IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 2083.2003

In the matter between

M W ARCHITECTS (PTY) LTD Plaintiff

and

THE PRINCIPAL SECRETARY,

MINISTRY OF PUBLIC WORKS AND TRANSPORT 1st Defendant

SWAZILAND GOVERNMENT 2nd Defendant

THE ATTORNEY GENERAL 3rd Defendant

Coram: Annandale, AC J

For the Plaintiff :Mr. S.A. Nkosi

For the Defendants: Mr. P.K. Msibi

JUDGMENT

30 September, 2005

[1] In this action, the Government is sued for unpaid professional architectural services under three separate

claims, amounting to some E3.8 million. The matter arises from architectural drawings that were presented by the plaintiff to the Ministry in respect of proposed extensions to and building of new offices for the Cabinet. None of the structures have been either altered or built. Government repudiates the claim and denies any liability at all. Statutory demand was made and is not in issue.

[2] What requires to be determined is whether the defendants are liable to pay any or all of the three claims against it. The first claim of E551 572.47 concerns the preparations of drawings and designs with regard to rehabilitation of the existing Cabinet Offices in Mbabane, the second claim of E1 832 487.60 regarding the construction of new Cabinet Offices at Emvakwelitje and the third claim of E1 494 980.80, again regarding the construction of new Cabinet Offices, but at a different site known as PPCU.

[3] It is common cause that when alterations to existing Governmental buildings are considered, or where new structures are envisaged, the first defendant, the Ministry of Public Works and Transport ("The Ministry") forms the link between the second defendant (the

Government of Swaziland) and contractors, suppliers and consultants outside the civil service when such entities

are engaged. Similar services are also provided within Governmental structures. From time to time, exigencies determine whether for instance architectural expertise is to be outsourced or not. It is also common cause that a capital project like the erection of an office block follows a procedure involving interministerial coordination. The client Ministry which requires a new building or changes to an existing structure must liaise with both the Ministries of Finance and Works in the course of the process. Further, the estimated costs of such structures are calculated by quantity surveyors, based on information obtained from architectural design drawings. The costs of these drawings and sketches are in turn calculated on the estimated costs of the buildings, not on pre-agreed amounts of money. The latter course is an optional contractual agreement which is not applicable in the present matter.

Claim 1, referring to the extension of existing Cabinet Offices, is alleged by the plaintiff to arise from both oral and written instructions to it by the Ministry. Annexure "A" to the summons is headed as "Notifications for appointment of professional consultant". It is a pro forma document, issued by the Ministry and directed to the plaintiff company. It reads that:-

"You are hereby informed that you have been pointed to undertake the following projects: Extension of Cabinet Offices. You have been selected to carry out the following duties: architectural services. Fees will be paid in accordance with the standard fee scale of the professional body for architects of which you are a member. NB: Government will not honour

claims without consultants agreements."

[5] There is serious dispute about the import of the notification as set out in this letter, to which I revert below. The essence of the dispute is that according to the plaintiff, this document in fact is regarded, as a matter of established practice, to form the consultant's agreement whereas the Ministry has it that a consultants agreement is only entered into much later, after the work has been done, not before the time.

[6] The Ministry pleads that the architects were not appointed at all, orally or in writing, to do the architectural services as it claims, that annexure "A" is not a consultancy agreement either and therefore, there is no contract or obligation to pay. Government views the quoted annexure as "a willingness to negotiate and to do possible business". It pleads that only once a consultancy agreement has been reached, which would include terms and conditions, the architect would only then start to prepare the sketch.

[7] The problem that arises from this was dealt with in the evidence heard at the trial, with the position of the plaintiff being that it is impossible to go about it in this manner as it is only after sketches have been made, quantity surveys done on the basis of the design sketches and a costing estimate made, that at that time the standard scale of fees can be used to calculate the consultant's fees, a percentage basis, at which time the consultancy agreement is settled.

[8] Claim 1 is further based on the allegation that as architects for the Ministry, it performed as instructed and submitted the sketch plans and designs to the Ministry who accepted it, following it up with an invoice in accordance with the applicable fees. To this, Government pleads that not only was no request made or mandate given to make such drawings, but that the drawings in issue were made by an employee of the first defendant, Mr. Sydney Jele. Further, it alleges that the plaintiff fraudulently passed it off as if its own creations and in any event, the plaintiffs only active director, Ms Mbhamali, was sick during the period in issue, implying that she could not prepare drawings for the plaintiff at that time.

[9] It is therefore that the Ministry denies any liability at all to pay the invoiced amount for an extension to the existing Cabinet Offices. It further adds that it had previously contracted with plaintiff for an extension to the Cabinet offices (rehabilitation) which work was fully paid for.

[10] Claim 2 which is in respect of new Cabinet Offices at Emvakwelitje is claimed to follow oral instructions to prepare architectural design drawings and sketches. The plaintiff pleads that the second defendant (Government, more precisely stated in evidence as the Secretary of Cabinet) engaged it as principal client which proposed totally new offices (as opposed to extending the present offices) at a new site. This new site is stated to have been Emvakwelitje, identified by the Ministry. The formal instructions, confirming the verbal mandate by the second defendant, are said to be contained in annexure "DM2".

[11] This document closely resembles annexure "A" (supra). In form, it seems to appear more in line with a computer generated version of the pro forma, eliminating words that were deleted by hand in the printed version and having inserted information in typescript, not longhand. This time, instead of relating to "extension of Cabinet Offices," it reads that it refers to a "new Cabinet Office block -Mbabane." It furthermore has provision for a signature on behalf of the Principal Secretary, signed by Masilela.

[12] As with the first claim, the defendants plea absence of any authority or instructions to prepare and submit architectural plans for the Emvakwelitje site. It is averred that the Ministry issued internal instructions to its employees not to engage external consultants until further notice as it abandoned the rehabilitation or extension project at the existing Cabinet Offices and was still in the process of looking for a possible new site. Following the instructions within the Ministry itself to suspend the Cabinet Offices project and with no uplifting of the moratorium, no new site having been identified, the defendants state that they did consider Emvakwelitje as a possibility but never decided on it nor did they tell the plaintiff about it. Again, as no "consultancy agreement" was entered into, no obligation to pay is said to arise, due to no mandate being given to prepare any architectural design drawings.

[13] Again, the import of annexure "DM2" is put in issue, on the same basis as with the first claim. The defendants also cry foul yet again, as with the first claim, in so far as they have it that the drawings in issue were not authorised by the plaintiff but drawn by their own civil

servant in their employ and paid by them. That these drawings are said to be stamped and receipted by the Ministry is held out to be a further fraudulent act to compel payment.

[14] Plaintiff bolsters its claim by incorporating a reference to the initial invoice it submitted to the Ministry, in the amount of E2 510 900.40. It then goes on to say that the amount itself was queried by the Ministry, with the result that plaintiff revised and reduced it accordingly and re-submitted a new invoice for payment on the Emvakwelitje site, amounting to E1 832 487.60 (annexure "MB3"). Defendants deny the issue of invoices herein "in the strongest possible terms."

[15] Claim 3 again features architectural sketch plans for a new Cabinet Office block, this time at a site known as PPCU. Plaintiff pleads that oral instructions for additional sketch plans followed soon after completion of the Emvakwelitje plans, since the first site was unsuitable. This appointment is said to have been confirmed in writing as set out in annexure "DM2", the same letter of the same date as relied on in claim 2, as with the other claims, due performance by plaintiff and acceptance by the Ministry is claimed. Plaintiff claims E1 494 980.80 for its services (annexure "MB2" being a copy of the invoice) calculated in accordance with the standard fee scale of the professional body of architects, as is the calculations said to be done in each claim.

[16] Again the defendants plea that no instructions were given to plaintiff to prepare any drawings for the site (PPCU), denying any project relating to the site. It is pleaded that there were internal discussions about such place but that it did not go beyond the corridors of the Ministry and certainly not to the plaintiff.

[17] Thus, in all three claims the defendants essentially plea that if the plaintiff prepared any architectural drawings relating to Cabinet Offices, it must have been a frolic of her own as Government did not mandate and authorise any of it. The furthest it went was to extend invitations to negotiate contracts, which could only have resulted in claimable work if consultancy agreements were entered into, which was not done. Also, the first two claims are said to be fraudulent as the Ministry's own architects did the drawings and not the plaintiff.

In all three claims there are alternative prayers for reasonable remuneration as implied terms of the agreements. In none is there any dispute about the actual calculated quantum but a denial of any duty to pay at all. There is also no dispute as to the quality and suitability of the work done. Punitive costs and interest is also claimed but no foundation for costs on the attorney and (own) client scale is established in the pleadings nor did it come to the fore in the course of evidence or argument.

The issues in dispute were ventilated over four days of trial wherein four witnesses were heard. Voluminous evidence resulted in a transcript of some 500 pages, which for the first time during my tenure on this bench was made available to the court prior to preparing a judgment. I record my appreciation for the transcript.

To summarise the voluminous evidence relating to the dispute I can do no better than making liberal use of the extensive written argument submitted by counsel. At my suggestion, written submissions were prepared in long form and to the greater extent it is incorporated herein. I now turn to deal with the evidence.

[21] The plaintiff called three witnesses to substantiate and amplify the pleadings. Ms Dumisile Mbhamali is an architect and director of the plaintiff firm. She represented the plaintiff in most of its dealings with Government in this matter. At diverse times, Mr. Sifiso Dlamini, a government employed architect, also worked for plaintiff firm. He did this in order to ready himself for his professional exams, to become a fully fledged member of the profession. During the time he worked on "secondment" with MW Architects, he partook in the preparation of the plans and drawings that are the subject matter in this case, together with Ms Mbhamali. In addition, he also formed the liaising function between the defendants and plaintiff, as well as the actual client, Cabinet. Plaintiff also called Terrence Gule, the senior architect in the Ministry of Works.

[22] The defendants called the chief building engineer, Mr. Mkhululi Mamba and another architect, Mr. Sydney Magagula both employed in the Ministry of Public Works and Transport.

[23] From the evidence it was established that Mr Magagula was the person who had the

responsibility to liase between the client being the Government (2nd defendant) and the plaintiff. He would in all instances be the person who would issue instructions to plaintiff on the project. Magagula, it seems , was not only the 1st defendant's project architect but was also seconded to plaintiff to work with plaintiffs architects on the design drawings. The reason given was that he intended to sit his professional architectural examination and Government had requested plaintiff to allow Magagula to work with them on the design drawings for the cabinet offices as part of his preparation. With regard to the work done it is clear that plaintiff did prepare initial design drawings for the extension of cabinet offices and that it submitted these initial drawings and was paid in full for these drawings.

[24] The plaintiff with respect to Claim 1 called Ms Dumsile Mbhamali, a director of plaintiff who is an architect. Mbhamali stated in her evidence that after plaintiff had completed the initial design drawings for which plaintiff was paid the government requested plaintiff to draw other design drawings which are termed rehabilitation of cabinet offices. She handed in a brief which she says was prepared by Mr Sydney Magagula, the project architect. This statement is not contradicted by the evidence and Mr Magagula who was called as a witness for the defendants confirmed that he had indeed drawn the brief on the instructions of the client being the cabinet office. Ms Mbhamali states that plaintiff did proceed to prepare design drawings based on this brief and she handed in a set of drawings (exhibit "A").

It is gathered from the evidence that cabinet needed more accommodation, hence these new

instructions. Cabinet required that the accommodation include a conference facility amongst other things. This is confirmed by the evidence both Ms Mbhamali and Mr Magagula. The plaintiff also called Mr Terence Gule who is the 1st defendant's Senior Architect. Gule states in his evidence that he was at that time not aware of the second instruction or the brief but came to know about the drawings for the rehabilitation of cabinet offices after the work had been completed by plaintiff. Gule who is Mr Magagula's senior does however concede that if Magagula issued the instructions to the plaintiff then such instructions are valid and that plaintiff is right in claiming payment for the design drawings.

The defendants called Mr Mkhululi Mamba, Chief Buildings Engineer employed by the 1st defendant. Mr Mamba's evidence with regard to Claim 1 is that there was no instruction given by the 1st defendant to plaintiff to prepare these design drawings. His evidence is however clearly contradicted by that of defendant's other witness, Mr Magagula, who confirms that he prepared the brief instructing plaintiff to prepare the design drawings. It is also contradicted by the evidence of the senior architect Gule who clearly states that Magagula has every right as the 1st defendant's Projects Architect on the project to issue instructions to plaintiff and who further conceded that the brief was valid and that if Magagula issues instructions then such instructions are valid.

[27] During cross-examination Mamba stated that he has no knowledge of the rehabilitation project. It follows therefore that whatever happened with regard to that project would fall

outside of his personal knowledge. One may reasonably infer therefore that he neither denies nor admits that laintiff was rightfully instructed to make the design drawings in respect of the additional work and that plaintiff did prepare the drawings and is entitled to payment thereof. It is thus very clear that nothing turns on the evidence of Mr Mamba in this regard.

[28] Mamba gave further evidence to the effect that he issued instructions that all subsequent work on the cabinet office design drawings must be done in -house. However he fails to say as to when this instruction was given. Magagula on the other hand confirms that such instructions were given but only after he had prepared the brief and Plaintiff had completed the design drawings for the rehabilitation of the cabinet offices. Even if such instruction had been given it seems to me that it is clear that Plaintiff was never advised of this and that Plaintiff rightfully proceeded to work on the design drawings having been properly instructed by the project architect being the 1st Defendant's representative on this project.

[29] Mr. Msibi argues on behalf of the defendants that the agreement between the parties falls outside the contractual capacity of Magagula and that whatever "instructions" may have been given, it is invalid. He says that it has been established from the evidence of Mr. Mkhululi Mamba that in relation to the first claim in the summons, which is the extension to Cabinet Offices project, there was no communication at all by the client to the Ministry of Works for the additional work that was allegedly done by the plaintiff on behalf of the defendants. Plaintiff decided to deal herein with the client directly instead of dealing with the Ministry of

Public Works and Transport. The contractual capacity for the cabinet offices are only limited to giving instructions to the Ministry of Public Works and Transport in writing and cannot deal with outsiders without involving the Ministry of Public Works and Transport.

[30] He continues to argue that the evidence shows further that the plaintiff herein dealt with a Government Officer who at the time was seconded to plaintiffs offices for articles of clerkship and/or training. Ms. Mbhamali told this court that she thought she was dealing with the right person by taking "instructions" from her own employee who was also a trainee, one Mr. Sydney Magagula.

[31] The problem with this argument is that even if Mamba might have lacked the authority to do as he did, there was a prima facie valid instruction given to an outsider, the plaintiff, by the person representing the Ministry, the liaison person.

[32] It cannot be expected of plaintiff to verify if the domestic line of authority within the Ministry has been properly followed when it accepted the work mandate.

[33] A further and serious problem that I have is with the evidence of the chief building engineer, Mr. Mamba. He did not make an impression of any positivity. To the contrary, I gained the impression that Mamba tailored his evidence to suit the occasion. He would not relent to admit mistakes where it clearly had occurred - rather, he would endeavour to transfer

blame to any convenient party, mostly towards Mr. Dlamini and Ms Sukati. His own line of authority within the Ministry was open to allow mistakes to occur.

[34] My further problem with his evidence, in all of the claims, is his continued view of when consultant's agreements came into existence. Contrary to the persuasive evidence of all other witnesses, he regards steadfastly that letters of appointment such as exhibit "A" is merely an invitation to do business. Ultimately, a formal consultant's agreement may well be required to effect payment, but the evidence heard at the trial very clearly indicates otherwise.

[35] To formulate the official "consultant's agreement," it has to be preceded by the actual drawings and plans from which a costing estimate is made which is used in turn to calculate the remuneration. This is done on a "sliding scale" basis, as evidenced in exhibit "D" - the architectural fees schedule. Different cost brackets attract a base fee plus a percentage of the project cost and becomes payable on completion of different stages of the work.

I cannot find Mamba's evidence to be in consonance with the reality of the matter. Furthermore, it seems to be a well established practice within the ministry, despite Mamba's contrary version, that letters of appointment are used as a basis on which consultancy work is done, thereafter, only once costing has been done, a basis is then established on which the architectural fees are calculated. That is the time when the consultant's agreement is made and not earlier. The architectural design drawings are made on strength of the letter of appointment, not the consultant's agreement. The fees cannot be calculated before the drawings have been done.

It is for these reasons that Mamba cannot be regarded as a credible witness when he categorically wants the cart to be put before the horses, to convey to the court that no mandate to perform work exists before the consultancy agreement is made.

With respect to claim 2 the plaintiffs Ms Mbhamali gave evidence to the effect that after having completed the design drawings for the rehabilitation of cabinet offices, she was advised that cabinet had changed its mind on the rehabilitation of the cabinet offices and now required that a new cabinet office block be designed. In essence the client had decided to abandon the idea of rehabilitating or extending the existing offices and embark on a new scheme.

[39] Ms Mbhamali was advised by Mr. Gule and Mr Magagula that cabinet had identified a new site for this project, being the Emvakwelitje site. Plaintiff was given instructions to design the new office block for that site. The evidence of Mr Gule confirms that Ms Mbhamali was actually taken to the site. Mbhamali also states that with respect to this new scheme plaintiff was given another letter of appointment which appears as annexure "DM2" to the plaintiffs particulars of claim. This letter of appointment is the same as annexure "A" in most respects except that it states that "you are hereby informed that you have been appointed to undertake the following project (s) "NEW CABINET OFFICE BLOCK -MBABANE" However unlike annexure "A" annexure "DM2" is signed by a Mr Masilela (the 1st Defendant's Quantity Surveyor) on behalf of the Principal Secretary at 1st defendant.

[40] Ms Mbhamali in her evidence states that plaintiff acting on the instructions prepared the design drawings for this project and that it took Plaintiff a considerable length of time (approximately 5 months) to complete the drawings. She further stated that the drawing work was done by Sydney Magagula the 1st defendant's project architect, Mr Dlamini an employee of plaintiff who is a architectural technician, and herself as Supervisor of the work. Magagula at this time was seconded to plaintiff.

[41] Upon completion of the exercise the drawings were submitted to 1st defendant and the client. Miss Mbhamali handed in a set of drawings for this scheme which were marked exhibit "B" by the Court. The plaintiff called Dlamini who confirmed that he had worked together with Magagula and Ms Mbhamali on these drawings; in fact the majority of these drawings bear his name and that of Magagula. The plaintiff also called Mr Gule the 1st defendant's senior architect who confirmed that plaintiff had been appointed and instructed to prepare the design drawings for the Emvakwelitje site and confirmed that the set of drawings exhibit "B" were indeed the drawings that plaintiff had submitted to 1st defendant and the client Cabinet. The defendants called Mr Magagula the Projects Architect who confirmed that the plaintiff had received instructions to prepare these drawings and he further confirmed that he had worked on the drawings with Dlamini and Mbhamali.

He confirmed that during this time he had been seconded by 1st defendant to work with the plaintiffs architects on this new scheme. The defendants called Mr Mamba whose evidence was that he had instructed his subordinates to do the work within the ministry and had instructed them not to involve outside architects in this new scheme. He denied that instructions were given to plaintiff to prepare the design drawings. He however could not explain how plaintiff had been appointed and his evidence sharply contradicts that of Gule and Magagula; he said that as far as he was concerned the design drawings had been prepared at the ministry by the architects employed there.

It is important to note that when asked where these drawings were he responded by saying they were somewhere in the ministry building, however despite that his evidence carried on to the next day he failed to produce the drawings he was referring to. The defendants failed to call any witness who could confirm Mamba's version or at the very least produce the drawings Mamba claims were prepared in-house at the ministry. It is instructive that the defendant's attorney failed to question Gule or Magagula about the existence of these drawings. It was clear from both their evidence that there were no such drawings in existence. Mr Mamba's version is unreliable and cannot be accepted on this issue. What is also clear is that these design drawings were submitted and approved by 1st defendant and the client after certain modifications had been made to them.

The defendants argue that there was no serious intention between the parties to contract and that Magagula did not obtain authority from his superiors to instruct plaintiff to do any work at all. Fraud is alleged to be the basis of non-existent claims.

Again it needs to be repeated that the internal ministerial administrative hierarchy cannot now be brought into play as a basis to avoid liability if it was at fault. A representation was made to the plaintiff that it was mandated to perform. In effect the plaintiff is sought to be found to have done the work either as a frolic of its own or otherwise without the Ministry having authorised its representative to do as he did. It would be folly to expect each and every government contractor to first enquire into and establish if the internal procedures have been complied with before it accepts to perform under strength of instructions to do so.

An analogous situation involves the third claim. The plaintiffs Mbhamali said in her evidence that after the plaintiff had completed the design drawings for the Emvakwelitje site the government once again changed its mind and decided that the designs for Emvakwelitje be adapted to a new site called the P.P.C.U. site. She got to learn about this new scheme when she attended a meeting at the 1st defendant's offices at which all the project consultants and the project architect Magagula were present. It was there that she learnt that the project architect had already started working on the new scheme.

Her evidence is that she questioned the project architect as to why he was doing the work in-house when the plaintiff had been appointed as the architect for the project. The result was that the project architect gave her the computer discs that he was using to prepare the adaptation of the Emvakwelitje design drawings to suit the new P.P.C.U site. These discs were taken to her office and after she modified and completed the designs, she handed in these drawings which were marked as exhibit "H". Her evidence is borne out by that of Dlamini whose evidence on the matter was that Mbhamali had brought the discs to plaintiffs offices and he and Mbhamali

worked on the designs and completed the drawings.

Magagula's evidence also bears out this series of events as he unequivocally says that he did hand over the computer discs to Mbhamali and issued instructions that plaintiff prepare the design drawings.

The reasons he gives is that he did so as plaintiff had been properly appointed as the project architect in terms of annexure "DM2". He does however state that the Chief Buildings Engineer, Mamba, had previously informed him that the drawings should be done in house. Magagula however countermanded these instructions on the grounds that plaintiff had been properly appointed as the architects for the project and hence he gave the instructions for plaintiff to proceed and prepare the design drawings for the P.P.C.U site. The evidence of Gule in this respect was that as far as he was concerned the instruction to adapt the Emvakwelitje site designs for the new P.P.C.U. site was to be done in-house by Magagula. He however does concede that the final drawings for this scheme were prepared and completed by plaintiff. His view is that if Magagula did issue the instruction to plaintiff then such instruction was lawful and that plaintiff must be remunerated for the work done.

[49] On the other hand the Chief Buildings Engineer, Mamba, stuck to the point that he had given instructions that these designs should be prepared in-house. He however could not deny that Magagula had given instructions to plaintiff. All in all it seems that Mamba was quite

unaware of what his subordinates were doing at the time. He failed to give any reasonable explanation as to how the letter of appointment ("DM2") was issued to plaintiff. He does not challenge its authenticity. He also failed to produce the drawings that he claimed had been prepared in-house at the Ministry. The defendants failed to bring any evidence to prove that the drawings were done in-house at the ministry, to counter the evidence of the plaintiff.

[50] Furthermore, it has to be borne in mind that the PPCU site was an alternative to the original Emvakwelitje project and that the original designs had to be adopted to cater for differences. It is these initial stages of adaptation that was commenced within the Ministry but all further work was done by plaintiff.

[51] Ms Mbhamali, Mr Gule, Mr Magagula and Mr Mamba all confirmed that annexures "A" and "DM2" are valid documents which are issued by the 1st defendant's Quantity Surveying Department. These letters of appointment are standard and are only issued after the 1st defendant has nominated a consultant for a particular project. The 1st defendant's nomination of the particular consultant is then given over to the Central Tender Board. Should the Central Tender Board approve of the nominee consultant then in such instance the 1st defendant is duly advised by the Secretary to the Central Tender Board by letter. Upon obtainance of the approval it is only then that the 1st defendant's quantity surveying department issues the letters of appointment.

[52] Lengthy evidence was led with respect to the letters of appointment, annexures "A" and "DM2". The evidence of Ms Mbhamali is that in her experience as an architect dealing with the 1st defendant, some seven years, upon receipt of the letter of appointment there is a process which leads up to the drafting and signing of the consultants agreement. This process is that the architect receives instructions and then prepares design drawings which define the concept of the project. These design drawings are then utilised by the 1st defendant to quantify the cost estimates of the project. This involves stages 1 to 3 of the Standard Services as more fully appears in the Architectural Fees Schedule which was handed in by Ms Mbhamali as exhibit "D".

It is only upon quantification of the cost estimates of the project that it becomes possible to draw up the consultancy agreement which has incorporated in it the cost estimates of the project. All the four witnesses concur that it is indeed the design drawings which lead up to the cost estimates being done by the quantity surveyor. Three of the four, Mbhamali, Gule and Magagula all state that, in their collective experience, which is considerable, the preparation of the design drawings is always done first and that the architect is paid fully in terms of the Fees Schedule. Mamba on the other hand stated that the letters of appointment are merely an invitation to enter into a contract or to do business and do not constitute a binding contract. His evidence is again at odds with that of Gule and Magagula. It is only after the design drawings have been completed and the cost estimates for the project calculated that a consultants agreement is entered into.

Mr Mamba is not plausable in his assertions. It is inconceivable that a situation in which an architect receives instructions, is duly appointed to render architectural services and proceeds to complete stages 1 to 3 of the Standard Services can be said not to have contracted with the 1st defendant. The 1st defendant seems to have put all of its faith in the nota bene which appears at the bottom of the letter of appointment i.e., "NB Government will not honour claims without consultants agreements". The interpretation they afford this nota bene is that it is somehow indicative that the letter of appointment, even though accepted by the architect, does not constitute an offer to do business. This interpretation is misleading and of no value as the wording does not in any event connote a negation of the notification for appointment letter.

[55] The letter of appointment is just that - it appoints the architect to carry out architectural services on behalf of the 1st defendant. If the architect acts on strength of the appointment, receives instructions and proceeds to prepare the design drawings a contract is in existence. Even Mr Mamba in his evidence concedes that an architect who completes stages 1 to 3 of the Standard Services has to be paid for the work done. Mamba's assertions that he gave instructions for the work to be done in-house is indicative that he may have been experiencing an administrative problem within his department. This does not have any bearing on the plaintiffs claims, as by his own admission, neither himself nor anyone else from 1st defendant ever informed the plaintiff, whether verbally or in writing, that plaintiffs appointment was now withdrawn and that the preparation of the design drawings would be carried out within the 1st

defendant's ministry by the 1st defendant's own architects. On the contrary, it is clear instead that Magagula in his capacity as 1st defendant's project architect for the cabinet offices issued direct instructions to plaintiff to prepare the design drawings for all three projects.

[56] The defendant's case is that no contract came into existence in any of the three claims and that between Magagula and Mbhamali there can only be a fraudulent concoction to milk Government of unearned money. There is no evidence to support such a suggestion.

[57] The two of them did work together but on a formally established basis of him being seconded to her firm to gain the necessary skills and experience for his final admission as architect. He also was the link between the defendants and the plaintiff.

[58] Mr. Msibi submitted that the court should realise that the evidence of Magagula should be treated with the same level of caution as it would do with the evidence of an accomplice witness in a criminal case because it is apparent that this witness was attempting to defraud the Government in this matter and as such his evidence has to be treated with greater care and suspicion because whatever he says is clearly in defence of his own unlawful actions.

[59] Magagula was not accused of fraud in cross examination to the above extent and thus did not motivate why it should not so be found. I do not make such a finding either. On the contrary, Magagula made a far better impression as a reliable witness than what his superior, Mr. Mamba did.

[60] Having established that there was a contractual relationship between plaintiff and 1st defendant it becomes clear that the 1st defendant through the Chief Buildings Engineer refused to sign the consultants agreements which were prepared and signed by the plaintiff. The result is that Mamba's refusal to sign the consultants agreements (which were handed into court by Ms Mbhamali as exhibits "E" and "F") culminate in the Government refusing to honour the plaintiffs claims for work done. That is the reason that the plaintiff has brought a suit against the government. The project of rehabilitating and/or building the cabinet offices has been put on hold by the Government and it is understandable why Mamba refuses to sign the consultancy agreements as it seems that Government was not then and is not now in a position to proceed with the construction of the cabinet offices.

[61] However this does not detract from the fact that plaintiff did prepare the design drawings for the three projects. Mr Mamba's refusal to sign the consultants agreements and by extension refusal to honour plaintiffs claims is in terms of the evidence unwarranted. The Government is by law obliged to honour the claims as submitted by the plaintiff and there is no factual or legal reason why the court should not made an appropriate order.

[62] It is also clear that the defendants did not challenge that the amounts claimed are in any way not appropriate in terms of the Architectural Fees Schedule (exhibit "D"). The defendants' liability does not rest on the basis of a quantum meruit but it is established by the evidence of

Ms Mbhamali, Mr Gule and Mr Mamba that exhibit "D" is in fact the basis upon which calculations for the fees of architects employed by the 1st defendant must be calculated.

[63] The issue which the evidence of Mamba seems to allude to is that plaintiff undertook the work, which in his evidence he does not deny was done except that he claims he knew nothing about it, but that it is not entitled to any remuneration. This is a similar matter which was dealt with in the case of De Zwaan V. Nourse 1903 TS 814 where Innes C.J. and Mason J had opportunity to analyse the law in this regard. Mason J. who delivered the judgement states at page 817:

"On considering the whole evidence we have come to the conclusion that the burden of proving that there was a definite offer to make plans without remuneration has not been discharged by the defendant".

The burden of proof in this instance lay with the defendants to prove that Plaintiff undertook the work to make plans without remuneration. There is no evidence which was offered to discharge the burden of proof by the defendants. In the De Zwaan case the Court concludes at page 823 to 824:

"Now the plaintiff was employed to make preliminary sketches to show how the ground could best be utilised, and he was given certain instructions with reference to portions of the proposed

buildings. It is not contended, apart from the question of limit of cost, that he did not exercise proper skill in the rough plans which he submitted, or that he deviated from the instructions which he received. We have also come to the conclusion that there are no circumstances proved in this case which justify the inference that the Plaintiff intended to work for nothing. The result is that we consider him entitled to some remuneration on the general principle that an architect who is employed to prepare designs or preliminary sketches for a building, and who exercising proper professional skill, complies with the instructions he has received, is entitled, should the employer decide not to proceed further so far as those sketches are concerned, to a reasonable reward unless there are circumstances or agreements indicating clearly a contrary understanding".

That the plaintiff did do work diligently and with appropriate skill is determined on the evidence of Ms Mbhamali and Mr Dlamini and it was not in any manner refuted by evidence to the contrary brought by the defendants. That under the circumstances the plaintiff is entitled to remuneration for the work done is further strengthened by the following extract derived from "The Law of Building and Engineering Contracts and Arbitration, 5th Edition" (1994), Juta, by H.S Mckenzie where at page 76-77 it is said:

"In the vast majority of cases architects are individually appointed and are employed in the first instance to draw plans for a proposed building. Once an architect has been appointed, and such appointment may be oral or in writing, there is a binding contract in existence between the architect and his employer. Accordingly an architect who is employed to prepare designs or preliminary sketches for a building, and who, exercising proper professional skill, complies

with the instructions he has received, is entitled to remuneration whether the employer should decide to proceed further with the work or not, unless there are circumstances or agreements indicating clearly a contrary intention. It would seem that, in the absence of agreement to the contrary, an architect is entitled to remuneration whether his employer approves of his designs or not It has further been held that where an architect has been employed to prepare plans for a building scheme, has been stopped, and instructed to prepare plans for alternative schemes, he is entitled to remuneration for work done on all sets of plans".

In the case of Ackerman and Adamson vs Colonial

Government 1902 SC 274 the Court was seized with a matter whose facts are to a great extent similar to the facts of the case before court. In that case the Court stated at page 283 of the judgement that:

"It was quite clear upon the authorities cited that when such contract has been entered into and the owner of the property afterwards decided to abandon the work simply for his own reasons, and did not intend to proceed any further, then some compensation must be paid to the architects for their work. The schemes had simply been abandoned, and, upon the authorities, in such a case the architects would be entitled to some compensation".

[67] Accordingly, the plaintiffs had to be paid for the work done.

[68] It is in view of the above that the present plaintiff also has to be remunerated for the work it has done on behalf of the defendants. Even though new Cabinet Offices may not have been built as of date on strength of the drawings created for it, it does not follow that plaintiff should suffer the loss for the work it did. Compounding the costs is the different sets of architectural plans made for the various sites as result of changing of the clients requirements.

During the course of the trial the defendants made no issue at all about the quantum of any claim. It was not shown either that any of the three claims, especially that in respect of the PPCU site, involved a duplication of previous plans, requiring a reduction of the amount claimed. It would therefore not be proper for this court to mero motu decide to do so.

It is the finding of the court that the plaintiff firm of architects has proved its three claims on a balance of probabilities and it is ordered that judgment be entered against the first two defendants, the one to pay the other absolved, in the amounts of E551 572.47 in respect of claim one, El 832 487.60 in respect of claim two and El 494 980.80 in respect of claim three.

Interest shall accrue at the usual rate of 9% per annum from the date of service of the summons, to wit the 22nd August 2003. Costs are ordered to follow the event, at the ordinary scale. There is no justification to order costs on the punitive scale of attorney and client, as claimed by plaintiff.

JACOBUS P. ANNANDALE

ACTING CHIEF JUSTICE