In the High Court of South Africa

KwaZulu-Natal Local Division, Durban

Case No :810/2011

In the matter between :

Nurcha Finance Company (Pty) Ltd Plaintiff

And

eThekwini Municipality First Defendant

Emerald Fire Trading 24 CC Second Defendant

Judgment

Lopes J

[1] The plaintiff, Nurcha Finance Company Ltd ('Nurcha') is a s 21 wholly owned subsidiary of the National Urban Housing and Reconstruction Agency, also a s 21 company, which was established during the 1990s with the South African government as a 50 per cent shareholder. I shall refer to the holding company of the plaintiff as 'the holding company' because of the similarity in names. The object of the holding company was to facilitate various aspects of assistance to previously

disadvantaged persons in areas such as housing and the development of businesses.

[2] The plaintiff was identified as a vehicle for providing finance, inter alia, to emerging civil engineering contractors. The primary stumbling block to the emergence of previously disadvantaged persons as contractors lies in their inability to obtain working capital. This is partly a function of their lack of what conventional financing companies would regard as an acceptable credit record.

[3] The model which is operated is that a contractor is given loan finance together with a mentoring process. The finances and the mentoring process are controlled by Tusk Construction and Support Services (Pty) Ltd ('Tusk'). In essence Tusk is designated as a 'paymaster' to administer the cash flow of the project, to advance drawdowns against the loan to enable the contractor to meet set-up costs, and the payment of materials and initial labour costs. Thereafter, as progress payments are made by the employer, Tusk has control over the finances such that it can co-ordinate the orderly repayment of the loans initially made to the contractor and ensure that the contractor receives the profits on the construction.

[4] The model is designed so that the bank accounts are kept in the name of contractors to enable them to build up credibility with banks and the Construction Industry Development Board ('the CIDB') which is the controlling body of civil engineering contractors and who rates contractors, which is an important aspect in

contractors being able to obtain future contracts at an ever-increasing level of finance and complexity. In order to secure the necessary control the plaintiff ensures that a number of security documents are completed, including suretyships, cessions, etc.

[5] In this matter the plaintiff advanced funds to the second defendant which were administered as paymaster by Tusk. However, problems arose when the first defendant, the eThekwini Municipality, did not, as it was intended that it would do, pay progress payments into the accounts designated by Tusk and the plaintiff. The money did not flow as it should have done and the model unravelled. There were eleven contractors who participated in the model, and in eight of these cases the plaintiff ended up in litigation with the eThekwini Municipality and the contractor.

[6] Arrangements were made to sort out the non-payment and it is the plaintiff's contention that the eThekwini Municipality assumed responsibility for the payment of the amounts due by the contractors. This was done in a document annexed to the plaintiff's particulars of claim marked 'B' (Annexure 'B'). These undertakings were allegedly given by a Mr van den Heever, an employee of the eThekwini Municipality.

[7] By agreement between the parties I am to decide two aspects of the matter and they are :

(1) the authority of Mr van den Heever to represent the eThekwini Municipality. In the pleadings the eThekwini Municipality has denied his authority, and the plaintiff has replicated an estoppel;

(2) the meaning of Annexure 'B', which the plaintiff maintains is an undertaking to pay. The eThekwini Municipality maintains that the document conveys only that it will pay the plaintiff instead of the second defendant but does not contain any liability as a debtor to the plaintiff.

[8] Initially I was required to determine the amount payable, if any. That, however, is no longer in dispute. It was recorded by Mr *Broster* SC, who appeared for the plaintiff together with Mr *J P Broster,* that the eThekwini Municipality admits having signed Annexure 'B' but averred that Mr van den Heever had no authority to do so.

[9] The first witness for the plaintiff was Hendrik Johann de Villiers. He told the court that he was the managing director of Tusk, and that his company had been appointed as a paymaster on behalf of the plaintiff. He told the court that the holding company had been established in the 1990s by Dr van Zyl Slabbert who had formed a relationship with the George Soros Organisation in the United State of America. The holding company was established together with the South African government as a 50 per cent shareholder. The plaintiff in turn is a wholly owned subsidiary of the holding company and was established for the purpose of channelling funds coming from the Open Society Foundation with the loans being underwritten by the South African government.

[10] Tusk had worked with the plaintiff since 2000 in providing support and co-funding projects. Mr de Villiers stated that the interaction of Tusk with the plaintiff operated as follows :

(a) when Tusk receives an application they conduct an assessment on the viability of the project and if they approve it, they make a recommendation to the holding company;

(b) once the holding company has approved the project they nominate the funder, in this case the plaintiff. Tusk would draw up the security documents which are loan agreements, suretyships, irrevocable payment instructions, etc and liaise with the contractor to have all the documents signed;

(c) Tusk would also assign a professional in the contracting industry as a construction support manager to mentor and assist the contractor. This is normally a qualified quantity surveyor or engineer or graduate in the construction industry;

(d) when all the documents are signed and checked by the Tusk legal department, a clearance certificate is issued to the holding company;

(e) part of the documentary process was the opening of bank accounts in the name of the contractor. These bank accounts have specific mandates as to the signing powers and must be opened prior to clearance being given to the holding company. When the clearance is issued, the plaintiff is notified that all the documents are in place and the loan is then activated. The normal construction on the project then begins. In terms of the cost breakdown agreed with the contractor the first draw would be made from the contractor's

loan account and this was usually for site establishment followed by draws for labour and materials;

(f) two current accounts were opened :

(i) a project account – ongoing operating expenses are paid from this account and the contractor and the Tusk administrator have signing powers;

(ii) a loan account which is a designated account referred to in the irrevocable payment instruction. It is intended that all the progress payments from the employer are paid into this account and only a director of Tusk and the Tusk financial manager have signing powers on this account.

[11] Mr de Villiers described the history of Tusk as follows :

(a) Tusk started in 1997 with a clear mandate to assist previously disadvantaged contractors;

(b) in the early 2000s they opened a branch in Umhlanga Rocks, but after some defaults by the Department of Public Works (who did not pay into the designated accounts) that branch was closed in 2005 after several court cases were held;

(c) Tusk has other offices throughout South Africa and although they experienced the same problems in other areas, they never did so on the scale that occurred in KwaZulu-Natal;

(d) the arrangement with the eThekwini Municipality evolved during 2008 when Tusk employees attended certain seminars. The eThekwini Municipality

asked Tusk to do a presentation of their contractor development programme. This was done by Mr de Villiers himself and the department was headed by one Jannie Pietersen an employee of the eThekwini Municipality and the head of the Contractor Development Department;

(e) after two or three meetings with other officials of the eThekwini Municipality represented by Clive Anderson, which meetings were held in the eThekwini Municipality technical division offices in Pinetown, Mr Anderson prepared a document and emailed it to Mr de Villiers explaining the envisaged contract development programme and included the holding company as a financier;

(f) in this regard Mr de Villiers referred to an organogram which was given to him by Mr Anderson setting out how the programme would operate to create access to finance for emerging contractors. On the organogram it was envisaged that Tusk would be the paymaster, and although it was not reflected on the document, Tusk would assist in training and mentorship of the contractors.

[12] After the meeting at which Mr de Villiers was given the organogram Mr Anderson asked him to draft a memorandum of agreement which Mr de Villiers did together with the holding company and emailed it to Mr Anderson. Mr de Villiers is unaware of the internal processes of the eThekwini Municipality, but in January of 2009 Mr Anderson notified him that he should obtain the signature of the Chief Executive Officer of the holding company on the memorandum of agreement and he would get Mr Sutcliffe to sign on behalf of the eThekwini Municipality.

[13] Mr de Villiers stated that the purpose of the memorandum of agreement was to assist the eThekwini Municipality to achieve their goals in their contractor development programme and for the holding company to fulfil its mandate in providing finance to previously disadvantaged contractors, and to ensure that the roles and responsibilities as understood by Mr de Villiers and Mr Anderson were captured in the memorandum of agreement.

[14] The memorandum of agreement was duly signed with one Viwe Gqwetha signing on behalf of the holding company. The responsibilities of the Municipality and the holding company were set out in the memorandum of agreement in Clause 6.2. Annexure 'C' to the memorandum of agreement was a sample undertaking by the contractor setting out an irrevocable instruction to the employer to pay all progress payments directly into a named bank account. That document records that the irrevocable instruction and bank account may not be changed without the written consent of Tusk. In this way Tusk would be given control over the finance of the project. Bridging finance was provided by the holding company for materials, labour and set-up costs. The memorandum of agreement was faxed by Mr de Villiers to Mr van den Heever who faxed it back to him with the signature of Mr Sutcliffe on the document dated the 23rd January 2009.

[15] The mentoring programme was started and the first project was one in the Valley of a Thousand Hills – a housing project. The job of Mr de Villiers was to make sure that everyone understood what was expected of them and ensure that his technical staff became involved in the project. Eleven or twelve contractors were

identified on this first programme. The loan agreements with the contractors were drawn up by Mr de Villiers's staff. The loan agreement in this case, concluded on the 7th August 2009 ('the loan agreement') was drawn up between the plaintiff and the second defendant, with the holding company acting as an umbrella company and, depending on the funding to be provided, different subsidiaries would be used to provide the finance. The document was signed on behalf of the plaintiff by Mr Gqwetha the operation directors and Mr Nxusani the finance director of the plaintiff.

[16] The project with the second defendant involved the building of 35 houses. The members of the second defendant signed the loan agreement The bank accounts had already by that stage been opened with First National Bank ('FNB'). Irrevocable payment instructions were recorded in a document which was signed by Mr Nyathikazi, a member of the second defendant and as having been received by Mr van den Heever on the 17th July 2009. A stamp appears next to the signature of Mr van den Heever recording 'ETHEKWINI MUNICIPALITY HOUSING PROJECTS' below which appears a post office box number in Pinetown and a telephone and fax number.

[17] With regard to the role of Mr van den Heever, Mr de Villiers stated that they were advised that he was in charge of Housing Development and he appointed consultants and advised the department of finance of the eThekwini Municipality of payments. A document was also completed comprising a cession of progress payments by the second defendant to Tusk. Mr de Villiers stated that this was only to be used if there was a default in the payment instructions.

[18] Mr de Villiers also referred to an agreement concluded between FNB, the second defendant and Tusk, which was an attempt by the bank and Tusk to ensure that contractors could not change the bank account or the signatories thereto. This had been arrived at after long negotiations with FNB because they had been reluctant to conclude such a contract because of the risks involved. That document was signed on behalf of Tusk by Mr Pieter de Villiers, the son of Mr de Villiers, and the then director of legal services for Tusk. A resolution authorising Mr Pieter de Villiers to sign on behalf of Tusk was annexed to that agreement.

[19] Mr de Villiers stated that at that stage he was of the view that as all the documents were in place nothing could go wrong. What happened however, was that funds were paid by the eThekwini Municipality, not into the nominated accounts, but directly to the contractors or other beneficiaries. He was told this by Mr Brett Gallagher, the manager of the plaintiff in Durban.

[20] In cross-examination Mr de Villiers stated :

(a) that he held no shares in the plaintiff and was not employed by it;

(b) that the holding company has a shareholding in Tusk;

(c) that the loan agreement at Clause 1.1.44 regulated matters between Tusk and the plaintiff. Tusk was to carry out the defined obligations of the paymaster in the agreement. As part of the agreement a certificate of indebtedness by a director of the plaintiff could be provided relating to the

amount owed by the second defendant to the plaintiff. Mr de Villiers was not sure whether such a certificate had ever been prepared;

(d) that the loan agreement had been prepared by both Tusk and the holding company. They had been invited to a meeting with the eThekwini Municipality. He and Stefan Roux of the holding company, had attended this meeting together;

(e) with regard to the dispute resolution clause (Clause 8) in the memorandum of agreement, any dispute arising out of that contract was to be referred to the City Manager for a final decision in the event that the parties could not settle the matter between themselves. The City Manager at that stage was Mr Sutcliffe. When payments were wrongly made by the eThekwini Municipality, Mr de Villiers had not contacted Mr Sutcliffe but had contacted Jannie Pietersen of the eThekwini Municipality. Whether his legal department had taken the matter further he did not know;

(f) he could not recall when the problems with the contract had started;

(g) that Jannie Pietersen was the head of the Contractor Development Programme and Technical Services in eThekwini Municipality. When approached by Mr de Villiers, he said that he needed to speak to Mr van den Heever who was the head of housing, and that his colleagues worked with the payments.

[21] The next witness was Pieter Carel de Villiers. He is the son of Mr de Villiers and the Director of Corporate Services in Tusk. To avoid confusion I shall refer to him as Mr de Villiers Jnr. He testified that towards the end of 2009 and during 2010 he was the Director of Sales and Legal in Tusk. He agreed that after the loan

agreements had been concluded the payment instructions had not been complied with, and this had not only occurred with the second defendant but with numerous of the other emerging contractors.

[22] He had been involved in the dealings with eThekwini Municipality from the beginning of 2010. The plaintiff's support manager in KwaZulu-Natal, Brett Gallagher, had told Tusk's director Eduan Naude that certain payments were not going into the accounts as per the security agreements. Eduan Naude had then referred the matter to Mr de Villiers Jnr and he had become involved. He requested Brett Gallagher to forward him all the information, and asked him to set up a meeting with the Head of Housing of the eThekwini Municipality and himself. The person who was the Head of Housing at eThekwini Municipality was Mr van den Heever.

[23] The problem was that one of the conditions of the funding model was that all payments were to go into the dedicated bank account – the loan account of the two accounts referred to by Mr de Villiers. The reason for the irrevocable payment instructions was that most of the emerging contractors were 'unbankables' (i.e. no credit history) and the only security which Tusk had was to control the bank accounts using the irrevocable instructions. A quantity surveyor was given to contractors to help them with estimating their borrowings and to enable Tusk to know what was needed, and when the employer made progress payments Tusk would know what was happening.

[24] Mr de Villiers Jnr met with Mr van den Heever at his office in Umhlanga Rocks. Mr van den Heever came on his own. They discussed the fact that wrongful payments had been made and sought to identify a way forward. He had only one meeting with Mr van den Heever. They had agreed that there were certain problems with numerous contractors and Mr de Villiers Jnr informed Mr van den Heever that they were at a crossroads with two options :

(a) to stop the whole programme and the plaintiff would take legal action against eThekwini Municipality and the contractors; or

(b) to come to an agreement as to how the plaintiff could be secured.

[25] Mr van den Heever did not want to proceed with the first option one because of the political problems which already existed on the construction sites based upon non-delivery. These involved complaints by local communities who wanted houses and the fact that labour payments were not being made on time. It was anticipated that this would interrupt the programme.

[26] Eventually he and Mr van den Heever had come to an arrangement. What had occurred was that contractors had signed cessions of the progress payments to be received from the eThekwini Municipality, to certain materials suppliers. The payment had gone to those suppliers instead of being controlled by Tusk. Mr van den Heever was looking to have the contractors complete the project, the eThekwini Municipality obtaining the benefit of the project, and the lender being repaid his monies.

[27] Mr de Villiers Jnr highlighted the fact that he could not go forward without payments being made and that someone needed to take responsibility for that aspect. Mr van den Heever had suggested a monthly repayment programme by contractors to the lenders. He was of the view that if Tusk insisted on payments being made the projects could not continue.

[28] Mr de Villiers Jnr made it clear that that was not a workable solution because they had no idea how long the projects would run for, and if the contractors could make the monthly payments. What Mr de Villiers Jnr proposed was an agreement that the outstanding loans would be viewed against the outstanding contract amounts, and then when progress payments were made that a calculated portion would be repaid to the plaintiff. This was eventually agreed upon between the parties and it was also agreed that the plaintiff would not give any future loans and would stop support fees being incurred by contractors. Support fees were payable by the contractors for the performance of the obligations of Tusk.

[29] Mr van den Heever stated that he would instruct his professional team to do whatever they could do to ensure that work was done on site and that the pro rata split was arranged. He said that the eThekwini Municipality would take care of the split and Tusk would not be involved in the split thereafter.

[30] Mr de Villiers Jnr, however, was adamant that the eThekwini Municipality should take responsibility and confirm that they would ensure that the plaintiff got repaid. Effectively they would stand in for the debt of the contractor. He told Mr van den Heever that the reason for that was because payments to the contractors were due and payable, and the plaintiff and Tusk could get court orders and attach their payments. Mr van den Heever agreed to the suggestions of Mr de Villiers Jnr. Mr de Villiers Jnr said that he would type out an agreement and discuss it with the contractors.

[31] Mr de Villiers Jnr said that they agreed that Brett Gallagher would liaise with the contractors to get copies of the payment certificates and ensure that the correct amounts were paid. Balloon payments were also envisaged to reduce the loans. Mr de Villiers Jnr emphasised that he had told Mr van den Heever that the eThekwini Municipality had to 'take ownership' of the debt, and he had agreed to this.

[32] Mr de Villiers Jnr denied that Mr van den Heever had said that he had to consult with the eThekwini Municipality prior to agreeing. As far as he was concerned when the meeting was ended there was an agreement in place. He took the notes he had made and typed out a summary of the discussions and the agreements. This document was typed by himself. Mr de Villiers Jnr used that document when he had a meeting with all the contractors who owed money to the plaintiff. This was held in his boardroom when he explained to them that they were in breach of their obligations to the plaintiff because money had been paid into different accounts, and the plaintiff wanted to be repaid. He told them of his meeting

with Mr van den Heever and their decision. He asked if the contractors had any alternatives and some suggested the payment of monthly cheques, but eventually agreed to the proportional payment system. Mr de Villiers Jnr then indicated that the next step would be to sign acknowledgements of debt and other documents. He thereafter phoned Mr van den Heever and confirmed his meeting with the contractors and they were both happy.

[33] Mr de Villiers Jnr also told Mr van den Heever that he needed the eThekwini Municipality to sign the written agreements. Mr de Villiers Jnr asked for Mr van den Heever's fax number and faxed the document, Annexure 'B' to him. The document was returned from Mr van den Heever signed by him, and then Mr de Villiers Jnr took the contractors to Brett Gallagher to enable him to work out the percentage split per project and go through the latest loan statements for each one. The acknowledgements of debt and agreements were signed by the various parties in the office of Mr de Villiers Jnr, and differed only in the names on the documents, the percentages and the amounts payable. They were otherwise the same.

[34] The original of the acknowledgement of debt which forms Annexure 'A' to the particulars of claim was then adduced in evidence. The reference to 'Simunye' in that document is that 'Simunye' was a contractor obtained by Mr Gallagher to provide contractors with supplies. 'Simunye' was made a party to the document because Tusk wanted to ensure that there were no problems between Tusk and 'Simunye. (At this stage Mr *Broster* placed on record that Mr van den Heever had signed and returned this document.)

[35] Mr de Villiers Jnr stated that the problem which then arose was that the eThekwini Municipality was already committed to certain of the cessions made by the contractors, and so when the percentage splits were done there was not enough money left because the beneficiaries of those cessions were paid off prior to monies being paid to the plaintiff.

[36] Mr de Villiers Jnr stated that his staff sat with the contractors every month and assisted in doing the draws with the plaintiff. His staff has signing powers on the various accounts and nothing could be taken out without Tusk's consent. The monthly reconciliations were done with each contractor. The loan statements appearing in the court bundle had been signed by the second defendant and had been compiled at the end of each month or so soon thereafter as it was possible to do them.

[37] The relevant aspects of the cross-examination of Mr de Villiers Jnr were :

(a) he was unaware how much longer each project would continue. He said that he only knew the balance of work which had to be done and the payments which had to be made. In each case he was not sure how many months were left;

(b) in the present case the contract had started the previous August and was for the building of 35 houses. At the stage he was reconciling the accounts he

had no idea how many certificates had been issued. He maintained however, that on a monthly basis Tusk knew exactly what amounts were outstanding. The number of certificates to be issued in the future were irrelevant to him. The only item which concerned him was the percentage of the outstanding debt was due. He maintained that in this way the quicker the contractors repaid, the quicker they would be able to reap the profits. In assessing the percentage they looked at the physical work to be done, the amounts to be received and the amounts outstanding;

(c) when asked why, if the loan limit available to the second defendant was R925 680, it had only made drawdowns of some R291 151,75, Mr de Villiers Jnr stated that this was because the contractors had milestones which were expressed in terms of the number of houses which they constructed. The fact that they had only drawn down R291 151,75 indicated that they were an underperforming contractor;

(d) he understood that although Tusk held a cession of progress payments, that would only benefit Tusk if the Municipality was notified that Tusk would rely on it. Mr de Villiers Jnr stated that it was the intention of the project that the cession of progress payments would only be relied upon if the contractor defaulted;

(e) he emphasised that Tusk and the plaintiff only wished to rely upon the cessions in the case of default. They were what may be described as a residual security. He maintained that he had given the cession of progress payments to Mr van den Heever who had raised the issue that if all the payments were made to Tusk, the contracts would grind to a halt. That is why

the memorandum of agreement provided for payments that were not in accordance with the cession of progress payments;

(f) In response to the suggestion that Mr de Villiers Jnr had stated that money was not paid into the dedicated bank accounts because contractors gave cessions to suppliers which were paid by eThekwini Municipality, Mr de Villiers Jnr stated that he had told Mr van den Heever that he must note the date of the cessions. It was suggested to Mr de Villiers Jnr that he knew he was in a queue. Mr de Villiers Jnr stated that the other cessions were signed after their documents. He accepted that without presentation of the Tusk cession to eThekwini Municipality, they could be ignored. He conceded that they did not at first want to enforce the cession of progress payments;

(g) Mr de Villiers Jnr also told the court that at that stage Tusk had been given an irrevocable undertaking that all progress payments would be paid into the dedicated bank account, and that eThekwini Municipality had known that the contractors were not allowed to sign cessions. He stated that the idea behind this scheme had been to build up the credibility of contractors and not to cede away their rights. The emphasis of the project was to build the credibility of contractors in the industry and for that reason they had insisted that eThekwini Municipality pay the progress payments into the contractors' bank accounts. The bank accounts were dedicated accounts which had irrevocable payment instructions attached to them. This had been done by Tusk because no assets vested in the contractors and they took cessions which were only to be used when something went wrong;

(h) Mr de Villiers Jnr emphasised the in the construction industry the contractors are governed by the CIDB who grades them. Without bank accounts

contractors are unable to build credibility because the turnover in their bank accounts is used to in part to construct the ratings of the CIDB. Those ratings, as they improve, enable the contractor to build his credibility and be able to tender for larger and more complex projects;

(i) Mr de Villiers Jnr accepted that when he met Mr van den Heever he appreciated that it was possible that by asking the eThekwini Municipality to take responsibility for the debt there was a possibility that the eThekwini Municipality could pay twice. He accepted that he was sceptical about the performance by the contractors, whether the payment system of the employer would work and to whom the money had previously been paid;

(j) Mr de Villiers Jnr accepted that at the meeting with Mr van den Heever he had spoken about the exposure to Tusk/ the plaintiff in the sum of approximately R2 000 000;

(k) although the memorandum of agreement had been available to Mr de Villiers Jnr he had only looked at it after the irrevocable banking instruction letters were signed. At the time of the meeting the loan agreement had been at his disposal. Prior to the meeting with Mr van den Heever, Mr de Villiers Jnr did not look at any of the contracts between the contractors and eThekwini Municipality. He had, however, looked at the letter of acceptance of the second defendant's tender which was dated the 13th June 2009 and addressed by Mr A D M Petersen to the second defendant. He was aware of the authority of Mr Petersen which was set out fully below his signature. Mr de Villiers Jnr was of the opinion that this was not a matter which fell under the jurisdiction of Mr Petersen, but rather something which fell to be dealt with by Mr van den Heever because he was the Head of Housing. He had been

referred to Mr van den Heever by Clive Anderson who worked in one division but the project was handled by Mr van den Heever in the housing section;

(l) Mr de Villiers Jnr stated that he had never heard of Mr Pather who was the Head of Housing or Mr Saccor who was the Deputy Head of Housing;

(m) with regard to the authority of van den Heever, Mr de Villiers Jnr said that although there were no other letters signed, there were a lot of communications with him in the form of emails. Everyone in the Nurcha/Tusk camp believed that 'the buck stopped with him' as Mr de Villiers Jnr put it, and all queries and wrong payments had been addressed to him and he had answered them. He believed that Mr van den Heever was managing the project and had authority to make all the decisions;

(n) with regard to the fact that the eThekwini Municipality may be required to pay twice, Mr de Villiers Jnr was aware of the possibility but stated that it was not a point that was ever emphasised. He said that he had never asked Mr van den Heever if he was authorised but Mr van den Heever had never said that he was not. At that stage they had dealt with numerous members of staff of the eThekwini Municipality who always referred to Mr van den Heever as the Head. He knew that Mr Sutcliffe had signed the s 21 agreement as the City Manager and he knew that he was the senior employee at the eThekwini Municipality;

(o) Mr de Villiers Jnr was also aware the Mr Petersen had concluded the contracts with the contractor and he was also of the view that Mr van den Heever was the cause of all the problems which the parties were experiencing.

[38] In reply to questions by the court Mr de Villiers Jnr stated :

(a) that he had given Mr van den Heever copies of the cessions relied upon by the plaintiff at the meeting of the 4th February 2010. It was at the stage when they were discussing the fact that they had reached a T-junction. Mr de Villiers Jnr only became aware of the other cessions when no payments were made and that had been the trigger to the meeting with Mr van den Heever. At the meeting he told van den Heever that he must note the dates of the cessions and drew his attention to the significance that they pre-dated the other suppliers' cessions. In the view of Mr de Villiers Jnr this gave him a pre-emptive advantage in law

(b) Mr de Villiers Jnr stated that the eThekwini Municipality knew that it should not recognise other cessions prior to the cessions made to the plaintiff because there were numerous discussions with Brett Gallagher, and according to Mr Gallagher this had been explained to Mr van den Heever when the irrevocable payment instructions had been agreed.

That was the plaintiff's case.

[39] The only witness for the defendant was Andre Dean Melvin Petersen (whom I have already referred to as 'Mr Petersen'). He is currently employed as the Head of the Supply Chain Management Unit in the eThekwini Municipality. Prior to 2014 he was the Deputy Head of Policy and Support Services since 2002. This was part of the Supply Chain Management Unit.

[40] Mr Petersen confirmed that he had signed the letter dated the 13th June 2009 accepting on behalf of the eThekwini Municipality, the tender made by the second defendant to construct 35 houses. He said the decision had been made by the Bid Adjudication Committee and the letter was drafted by a Mr Ibbie Mahomed on his behalf. He had signed because his role was to give effect to the decisions of the Bid Adjudication Committee. The only involvement of Mr Petersen was to issue the letter of acceptance of the tender. He played no further role in the conduct of the contract. Mr Petersen said that his delegated authority was set out beneath his signature so that people would understand that he was a duly authorised official to accept the tender on behalf of the eThekwini Municipality.

[41] He stated that he knew Mr van den Heever as a Housing Project Manager until he resigned. Mr van den Heever was approximately fourth in line in the department of housing. The head of housing was Mr Pather and immediately below him a Ms Gcabashe and below her Mr Jeff Nightingale. Mr van den Heever slotted in below Mr Nightingale. Mr Petersen stated that the designation 'Regional Manager Housing' was an accurate description of Mr van den Heever's tasks and that he operated in the inner west region based in the New Germany office in Pinetown.

[42] Mr Petersen was not involved in the compilation of the document with forms Annexure 'B' to the plaintiff's particulars of claim. He stated that because of the nature of the undertakings given in that letter he would have had problems signing it.

He played no part in the monitoring programme and had no knowledge of the repayments on the loan and agreements. Save for what was contained in the letter itself he had no background information to the letter.

[43] Mr Petersen said that Mr van den Heever would have had a budget in 2010 because each department had one. It would probably have been a large budget because of the fact that he was regional manager of the housing department of the Inner West, but Mr Petersen did not want to hazard a guess as to what it might be. Mr Petersen stated that only two persons, himself and Ms Bongiwe Nyandeni, had the authority to accept tenders which were awarded by the Bid Adjudication Committee.

That was the case for the defendant.

[44] The parties' representatives placed on record that the amount claimed by the plaintiff was no longer in issue, nor was the date from which interest was to run. The amount in question was R215 949,31 and mora interest was to run from the 20th October 2010 at the prime rate of interest of FNB plus 0,2 per cent per annum.

[45] Mr *Broster* recorded that the issue of a lack of authority to bring the action was also no longer an issue in dispute between the parties. The parties were in agreement that whatever the result of my judgment would be, it was to apply in the

case between the plaintiff and eThekwini Municipality and Bitline SA 569 CC under case number 811/2011 with the amount, if applicable, to be R132 252,96 with interest at the same rate from the same date.

[46] Mr *Troskie* SC who appeared for the plaintiff submitted that only two issues remained :

(1) the question of authority of Mr van den Heever;

(2) the meaning of Annexure 'B' to the plaintiff's particulars of claim.

[47] Dealing firstly with the question of authority, Mr *Troskie* submitted that every party concluding a contract is presumed to have the legal capacity to do so unless the contrary is proved. The onus of establishing a lack of capacity rests with the party disputing the capacity.

[48] In this regard he referred me to R H *Christie : The Law of Contract in South Africa* 5th ed at 227 :

'Every party entering into a contract is presumed to have the legal capacity to do so, unless the contrary is proved, so the burden of proving lack of capacity lies on the party setting it up as a defence. It is necessary to examine those parties whose contractual capacity is abnormal and in respect of whom this burden may therefore be discharged.'

(This passage also appears in *R H Chistie et al : The Law of Contract in South Africa* 6th ed) The authorities contained in the footnote to this quote are *Fick v R* 1904 ORC 25 28; and the *Serobe* judgment referred to below.

[49] Mr *Troskie* also referred me to the matter of *Serobe v Koppies Bantu Community School Board* 1958 (2) SA 265 (O) at 271 F – H. This matter concerned the power of a school board under the then education system to conclude an agreement with a teacher. Botha J referred to Volume 1 of Wessels's *Law of Contract* (2nd ed) where the learned author stated :

'All that the law requires a party to prove who alleges a contract is the existence of the agreement. If it contains all the essential elements of a binding contract and is enforceable in our courts, the law will presume that the parties were capable of contracting and that they intended to be bound by their promises. As, therefore, the capacity to contract is presumed, the incapacity to contract is an exception which the person who sets it up must prove (*Voet 4.4.12*.).'

Botha J then went on to state the following In the passage referred to by the learned author *Voet* states that :

"Furthermore in case of doubt every single contracting party is rather presumed to have had the legal capacity to carry out effectively the act to which he addressed himself; so that the need of proof appears to have to be laid upon him who asserts the contrary, as one upon whom a presumption fights."'

Based on these authorities the court held that the defendant school board had the power to conclude the alleged agreement with the teacher.

[50] Mr *Troskie* submitted that there was nothing in the conduct of Mr de Villiers Jnr in the conclusion of the agreement with Mr van den Heever to indicate that Mr van den Heever did not have the necessary authority to represent the eThekwini Municipality. The onus of demonstrating that he was factually not authorised rests

upon the defendant. The plaintiff avers that in the event that it is established that Mr van den Heever was not authorised then estoppel operates to establish the authority.

[51] Mr *Troskie* submitted that by virtue of the operation of the *Turquand* rule which is applicable to the eThekwini Municipality, Mr de Villiers Jnr was not bound to enquire whether Mr van den Heever was actually authorised to conclude the agreement in Annexure 'B'. In this regard he referred to *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA). This case concerned the application of the *Turquand* rule to trusts. At page 491 F – J, Farlam JA stated :

'… the trust deed provided that the trustees could empower one of their number to sign documents on their behalf, to implement any transaction in connection with the trust's affairs. It was said further that the respondent would not be in the position, nor was it expected of it, to inquire into the internal pre-requisites for authority, for example, a decision of the trustees. In this regard, the respondent relied on the so-called *Turquand* rule, first laid down by the Court of the Queen's Bench and confirmed by the Exchequer Chamber in *Royal British Bank v Turquand* (1856) 119 ER 886 (ExCh) … which has been adopted by our Courts as part of our company law … and been held to apply also in cases involving trade unions … A modern formulation of the rule which was approved by Lord Simons in *Morris v Kanssen* [1946] AC 459 at 474 ([1946] 1 All ER 586), is taken from *Halsbury's Laws of England* 2nd ed Vol 5 para 698 (see now 4th ed, re-issue Vol 7(1) para 980), and is in the following terms :

"(P)ersons contracting with a company and dealing in good faith may assume that acts within in its constitution and powers have been properly and duly performed, and are not bound to enquire whether acts of internal management have been regular."'

[52] Mr *Troskie* also referred to *Potchefstroom se Stadsraad v Kotze* 1960 (3} SA 616 (AA) at 621 B – C. Here, the municipality had claimed an amount as rent for a farm and the respondent denied his indebtedness on the basis that the parties had cancelled the lease. This had been done by the Town Clerk who wrote a letter confirming the arrangement. No trace of the letter in the minutes of the proceedings of the council could be found. The court held that the fact that the Town Council had in fact not authorised the cancellation of the lease was irrelevant and could not prejudice the respondent. The Town Council could not deny the authority of the Town Clerk because if the letter, which the Town Clerk had addressed to the respondent, did contain a notice of cancellation, the council was bound thereby. The suggestion had been made that the letter of the Town Clerk merely contained his personal understanding that the Town Board would be prepared to cancel the agreement. The court referred to the application of the *Turquand* rule and stated that a municipality, in the normal exercise of its functions, necessarily concludes contracts with members of the public. It would be unbusinesslike if the respondent had been duty-bound, when he received the Town Clerk's letter, to make enquiries to ensure that the Town Clerk was in fact authorised by the Town Council to convey the cancellation. The person who conveyed the communication was none other than the Town Clerk himself.

[53] Mr *Troskie* finally submitted that as no evidence had been adduced that Mr van den Heever was not authorised, the defendant bore the onus of showing that fact, and had not done so.

[54] With regard to the interpretation of Annexure 'B', Mr *Troskie* referred me to *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) and *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA). Mr *Troskie* referred me to the dicta of Wallis JA at page 499 G – H :

'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop a perceived literal meaning of those words but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stage but is "essentially one unitary exercise".'

[55] Mr *Troskie* referred me to the defendant's plea which states as follows :

'5

'In the alternative, and only in the event of the Plaintiff proving that the Regional Manager : Housing, had the authority to sign Annexure "B" to the Particulars of Claim then the First Defendant pleads as set out hereunder.

6.

On a proper construction of Annexure "B" to the Particulars of Claim

(a) the First Defendant undertook to do no more than to pay to the Plaintiff instead of the Second Defendant the amount certified as due to the Second Defendant for work actually done and certified in the execution of its agreement with the First Defendant;

(b) no independent liability arises resulting in the First Defendant being obliged to pay to the Plaintiff the amount which it lent the Second Defendant as opposed to the amount due to the Second Defendant for work actually done by it for the First Defendant.'

[56] Mr *Troskie* contended that the eThekwini Municipality had not paid to the plaintiff amounts certified as due to the second defendant for work actually done and certified in the execution of its agreement with the eThekwini Municipality. This was the very reason Mr de Villiers Jnr had the meeting with Mr van den Heever in order to attempt to rectify the damage caused by the fact that the eThekwini Municipality had paid out progress payments to the wrong parties in the first place.

[57] Mr *Troskie* also pointed out that, as between the eThekwini Municipality and the second defendant, the fact it was only obliged to pay into the second defendant's bank account amounts due for work actually done by the second defendant for the first defendant pursuant to the building contract, does not assist the eThekwini Municipality. If indeed the allegations in paragraph 6(b) of the plea were correct, no such evidence of progress payments were proved and the plaintiff must lose in any event.

[58] Mr *Broster* submitted that the contents of Annexure 'B' must be read together with the acknowledgement of debt which was Annexure 'A' to the plaintiff's particulars of claim. This is because both documents were signed on the same day. The acknowledgement of debt, however, was between the second defendant and the plaintiff. What the acknowledgement of debt did was to record the indebtedness of the second defendant to the plaintiff and set out a means for repayment of the

arrears which was to be made by way of monthly payment of not less than 22,59 per cent of each progress payment certificate. Mr *Broster* submitted that this was a novation of a portion of the building contract, and separated out the amount sued on from the building contract, and created a mechanism in the acknowledgment of debt for repayment.

[59] Mr *Broster* submitted that it was not unreasonable to conclude that both parties to Annexure 'B' believed that the contracts would be concluded, and that no double payments would be made. With regard to the last paragraph of Annexure 'B' it read :

'Irrespective of the aforesaid and whether the projects get completed or not, the amounts due to NURCHA/TUSK and Simunye will be the responsibility of eThekwini until such a stage as zero balance certificates are forwarded on each project to eThekwini.'

[60] Mr *Broster* submitted that this last paragraph was ambiguous and in order to conclude that a separate independent undertaking was created by eThekwini Municipality, it was necessary for Annexure 'B' to constitute an indemnity, a suretyship or a guarantee. He maintained that all of those legal concepts were inconsistent with the last paragraph of Annexure 'B'.

[61] Mr *Broster* submitted that the words 'as zero balance certificates' referred to progress payment certificates and meant that the contractor (the second defendant in this case) was not entitled to any further payments under the building contract. With regard to the repayment of the arrears, they would be taken out of the progress certificates as they were earned by the contractor. If nothing had been earned, nothing was there to be repaid.

[62] Mr *Broster* submitted that an indemnity, guarantee or suretyship would require a new authority from the eThekwini Municipality and has nothing to do with a housing engineer. Stating, as it does in the last paragraph of Annexure 'B' that amounts due will be the responsibility of eThekwini Municipality 'until such a stage as zero balance certificates are forwarded on each project to eThekwini' is entirely inconsistent with an unequivocal independent liability. All that is contained in Annexure 'B' read with Clause 2.1 of the acknowledgement of debt is a payment process which Mr van den Heever had authority to agree to. However, once he went beyond the strictures of that process, the agreement became something other than a variation of the initial contract. This was not a contract sanctioned by the eThekwini Municipality and not one upon which the plaintiff could rely.

[63] With regard to the question of authority, Mr *Broster* submitted that there are exceptions to the *Turquand* rule. He maintained that the *Turquand* rule is only available to a person who in good faith believes that the person with whom he contracts has authority. Mr *Broster* very fairly emphasised that there was no suggestion in this case that Mr de Villiers Jnr did not act in good faith.

[64] Mr *Broster* submitted that the person who should have been approached was in fact the City Manager and, in his absence, Mr Petersen because he was the person who had accepted the second defendant's tender on behalf of the eThekwini Municipality.

[65] In *Tuckers Land and Development Corporation (Pty) Ltd v Perpellief* 1978 (2) SA 11 (TPD) a company secretary had consented to the jurisdiction of the Johannesburg Magistrates' Court and the company had denied in a special plea that it had consented. The court held that the onus was on the plaintiff to show that the company secretary had implied or ostensible authority despite the defendant relying on certain other acts performed by the secretary on its behalf. The court here (Nestadt J) held at 17C that there were two factors to be considered in deciding whether or not the company secretary was impliedly authorised to sign the document. They were :

(a) the nature of the contract that he purported to conclude;

(b) the nature of his position with the company.

Having analysed these aspects, Nestadt J found that on the circumstances of that case, no prima facie case of implied authority had been established. In this regard he referred to the principle that where a person knowingly suffers another to do acts in his own name without any opposition or objection, he is presumed to have given authority to do those acts. The danger, in attempting to establish an implied authority by relying on the acts of the person who purported to represent the company was highlighted by the learned Judge.

[66] Mr *Broster* also referred me to *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 (SCA). This case dealt with the ostensible authority of a bank manager who accepted deposits from the public but misappropriated the monies. The bank manager had issued certain letters of undertaking. The court held that the representations which the bank manager himself made cannot be

viewed as the representations of the bank. However, the court held that the bank had held out its branch managers as its front to the world and its local spokesmen, and had created a façade of regularity and order that it made it possible for the bank manager to purse his dishonest schemes. The representation by the bank was that the manager was authorised to agree to deposit terms and take monies deposited even in non-routine transactions.

[67] Mr *Broster* submitted that on the facts of this case there was no actual authority and the plaintiff should have realised this. He also submitted that the nature of the undertaking was significant in that it was a separate undertaking to pay which was a new contract. He maintained that Mr van den Heever was entitled to re-arrange the original building contract because he was the Head of Housing, but he could not go outside of that contract, which he had done.

[68] The fact that no progress payments were made by the eThekwini Municipality to the second defendant after the conclusion of Annexure'B' has the consequence that there is nothing upon which the ambit of Annexure 'B' can operate, and to go outside the ambit of the contractual undertaking is not authorised.

[69] In this regard Mr *Broster* drew attention to the fact that Mr de Villiers Jnr appreciated the fact that if the work was not done there was a possibility that the eThekwini Municipality may have to pay twice – i.e. once on the original work done

and again on its contractual obligation to repay the plaintiff. This was something in respect of which it was improbable that it could be done by someone in his position.

[70] I shall deal firstly with the question of authority.:

(a) it is common cause that Mr van den Heever held the position of Acting Regional Manager, Housing Projects of the eThekwini Municipality;

(b) it was also common cause that the area of his jurisdiction was the Inner West, which is why he operated from the municipality's offices in Pinetown;

(c) it was the evidence of Mr de Villiers Jnr that he and his staff regarded Mr van den Heever as the 'Head of Housing' because all decisions relating to the conduct of the eleven building contractors were made by Mr van den Heever. Mr Petersen, who had concluded the agreement for the building contract on behalf of the municipality, stated that he had played no part in the execution of the projects and that is only function was to sign the acceptance of the second respondent's tender. There was thus no evidence that he was the appropriate person with whom the plaintiff should have negotiated;

(d) although the original memorandum of agreement between the municipality and the holding company was concluded by the municipal manager, Mr Sutcliffe, he too played no further part in the execution of the projects. That he may have been part of the dispute resolution provisions in the memorandum of agreement does not assist the eThekwini Municipality because the dispute resolution process was not raised in pleadings as a defence;

(e) when matters went awry, after the eThekwini Municipality paid out on progress payment certificates to other suppliers and the contractors in breach of its original undertaking to the plaintiff, it was Mr van den Heever to whom the representatives of Tusk turned in order to resolve the matter. It is clear from the evidence of Mr de Villiers Jnr that he believed at all times that as the 'Head of Housing' Mr van den Heever was authorised to conclude agreements with regard thereto;

(f) it is clear that the beliefs of Mr de Villiers Jnr were not induced solely by the representations of Mr van den Heever. The agreement which Mr de Villiers sought to obtain from Mr van den Heever – i.e. that the eThekwini Municipality 'assume ownership' of the debt because the non-repayment had been solely because of the fault of the eThekwini Municipality's employees, was not an agreement out of the ordinary or one which Mr de Villiers Jnr could reasonably have expected was beyond the authority of Mr van den Heever to conclude.

[71] In all those circumstances I am of the view that Mr van den Heever, if not expressly authorised, had the ostensible authority to conclude the document Annexure 'B'. By the conduct of its employees generally, and the employees of Tusk and the plaintiff were led to the reasonable belief that Mr van den Heever was the person authorised to deal with all matters relating to the ongoing conduct of the programme.

[72] Dealing with the interpretation of Annexure 'B', in my view it very clearly in its terms sets out the liability of the eThekwini Municipality to ensure that the plaintiff ultimately received its bargain. With regard to the background circumstances leading up to the conclusion of the agreement, the attitude of Mr de Villiers Jnr was that plaintiff would either attach all the progress payments (with the result, according to Mr van den Heever, that the projects would come to a grinding halt) or the plaintiff could be secured by the eThekwini Municipality undertaking to ensure that the repayment of the capital sum due (and which had not been paid because of the fault of the municipality's employees). The probability is overwhelming that Mr van den Heever wished to avoid the project being a failure. Agreeing to the terms of Mr de Villiers Jnr ensured that it would not be.

[73] In my interpretation of the document I also place emphasis on the wording of Annexure 'B', including the following :

'eThekwini, notwithstanding the proposed action plan as proposed hereunder, takes full responsibility for the repayment of the outstanding amounts…'

'eThekwini with the support of LDM will ensure the repayments to NURCHA/TUSK and Simunye as per the acknowledgement of Debt and ultimately the total loan.'

'Irrespective of the aforesaid and whether the project gets completed or not, the amounts due to NRCHA/TUSK … will be the responsibility of eThekwini until such stage as zero balance certificates are forwarded on each project to eThekwini.'

[74] With regard to the last sentence in Annexure 'B' it is not necessary for me to decide precisely what was meant by 'zero balance certificates' in the sense that that

phrase could have referred to the fact that no further progress payment certificates would be forwarded to eThekwini Municipality or that it was intended to mean that the loan by the plaintiff had been extinguished. I appreciate that in its terms it may be an ambiguous statement because principal engineers do not, it was submitted, conventionally issue 'zero balance certificates' because the nature of progress payment certificates is to obtain payment. If no payment is due there seems little point in forwarding a zero balance progress payment certificate. Mr *Troskie* submitted that this was clearly a reference to a certificate reflecting a zero balance on the loan to the plaintiff.

[75] Whatever the correct interpretation of the last paragraph of Annexure 'B' may be, in my view the document, read a whole, and taking into account the circumstances surrounding its conclusion, clearly anticipates that eThekwini Municipality will ensure that the whole amount is paid to the plaintiff.

[76] I accordingly make the following order :

1. Under case number 810/2011 :
   (a) The first defendant is to pay to the plaintiff the sum of R215 949,31;
   (b) The first defendant is to pay interest on that sum calculated at the rate of First National Bank's prime rate of interest plus 0.2 per cent per annum from the 20th October 2010 to date of payments;
   (c) The first defendant is to pay the plaintiffs costs of suit, such costs to include the costs consequent upon the employment of senior counsel.

2. Under case number 811/2011 :

   (a) The first defendant is to pay to the plaintiff the sum of R132 252,96;

   (b) The first defendant is to pay interest on that sum calculated at the rate of First National Bank's prime rate of interest plus 0,2 per cent per annum from the 20th October 2010 to date of payment;

   (c) The first defendant is to pay the plaintiff's costs of suit.

Date of hearing : 9th September 2014

Date of judgment : 17th September 2014

Counsel for the Plaintiff : A J Troskie SC (instructed by Larson Falconer Inc)

Counsel for the Defendant : L B Broster SC with J P Broster (instructed by Berkowitz Cohen Wartski)