse between the DPW and Mvela Phanda and Mr Potgieter's stance. After all, there is no other reasonable explanation why Mr Potgieter was henceforth excluded from dealing with the matter of the cancellation fee. Mr Malebye therefore in August 2009 was aware of the problem with Mvela Phanda and the calculation of the cancellation fee. Equally so, he had to be aware of Mr Brink's proposed calculations in which Mr Potgieter notwithstanding his reservations, acquiesced.

[134] Mr Malebye entered a meeting without officials from the DPW, who are strategic in the Financial Delegations. His excuse, poor as it was, is that he did not call the meeting and if he did, they would be present. I re-iterate that nothing precluded him from calling for their attendance at the meeting. With knowledge a foresight of the stance of Mr Potgieter who was highly regarded as the expert of the DPW in matters of this nature, he failed to call on him either. Notwithstanding Mr Malebye's materially contradictory evidence on the meeting of 5 October 2009, it is clear that he rejected the analysis and calculation in terms of clause 39.2.3 of Mr Brink. This was figure in which Mr Potgieter acquiesced. He then unilaterally decided, without attempting to understand Mr Brink's reasoning, to reject Mr Brink's input because Mvela Phanda rejected it.

[135] Mr Malebye instead allowed settlement on an amount outside of the strict terms of clause 39.2 simply because Mvela Phanda threatened legal action. So much more reason why Mr Malebye was at liberty as the accounting officer of the DPW, to call on the Chief Director: Legal Services or the State Attorney for an

opinion. The upshot of this decision by Mr Malebye is that no amount was payable to Mvela Phanda. The arbitrary amount of R33 726 705.90 (including VAT) was not justified.

[136] Despite Mr Malebye pleading ignorance on the contractual relationships with Government of his cousin Mr Moloisaine, evidence demonstrates that his own business dealings with Mr Moloisane and his familial relationship with him, makes a mockery of his plea of ignorance. As made plain at para 31 of the SCA judgment in *Phillips v Fieldstone Africa (Pty) Ltd and another* the rule is a strict one which allows little room for exceptions; it extends not only to actual conflicts of interest but also to those which are a real sensible possibility; the defences open to a fiduciary who breaches his trust are very limited: only the free consent of the principal after full disclosure will suffice.

[137] Mr Malebye undoubtedly from the evidence was acutely aware that Mpelo Construction CC was contractually connected to Mvela Phanda. Mr Malebye dismally failed to explain his failure to make very relevant disclosures which tied him to Mpelo Construction. Despite his late discovery of purported “Tax Invoices” to explain sums of money paid by Mpelo Construction to Merli Motors which was owned by himself, he fell on his own sword with these documents.

[138] That there was actual conflict of interest on the part of Mr Malebye is evidently clear from the evidence. Even on his own version, a real sense possibility is evident. In breaching his trust with the DPW his employer, the defences available to Mr Malebye are limited. As the SCA made it plain, only the free consent of the principal will suffice. It is unsurprising therefore that the defence raised not only by Mvela Phanda but also Mr Malebye is a very limited defence claiming an agreement reached to settle the matter. Mr Malebye adds a rider to his defence by raising a special plea of waiver.

[139] Mr Malebye was clearly conflicted, which precluded him from being involved in any aspect of determining the cancellation fee. With the agreement between Mvela Phanda and the DPW at the instance of Mr Malebye having been reached outside of clause 39.2, such agreement was invalid and of no force and effect. There

is simply no room for leeway in this regard. Notwithstanding, Mr Malebye instructing Mr Brink to prepare the final payment certificate, with the addition of the words “as agreed”, the final payment certificate itself, which in ordinary parlance is unassailable unless set aside, this is of no moment in the context of the evidence in this matter and is by no means legally binding on the DPW. The final payment certificate was invalid.

[140] Mr Malebye through his breach of clause 39.2 failed to act in the best interests of the DPW and therefore failed to observe the utmost good faith towards the DPW, all to its prejudice.

[141] The matter is further exacerbated by a memorandum sent by Mr Mabuso to Mr Malebye seeking approval of the final payment to Mvela Phanda and in which he records that the payment is following “*consultation with the Contractor, Departmental Quantity Surveyor and Private Quantity Surveyor we recommend the implementation of clause 39.2.3 as stipulated above. This option is found to be Economical for the Department.*” As the evidence reveals, however, the inputs and calculations of Mr Brink (the private quantity surveyor) were not considered at the meeting of 5 October 2009 and Mr Potgieter (the quantity surveyor of the DPW) was not present at that meeting. Even more curious, is that Mr Mabuso added that “*as the Employer we engaged the contractor to address their concerns about sub-clause 39.2.3 as we proposed, we resolved to apply sub-clause 39.2.2 to avoid unnecessary litigations ...*”.

Conclusion

[142] Claims A and D as formulated against Mvela Phanda and Mr Malebye by the DPW, must accordingly succeed. Neither Mvela Phanda nor Mr Malebye were at liberty to conclude an agreement outside the parameters of clause 39.2. The defence raised by Mvela Phanda and Mr Malebye predicated on this agreement is accordingly rejected.

[143] Mvela Phanda failed to provide evidence or proof of actual loss as required by clause 39.2.

[144] Mr Malebye in concluding the agreement, being heavily conflicted as the evidence demonstrates, undoubtedly breached his contract of employment with the DPW.

[145] Mvela Phanda and Mr Malebye are accordingly liable to compensate the DPW for the damages it suffered as result of the payment of the amount of R33 726 705.90.

Costs

[146] Costs follow the result. Mvela Phanda and Mr Malebye are accordingly liable for the plaintiff's costs in the prosecution of the action, which costs are to include the costs of two counsel, where so employed.

Order

[147] In the result, it is ordered that:

1. The first and second defendant, are liable for payment of the sum of R33 726 705.90 plus interest at the prescribed rate of interest, from 11 October 2012 (date of service of summons) to date of payment, jointly and severally, the one paying, the other to be absolved.
2. The first and second defendant shall pay the costs of suit, which costs shall include the costs of two counsel, where so employed.

AH PETERSEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances

For the Plaintiff : Adv D Berger SC

Instructed by : Haffejee, Roskam Savage Attorneys

For the First Defendant : No appearance at Defendant's Case

For the Second Defendant : Adv M Phukubje

Instructed by : JV van Rensburg Kinsella Attorneys