IN THE SUPREME COURT OF APPEAL OF SWAZILAND

CRIMINAL CASE NO. 34/05

In the matter between:

THE SWAZILAND GOVERNMENT **1st APPELLANT**

THE MINISTRY OF PUBLIC WORKS

AND TRANSPORT **2nd APPELLANT**

THE ATTORNEY GENERAL **3rd APPELLANT**

and

M.W. ARCHITECTS AND URBAN DESIGNERS (PTY) LTD **RESPONDENT**

CORAM : J. BROWDE - AJP
N.W. ZIETSMAN -JA
P.H. TEBBUTT -JA

JUDGMENT

ZIETSMAN J.A

It is common cause that the Swaziland Government decided to extend its cabinet offices and that the respondent was appointed as an outside consultant to prepare the necessary architectural drawings for this purpose. Drawings were prepared by the respondent and the respondent was paid for these drawings.

It is further common cause that the government subsequently decided that it would be to its advantage if an entirely new cabinet office block was erected at a site referred to as the Emvakwelitje site. The respondent was again appointed as an outside consultant to prepare the necessary architectural drawings which drawings were completed by the respondent. The respondent was, however, not paid for these drawings.

The respondent alleges that in addition to the two sets of drawings referred to above it prepared two other sets of drawings for the government. The respondent alleges that after it had prepared the first set of drawings to extend the cabinet offices the government decided to add a further additional extension to the offices to include a conference centre, a library and archives. It is common cause that the respondent did the necessary drawings for this further additional extension and presented the drawings to the government. The government alleges, however, that the respondent was not instructed to do these additional drawings and is therefore not entitled to claim any fees for them.

After receiving the respondent's drawings for the Emvakwelitje site the government decided not to erect a new office block at Emvakwelitje because the lack of facilities at that site made it unduly expensive to erect a building there. The government then identified another site, known as the PPCU site, and endeavoured to ascertain whether the building designed for the Emvakwelitje site could be erected there. The PPCU site

was narrower than the Emvakwelitje site and it was found that the drawings done by the respondent for the Emvakwelitje site would require certain alterations and adaptations to make them suitable for a building on the PPCU site. The respondent alleges that it was instructed to prepare the necessary drawings for the PPCU site. Such drawings were in fact done and were presented to the government. The government alleges, however, that no instructions were given to the respondent to prepare drawings for the PPCU site and that the respondent is accordingly not entitled to claim fees therefor.

The position is that four sets of drawings were done by the respondent. These were the initial drawings to extend the existing cabinet offices, the drawings for the further additional extensions to the offices, the drawings for a new cabinet office block to be built at the Emvakwelitje site, and the drawings for a new cabinet office block to be built at the PPCU site.

The government paid the respondent for the first set of drawings but denied liability in respect of the other three sets of drawings, alleging that the respondent was not mandated to do these drawings.

The respondent issued summons against the government. In respect of the second set of drawings, referred to as the rehabilitation of cabinet offices project or the proposed extension to cabinet offices phase 2, it claimed the sum of E551,572.47. For the Emvakwelitje project it claimed the sum of El,832,487.60. For the PPCU project it claimed the sum of El,494,980.80.

The trial judge found in favour of the respondent and ordered the first and second appellants, the one paying the other to be absolved, to pay all three claims to the respondent, together with interest and costs.

The appellants appeal against the order in respect of the respondent's first and third claims. The only appeal lodged against the judgment in respect of the second claim is in respect of the quantum awarded.

In other words, the appellants, on appeal, accept that the respondent was authorised to prepare the drawings for the Emvakwelitje site and are entitled to be paid their fees therefor, but they allege that the quantum of their claim was disputed and was not properly dealt with by the trial judge. I shall deal with the question of quantum later in this judgment. The appellants' submissions on appeal in respect of the respondent's first and third claims is that the respondent was not mandated to prepare the drawings and is therefore not entitled to any fees for doing the drawings.

A key player in the events that took place was the witness Samkelo Sidney Magagula. He was employed by the Ministry of Public Works and Transport as an architect. He had completed his architectural academic qualifications but was preparing to write a further examination set by the South African Council for the Architectural Profession. He needed further experience and it was arranged that for a certain period he would be seconded to the respondent firm of architects and would assist in preparing the drawings for the new or extended cabinet offices. He, however, retained his employment with the Ministry and was paid by the government during his period of secondment.

It is clear from the record that the drawings in respect of which fees were claimed by the respondent were in fact completed by the respondent. The main issue in this appeal is whether the court ***a quo*** was correct in finding that the respondent had been mandated by the government to do the drawings for the further extension to the existing cabinet offices (referred to as the rehabilitation or phase 2 drawings) and the drawings for the new building at the PPCU site.

I shall deal firstly with the drawings for the further extension to the existing cabinet offices which I will refer to as the phase 2 project.

The respondent received from the Ministry of Public Works and Transport a document headed Notification for Appointment of Professional Consultant. The document is dated 24 May 2000 and reads as follows:

> "*You are hereby informed that you have been pointed*

(sic) to undertake the following project (s) - 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."

This notification document was received by the respondent before the first set of drawings was done by the respondent. No further notification document was issued in respect of the phase 2 project.

The phase 2 project involved the construction of an entirely new building which would include a conference centre, a library and archives, to be built on the site of the existing cabinet offices.

The witness Dumsile Mbhamali, the director of the respondent company, alleged in her evidence that while the first set of drawings were being completed she was requested to go and see Terence Gule, the senior architect in the Ministry. She did so and Terence Gule verbally instructed her to do the phase 2 drawings as well. Thereafter she received a written brief explaining what accommodation would be required. This written brief was handed into court as Exhibit G and is headed "Rehabilitation of Cabinet Offices". It appears that Exhibit "G" was prepared during March 2001 by Magagula who was then seconded to the respondent and who was working with Mbhamali on the drawings. As stated above, Magagula was still employed by the government and it was a part of his duties to convey instructions from the government to the respondent. Mbhamali alleges that the drawings for phase 2 were

completed, and she then went with the senior architect to present the drawings to the government at the cabinet offices.

Magagula confirmed in his evidence that the respondent had been mandated to do the phase 2 drawings. He confirmed that he had prepared Exhibit "G" and had given it to Mbhamali. He stated that he received Exhibit "G" from David Lukhele who was also employed by the government.

David Lukhele was not called as a witness. The government's chief building engineer, Raymond Mkhululi Mamba, denied any knowledge of the phase 2 project, or of the brief Exhibit "G". This seems unlikely in the circumstances and Mamba was found not to be a reliable witness by the judge ***a quo.***

Terence Gule did give evidence. He denied that he had instructed Mbhamali verbally to do the phase 2 drawings. He however accepted the fact that Mbhamali had received the brief Exhibit "G" in respect of the phase 2 project from Magagula, and he stated that on receiving such instructions from Magagula the respondent was entitled to accept that it had been properly instructed to go ahead and do the phase 2 drawings.

It seems possible, from the record, that the normal procedures adopted in such matters by the Ministry were not fully implemented. However, it is clear that instructions were given by Magagula to the respondent to do the phase 2 drawings and that the respondent was therefore entitled to accept that it had been properly mandated. This was the factual finding of the trial judge and it cannot be said that he erred in coming to that conclusion. The finding was that the drawings were in fact done by the respondent and that the respondent was entitled to claim its fees for the drawings.

The initial notification of the respondent's appointment contains the statement "*N.B.: Government will not honour claims without consultants agreements.*" The procedure normally followed is that after preliminary drawings are done by the architect they are discussed and amended if necessary. The consultant architect then draws up a consultancy agreement which is signed by both parties. Mbhamali alleged in evidence that she had drawn up and signed the necessary consultancy agreements and had submitted them to the government. The government apparently failed to sign them. This cannot have the effect of depriving the respondent of its fees if the drawings were mandated and were properly completed. In the case of the Emvakwelitje project no signed consultancy agreement was produced but the appellants concede the fact that in respect of the drawings done for that project the respondent is entitled to its fees.

I come now to deal with the PPCU project. It is common cause that drawings were done for this project. The questions to be answered are whether the drawings were done by the respondent, and if so, whether the respondent was mandated by the government to do the drawings.

It is common cause that after receiving the drawings for the Emvakwelitje project it was decided by the government that it would be too expensive an undertaking to build the new cabinet office block there. This was because the Emvakwelitje site was undeveloped virgin land with no infrastructure. It was then decided to look at alternate sites. One such site which the government thought might be suitable was the PPCU site. Magagula was then asked to take the Emvakwelitje design and to see whether it could be used for the PPCU site. The PPCU

site was narrower than the Emvakwelitje site and this required alterations to be done to the Emvakwelitje site drawings in order to produce a design suitable for the PPCU site. It is clear from the evidence that Magagula was told that he must himself work on the alterations and that external architects would not be employed for that purpose. The project was to be an in house project.

Magagula started to work on the drawings. Mbhamali discovered this and asked Magagula why the respondent was not involved. Magagula alleges that he told Mbhamali that the project was an in-house project. He alleges that Mbhamali then showed him a letter of appointment indicating that the respondent had been appointed to do the work and she then asked him to pass on to her the work already done by him. He gave her the disc from his computer and the respondent then completed the drawings which were handed to the government. It is not clear from the record how much work was done by the respondent in completing the drawings which had been initiated by Magagula.

The letter of appointment which Mbhamali showed Magagula was attached as annexure DM2 to the plaintiffs particulars of claim. This letter, entitled "Notification for appointment of Professional Consultant, reads as follows:

> "*You are hereby informed that you have been pointed (sic) to undertake the following project(s) - New Cabinet Office Block - Mbabane. 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 agreement".

This document was given to the respondent before the Emvakwelitje project drawings were done, and it clearly has reference to that project. No further notification of appointment was issued to the respondent.

Both the Emvakwelitje site and the PPCU site are in Mbabane, and it is submitted on behalf of the respondent that the notice DM2 covers both building sites. What is submitted is that the respondent was appointed to do drawings for a building at Mbabane, that this was an ongoing project and that the respondent's mandate was not at any stage cancelled. This being the case, so it is submitted, the respondent was mandated to do drawings for the PPCU site as well, and is entitled to its fees for having done so.

Mbhamali did say in her evidence that she attended a meeting at which the PPCU site was discussed. She does not say who attended the meeting and it is clear from her evidence that she bases her claim on her initial appointment as set out in the document DM2.

The facts, as I see them, are that the respondent was appointed to do the drawings for the proposed building at the Emvakwelitje site. When the government discovered how expensive it would be to construct the building there, its internal architects were asked to see whether the same building could be built on the PPCU site, and to alter the Emvakwelitje site drawings if necessary to make them suitable for the PPCU site. It was however decided that this exercise would be done by its internal architects. Magagula was aware

of this, but he was induced by the document DM2 to hand the results of his work over to the respondent. No other instruction from the government to the respondent to prepare drawings for the PPCU site was proved. In fact it is clear from the evidence that it was at all times the government's intention that this work would be done in-house.

My conclusion, based on the facts set out above, is that the respondent was not mandated by the government to do drawings for the PPCU project. The respondent was appointed, in terms of the document DM2, to prepare the plans for the Emvakwelitje project, but such appointment did not extend to the PPCU project which was to be handled as an in-house matter.

The respondent cannot claim fees for drawings which it was not mandated to do and the appeal therefore succeeds in respect of the respondent's claim 3.

Concerning the phase 2 claim and the Emvakwelitje project claim, it has been submitted that the appellants' denial of any liability in respect of the claims also placed in issue the quantum of the respondent's claims. Both notices of appointment state that fees will be paid to the respondent in accordance with the standard fee scale for architects. Evidence was given by Mbhamali that the respondent's claims had in fact been determined in terms of the standard fee scale and this evidence was not disputed. In the circumstances the judge ***a quo*** was correct in holding that the actual amounts claimed by the respondent were not challenged.

There remains the question of costs. Both parties have had success in this appeal. The appellants succeed in having the judgment in respect of the respondent's third claim set aside.

The respondent succeeds in having the appeal in respect of claim 1, and the quantum argument in respect of claims 1 and 2, dismissed. A fair order, in my opinion, will be to leave each party to pay its own costs. I would therefore make no order in respect of the costs of the appeal.

I would make the following order.

The appeal succeeds to the extent that the order that the appellants are to pay to the respondent the sum of E1,494,980.80 in respect of claim 3, together with interest thereon, is set aside. For the rest the orders made by the court ***a quo*** are confirmed.

No order is made in respect of the costs occasioned by this appeal.

N.W. ZIETSMAN
JUDGE OF APPEAL

I agree

J.BROWDE
ACTING JUDGE PRESIDENT

I agree

P.H. TEBBUTT
JUDGE OF APPEAL

Delivered on day of May 2006.