IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 3121/23P

In the matter of:

UMGENI WATER	**PLAINTIFF**
and	
KHULE GEDEZA PROPERTIES (PROPRIETARY) LIMITED	**FIRST DEFENDANT**
MDUDUZI MNYANDU	**SECOND DEFENDANT**
SIZWE JOKWENI	**THIRD RESPONDENT**

ORDER

The following order is granted:

1. Judgment is granted against the first defendant as follows:
   (a) Payment of the sum of R4 516 375.10;
   (b) Payment of R2 871 706.48;
   (c) Interest on the aforesaid sums from date of service of summons to date of payment at the rate of 10.5% per annum; and
   (d) Costs of suit.
2. The plaintiff's case against the second defendant is dismissed.
3. The relief sought against the third defendant is adjourned *sine die*.

JUDGMENT

Pietersen AJ:

Introduction

[1] The plaintiff instituted action against the defendants for two claims, referred to as the site establishment claim and the rental claim. The plaintiff averred in its particulars of claim that, following a tender process, the plaintiff concluded a contract with NRB Piping Systems (Pty) Ltd (NRB) for the supply and delivery of steel, concrete and plasticised PVC pipes for the South Coast Phase 2B pipeline and the Mpophomeni Waste Water Works and for the establishment of a pipe storage yard. This matter only concerns the South Coast Phase 2B pipeline tender and its pipe storage yard.

[2] As part of the plaintiff's empowerment programme, the tender required the successful tenderer, NRB, to allocate 35% of the contract amount to contract participation goal (CPG) sub-contractors approved by the plaintiff. The tender further required a storage yard to be constructed for purposes of storing pipes after delivery and the document identified a specific site for this purpose. It further stipulated that the storage yard was to be constructed by a CPG sub-contractor.

[3] After the plaintiff concluded the contract with NRB, JG Afrika (Pty) Ltd (JG Afrika) was appointed as the project engineers and the first defendant was appointed as the CPG sub-contractor for the purpose of constructing the pipe storage yard.

[4] The plaintiff pleaded that the first defendant concluded three lease agreements

with the plaintiff in respect of a pipe storage yard. However, these leases were not for the original site identified in the tender document but for a different site, referred to in evidence as ‘Field 1’. It was the plaintiff’s case that the change of site was the result of fraudulent manipulation on the part of the first and third defendants and sought to hold the defendants liable for payment of liquidated damages on the basis of a fraudulent misrepresentation made by the first and third defendants to the plaintiff.

[5] The action was defended by the first and second defendants only. The second defendant is the sole director and shareholder of the first defendant. The third defendant, a former employee of the plaintiff, did not enter an appearance to defend the matter. Whilst the plaintiff during opening argument indicated that it would be seeking default judgment against the third defendant, it ultimately accepted in closing argument that there is no proof of service of the summons on the third defendant and it is therefore not entitled to apply for default judgment against this defendant. The relief sought against the third defendant will, therefore, be adjourned *sine die*.

[6] The second defendant appeared in person at the trial. He initially sought to represent the first defendant but after the plaintiff objected on the basis that, in the absence of exceptional circumstances, a juristic entity can only be represented by a legal practitioner, the second defendant proceeded to only represent himself.

The evidence

[7] The plaintiff’s first witness was Mr William James Voortman. Mr Voortman testified that he was employed by the plaintiff from 1992 until October 1998 and again from 2010 until present. Mr Voortman is employed by the plaintiff as a project manager and held this capacity in 2017 when most of the events in this matter unfolded. Subsequently, during 2020, Mr Voortman managed the functioning of the project manager’s office, which entailed an oversight role over all of the plaintiff’s projects.

[8] Mr Voortman further testified that during 2017, when the tender was advertised, the third defendant was the plaintiff’s project manager. However, the third

defendant abandoned this position in 2018 when he left the plaintiff's employment without any notice to the plaintiff.

[9] On 6 June 2017, the plaintiff addressed an intention to award letter to the successful tenderer, NRB, to advise that its bid was successful. Importantly, for present purposes, it was recorded in this letter that the final award of the tender would be contingent upon, *inter alia*, a successful CPG negotiation with the plaintiff. Mr Voortman further testified that the plaintiff usually proceeds by asking bidders to nominate their CPG partners. In its tender document, NRB duly identified three CPG partners. However, the first defendant's name did not appear on this schedule of proposed CPG sub-contractors.

[10] Mr Voortman testified that the omission of the first defendant's name from this schedule of proposed CPG sub-contractors was not necessarily out of the ordinary, as sub-contractors may become unavailable due to a time lapse between the completion of the tender document and the commencement of the works or certain sub-contractors may be eliminated when the plaintiff conducts its due diligence, particularly due to concerns about fronting.

[11] The tender document specified that:

'Tenderers are required to achieve at least 35% contract participation goals (CPG) including a minimum 5% black women participation of the value of goods, services and works paid to one or more enterprises (CPG partner/s) as agreed with Umgeni Water before contract award.'

Therefore, so Mr Voortman testified, CPG partners are sub-contractors of the successful tenderer, whilst the only contract concluded by the plaintiff would be between it and the successful tenderer.

[12] The tender document further specified the following location for a pipe storage yard for the project:

'The pipe storage yard for South Coast Phase 2B Pipeline is located in close proximity to the Park Rynie off ramp from the N2. The pipe yard will also be the most logical area for the site

establishment. When heading south along the N2 from Amanzimtoti, turn right at the Park Rynie off ramp. Continue approximately 750m from the offramp and turn right onto the gravel road. Proceed about 550m along this road. The site camp and pipe yard position will be on your right.'

[13] Mr Voortman testified that he was not involved at the time in identifying this particular site, as it is usually the contract engineer's role. He did not know why this location was subsequently changed to the new site. Mr Voortman further testified about the lease agreements concluded between the plaintiff and the first defendant. The first lease agreement was concluded during February 2017 and provided for a lease of premises in extent 12.5 hectares of land on Portion 354,1[...] P[...] R[...], ET, KwaZulu-Natal. The commencement date was specified as March 2017 with the contract to endure for a period of 18 months. The monthly rental was recorded as R41 670, excluding VAT.

[14] Mr Voortman further referred to a memorandum dated 4 September 2017, which recorded a discussion between Mr Lwazi Ndlovu, who was the plaintiff's manager for IDMS Contracts and Ms Marsha Philips, who was the plaintiff's acting general manager for finance. In terms of this memorandum, it was recorded that the tenderer's CPG partners were proposed jointly by the plaintiff and the tenderer and that the first defendant was appointed as the CPG partner on the basis that it is currently leasing the land that will be used as a pipe yard.

[15] Mr Voortman was asked to comment on the timeline where a lease agreement is concluded between the plaintiff and first defendant before the award of the bid. Mr Voortman testified that it is certainly not normal but conceded that it can happen in certain circumstances. He further indicated that the availability of the pipe yard made logistical sense at the time.

[16] Mr Voortman further testified about a second and third lease agreement between the plaintiff and the first defendant. The second lease agreement was concluded on 19 November 2018 and concerns the same leased premises as the first

agreement. The agreement commenced on 1 October 2018 for a period of six months and recorded monthly rental in the sum of R45 837, excluding VAT, as well as a monthly 'security services rental' in the sum of R72 597, excluding VAT. The third lease agreement was concluded on 27 July 2020, with a commencement date of 1 July 2020 and termination date of 30 June 2021.

[17] Mr Voortman testified that he was also not involved in the conclusion of the second and third lease agreements.

[18] In an email of 24 June 2020, shortly before the expiry of the second lease agreement, Mr Voortman raised certain concerns with his colleagues. In particular, Mr Voortman raised the fact that the land area is listed as 12.5 hectares but the extent of the actual pipe yard measured only approximately 2.1 hectares. A property valuation by a registered valuer was apparently requested, but never done, and the further lease agreements were also not vetted by the plaintiff's legal services.

[19] Mr Voortman further testified about variation orders in terms of this tender. He explained that to the extent of his knowledge, a variation order was never approved to justify payment of the first defendant's claim of R5 033 857.10. Notwithstanding the lack of a variation order, site establishment proceeded but there was no money left in the project to pay for the pipes, as the money was used to pay for the first defendant's claims. These claims were paid without a variation order ever being processed or submitted for approval, according to Mr Voortman.

[20] During cross-examination, Mr Voortman was questioned about his qualifications and whether he is registered as an engineer. Mr Voortman indicated that he is not so registered and that his role as project manager does not require such registration. In explaining his role in cross-examination, Mr Voortman testified that Mr Parsons of JG Afrika is the employer's agent and he is, in fact, an engineer, duly registered. Mr Voortman explained that he designs projects and that neither he nor Ms Manyoni of the plaintiff is involved in procurement. Mr Voortman was questioned about

the plaintiff's public documents and it was ultimately put to Mr Voortman that the second defendant, as a businessman, is fully entitled to position his business in order to be able to benefit from an opportunity such as the present tender. Mr Voortman agreed with this proposition.

[21] Regarding the variation order, it was put to Mr Voortman that, whilst there does not seem to be an approved variation order, it was a 'cover-up' by JG Afrika, with the plaintiff acting on bad advice and a bad design of the project. Mr Voortman did not comment on this proposition.

[22] The plaintiff's second witness was Ms Janet Claire Norris. Ms Norris testified that she is a civil engineer, practising as such with JG Afrika and based in Hilton, KwaZulu-Natal. She is a director of JG Afrika and the responsible office manager at the Hilton office.

[23] Ms Norris testified that she was aware of this particular tender but held no oversight role. She was also aware that the third defendant was the plaintiff's project manager at the time. She has no personal knowledge of any variation orders and simply commented on the general role of a project manager.

[24] The plaintiff's third witness was Mr Timothy John Crookes. Mr Crookes testified that he is a director and a 25% shareholder of Ellingham Estate (Pty) Ltd (Ellingham Estate). Ellingham Estate is a property owning company, which owns the property identified in the tender document as the proposed pipe storage site as well as the property that was subsequently used as the pipe storage site. Mr Crookes indicated that he knows the second defendant well, having concluded a lease agreement with the first defendant, represented by the second defendant, in respect of the pipe storage site.

[25] Mr Crookes made it clear that the lease agreement with the first defendant was only in respect of a portion of the property, being 1.5 hectares in extent, which was

subsequently increased to 2.2 hectares, albeit without permission. It remains that the lease agreements concluded between the first defendant and Ellingham Estate only dealt with a portion of 1.5 hectares. At no stage, according to Mr Crookes, was there a lease agreement concluded in respect of a portion of 12.5 hectares. Mr Crookes further emphasised that the rental charged by Ellingham Estate was its going rate at the time and it would have rented the property to any tenant.

[26] During cross-examination, Mr Crookes indicated that he was never approached by the plaintiff to lease the property and if the plaintiff had done so in the past, they would have dealt with Ellingham Estate's general manager. He agreed that the company derived a benefit from the lease agreements in the form of rental payments but also mentioned that the first defendant was in default of its rental payments and fell in arrears, accumulating to approximately R150 000. The site was accordingly locked and the contractor employed to install the pipes, known as Cerimele, ultimately approached Mr Crookes to have the site unlocked in return for payment of the arrears. A new lease agreement was then entered into with Cerimele.

[27] The plaintiff's last witness was Ms Nobuhle Mchiza. Ms Mchiza testified that she has been employed by the plaintiff since March 2008 in a supervisory position, which entails the payment of invoices and keeping records of all payments. Ms Mchiza took the court through an 'Excel dump' from their system, which showed payments made to the first defendant over the relevant period. Ms Mchiza's evidence was not seriously challenged in cross-examination. The plaintiff thereupon closed its case.

[28] The second defendant presented only his own evidence. He testified that he studied BSc Agriculture and Microbiology and that he worked for, among others, a local municipality in project management and he also ventured into national projects. His intention was to undertake property development but he subsequently went into construction. He is familiar with the South Coast area and approached the plaintiff to make a proposal when he anticipated the commencement of this project. He subsequently reached an agreement with the plaintiff during a meeting held at

Pinetown and he was told that the plaintiff would do a site visit with an engineer for purposes of assessing the viability of the proposed pipe yard.

[29] After the site visit by the engineer, Mr Parsons of JG Afrika, Mr Parsons indicated that he would proceed to prepare a drawing. This was done and the first defendant proceeded to price the project and was appointed by the contractor.

[30] The second defendant further indicated that he recalled only one project meeting of which minutes were circulated but no other meetings took place. He emphasised that the third defendant was introduced to him after he had already met with the land owner, Ellingham Estate. He explained this by saying that he is well placed in the general South Coast area and he had speculated many times and can identify an opportunity when it is arising. According to the second defendant, there was nothing untoward about his meeting with Ellingham Estate prior to the first defendant being awarded any contract by the plaintiff or the contractor.

[31] The second defendant further testified that there was no proper management of the project after the project manager absconded and he suspected that there had been collusion between contractors and CPGs at the time, which is why the plaintiff is now pursuing him and his company, as he was an outsider who disrupted the collusion between other parties. He further blamed the plaintiff for the first defendant's default in rental payable to Ellingham Estate, as he contends that the plaintiff did not effect due and proper payment of its rental to the first defendant. He further testified that he was of the intention to develop a motor sport arena on this particular site, and, therefore, if no agreement were to be concluded with this particular contractor, there were other plans in place for the development of this site.

[32] Under cross-examination, the second defendant agreed that he signed a lease with Ellingham Estate before the tender was even identified by the plaintiff and that the second defendant, on behalf of the first defendant, concluded a lease agreement with the plaintiff before the lease agreement was concluded with the land owner. He further

explained that the site was suitable for the construction of a pipe yard based on a visual assessment. It was only established later after a Geotech revealed that more preparation was anticipated for the pipe yard to be properly established.

[33] The second defendant also agreed that he is familiar with supply chain management procedures, as he was deputy municipal manager of the Ugu Municipality, during which time he was also chair of the municipal bids specification committee. The second defendant testified that it did not trouble him whether the plaintiff followed the necessary procedures and he did not experience anything being wrong, as the plaintiff could have followed the proper process without him knowing.

[34] The second defendant agreed that he should have waited for an agreement to be signed before he approached the plaintiff for a lease agreement. However, the second defendant indicated that he was confident that he would be able to obtain a lease agreement with Ellingham Estate. The second defendant also conceded that the first defendant would have been unable to comply with its lease obligations towards the plaintiff if suitable land were not obtained. He also conceded that the first defendant should only have charged rental from when the plaintiff actually occupied the site. The second defendant agreed that as the sole director and shareholder of the first defendant, he was its controlling mind.

[35] The second defendant further agreed in cross-examination that he is aware of the procedure when an organ of state wants to undertake a project. He also agreed that the tender document contained a pipe storage yard, which was different from the pipe storage yard ultimately used. However, the second defendant testified that he was not privy to the internal procedures of the plaintiff.

[36] The second defendant further conceded in cross-examination that in terms of all three lease agreements, the plaintiff was either to carry out the site rehabilitation or it was to be carried out at the plaintiff’s expense.

[37] The second defendant was questioned about the first defendant's direct contract with the plaintiff even though it was appointed as a CPG subcontractor. The second defendant made it clear that he could not comment on any internal communication or decisions of the plaintiff and that he was unaware of anything untoward which may have happened which resulted in the first defendant's appointment. He explained that he took a risk when he concluded the lease agreement in respect of Field 1 prior to any contract with the land owner or the contractor but that it is necessary in his business ventures to take risks of this nature. The second defendant agreed that the first defendant would have been the beneficiary of any dealings which resulted in the appointment of the first defendant but emphasised that he is not privy to the internal discussions of the plaintiff.

Plaintiff's claims against the first defendant

[38] In the absence of an appearance before me at the trial on behalf of the first defendant, the plaintiff is entitled to default judgment against this defendant in terms of Uniform rule 39(1). The plaintiff's claims against the first defendant are for liquidated amounts and a consideration of the above evidence is therefore not necessary for purposes of judgment against the first defendant.

[39] The plaintiff limited its site establishment claim against the first defendant to R4 516 375.10 and thus sought judgment against the second defendant in the same amount. In respect of the rental claim, the plaintiff took into account that it would in any event have had to lease a storage yard for its pipes and Mr Crookes, director of Ellingham Estate, indicated in his evidence that he would have been prepared to let Field 1 to the plaintiff at the same rental. The total rental payable in terms of the two leases was the sum of R856 000 and this sum must therefore be deducted from the rental claim, which reduced the plaintiff's claim to the sum of R2 872 206. In its draft order, the plaintiff seeks judgment for a further slightly reduced sum of R2 871 706.48. Default judgment for this claim will therefore be granted against the first defendant in the amount of R2 871 706.48.

Plaintiff's claim against the second defendant

[40] In its particulars of claim, the plaintiff only sought judgment against the second defendant in respect of the site establishment claim. The limited basis upon which the plaintiff sought to hold the second defendant liable was pleaded as follows in paragraph 40 of the particulars of claim:

'40. The third defendant worked corruptly and in concert with the first defendant and the second defendant to secure that the first defendant was appointed CPG sub-contractor; and thereafter.

40.1 third defendant took steps took steps to achieve an outcome where first defendant's site was selected; and

40.2 first defendant received payment of far more than the figures set out in the bill of quantities or annexure intending thereby to secure an undue benefit for the first defendant at the cost and to the prejudice of the plaintiff.'

[41] On the second day of trial, I raised with the plaintiff's counsel, Mr *Pammenter SC,* who appeared with Ms *Mbonane*, the poorly pleaded case against the second defendant and expressed the *prima facie* view that there does not seem to be a proper cause of action pleaded against this defendant. It must be said that Mr *Pammenter* and Ms *Mbonane* were not the authors of the particulars of claim. Mr *Pammenter* agreed that the case against the second defendant could have been better pleaded but indicated that he did not wish to amend at this late stage and would rather continue with the trial.

[42] In closing argument, the plaintiff submitted that the following issues arise in regard to the claim against the second defendant:

(a) Did he act corruptly in concert with the first and third defendants to secure the first defendant's appointment as the CPG sub-contractor?

(b) If so, did the first defendant, as a consequence, receive payment of far more than the figure set out in the bill of quantities?

(c) Did this amount to an undue benefit to the first defendant at the cost and to the prejudice of the plaintiff?

[43] Furthermore, in support of its case against the second defendant, the plaintiff submitted the following:

(a) The construction of the pipe yard was to be done by a CPG sub-contractor. Tenderers had to submit a list of their proposed CPG sub-contractors. NRB, however, did not include the first defendant as such a subcontractor.

(b) The CPG sub-contractors had to be agreed to by the plaintiff before the contract award.

(c) The third defendant was the plaintiff's appointed project manager for the project. He and the second defendant knew each other and had previously worked at the same time at the Ugu District Municipality.

(d) In 2016, Ms Mbali Kubheka and the third defendant worked together at the plaintiff.

(e) The second defendant contended that he was aware of the intention to lay the South Coast Phase 2B pipeline and that he saw an opportunity and started looking around for possible pipe storage yards.

(f) Out of the blue, Ms Kubheka contacted the second defendant regarding the pipe storage yard.

(g) The second defendant sent an email to Ms Kubheka, wherein he suggested that Field 1 be considered as a location for such a pipe yard.

(h) On 21 April 2016, Ms Kubheka sent an email to the first defendant, indicating that the 'surveyor' might be able to come through on Monday, 25 April 2016 'to finish up the process'.

(i) In his evidence, the second defendant stated that he had, in fact, consulted with the engineer around about this time and suggested that Field 1 should be used as the storage yard.

(j) The engineer did not accept this suggestion because the tender document (prepared by the engineers), provided that the storage yard should be established on the original site.

(k) Notwithstanding, on 1 February 2017, a lease was concluded between the first defendant and the plaintiff for the lease of Field 1, which commenced 'on March 2017'.

(l) Field 1 was owned by Ellingham Estate. However, the very first approach made by or on behalf of the first defendant to Ellingham Estate to lease the site, was on 16 March 2017, and a lease for Field 1 was only signed in August 2017.

(m) Accordingly, at the time the lease between the plaintiff and first defendant was signed, the first defendant was not able to give the plaintiff vacant possession of Field 1. Notwithstanding this, the first defendant demanded and was paid rental with effect from March 2017.

(n) In an internal memorandum from Mr Lwazi Ndlovo to Ms Marshall Philips, the appointment of the first defendant as a CPG partner was motivated on the basis that it was currently leasing Field 1. The memorandum is dated 4 September 2017.

(o) In the addendum to CPG negotiations, the value of the site establishment of the storage yard was reflected as being R450 000 and that this work was to be carried out by the first defendant.

(p) The amount of R450 000 was a provisional sum included in the original bill of quantities for the site establishment of a storage yard, as reflected in the tender document.

(q) At the site handover meeting on 15 September 2017, JG Afrika was informed for the first time that the location of the storage yard had been changed to Field 1 and, as a consequence, a site survey had to be commissioned and the site layout had to be designed afresh.

(r) At some stage prior to 16 October 2016, the first defendant submitted a quotation for the establishment costs of the pipe yard and Field 1 in an amount of R5 033 857.10, plus a 15% contractor's markup. This quote was forwarded by the contractor to the plaintiff.

(s) On 16 October 2016, the third defendant requested Mr Parsons of JG Afrika to comment on this quotation.

(t) A string of emails followed between Mr Parsons and the third defendant, wherein Mr Parsons pointed out that JG Afrika's estimate for the establishment costs was R2 232 130.50. However, the third defendant advised that the first defendant was to do site rehabilitation at the end of the contract and this probably accounted for the difference in prices.

(u) Mr Parsons accepted this explanation and undertook to prepare a variation order in order to amend the bill of quantities.

(v) The statement by the third defendant that the first defendant was to undertake site rehabilitation was not true. The three leases concluded between the plaintiff and the first defendant indicated that the site rehabilitation was either to be carried out by the plaintiff or at the plaintiff's expense.

(w) Although the first defendant was appointed as a CPG sub-contractor, it, in fact, contracted directly with the plaintiff for the lease of Field 1.

(x) Notwithstanding this fact, no procurement process took place as envisaged in s 217 of the Constitution or s 51(1)*(a)*(iii) of the Public Finance Management Act 1 of 1999, or in terms of the plaintiff's own Supply Chain Management Policy.

[44] It has been held in *Courtney-Clarke v Bassingthwaighte*[1] that a party wanting to rely on fraud must not only plead it but must also prove it clearly and distinctly. Whilst the onus is the ordinary civil onus, fraud is not easily inferred.[2]

[45] The essential allegations for a claim based on fraud are well known and are as follows:[3]

(a) A representation by the representor to the representee;[4]

(b) The mental element of fraud in the sense that the representor knew the representation to be false;[5]

(c) That the representation induced the representee to act in response to it;[6] and

(d) Damages suffered by the representee.[7]

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[1] *Courtney-Clarke v Bassingthwaighte* 1991 (1) SA 684 (NM) at 689F-G.
[2] *Gilbey Distillers & Vintners (Pty) Ltd and Others v Morris NO and Another* 1990 (2) SA 217 (SE) at 226A.
[3] *Geary & Son (Pty) Ltd v Gove* 1964 (1) SA 434 (A) at 441C-D. See also generally L T C Harms *Amler's Pleadings* 10 ed (2024) at 204-205.
[4] *Feinstein v Niggli and Another* 1981 (2) SA 684 (A).
[5] *Breedt v Elsie Motors (Edms) Bpk* 1963 (3) SA 525 (A) at 529G-H.
[6] *Hulett and Others v Hulett* 1992 (4) SA 291 (A) at 310H-311C.
[7] *Truth and Reconciliation Commission v Mpumlwana* [2001] 3 All SA 58 (CK) at 66.

[46] The plaintiff pleaded a case of 'corruption' against the second defendant. Corruption is a crime and is regulated by the Prevention and Combating of Corrupt Activities Act 12 of 2004. The elements are set out in s 3 as follows:

'3. General offence of corruption.—

Any person who, directly or indirectly—

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,

in order to act, personally or by influencing another person so to act, in a manner—

(i) that amounts to the—

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to—

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules;

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of the offence of corruption.'

[47] The plaintiff has failed to plead how the crime of corruption can be a cause of action in a civil claim for damages and I am not aware of any such cause of action. In *Delta Property Fund Limited v Nomvete and Others*,[8] the company sued its directors for losses incurred due to their conduct, which included corruption. However, this cause of action was not based on corruption but on s 77 of the Companies Act 71 of 2008 (the Companies Act), which deals with the liability of directors and prescribed

[8] *Delta Property Fund Limited v Nomvete and Others* [2025] 4 All SA 422 (GJ).

officers of a company. This case can therefore be distinguished from the present facts. The plaintiff has also not pleaded a cause of action for commercial bribery.[9]

[48] It is immediately apparent from the above that the plaintiff has not remotely succeeded in pleading a claim based on fraud or corruption (should such a cause of action exist in our law) against the second defendant. The particulars of claim contain no allegations regarding any representation by the second defendant. It is not alleged that the second defendant acted with the required mental element, if a representation was made by him, and that this representation caused the plaintiff to suffer damages.

[49] It needs to be considered that the first defendant is a juristic person with separate legal personality. The plaintiff has not pleaded any allegations in support of an order for piercing the corporate veil or to otherwise hold the second defendant liable as director of the first defendant. I am mindful of the fact that the court has no general discretion 'to disregard a company's separate legal personality whenever it considers it just to do so'.[10] On the contrary, 'limited liability is at the very heart of the reasons for the existence of the company and it cannot be interpreted away without the most compelling of indications'.[11]

[50] The plaintiff thus failed to plead a case in support of the bald statement that the second defendant 'worked corruptly and in concert' with the other defendants. The plaintiff's argument that the second defendant was the controlling mind of the first defendant and thus clearly a party to the corruption is insufficient to found a cause of action based on fraud or to support an order for piercing the corporate veil.

[51] The plaintiff has therefore failed to establish a claim against the second defendant.

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[9] See *Extel Industrial (Pty) Ltd and Another v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA) at 724D-F for the elements of commercial bribery.
[10] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A) at 803A-B; *Venator Africa (Pty) Ltd v Watts and Another* [2024] ZASCA 60; 2024 (4) SA 539 (SCA) para 24.
[11] M P Larkin 'Regarding judicial disregarding of the company's separate identity' (1989) 1(3) *SA Merc LJ* 277 at 297 to 298.

Order

[52] I accordingly grant the following order:

1. Judgment is granted against the first defendant as follows:
   (a) Payment of the sum of R4 516 375.10;
   (b) Payment of R2 871 706.48;
   (c) Interest on the aforesaid sums from date of service of summons to date of payment at the rate of 10.5% per annum; and
   (d) Costs of suit.
2. The plaintiff's case against the second defendant is dismissed.
3. The relief sought against the third defendant is adjourned *sine die*.

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PIETERSEN AJ

Date of hearing:	4 – 6 May 2026
Date of Judgment:	29 May 2026

APPEARANCES

Plaintiff:	Mr CJ Pammenter SC Ms MA Mbonane
Instructed by:	**XABA ATTORNEYS** 37A Roberts Road Clarendon Pietermaritzburg E-mail: mail@xabainc.com (Ref: D Xaba/S Nene/pnn/01)
Second Defendant:	Mr M Mnyandu (in person) 15 Kerhode Place Glen Ashley Durban North E-mail: mnyandu@kgpro.co.za