KENMARK BUILDERS (PVT) LTD
(In liquidation represented by T Grimmel)
and
STUDIO ARTS INCOPORATED
and
MAZUVA NOEL
(t/a NMC CONSULTING ENGINEERS)
and
CRAFT VIEW CONSULTANTS (PVT) LTD
and
VANGUARD ENGINEERING SERVICES (PVT) LTD
and
NCUBE BURROW (PVT) LTD
and
PRODUCAN INVESTMENTS (PVT) LTD
and
ASTRA STEEL AND ENGINEERING (PVT) LTD
and
PHEROSTEEL (PVT) LTD
versus
ZIMBABWE DIAMOND TECHNOLOGY CENTRE (PVT) LTD

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 10 July 2014, 23 February 2015, 24 – 26 February 2015,
16 and 17 March 2015 16-18 June 2015 and 25 Nov 2015

Trial Action

J. Dondo, for the plaintiffs
W T Pasipanodya, for the defendant

DUBE J: The seven plaintiffs claim varying amounts of money outstanding from work carried out when they took part in the construction of the Zimbabwe Diamond Technology Centre at Haydon Estates in Mount Hampden, (hereinafter referred to as the Centre). The plaintiffs' claims are based on services rendered and material supplied as follows,

The first plaintiff, $1 623 954-11, second plaintiff $1 011 683-03, third plaintiff US$ 5 932 549-00, fourth plaintiff $404 987-36, fifth plaintiff, $422 199-55, sixth plaintiff, $ 263

161-04, eighth plaintiff $51 837-74.The seventh and ninth plaintiffs did not pursue their claims. The plaintiffs claim that the defendant has refused and neglected to pay to the plaintiffs what is due to them.

The defendant defends all the claims. In its plea, the defendant accepts that all the consultants with the exception of first plaintiff entered into contracts and agreements separately with defendant for the construction of the Centre. The defendant refutes entering into a contract with first plaintiff and denies the existence of any contractual obligation between them. The defendant avers that the first plaintiff never did or finished the job he was required to do and instead Msasa Builders carried out the contract and concluded the first plaintiff's obligations .The defendant avers that no discussions ever took place between it and the first plaintiff over the figure claimed and that no documents to that effect were ever availed to defendant.

The defendant claims that all the plaintiffs were aware that the budget for the project was 4 million dollars and agreed to that figure and their claims reflect this position. The defendant claims that the figures claimed by the plaintiffs are unilateral and the plaintiffs are trying to extort money out of the defendant. The defendant claims that the claims were unbudgeted for and not based on actual work done. The defendant avers that all the claims are not due and owing.

The following issues were identified for trial at the pre-trial conference.

1. Whether a contract was made and entered into between the defendant and each of the plaintiffs
2. Whether each of the plaintiffs rendered services to the defendant in terms of the contract.
3. Whether the amounts claimed in respect of each of the plaintiffs is legitimate, due and payable
4. Whether or not there has been a breach in terms of the agreement of the parties.

The first plaintiff called Abiathar Mujeyi its chairperson and shareholder His evidence is as follows. The first plaintiff was approached by the defendant with a proposal to build the Centre in July 2010. The parties agreed on a contract based on a cost plus basis. A confidentiality contract referred to as a memorandum of understanding (MOU) was signed on 9 July 2010. It was emphasized in that MOU produced, that time was of the essence and on the signing of that MOU, the plaintiff was to immediately move on site to commence works. The plaintiff moved to site and the defendant paid a site establishment fee of $280 000-00

and $200 000-00 on 16 July 2010 and another $82 000-00 on 18 July 2010 the site was and the site was handed over to the first plaintiff

Although the actual contract had not been signed they moved onto the site because they were told that time was of the essence, the contract document was later prepared but was not signed on 1 September 2010 as arranged because the defendant required to make some consultations. Later the first plaintiff signed the contract and gave copies to the defendant for his signature which was not returned to it. The defendant kept promising that the document would be signed and returned.

When they moved on site, they dug the foundations, poured concrete into the foundations. They engaged Tarcon Engineering (Tarcon) to do the road works. They hired labour, constructed the site office and administration blocks, pumping out water from the marshy area and drilled boreholes and toilets and took some structures out of the ground.

The total estimate cost of the development of the project would be advised. The figure would be calculated based on the bill of quantities that was to be prepared by the quantity surveyor. The plaintiff did the initial pricing based on the bills of quantities supplied by the quantity surveyor and it gave the figure to the quantity surveyor who revised the figure and came up with a final project value of $24 005 015-13 (24 mil). The original estimate was 18 million and rose to 24 million with the increased number of buildings. The defendant was aware of the project cost because his representatives attended the site meetings where progress was reported and the figure was captured in the minutes. Colonel Mugari managed the project and attended all meetings. The plaintiff never received any communication regarding the 4 million budgets. The witness denied that the total budget for the project was 4 million dollars. The first time he heard about the figure was after the institution of these proceedings.

The first plaintiff would get quotations and select the best and included these in their costing. The parties agreed on a 10% mark-up of materials and labour and all services supplied to the project. First plaintiff would get materials from its own resources and all invoices would be handed over to the quantity surveyor for a proper evaluation and the claim documents handed over to the architect who would make a certificate. The quantity surveyor and architect were appointed by the defendant to protect its interests and supervised construction work on behalf of the defendant.

Plaintiff did its work and claims $1 6 239 541-00 .The witness produced valuation certificates to prove its claims. The plaintiff borrowed the money from a bank. The plaintiff is

now under litigation because it ordered materials in its name and the defendant refused to pay for it. Plaintiff was forced to go into liquidation. Plaintiff stopped construction when it realised that it was falling more and more into debt. Client was not paying. The witness realised the presence of Msasa Builders on site at a very late stage when there were a lot more workers on site recruited by the defendant. Some of the workers belonged to Msasa Builders. The plaintiff left the site in late 2011.

Under cross examination the witness maintained his story and insisted that it did extensive work on site which was supervised by independent professionals appointed by the defendant. The witness maintained that it was not aware of the 4 million budgets. The witness denied that the plaintiff only did 10% of the work it was required to do.

The next witness to be called by the first witness is Theresa Grimmel. She is the liquidator of the first plaintiff. She told the court that she is aware of the proceedings and gave the go ahead to institute the proceedings. Her evidence was purely procedural.

The next witness is Richard Ziyavaya representing Astra Steel, the eight plaintiffs. He testified as follows. The second plaintiff is suing for $51 837-74 being reinforcement steel supplied to the project through Kenmark Builders. They were subcontracted by Kenmark. The witness produced an application for credit facilities signed by the defendant. They started supplying steel in October 2010. The arrangement was a pre-payment agreement. They supplied steel worth $71 837 -74.They failed to get payment from Kenmark Builders after which they decided to claim directly from the defendant. They got 2 payments in January 2011 of $15 000-00 and$ 5000-00. The defendant gave them an acknowledgement of debt confirming the amount owed as $51 837-74 after $20 000-00 had been paid. The acknowledgement of debt signed by Vitalis Zvinavashe from Rae Holdings was signed on behalf of the defence witness. Rae Holdings is one and the same as the defendant.

The witness refuted suggestions that he had been paid$25000-00 by way of RTGS in October 2010.He does not know the origins of the RTGSs He has no evidence that the money went through as the money did not reflect in the witness's account. The witness also refuted that he was paid $33 200-00and $14902-00 in September and August 2010 and maintained that there is no reason why the defendant would pay him in August 2010 when he only supplied goods for the project in October 2010.The witness challenged the amounts allegedly paid of $96 102-00 because only goods worth $71 837-00 were supplied.

Engineer Shepherd Kunaka is a director of the fifth plaintiff, Vanguard Engineering testified as follows. The company is a mechanical and electrical engineering services

consultant. The plaintiff was invited in January 2010 by defendant's principal Studio Arts to take part in the project. The plaintiff's part was to provide professional mechanical and electrical engineering services on the development. The Plaintiff designed briefs and prepared mechanical and electrical services designs .They did the air conditioning designs and the wet services designs (pumping designs) ventilation, kitchen equipment, lighting power designs, external lighting, lighting protection designs, designs for the electrical substation and electrical power reticulation from the substation to the various buildings. They carried out the designs and prepared and the mechanical and electrical specifications, drawings and bills of quantities and presented their budget estimates for their services. After this they the bill of quantities for electrical services was passed onto the main contractor as directed by the defendant.

They charged their fees on the basis of a scale of fees regulating all engineers. They came up with the figure for their services and advised the defendant through the architect. The total professional fees due is $442 199-55 based on the design preparation of tender documents. They were given an advance of $69 000-00. The claim is also premised upon the factory units envisaged to be built.

The quantity surveyor did a project estimate of costs which was way above 4 million and defendant was advised. The initial estimate came to about 15 million before the additional factory buildings like the auction floor, and canteen were added. This came to 18 to 19 million dollars. They advised the defendant that with the costing addition and buildings, there was a need to add an additional substation and this was a state of the art design.. A number of site meetings were held and there was never a query that the project should not exceed 4 million. The witness refuted the suggestion that there was collusion between the professionals.

Under cross examination, the witness maintained that they did their work professionally. He denied that the project sum should not have exceeded 4 million. The 4 million budget only surfaced after the project quantity surveyor had given a budget of 15 million for the project advised the defendant on the cost of the works. He rejected the idea that the $222 818-50 paid to the plaintiff was in full and final settlement of their professional fees and insisted that it was a deposit. The witness testified that fee invoices were prepared by the professionals using estimates but they had in the interest of progress agreed to prepare invoices bases on the 4 million figure pending the pricing of the bill of quantities. He insisted that the 4 million was the client's cost and not the professional team's budget estimate. The witness was

unaware that he had 4 million dollars only. The defendant knew that the project cash would exceed 24 million because there were site meetings held which discussed the total project cost of 24 million. The witness denied that the fifth plaintiff received a total of $134 000-00 from the defendant. The witness's testimony was generally good. He maintained his story under cross-examination.

Daniel Mackenzie Ncube is a civil engineer and principal of the sixth plaintiff. He testified as follows. The plaintiff was approached by Studio Arts to provide Civil Engineering works at the Centre in January 2010.They were to design external works thus roads, boreholes, parking areas, water supply and reticulation and treatment plant within the complex. The plaintiff signed the standard engineering contract for civil works and the defendant was represented by Mr Kurotwi. They also signed a memorandum of agreement setting out the rights and duties of the plaintiff. The plaintiff drew, designed and supervised the carrying out of this work. They also designed a pipeline. The witness has all the drawings to show how much work was done. Its fees were calculated based on the figure of $4 937 553-50 supplied by the contractor and Tarcon. The total fee payable is $307 161-64. The defendant was supposed to finance the project through the sale of diamonds. About May 2010 the architect told the plaintiff for the first time that there was a budget of 4.1 million to pay all the consultants. It was an interim budget. A facility this size could not be constructed on 4million dollars. It was never indicated at the meetings that the sum should not exceed 4million.The plaintiff was paid $68 000-00. The total fee payable is $263 161-04. The contract to provide these services was not signed through an oversight. The plaintiff did not refuse to sign the contract. After it was told of the interim budget of 4 million it continued to offer its services. Under cross examination, the witness denied that Tarpon did work they refused to do. The witness testified that Tarcon worked under their instruction and Tarcon's payment was authorised by them. He insisted that the architect had told them that for the time being, in order to pay everyone else, there was a budget of 4 million and that it was interim. He was paid 68000-00.They did not withdraw their services when told of the 4million budget. They did so when the contractor walked off site and they continued to support the defendant by supervising the project. The witness refuted that the reason why he did not sign the contract is that he had become aware of the defendant's budget, insisting that he failed to sign through an oversight. The witness testified well. He gave a clear and straightforward version of his story. He was not shaken under cross examination.

The next witness was Noel Muzuva, a consulting civil engineer and principal to the third plaintiff. He testified as follows. The plaintiff was commissioned to carry out Structural Engineering Services for the Centre in January 2010. The plaintiff did foundation designs, ground floor and first floor designs. Initially there were seven buildings required to be constructed. More units were subsequently added which included an additional gate house, one canteen, medical centre and two additional factory and administrative buildings to make them six. The plaintiff produced additional reinforcement drawings. They produced 28 different drawings which they gave to the contractor to enable it to buy steel. The witness explained how they charged their fees and came up with a claim of $593 254-91 for the work done. None of the money has been paid. He testified that they were a team of professionals together with the other plaintiffs and gave the best advice. They worked on the requirements of the client. Their work was checked by professionals . When more buildings were added ,defendant was advised that the cost had gone up.

The total cost of the project was 24 million and their charges were based on the structural component. They did 100% of the work required. Client's justification for the budget of 4 million was that he would buy materials from outside the country but this was never done. There was no basis or support of this figure. The plaintiff left the site in October 2011..

Under cross examination, the witness insisted that the defendant insisted that he could the project with 4 million against the advice of all the professionals. He gave a clear and satisfactory account of his claim.

Justin Majakwara, is a registered Quantity Surveyor and director of the fourth plaintiff. He testified that the fourth plaintiff was approached by Studio Arts on behalf of the Centre. They entered into a contract with the defendant for the profession of quantity surveying services. They were to do preliminary consultations, prepare estimates, bills of quantities, tender documents, tender adjudications and surveying works. They prepared a project estimate and prepared the bill of quantities and negotiated with he selected contractor for rates of construction work. They did valuations of work done by the main contractor in conjunction with the subcontractors. The additional works added also added to the scope of the works especially the canteen., medical centre and 2 more factories and administrative blocks. Their charge was calculated on the basis of the statutory instrument that provides for rates chargeable Their charges are based on the level of completion of works by other consultants. The plaintiff claims $404 987-36.

. The contractor's estimate was 23, 7 million for four factory buildings, admin block and auction centre, canteen and two gate houses. This figure was negotiated to 18, 7million. The scope of the works changed when two factory buildings were added a boundary wall and other works. The final figure of work to be done was $24 005 015-37. (24 million) and would advise at all stages the building costs, the project estimate cost was initially 14, 8 million after the additional buildings, client was advised that the price had gone up to 19 million. The defendant was aware of the figures because his representatives would attend the site meeting where the contract price would be disclosed and written in the minutes of the meetings produced. The defendant's representative Mr *Kurotwi* would attend the meetings at times.

The first estimate they carried out in line with the first 7 buildings was 14,8 million. He denied that the defendant was to pay at least 4 million for the project. The agreement specified that the services were to be provided without a budget figure. The defendant gave his requirements of buildings and it is the professionals who have the duty to advise him on the cost and they did and submitted the cost estimate. The defendant challenged the cost estimate and said it can be done at 4 million and this was after the designs had been done and we had already prepared an estimate for the project. The defendant was of the view that he could achieve the project of 4 million through strategies of sourcing materials from China and South Africa. The plaintiff did not agree that this could be achieved. A schedule of materials to be imported was prepared but no importation was done. The challenge was raised well after the contract. The witness checked and verified the first plaintiff's claim and it was above board and was supported by paperwork. The claims by other plaintiffs were also checked. The plaintiff left the site after the contractor left as there was no more work to supervise. They did not terminate or abandon the project .

Under cross examination the witness insisted that the defendant insisted that he could do the project on 4 million against the advice of all professionals involved in the project. The plaintiff agreed to claim the interim amounts from the 4 million. The plaintiff challenged the 4 million budget but not directly with Mr Kurotwi. The witness gave his evidence well, he did not waiver under cross examination. .

The second plaintiff was represented by Davies Madusolumuo. He testified as follows. They are an architectural practice. The defendant approached the plaintiff to make designs for the Centre. The plaintiff entered into an agreement with the defendant. Three architects developed the concept. Their mandate was divided into three stages, the project stage which constitutes 1,5 per cent of the final cost of the project, the contract stage is 3 over

cent of the project and the 3rd stage is the supervision stage at 1,5 per cent of the final cost of the project giving a total of 6 per cent. The plaintiff carried out in full the first two stages done in the offices. The last stage of supervision was suspended after 20 per cent of the work had been performed. He demonstrated how he came up with the claim at $1 011 683-03. The defendant only paid $54 000-00. It is not true that the parties agreed that the project cost was 4 million. The figure of 4 million came about on 1 May 2010 when all the design works had been completed and approved by the defendant and the team was ready to go to site. This was after the plaintiff send the first fee note of about $400 000-00. The defendant was advised not to start the works on site without knowing the total costs of works involved but it went ahead and started on site. Time was of the essence he wanted works to start as soon as possible.

When the project started in January 2010, there was no limit to the project cost, By March 2010, there was a preliminary estimate of 14, 8 million made up of 4 factory units, an admin block and one gate house. The defendant was advised and he had no objection. Instead the defendant added two extra factory units, a medical centre and another gate house, boundary walls, staff canteen. The cost of the project is the cost that the contractor is prepared to carry out the works at. The contractor came up with a project cost of 24 million because of the additional buildings. The defendant did not accept our advice competitive tendering for contractors doing the work. He chose his own contractor. The plaintiff had no part in influencing the contractor to inflate the price. There was no collusion. The quantity surveyor did the cost adjustment from $31 million that was submitted by the contractor to 24 million.

The plaintiff was the lead consultant and supervised the work of the other consultants and their claims. The contractor and consultants did their work speedily. The consultants performed their duties, completed their duties according to the time frame agreed to. Delays started when payments were not honoured as promised. The plaintiff was the lead consultant. They supervised all the works of the consultants. They would vet the fee notes and make sure they are correct before passing them. All the claims are in order. It is not true that there was overcharging

Under cross examination the witness testified that they visited Botswana not to copy their Diamond Centre but to see. He refuted that the plaintiff was tasked to develop plans for phase 1 only in accordance with the Botswana plan. The Botswana Centre is a block and this one is a park made up of many units. He was not aware that the bill of quantities was rejected by the defendant. He denied that the defendant negotiated and the consultants agreed

on 4 million. When the issue of 4 million was brought up by the defendant because he wanted to pay based on what he had, the consultants adjusted their claims based on that figure. The document on p 104 is not the whole claim; it's an interim claim on 27 May 2010 Their fee for that budget is $652 093-78. $207 000-00 is 6 per cent of 4 million. They were entitled to claim stage claims at any time. The plaintiff got a letter speaking of 4 million in May 2010 after they had finished all the works. After failing to receive due payments, they got frustrated and left the site in November 2010. The contractor left the site as well for non-payment. The witness denied that there was over engineering of the thickness of the walls. In order to inflate figures.

He witness insisted that he got to know of the 4 million in a letter dated 27 May 2010. The witness insisted that if one fixes the cost, you don't increase the number of units and not the consultants and contractor's fees. The parties agreed on a cost plus based contract. The contract sum came from the defendant's contractor and would be finalized on 13 August 2010. The contractor went on site immediately because time was of the essence. The witness insisted that site meeting were held to capture what was going on and site minutes recorded and distributed by email to all including the defendant's representatives. He denied that the defendant was overcharged. The witness testified well. Although he spoke fast, his evidence was clear and satisfactory.

Lovemore Kurotwi is a director of the defendant. His testimony is as follows. The defendant engaged Studio Arts. One of its directors JB Matiza visited Botswana Diamond Park so that he could develop a Centre moulded along the same lines. The value of the first phase of the Diamond Centre to be developed was 70 million pula which equates to about 1.3 Million. The Centre had a budget for the project of 4 million. The defendant sourced 4 million. When he met Mr Madu for the first time in 2010 he quarrelled with him and the quantity surveyor because they were refusing to accept defendant's budget of 4 million to complete the entire project. The quantity surveyor advised him that he cannot work on a budget of 4 million. He advised them that if this budget was not acceptable to them, they should leave. The consultants were required to sign a contract because the defendant wanted to know what they would charge. He was told that each would charge a percentage of total cost of the project.

The first phase included construction of two gates, house, admin block, 4 factories and an auction floor. The project cost was 4 million. The 4 million was for the first phase only and not the entire project. The cost of constructing one factory cost more than one

million to complete when the cost should not have exceeded $1 200 000. This was because their walls were too thick. The columns on the factories can carry three or more floors yet the factories were a just single storey building which does not require that thickness. The engineer (Muzuva) conceded that it was overdone. Kenmark were supposed to do the construction of phase 1 and to be paid a percentage of the total cost of the 4 million project. Kenmark were required to construct four factories, 2 gate house, and administration block and auction floor. The second contractor Msasa was only given two different factories. Studio Arts was supposed to be paid 60 per cent of 4 million, NMC were going to be paid a percentage of the total project cost as well as all other plaintiffs.

Ncube Barrow had an issue with the 4 million budget and refused to sign a contract with the defendant. He is unaware if they did any work towards the project as they were no longer part of the team. Tarcon did the work they were supposed to do. Astra Steel were advised of the budget and agreed with the defendant on the budget before anything was done .The consultants adjusted their claims in line with the budget of 4 million and were paid. They were aware of the defendant's budget. The plaintiffs had no authority to work outside the budget of 4 million. Anything done outside the budget was supposed to be approved.

The witness denied that the defendant ever received any minutes of meetings. The meetings held by the plaintiffs were theirs and the defendant was not advised of the meetings. The plaintiffs were never instructed to do any other phase outside phase 1. The witness heard about the canteen here in court. It was not part of the drawing .Plaintiffs disappeared from the site by 28 October 2010. Studio Arts were paid what they were owed. The defendant paid more because they had extra costs like photocopying which was to be re-imbursed. Ncube Barrow were paid $131 148.87 and are not owed. NMC were paid 104 259.67 and are not owed. Prominent were paid 103 500.00 and are not owed. Vanguard was paid 222 816.15 Astra Steel were paid 103 102.00 and are not owed. After the plaintiffs abandoned the project they were still paid one million.

The invoice done by Studio Arts is based on the defendant's budget of 4 million. They were aware of the 4 million from the onset. The letter on p 104 confirms their fees as to our budget on 4 million. Ncube Barrow wrote a letter dated 27 May 2010 and fees based their fees on the 4 million budget. They knew that the 4 million was for entire budget. Prominent claimed advance payment based on client's budget of 4 million. Kenmark builders just did preliminary work which included just the cleaning. When the plaintiffs abandoned the project, the defendant engaged Msasa Builders who constructed the Centre. The second

plaintiff's charges are very high for example they put the air conditioner at $1 672 000.00 .They were just trying to get money out of the project. Kenmark was not authorised to agree to figures in excess of the defendant's budget. The defendant never agreed to a 24 million project. The witness got to know of it when he was served with the summons. The defendant maintained his story in his evidence.

The defendant called Belinda Chizu is an administrator for the defendant. She was responsible for administration. She consolidated invoices and created files for consultants. She disbursed funds according to invoices submitted. She testified that the defendant sourced 4.2 million from 2 banks for the project. She was asked to comment on exhibit 32 which is the cash payment voucher. She testified that Mr Muzuva is the payee and he was paid. It was paid by Rae Holdings on behalf of the defendant. The witness was sitting in court throughout most of the proceedings. Not much weight is to be attached to her evidence.

The following evidence is common cause. All the plaintiffs did some work at the defendant's Diamond Technology Centre. The defendant made certain payments for the work done. When the first plaintiff left the site before completion of the project for non-payment, all the other professionals also left the site and Msasa Builders completed construction of the Centre. The dispute centres on the budget for the project and whether the plaintiffs are entitle to their claims.

A litigant bringing a civil claim has an onus which he must discharge. In *Ocean Accident and guarantee Corporation Ltd v OCH 1963 (4)SA* 147 the court followed the formulation in *Miller v Minister of Pensions 11947 (2) ALL ER 372* where the court stated as follows,

It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "we think it is more probable than not", the burden is discharged but if the probabilities are equal, it is not.''

The onus on a plaintiff must be discharged on a balance of probabilities.

The defendant claims that the project budget was 4 million and that the plaintiffs agreed to complete the entire project on that amount. What emerges from the evidence led is that when the project started in January 2010, there was no limit to the project cost. The figure of 4 million came about on 1 May 2010 when all the design works had been completed and approved by the defendant and the team was ready to go to site. The project started with 6 units. The contracts entered into with the professionals were based on this initial number. The defendant went on to add additional units increasing the structures to be constructed. The

budget for the additional structures was not given. It is inconceivable how a project started on a budget of 4million can continue with the same budget when five additional buildings have been added. It is obvious that the budget was not going to remain constant. Even if assuming that the budget agreed to was 4 million, it could not remain at that figure. The budget ought to have increased with the increase in the structures. The plaintiffs insisted that a project of that magnitude would not be completed at that budget. This was a state of the art structure which could not possibly be completed at such a budget especially when one has regard to the specialist work to be done. The defendant was given advise against such a budget and he did not take it .The defendant would at times be present at the meeting and was represented at all times. The defendant contended that it never agreed to a 24 million project. The defendant got to know of it when served with the summons. The defendant's assertion is not supported by the evidence led. Whilst the defendant's representative claimed that the project budget was 4 million. He failed to explain why he in newspaper articles, talked of $20 000 000.00 (20 million) as the project cost. Further he failed to explain why he as claiming that based on the Botswana project of 70 000 000.00 Pula (almost $12 000.00) he expected his own project to be completed at a costs of US 4 million. The Botswana project is at a smaller scale. I did not believe the defendant's evidence on this point. The plaintiffs have all disproved on a balance of probabilities that the budget of the project was 4 million.

The defendant's claim that the plaintiffs were aware of the defendant's budget of 4 million was refuted. The fact that the defendant sourced 4 million does not mean that the costs incurred did not exceed that budget. All the plaintiffs testified that they were not made aware of the budget of 4 million I believed the plaintiffs evidence that the budget figure was not 4 million and that this was not communicated to them. They testified that they only became aware of this budget when they were told that they were to claim their claims on the basis of an interim budget. The evidence reveals that all the plaintiffs were not aware of the 4 million budget at the time they entered into contracts with the defendant.

The defendant refuted that any site meetings were ever held and challenged minutes produced by the plaintiffs to show discussions that took place at the meeting. Evidence of all the defendants reveals that site meetings were held and minutes produced. I believed the witnesses. The defendant was represented at such meetings. There was never a query that the project should not exceed 4 million at the meetings held. There were representatives who allegedly attended site meeting. The defendant failed to call at least Colonel Mugari who was he project manager. It appears that Colonel Mugari may not have co-operated. I find that

the plaintiffs were not aware of the 4million budget until they were asked to put in their claims on the basis of the interim budget. Further that the defendant was aware of discussions that took place at the meetings.

There was no evidence led to suggest collusion between the professionals who insisted that they did their work was professionally done. The work was supervised by professionals appointed by the defendant. The witnesses refuted the suggestion that there was collusion between the professionals. The defendant claimed that the plaintiff connived to inflate figures. The fact that the quantity surveyor revised the contractor's price downwards because as it felt that the rates were too high is not suggestive of collusion. There is no evidence that the plaintiffs connived and inflated figures. This allegation was not proved.

The claims can only be justified on the basis of the work done. There was no meaningful challenge to the works carried out. The defendant did not challenge the assertion that all professional plaintiffs had completed their works and all that remained was supervision. They had done 20 per cent of the 25 per cent supervision work. The basis of these claims was not challenged. Explanations and calculations given for the computations of these figures went unchallenged. The work done by the first plaintiff the contractor was not meaningfully challenged

The first plaintiff and the defendant did not sign an agreement before the applicant went on site and commence work because time was of the essence. They entered into an Mou. It was emphasized in the MOU that time was of the essence and that on the signing of that MOU, the plaintiff was to immediately move on site to commence works. This MOU shows that the first applicant was the contractor for the Centre. The plaintiff was required to quickly go on site. Evidence reveals that an agreement was subsequently entered into but the plaintiff did not retain a copy. The agreement between the first plaintiff and the defendant was a "cost plus" agreement. When the plaintiff went on site the defendant paid it. This evidences that there was a relationship between the two. Evidence available discloses an agreement between the parties to construct the Centre.

The first plaintiff's claim is supported by the quantity surveyor and verified and certified by the Architect as true and legitimate. Evidence led in court which included pictures show that the plaintiff carried out some work on site. Evidence that they set up the site, dug up the foundations, prepared concrete, contracted Tarcon to do the road works., hired labour which required to be paid and started construction of some of the units and laid bricks . They also constructed gate houses up to roof level. The witness maintained that the claim was justified

because this is a marshy area and they had to pump water out of the ground which constituted a lot of work. All this evidence is evidenced in pictures and was not rebutted. The valuations done by the quantity surveyor confirms that what the plaintiff claims arises out of work done .It leased some property from third parties that require to be paid. The plaintiff's claim was well tabulated. Although Msasa finished the construction of the Centre, the first plaintiff had carried out substantial work on site for which it is entitled to charge. The plaintiff' claim was not meaningfully challenged.

The second plaintiff did the designs and came up with the concept of the Centre and drafted the designs. They carried out in full the project stage and the contact stage. They did 20% of the supervision stage which is the last stage. The plaintiff did what they were required to do until the last stage when they left the site. The plaintiff produced certificates to prove its claim. It demonstrated how its claim was calculated based on the memorandum of Agreement of the parties. The defendants did not challenge the formula used and did not dispute the calculations relied on.

The 3rd plaintiff did foundation designs for the ground floor and first floor. They did the designs for the additional buildings and produced 28 drawings. They did 100% of the first three stages and 60% of the 4th stage, the construction stage. They produced additional reinforcement drawings .Its claim was well explained. The third plaintiff produced a memorandum of agreement for Civil Structural, Mechanical and Electrical engineering works and demonstrated how the claim was arrived at. The calculations were not seriously disputed.

The fourth plaintiff did the preliminary consultations, prepared estimates, bills of quantities surveying works and tender documents and adjudications demonstrated the tariff applied and formula used to arrive at their claim. They did valuation of work done by the contractor in conjunction with subcontractors on a monthly basis. Their claim, based on a statutory instrument was well articulated.

Evidence of the fifth plaintiff that it prepared mechanical and electrical services, air conditioning, the wet services, ventilation, kitchen equipment, lighting, power, extensive security services, external lighting, lighting protection, substation and electrical power reticulation designs not disputed. They carried out the designs and prepared the mechanical and electrical specifications drawings and bills of quantities and presented a budget estimate for these services. The plaintiff did its work. The defendant did not challenge the quantification of the claim. The plaintiff was clear that their charges are based on a scale of

fees regulating consulting engineers they used. The witness demonstrated how he arrived at their claim. The figures claimed were not meaningfully challenged.

The sixth plaintiff's evidence is that it designed external works thus roads, sank boreholes, parking areas, water supply and reticulation and treatment plant, sewer systems, within the Centre developed a pipeline. They would do a cost estimate which they would take to tender and the defendant had a feel of what was happening and all they did was mutual .All their work was done through the architect. The witness set out its claim in a clear manner. There was no challenge to this claim.

The eight plaintiff 's evidence shows that the defendant applied for credit facilities with the plaintiff after which it was supplied with steel. The defendant did not dispute that it received the supplies in issue. After it failed to pay a company associated with the defendant signed an acknowledgement of debt on its behalf. Evidence of other transactions show that Rae Holdings was conducting business on its behalf. The defendant's representative signed for and acknowledged the eighth plaintiff's claim. The acknowledgement of debt was not challenged. The eight plaintiff demonstrated through delivery notes the quantity of steel it supplied the defendant. The evidence reveals that this money was not paid. The defendant failed to explain why it signed an acknowledgement of debt with respect to eight plaintiff's claim. It was not made clear why the defendant refutes this claim and refuses to pay the outstanding amount. An attempt to prove that the plaintiff was paid all the money proved futile when it was shown that the defendant's assertion shows that it couldn't have paid more was required.

The relevance of Belinda Chiza's evidence remained a mystery to the court.

Conclusion

Each of the plaintiffs called a single witness. All the witnesses corroborated each other in all material respects. The second plaintiff explained and corroborated each of the plaintiff's cases. All the plaintiffs have proved the existence of contracts to carry out construction of the Centre. All the plaintiffs proved that they rendered their services at the Centre. Their evidence of how they arrived at their claims went unchallenged. They all proved that they performed work for amounts claimed. The defendant did badly at challenging the basis of each of the claims of the consultant plaintiffs. The defendant has failed and refused to make good the claims. He has breached the contracts he entered into with the various consultants.

The court was not addressed on paragraph (j) of the draft which seeks an order that defendant's rights and, title and interest in the Centre be and is hereby attached and declared executable. I was not addressed on this aspect and I find no basis for that part of the order. The court was also not addressed on the issue regarding costs on a higher scale.

I am satisfied that all the plaintiffs have proved their claims on a balance of probabilities. The plaintiffs are entitled to their claims.

In the result it is ordered as follows;

The defendant is to pay the plaintiffs as follows,

1. US$1 623 954.11 together with interest thereon at the minimum bank lending rate +2% per annum calculated from the date when each of the Certificates became due and payable and costs of suit to the first plaintiff
2. US$1011 683,03 together with interest thereon at the minimum bank lending rate +2% per annum calculated from the date when each fee claim became due and payable to the date of payment in full and costs of suit to the second plaintiff.
3. US$593 254.91 together with interest thereon at the minimum bank lending rate +2% calculated from the date when each fee claim became due and payable to the date of payment in full and costs of suit to the third plaintiff.
4. US$404 987.63 together with interest thereon at the minimum bank lending rate +2% per annum calculated from the date when each fee claim became due and payable to the date of payment if full and costs of suit; to the fourth
5. US$442 199.55 together with interest thereon calculated at the minimum bank lending rate +2% per annum calculated from the date when each fee claim became due and payable to the date of payment in full and costs of suit to the fifth plaintiff.
6. US$263 161-04 together with interest thereon at the minimum bank lending rate +2% calculated from the rate date when each fee claim became due and payable to the date of payment in full and costs of suit to the sixth plaintiff
7. US$51 837 74 together with interest thereon at the minimum bank lending rate +2% per annum calculated from the date when each invoice became due and payable to the date of payment in full and costs of suit to the eighth plaintiff
8. Costs of suit.

Cinemas, Mudimu&Dondo, plaintiffs' legal practitioners
Manase&Manase, defendant's legal practitioners