IN THE GAUTENG LOCAL DIVISION OF THE HIGH COURT, JOHANNESBURG

Case No: 2011/35125

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: Yes

6 May 2014

DATE SIGNATURE

In the matter between:

THE JOHANNESBURG STOCK EXCHANGE LTD Plaintiff

And

QUISPIAM CC 1st Defendant

ANTONY VAN TIL 2nd Defendant

DANA VAN DEN BERG 3rd Defendant

JUDGMENT

C. J. CLAASSEN J:

INTRODUCTION

[1] This is a delictual claim for damages arising from alleged fraud committed during the conclusion and execution of a consultancy contract between the parties. The plaintiff alleges that the three defendants' collusive conduct

surrounding the conclusion of a contract between the plaintiff and the first defendant in terms whereof the first defendant undertook to render certain expert Information Technology Asset Management ("ITAM") services during 2009 to 2011, amounted to fraud perpetrated to the detriment of the plaintiff. At the outset it is necessary to mention that the "Lillicrap"-principle[1] does not apply (nor did counsel for the defendants rely in argument thereon) as the parties never intended to regulate fraudulent conduct by either party in the contract concluded between the plaintiff and the first defendant.

[2] The plaintiff is the Johannesburg Stock Exchange Ltd ("the JSE"). It employed the third defendant, Mr Dana van den Berg ("Van den Berg"), as Head of Supplier and Asset Management. He was instructed by his superior, Mr Riaan van Wamelen ("Van Wamelen"), the Chief Information Officer of the JSE, to secure the a consultancy agreement for the rendering of the required expert services. Van den Berg engaged the services of the first defendant, ("Quispiam"), to do so. A written contract was concluded during November 2009 in terms whereof three "Confirmations of Engagement" agreements ("confirmations") were issued and signed.[2] Quispiam was owned by the second defendant, Mr Antony van Til ("Van Til"), who had known Van den Berg for some time prior to the conclusion of the contract. During the execution of the contract, Van den Berg's wife, Mrs Cecilia van den Berg ("Mrs van den Berg"), was employed by Quispiam.

[3] The initial expert, Mr Gorelick, employed by Quispiam to render the services proved to be incompetent, as a result whereof Van Til took over the duties as the expert consultant. Certain work which benefited the JSE was completed by two junior employees of Quispiam, Messrs Y. Ragubeer ("Rugabeer")

[1] See **Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd** 1985 (1) SA 475 (AD)
[2] See The first, second and third Confirmation of Engagement Agreements, Bundle "A", pp. 56 – 58

and G. Sithonga ("Sithonga"). However, by June 2011 the JSE cancelled the contract due to Quispiam's inability to render the expert consultancy services stipulated for in the contract.

[4] The plaintiff's claim for damages is computed on the basis of the repayment to it of such amounts paid by it to Quispiam for which the JSE received no benefit. The total amount paid by the JSE to Quispiam in respect of the first and second confirmations was the sum of R1 636 200.00, from which is subtracted the amount of the salaries paid to Ragubeer and Sithonga (including their December 2010 bonus) amounting to R582 000.00. This amounts to a claim for damages in the sum of R1 054 200.00. To that amount must be added the full amount of R270 000.00 paid under the third confirmation for which no services were rendered, bringing the total claim to an amount of R1 324 200.00.

THE WITNESSES

[5] For the plaintiff, the following witnesses testified:

- Mr Allan Greyling ("Greyling"), a chartered accountant and forensic expert.
- Mr Riaan van Wamelen, the Chief Information Technology Officer of the JSE.
- Mr Vuyo Sithonga, a junior employee of Quispiam.
- Mr Vincent Coetzer ("Coetzer"), a business man who had some dealings with Van Til.

[6] On behalf of the defendants, the following witnesses testified:

- Mr Dana van den Berg, the third defendant.

- Mr Tony Trollip ("Trollip"), a senior information technology consultant.
- Mr Antony van Til, the second defendant.

[7] Let me say immediately that I found Greyling to be an honest and trustworthy witness. His expert testimony was to a limited extent hampered by a lack of information which was subsequently remedied by further information obtained during the trial from the defendants. He was able to pinpoint certain inexplicable inconsistencies between the documentation provided by the defendants and the defendants' version in court and assisted in the calculation of plaintiff's damages.

[8] Van Wamelen was an honest and straightforward witness. His evidence was supported by documentary evidence and in regard to those facts unknown to him he was quick to admit his lack of knowledge.

[9] Sithonga was an honest witness and readily admitted his own lack of experience and formal training in the duties required of him. He can be believed in the contribution that he was able to make regarding the work that he and his colleague Rugabeer performed and the contribution of Van Til.

[10] Coetzer was not a credible witness. He had an obvious axe to grind with Van Til. Reliance can only be placed on his evidence to the extent that it is either common cause or corroborated by other credible evidence.

[11] Van den Berg performed well in his evidence in chief, but sadly crumbled under cross-examination especially in regard to facts emanating from his disciplinary hearing and the fact that he conducted himself contrary to the ethics of his own code of conduct that he was subject to. He desperately attempted to distance himself from many obvious inferences such as the

involvement of his wife in the business of Quispiam and the transfer of certain funds to her bank account. He found himself on the horns of a dilemma in that he differed from Van Til's evidence on certain material issues.

[12] Trollip gave expert testimony which, in my view, in certain respects, supported both the plaintiff's and the defendants' versions. He was a good witness and objective in regard particularly to the nature of the services to be rendered in terms of the consultancy contract concluded between the JSE and Quispiam.

[13] Van Til did not make a good impression upon me. I find him to be an unreliable witness. The contemporaneous notes I made during the trial, reveal that I found him to be a dishonest, unsatisfactory and lying witness. In certain instances my notes also reveal that he testified in an unsure manner.

[14] The aforesaid evaluations of the witnesses will become plain in the remaining portion of this judgment.

THE PLEADINGS

[15] It is necessary to refer to the pleadings in some detail. The plaintiff's particulars of claim start out with references to the employment of Van den Berg by the JSE on 1 October 2008. The terms of employment are captured in annexure "POC1" attached to the particulars of claim. In particular it is alleged that Van den Berg was responsible for the information technology division and the JSE's requirements in this regard. He was also bound by a code of conduct a copy whereof is attached as annexure "POC2" to the particulars of claim. In paragraph 4.18 of the code of conduct the question of conflict of interest is dealt with. It states the following:

"4.18 **Conflict of Interest**

The general principle that underlies conflict of interest is that employees should avoid any activity, investment or **interest that might** reflect unfavourably upon the integrity or good name of the JSE or **themselves.**

Personal interests should not influence employees when engaging in business dealings on behalf of the JSE. They are expected to place the JSE's interest **ahead of any personal gain** in every business transaction as well as **disclose all the facts** in any situation where a conflict of interest may arise.

For example, a conflict of interest may arise where an employee:

4.18.1 Has personal financial interests that might affect a business decision.

4.18.2 Influences, either directly, or indirectly, the JSE's dealings with any supplier with whom the employee has **a personal or financial relationship.**

4.18.3 Has a personal or financial interest in the JSE's supplier, competitor or client.

4.18.4 Gains personal enrichment through access to confidential information.

4.18.5 Competes with the JSE regarding trade matters or works for the JSE's competitor whilst currently employed."(Emphasis added)

[16] In addition clause 5.9 of the code of conduct describes "dishonesty" as including "receiving a gift from a client in return for a favour(s)".

[17] It is further alleged in paragraph 8 of the plaintiff's particulars of claim that Van den Berg owed a duty of care to the JSE in the following terms:

"8. Independent from and in addition to his duties and obligations as an employee of the plaintiff, the third defendant in any event, owed the plaintiff a duty of care:

8.1 not to defraud or allow the plaintiff to be defrauded;

8.2 not to collude with any other person either to defraud the plaintiff or to cause the plaintiff to incur expenses or pay out monies which were not actually due;

8.3 to do all things which were reasonably necessary in the circumstances in order to ensure that no act or omission on his part will cause the plaintiff to suffer a financial loss."

[18] In paragraphs 9 to 11 the consultancy agreement which was concluded between the JSE and Quispiam is referred to. A copy of the agreement is attached as annexure "POC3". The relevant clauses of the consultancy agreement are:

"In this Agreement unless otherwise indicated by the context:

1.5 the following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings:

1.5.1 '**Agreement**' means the agreement contained in this document and the Confirmation of Engagement hereto which Confirmation of Engagement shall form an integral part hereof and to which the provisions, stipulations and conditions of the Agreement shall apply mutatis mutandis. Where there is conflict between any of the provisions, stipulations and conditions of the Agreement and that of any Confirmation of Engagement, the provisions, stipulations and conditions of the Agreement, **except for those contained in the special conditions of such Confirmation of Engagement**, shall take precedence;

1.5.2 …

1.5.3 '**Consultant**' means a **skilled person from Quispiam** who will provide the Services;

1.5.4 '**Confirmation of Engagement**' means the confirmation of engagement substantially in the format attached hereto as Annexure A to be signed by the Parties which details the provision of the Services;

1.5.5 '**Designated Representatives**' means in the case of the JSE, Dana van den Berg and in the case of Quispiam, Tony van Til or their alternates or replacements appointed by written notice and who must be at a level of seniority substantially similar to the persons they are standing in for or replacing, and be acceptable to the other Party, in its reasonable discretion;

…

1.5.9 '**Services**' means the professional consulting services to be performed by the Consultant to the JSE, **as more fully described in a Confirmation of Engagement**;

3.1 It is recorded that **nothing** in this Agreement shall constitute an **employment relationship** between the JSE and the Consultant.

4 ENGAGEMENT AND SERVICES

4.1 **Quispiam shall ensure that the Consultants will have the necessary skills and expertise to provide the Services.**

4.2 Quispiam shall ensure that all Consultants submit weekly **timesheets** detailing the hours worked, and tasks and activities conducted by that Consultant to the JSE's Designated Representative, which timekeeping and expense records have to be approved by the JSE's Designated Representative.

4.3 …

4.4 The Confirmation of Engagement shall specify the following –

4.4.1 the Premises from which the Services are to be rendered;

4.4.2 the specific Services required to be rendered/task to be performed by the Consultant;

4.4.3 the number of hours which are to be worked as well as whether such hours shall be rendered on a flexitime or a fixed working hours basis;

4.4.4. the Service Fees due by the JSE to Quispiam for the performance of the Services by the Consultant;

4.4.5 the start date and duration of the Services, which shall be specified as a fixed period or until the completion of a particular task, as described in the Confirmation of Engagement; and

4.4.6 any other information which the Parties may deem appropriate in the circumstances.

4.5 In the event of resignation or dismissal from Quispiam of a Consultant, Quispiam reserves the right to replace such Consultant with a suitable replacement, and shall provide the JSE with 30 (thirty) days **prior written notice** of such replacement.

…

5 JSE RESPONSIBILITIES

The JSE shall:

5.1 …

5.2 …

5.3 manage, on a daily basis, the Consultants including, without limitation, the work allocation and performance of each Consultant.

…

7 SERVICE FEE

7.1 The JSE shall pay Quispiam a service fee in accordance with the rates specified in the Confirmation of Engagement, which rates shall be exclusive of VAT ('Service Fee').

7.2 Any amount due by the JSE to the Consultant shall be paid within 30 (thirty) days from receipt of invoice.

7.3 Quispiam shall ensure that all invoices submitted to the JSE are sufficiently detailed and include such supporting documentation as is necessary for the JSE to be able to confirm the correctness of the amounts being invoiced as well as to be able to tie each such invoice to the specific Services delivered.

7.4 **Quispiam shall maintain complete and accurate records** of, and supporting documentation for, **all amounts invoiced to and payments made by the JSE** in terms of this Agreement in accordance with generally accepted accounting principles applied on a consistent basis and shall make these available for review to the JSE (or its auditors) upon written notice.

…

11 DURATION AND TERMINATION

11.1 …

11.2 …

11.3 In the event of the Consultant **performing poorly**, other than as a result of the JSE's mismanagement of such Consultant, or displaying unacceptable behaviour in the JSE's reasonable opinion or in the event of the JSE becoming aware of information pursuant to its security procedures and inquiries which indicates that it would be **prejudicial to the JSE** or to its affiliates or to their respective customers for a Consultant to continue rendering the Services, the JSE shall be entitled to request Quispiam to replace such Consultant on 7 (seven) days written notice to Quispiam, failing which the JSE shall be entitled to cancel the specific Confirmation of Engagement, in which event the

JSE shall only be liable to pay Quispiam for the Services rendered by the Consultant up to the date of cancellation of the Confirmation of Engagement.

…

12 WARRANTY

Quispiam gives the following warranties to the JSE:

12.1 It shall provide adequately skilled Consultants to the JSE and the Consultants are qualified and suitable to render the Services to the JSE;

12.2 It shall ensure that it and its Consultants perform its responsibilities under this Agreement in a manner that does not infringe, or constitute an infringement or misappropriation, of any intellectual property or other proprietary rights of any third party;

12.3 …

12.4 the Consultants shall perform the Services properly, diligently, promptly, timeously, efficiently and in compliance with the JSE's lawful instructions." (Emphasis added)

[19] In paragraphs 12 to 20 the plaintiff pleads the three confirmation agreements that were concluded between the JSE and Quispiam. The first Confirmation was concluded on 23 November 2009 and attached to the particulars of claim as annexure "POC4". It reveals that Quispiam was to supply two junior consultants and one "ad hoc senior ITAM resource". The specific services to be rendered were stated as "development of IT asset management ('ITAM') programme and associated deliverables." It further specifies the amount of hours per month to be served by the junior and senior resources and a service fee of R90 000.00 per month excluding VAT which includes overtime. It records that the start date will be 23 November 2009 and the duration thirteen months. It further contained special conditions in the following terms:

"1. The scope and deliverables will be agreed by the parties during the initial stages of the Consulting Agreement.

> 2. Notwithstanding clause 9 of the Agreement, the JSE is permitted to solicit the junior ITAM resources immediately after the duration of engagement with no placement fee payable to Quispiam."

[20] The second Confirmation of Engagement is attached as annexure "POC5" to the particulars of claim. It constitutes the renewed appointment of the consultants mentioned in the first Confirmation of Engagement for the same services to be rendered at the same number of hours, but the service fee was increased to R95 400.00 per month excluding VAT and including overtime. This constitutes approximately a six percent increase in the service fee. The start date was set to be 24 December 2010 and the duration until 31 December 2011. The special conditions were the same as in the first Confirmation of Engagement agreement.

[21] The third Confirmation of Engagement is attached to the particulars of claim as annexure "POC6". It calls for the appointment by Quispiam of an "external legal counsel on a part time fixed scope basis" to render a "summary of all the software EULA's ("End User Licence Agreements") to ensure compliance of our assets standards list." It stipulates a three month engagement and the service fee was stated to be R90 000.00 per month excluding VAT, but including overtime. The engagement was to start on 1 August 2010. It is common cause that the required external legal counsel was never engaged and that an amount of R270 000.00 was paid equalling the amount of R90 000.00 per month for three months. It is further common cause that the engagement did not commence on 1 August 2010, but only during October 2010.

[22] As stated in the heads of argument for the defendants, it is common cause that a total amount of R1 917 000.00 was paid by the JSE to Quispiam in respect of the three Confirmation Agreements. In this regard, I quote from

paragraph 1.12 of the defendants' heads of argument which states the following:

> "1.12 The first defendant submitted invoices to the plaintiff and payments were made to the first defendant. Despite the fact that the third defendant denied payment by the plaintiff to the first defendant, it can be accepted as common cause between all the parties that the plaintiff made the following payments to the first defendant, namely:
>
> 1.12.1 in respect of the first confirmation of engagement – R90 000.00 (plus VAT) x 13 months = R1 170 000.00 (plus VAT);
>
> 1.12.2 in respect of the second confirmation of engagement – R95 400.00 (plus VAT) x 5 months = R477 000.00 (plus VAT); and
>
> 1.12.3 R270 000.00 (plus VAT) in respect of the third confirmation of engagement."

[23] Plaintiff's cause of action is pleaded in paragraphs 24 to 32 of the particulars of claim in the following terms:

> "24. In submitting the aforesaid invoices, as detailed in paragraphs 21 to 23 above to the plaintiff, the first defendant, duly represented by the second defendant, represented to the plaintiff that all of the Services provided for in each of the First, Second and Third Confirmations had indeed been rendered and, more particularly, that:
>
> 24.1 The senior ITAM resource, as provided for in the First and Second Confirmations, had indeed been assigned to the plaintiff and had rendered 40 hours of Services per month to the plaintiff; and
>
> 24.2 The external legal counsel for whom provision was made in the Third Confirmation had indeed been engaged and had rendered the Services which were provided for in the Third Confirmation.
>
> 25. To the knowledge of the first and second defendants, the representations as described in paragraph 24 above were false.
>
> 26. The aforesaid misrepresentations were made fraudulently, alternatively negligently.
>
> 27. More particularly, and to the knowledge of the first, second, and third defendants (the knowledge of the second defendant being attributable to the first defendant):

27.1 No senior ITAM resource, as contemplated by the First and Second Confirmations, was ever assigned to the plaintiff;

27.2 The plaintiff did not receive or derive the benefit of 40 hours of service per month (or indeed any amount) from a senior ITAM resource;

27.3 The services or an external legal counsel (as provided for in the Third Confirmation) had never been engaged;

27.4 Despite having paid therefor, the plaintiff never received or derived the benefit of the services of an external legal counsel to provide the services as contemplated by and provided for in the Third Confirmation.

28. The value of the senior ITAM resource for which the plaintiff paid, but did not receive:

28.1 In terms of the First Confirmation, was the sum of R54 000.00 per month excluding VAT; and

28.2 In terms of the Second Confirmation, was the sum of R55 800.00 per month excluding VAT;

29. Upon discovering the facts as detailed in paragraphs 24 to 28 above,

29.1 on or about 9 June 2011 the plaintiff terminated the Consultancy Agreement and the Second and Third Confirmations;

29.2 on or about 21 June 2011, and pursuant to a disciplinary hearing which had been convened and conducted, the plaintiff terminated the third defendant's employment contract.

30. In the circumstances, and in consequence of that which has been detailed in paragraphs 24 to 28 above, the plaintiff has suffered damages in the total amount of R1 251 000.00, which amount comprises and is calculated as follows:

30.1 The overpayment in respect of the senior ITAM resource for the thirteen month period from November 2009 to December 2010 at the rate of R54 000.00 per month, a total of R702 000.00;

30.2 The overpayment in respect of the senior ITAM resource for the five month period from December 2010 to April 2011 at the rate of R55 800.00 per month, a total of R279 000.00; and

30.3 The R270 000.00 which the plaintiff paid to the first defendant under the auspices of the Third Confirmation, in

respect of the Services of an external legal counsel which were never rendered or received.

31. The plaintiff's aforesaid damages arose by virtue of the following:

31.1 The first, second and third defendants having colluded with one another to defraud the plaintiff out of the monies which are more fully detailed in paragraph 30 above;

31.2 The first defendant having breached the terms of the Consultancy Agreement and the First, Second and Third Confirmations by:

31.2.1 failing to provide a senior ITAM resource to render Services to the plaintiff;

31.2.2 charging for the Services of a senior ITAM resource which had never been provided;

31.2.3 failing to ensure that a senior ITAM resource, with the necessary skills and expertise to provide the requisite Services, was, firstly, appointed and provided and, secondly, rendered the requisite Services;

31.2.4 failing to ensure that the requisite and stipulated weekly time sheets were either produced or submitted;

31.2.5 failing to ensure that the invoices which it submitted to the plaintiff were sufficiently detailed and included the necessary supporting documentation, as detailed in paragraph 11.10 above;

31.2.6 failing to appoint or engage the services of an external legal counsel as contemplated by and provided for in the Third Confirmation;

31.2.7 failing to ensure that any such external legal counsel in fact rendered the Services which he or she was obliged to render in terms of the Third Confirmation;

31.3 The third defendant having breached his contract of employment with the plaintiff in one or more or all of the following respects:

31.3.1 influencing, either directly or indirectly, the appointment of the first defendant and the conclusion of the Consultancy Agreement and each of the Confirmations in circumstances where he had a conflict of interest regarding such appointment,

particularly given that he had a personal relationship with the second defendant;

31.3.2 acting negligently in the performance and execution of his duties as the plaintiff's employee;

31.3.3 failing to ensure that the Services for which the plaintiff had contracted in terms of the First, Second and Third Confirmations (and for which the plaintiff paid) had indeed been rendered;

31.3.4 failing to insist upon the production and receipt of all supporting documentation in substantiation of the aforesaid amounts which the first defendant invoiced to the plaintiff, and which the plaintiff paid;

31.3.5 deliberately and wrongfully, alternatively negligently approving all of the first defendant's aforesaid invoices for payment in full, and authorising such payment to the first defendant;

31.3.6 causing and/or allowing the first defendant's aforesaid invoices to be paid in full under circumstances where he ought not to have done so;

31.3.7 conducting himself in the manner as more fully detailed in paragraphs 31.3.3 to 31.3.6 above, which conduct amounted to and had the effect of falsifying the process of the relevant transactions;

31.4 The third defendant having breached his duty of care as more fully detailed in paragraph 8 above by:

31.4.1 defrauding the plaintiff, alternatively allowing the plaintiff to be so defrauded;

31.4.2 colluding with the first and second defendants, as detailed in paragraph 31.1 above;

31.4.3 failing to exercise due and reasonable care;

31.4.4 causing and/or allowing the plaintiff to suffer the aforesaid damages when, by the exercise of due and reasonable care, he could and should have prevented such losses from occurring;

31.4.5 approving and authorising the first defendant's aforesaid invoices for payment in full, thereby fraudulently, alternatively negligently misrepresenting to the plaintiff that such payments were indeed due to the first defendant; and/or

31.5 The facts as detailed in paragraphs 24 to 27 above.

32. The conduct of the first, second and third defendants, as detailed in paragraph 31 above, jointly caused the plaintiff to suffer its aforesaid damages."

[24] The first and second defendants filed a joint plea. In essence the allegations in paragraph 1 to 23 of the plaintiff's particulars of claim are admitted. Thereafter they plead as follows:

"12. **AD PARAGRPAH 24**

12.1 First defendant represented to the plaintiff that the services reflected on its invoices had been rendered.

12.2 Save as aforesaid, the contents of this paragraph are denied.

13. **AD PARAGRAPH 25 TO 28**

The contents of these paragraphs are denied.

14. **AD PARAGRAPH 29 READ WITH 29.1**

14.1 It is admitted that on 9 June 2011 Plaintiff terminated the Consultancy Agreement and the Second and Third Confirmations.

14.2 Save as aforesaid, the contents of these paragraphs are denied.

15. **AD PARAGRAPH 29 READ WITH 29.2**

The contents of these paragraphs are denied.

16. **AD PARAGRAPH 30 TO 34**

The contents of these paragraphs are denied."

[25] The third defendant filed a separate plea. Paragraphs 1 to 7 of plaintiff's particulars of claim are admitted, but paragraph 8 regarding the duty of care is denied. Paragraphs 9 to 20 are also admitted whereas paragraphs 21 to 23 are denied. Save to admit the rendering of the invoices, the third defendant alleges that all the services referred to in the invoices were in fact rendered. He also denies the contents of paragraphs 25, 26, 27 and 28 of the particulars

of claim, but admits the contents of paragraph 29. As to the remaining allegations in the plaintiff's particulars of claim as stated in paragraphs 30 to 34, the third defendant denies the same and in amplification pleads as follows:

> "10.2 In amplification of the afore stated denial, the third defendant pleads that at all times material to the existence of the employment contract between the plaintiff and the third defendant, the third defendant complied with the obligations which were imposed upon him by the employment contract.
>
> 10.3 Without derogating from the generality of the afore stated denials, the third defendant denies in particular that the third defendant breached the terms of the employment contract as claimed by the plaintiff or at all.
>
> 10.4 The third defendant pleads further that in the event that the above Honourable Court finds that the third defendant owed the plaintiff a duty of care, then the third defendant denies that he had breached the duty of care."

[26] In simple terms the pleadings imposed upon the plaintiff the duty to prove on a balance of probabilities that the three defendants colluded to defraud the JSE by representing that such services specified in the confirmation agreements could be and was in fact rendered. I agree with the submission of plaintiff's counsel that it is difficult to penetrate a fraud when the participants close ranks, particularly when they do so to such an extent that they choose to be represented by the same legal team even in the face of obvious potential conflicts of interest.[3] The plaintiff submitted, however, that the JSE was able to demonstrate the existence of a number of unusual and irregular features in the manner in which the Consultancy Agreement was entered into and performed. It was argued that the defendants have either been forced to admit these features, or have put up purported explanations which are so improbable or contrived that they can safely be disbelieved.

[3] Transcript Volume 7 p. 660 lines 16 to 25 – Volume 10 p. 991 lines 1 - 11

THE EVIDENCE

[27] The JSE employed Van den Berg in October 2008 as Head of Supplier and Asset Management. At the direction of his superior, Van Wamelen, the JSE's Chief Information Technology Officer, he focussed initially on procurement and contract management. His focus turned to asset management in the latter part of 2009.[4]

[28] Van den Berg formed the view, which he communicated to Van Wamelen, who relied upon him, that external experts would be required because there was insufficient expertise in the field of asset management within the JSE.[5] In accordance with the procurement policy (which he had drafted), Van den Berg ran a request for proposal ("RFP") process (essentially a call for tenders) in an attempt to identify external experts.[6] He reported to Van Wamelen that there were no suitable responses to the RFP.[7]

[29] Subsequently, Van den Berg advised Van Wamelen that he had identified a supplier who could provide consultancy services in the specialised area of IT Asset Management (ITAM). The supplier he identified was Quispiam.[8] It was within Van den Berg's mandate to assess the suitability of the service provider, and he advised Van Wamelen that Quispiam had the required ITAM expertise. It was on that basis that Van Wamelen signed off on the Consultancy Agreement with Quispiam.[9] Van den Berg stated that he did not look further for ITAM experts due to time pressures. This is an unconvincing excuse in view of the evidence of the defendants' expert Trollip that such

[4] Transcript Volume 2 p. 177 (van Wamelen) from line 1 to middle of page; p. 90 middle paragraph
[5] Transcript Volume 2 p. 190 Third paragraph – p. 191 lines 1 – 5
[6] Transcript Volume 2 p. 184 foot – p. 187 middle
[7] Transcript Volume 2 p. 192 lines 1 – 5
[8] Transcript Volume 2 p. 192 from last third of page – p. 193 line 1
[9] Transcript Volume 2 p. 194 last paragraph – p. 195 par 2

ITAM experts were available overseas, although at a high price. Van den Berg never stated that prices were a concern to either himself or the JSE at that particular point in time.

[30] An issue hotly debated during the trial was whether the contract was in fact a Consultancy Agreement or a Labour Broking Agreement. The difference between the two types of agreement is in fact relevant to this case. A Consultancy Agreement is one in terms of which the JSE contracts to receive specialist and professional services, generally for a particular identified task or to establish a particular capability. The provision of the services will be undertaken, managed and controlled by the consultant, in view of the fact that the JSE itself does not possess the necessary skills and experience to perform such services by itself. On the other hand, in a Labour Broking Agreement, the JSE simply hires people for a limited period to perform certain work under the management and control of existing JSE management.[10] In my view, the defendants' attempt to describe the contract between the JSE and Quispiam as a Labour Broking Agreement must be rejected. The terms of the contract speak for themselves. No surrounding evidence is necessary to interpret it, as there are no ambiguities in the contract requiring such evidence. In my view the terms unambiguously call for expert professional consulting services to be rendered by a "Consultant" as described in the Confirmation of Engagement.[11] Expressly, the parties excluded any labour broking element in their contract.[12] I conclude without difficulty that the parties' relationship was in fact a consultancy arrangement in terms whereof Quispiam was required to render the expert services of an ITAM expert nature. In my view clause 4.1 expressly requires of Quispiam to deliver individuals that fall into this category. Clause 5.3 does not derogate

[10] Transcript Volume 2 p. 194 par 2
[11] See clauses 1.5.3, 1.5.9 as read with the description of the services in the Confirmation Engagements.
[12] See clause 3.1

from this conclusion in any manner. "Managing the performance" of Quispiam's ITAM experts does not mean, as the defendants would have it, "training the resources to become experts" while executing the contract.

[31] Some disturbing features surrounding the conclusion of the Consultancy agreement came to light during the evidence. Some of these features are the following:

1. Shortly before identifying Quispiam as a suitable ITAM consultant, Van den Berg had, as part of his focus on procurement and contract management, rationalised the list of labour brokers who provided services to the JSE. Quispiam had **not been on the list at all, but, as a favour to Van Til**, Van den Berg introduced Quispiam as one of only five labour brokers who made it onto the rationalised list. Van den Berg admitted that he did so contrary to the proper procurement process, and without any knowledge of or enquiry into Quispiam's track record as a labour broker.[13]

1.1 On the basis that Quispiam was on the preferred list of suppliers, Van den Berg approached Van Til about the need for a senior ITAM resource. Van den Berg **did not approach other labour brokers** with a similar request. Van den Berg made no investigation into the availability of skilled ITAM resources from any other source before recommending Quispiam.[14] He admitted that other brokers would in all likelihood have been able to source such a resource. He sought to excuse his conduct on the basis that the JSE was under **strict time constraints** and that he was

[13] Transcript Volume 7 p. 710 line 4 – p. 716 lines 1 – 23; p. 972 line 1 – p. 977 line 1
[14] Transcript Volume 8 p.727 lines 22 – 25

comfortable with the resource that was introduced to him by Quispiam.[15] In my view this was a lame excuse. No details of any time pressures so severe as to deny a proper investigation of other ITAM sources were supplied by Van den Berg.

1.2 Van den Berg approached Quispiam even though he knew that it was **not** an ITAM consultant, but just a labour broker.[16] He also **knew** that Van Til, though he may have had certain relevant skills, was **not** an **ITAM expert**.[17]

1.3 Van Til told Van den Berg that he had a skilled ITAM resource available who would be able to supply the services sought by the JSE.

2. In my view, the coincidences evidenced by this chain of events[18] are too **remarkable** to be accepted as true **coincidences**. It is more probable that they establish clear evidence of an orchestrated collusion between Van den Berg and Van Til to bring into effect a contractual relationship between the JSE and Quispiam for the mutual benefit of Van den Berg and Van Til.

3. The Consultancy Agreement was concluded contrary to those provisions of Van den Berg's employment contract that related to the avoidance of **conflicts of interest**. The conflict of interest

[15] Transcript Volume 8 p. 718 lines 1 – 25 – p. 720 lines 1 – 25
[16] Transcript Volume 8 p. 726 lines 11 – 25
[17] Transcript Volume 8 p.727 lines 14 – 22
[18] As put to Van Til in cross-examination: Transcript p. 990 line 5 – p. 991 line 19

provisions were very clearly set out, and included examples for a clearer understanding.[19] Contrary thereto:

3.1 Van den Berg knew Van Til from a time long before any relationship existed between the JSE and Quispiam.[20]

3.2 Van den Berg did not reveal his previous relationship with Van Til to Van Wamelen.[21]

3.3 According to Van Wamelen, had he known of the previous relationship, it would have raised a significant red flag.[22]

3.4 Moreover, Van den Berg was the "designated representative" of the JSE in relation to the Consultancy Agreement, meaning that he was the person responsible for liaising with Quispiam, and charged with ensuring that the services were being duly delivered and that the obligations under the contract were being duly observed.[23] He was so obliged also in terms of clause 5.3 of the Consultancy Agreement. This meant he had to retain an independent stance vis-à-vis Quispiam in order to properly protect the JSE's interests as its employee.

4. I conclude that the proven facts militate against any other inference but that Van den Berg arranged matters so that the established procurement requirements could be circumvented. He relied on the earlier RFP process as a basis for taking on Quispiam without

[19] Bundle "A" p. 35 clause 4.18
[20] Transcript Volume 10 p. 971 lines 6 – 8
[21] Transcript Volume 2 p. 193 line 2 to end of third paragraph
[22] Transcript Volume 2 p.193 lines 2 – 4
[23] Transcript Volume 2 p.196 last paragraph – p. 197 end of third paragraph

obtaining competitive tenders, notwithstanding that he accepted that there was no reason to believe that other brokers would not have been able to provide the same service that he sought from Quispiam. This is particularly significant as Van den Berg drafted the procurement policy.[24]

FIRST AND SECOND CONFIRMATIONS OF ENGAGEMENT

[32] The following definitions in the Consultancy Agreement are important to an understanding of the services that were required to be provided under the confirmations of engagement:

1. "**Consultant**" means a **skilled** person (in context, that meant a person skilled in ITAM) from Quispiam who will provide the services;

2. "**Services**" means the professional consulting services to be performed by the consultant to the JSE, as more fully described in a confirmation of engagement. [25]

[33] Moreover, in clause 12 of the Consultancy Agreement, Quispiam warranted that "it shall provide adequately skilled consultants to the JSE and the consultants are qualified and suitable to render the services to the JSE".[26]

[34] Clause 11.3 is also relevant, given the events that occurred during the subsistence of the agreement. It provides as follows:

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[24] Transcript Volume 2 p.185 line 1 to last line; p. 186 line 1 to third paragraph – p. 187 middle of page; p.192 last paragraph
[25]Consultancy Agreement Bundle "A" pp. 42 – 43
[26] *Ibid* at p. 50

> "In the event of the Consultant performing poorly, other than as a result of the JSE's mismanagement of such Consultant, ..., the JSE shall be entitled to request Quispiam to replace such Consultant on 7 (seven) days written notice to Quispiam, failing which the JSE shall be entitled to cancel the specific Confirmation of Engagement, in which event the JSE shall only be liable to pay Quispiam for the Services rendered by the Consultant up to the date of cancellation of the Confirmation of Engagement."[27]

[35] The contractual right to replace incompetent consultants was never exercised other than to replace the first incompetent Mr Gorelick with Van Til who also proved to be incompetent. The JSE at that stage had a right to exercise the provisions of clause 11.3 but in view of the fact that Van den Berg was not acting at arm's length to the benefit of his employer, the JSE, his favoured friend Van Til was also not replaced.

[36] The evidence, in my view, proves that Van den Berg and Van Til were in cahoots with one another and that the relationship concluded between Van Til for Quispiam and Van den Berg for the JSE were **not entered into at arm's length**. This conclusion flows from the following:

1. The agreement clearly contemplated the provision by Quispiam to the JSE of consultants with ITAM skills and experience, both at the junior and senior level, who would come into the JSE over a fixed period to develop an ITAM programme. The reality was very different. Ragubeer and Sithonga were raw graduates with no knowledge of or skills in ITAM.[28] Van Til, who took on the role of "senior ITAM resource", was **self-confessedly not an ITAM expert**. Although he had certain useful skills, and had, during the course of his career, performed some asset management-related tasks, he knew nothing about the newly emerging ITAM discipline.

[27] Consultancy Agreement Bundle "A" p. 49
[28] Transcript Volume 4 p. 371 lines 12 – 25 and p. 376 lines 6 – 9

2. Indeed, Van Til did not even identify himself as the appropriate ITAM resource when Van den Berg first told him he was looking for one. He identified Mr Gorelick.[29] Gorelick contributed a mere 10 hours of background work before Van den Berg decided it that Gorelick was entirely unsuitable and added no value. A replacement was sought but not found, and so Van den Berg suggested that Van Til himself take on the role. There is no dispute that Van Til does not fit the description of a "senior ITAM resource".

3. In any event, the evidence of **Sithonga** (corroborated by Van den Berg himself) was that Van Til provided **minimal input** or **instruction** to the **junior resources** in relation to ITAM or at all. The juniors were instructed by and under the guidance of Van den Berg.[30] The role played by Van Til was never fully explained. Van den Berg merely said he found Van Til to be a "useful sounding board".[31] In my view, that did not justify the appointment of Van Till as being compliant with the requirements set by the Consultancy Agreement.

4. Despite the fact that Gorelick was removed from the contract by Van Til on the basis that he would be paid for **10 hours work**, Quispiam invoiced the JSE in full for the entire three-month period during which Gorelick was the identified ITAM resource. Contractually speaking this fact may be of lesser import, but delictually speaking, it makes the existence of a scheme to defraud the JSE that more probable.

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[29] Transcript Volume 10 p. 991 lines 20 – 24
[30] Transcript Volume 4 pp. 396 – 397. Van Til accepts that he spent very little time "*on site*" at the JSE
[31] As explained by Van den Berg at his disciplinary hearing – Bundle "D" pp. 206 – 207

5. Furthermore, Van den Berg, who was aware of the arrangement reached with Gorelick, authorised payment of the invoices for work allegedly done in excess of 10 hours. Van Til sought to justify the payment on the basis, as owner of Quispiam, that he was "**hands-on**" with the project from the start.[32] However, he was obviously **not there, as ITAM expert** at that time, and his presence did not justify his charging the JSE for his time as if he were the ITAM consultant. It was plain dishonest and fraudulent to charge for a service not rendered.[33]

6. The monthly fee of R90 000.00 is itself a manifestation of the fraud. Every attempt by Van Til and Van den Berg to justify the amount was futile and patently contrived. It would be difficult to assess the reasonableness of **R90 000.00** per month as a fee for the services that were supposed to be provided in terms of the Consultancy Agreement read with the Confirmations of Engagement. In any event, the JSE accepted that fee for the services described. However, Greyling testified that when the fee is considered against the reasonable value of the services that were **actually** provided, the fee is **patently unreasonably excessive**.[34] This conduct is more consistent with an intent to defraud than with an intent to merely overcharge.

7. Apart from the fact that it was grossly excessive, the significance of the fee being set at the level of R90 000.00 per month is that it falls just within the parameters of Van den Berg's authority. Is this yet another coincidence? In terms of the applicable limits of authority prescribed by the JSE at the time, Van den Berg could authorise payments of up to

[32] Transcript Volume 10 p. 985 line 1 – p. 986 line 22
[33] Transcript Volume 10 p. 986 lines 4 – 25; p. 987 lines 1 – 19; p. 993 lines 1 – 25
[34] This aspect was dealt with extensively by the plaintiff's expert, Mr Greyling. His evidence is usefully summarised at paragraphs 21 – 32 of his supplementary report at Bundle "C" pp. 811 – 813. See also Transcript Volume 1 p. 103 line 171 – p. 108 line 6

R100 000.00. He was accordingly able to, and did, authorise payment of Quispiam's monthly invoices, thereby ensuring that no awkward questions were asked by independent members of the JSE management.[35]

8. A telling and damning vignette involving the quantum of the fee was Van den Berg's attempt to justify it on the basis that it would have to cover the fees of other consultants enlisted from more expensive professions whose services might be needed from time to time.[36] It was put in cross-examination on behalf of the defendants, as an example of the use of other skilled consultants on the contract that services had been provided by, and payment made to, the **attorney Regina Jansen van Rensburg**. The JSE was able to find its records of the payment made to Ms Jansen van Rensburg. The records revealed that the version put on behalf of the defendants was entirely false and without foundation.[37] This was a patent attempt to deceive the court and reflects adversely on the credibility of Van den Berg. It constituted a failed cover for what was a fraudulent course of action by the defendants.

9. Despite the stipulation in clause 4.2 of the Consultancy Agreement, no records whatsoever were kept of the hours contributed by Van Til. There can be no doubt that, in an arm's length relationship, the JSE's designated representative in relation to the Consultancy Agreement would have required the senior ITAM resource allocated to the JSE, to

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[35] Transcript Volume 3 p. 224 line 12 – p. 226 lines 1 – 3; see Bundle "D" Volume 2 p. 184 "*Delegation of Authority*"

[36] Transcript Volume 7 p. 702 paragraph 1

[37] Indeed, as it turned out, the amount charged by Ms van Rensburg was an amount for drafting an agreement related to a business opportunity that Van den Berg was exploring for Van Til in October 2010, again indicative of a relationship that was far from arm's length. See Transcript Volume 4 p. 363 line 16 – p. 367 line 23

prove the extent of his or her provision of services.[38] Both Van den Berg and Van Til were unsatisfactory witnesses in this regard as they were unable to deal with this aspect in anything other than vague terms.

[37] The collusive and fraudulent arrangement between Van den Berg and Van Til is, in my view, conclusively proved by the involvement of Mrs van den Berg as an employee of Quispiam.

[38] The purported employment of Mrs Cecilia van den Berg by Quispiam is fraught with improbabilities. For example[39]:

1. Van Til did not check any references. He just looked at her and was convinced that she was the right person. Her CV was not discovered in this matter.

2. There was no written contract of employment signed between her and Quispiam.

3. She was allegedly on a contract terminable on one month's notice. Van Til then stated that he had agreed to a signing-on fee provided she stayed for the full length of the contract, i.e. twelve months.[40] A monthly contract is inconsistent with a twelve month contract.

4. When challenged with the inconsistency between the fixed-term twelve month contract, and the one month's notice provision, Van Til

[38] Transcript Volume 8 p. 731 lines 15 – 20; p. 772 line 1 – p. 774 line 20
[39] Transcript Volume 11 p. 1032 lines 1 – 21
[40] Transcript Volume 11 p. 1033 lines 3 – 12

backtracked and stated that she would then have had to pay back the bonus.[41]

5. The defendants claimed that she had negotiated a signing-on fee equivalent to two months' pay. This is despite the fact that she had never worked in the industry and brought nothing exceptional to the table.

6. Van Til asserted that she had an unwritten and yet exceedingly lucrative "bonus" arrangement. Van Til stated that the bonus would be paid to her for "(A)nything that is not body shopping".[42] The bonus agreement was not reduced to writing. Van Til claimed he had a standard commission agreement with most of the employees.[43] This arrangement with Mrs van den Berg was not a "standard commission agreement" with Quispiam. The standard agreements would, according to Van Til, be one month's profit on that resource.[44] Van Til could not recall the date on which the commission agreement was concluded with her.[45]

7. Van Til could not recall where the bonus agreement was concluded.[46] On being asked what percentage was due to her, Van Til was quite unclear about it, stating initially that it was "50 percent of…contract…less costs…50 percent…minus adjusted sort-of fees".[47] Pressed further Van Til stated that it was 50% of the contract value less costs.[48] The other terms of this agreement were similarly hazy. He

[41] Transcript Volume 11 p. 1033 lines 17 – 20
[42] Transcript Volume 11 p. 1056 lines 19 – 20
[43] Transcript Volume 11 p. 1056 lines 21 – 25
[44] Transcript Volume 11 p. 1057 lines 3 – 7
[45] Transcript Volume 11 p. 1057 lines 8 – 9
[46] Transcript Volume 11 p. 1057 lines 12 – 13
[47] Transcript Volume 11 p. 1057 lines 17 – 22
[48] Transcript Volume 11 p. 1057 lines 24 – 25

could not give a straight answer as to whether she became entitled to the 50 percent bonus immediately after she made the connection between the new business and Quispiam,[49] or when payment was received, or at some other point. He stated that she would be entitled to the bonus on signing of an agreement with the new customer.[50] Moments later, Van Til sought to depart from this and said that payment would not be made on signing of the agreement.[51] On being confronted with the contradiction, he asserted vaguely that Quispiam "would normally be happy to pay on signing of an agreement".[52]

[39] It is also not clear in what capacity Mrs van den Berg was allegedly employed. Her employment status appears to change during her alleged period of employment.

1. In November 2009 she was described on her payslip[53] as an independent contractor earning "commission".

2. From March 2010, she is described as an employee earning a basic salary.[54]

3. From March 2011, she apparently reverts to being an independent contractor.[55] This is reflected on all the rest of the payslips,[56] up to the last payslip dated December 2011.[57]

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[49] Transcript Volume 11 p. 1058 lines 5 – 24
[50] Transcript Volume 11 p. 1060 lines 14 – 19
[51] Transcript Volume 11 p. 1061 lines 15 – 22
[52] Transcript Volume 11 p. 1061 lines 24 – 25
[53] Bundle "B" pp. 337 – 340
[54] Bundle "B" pp. 341 – 352
[55] Bundle "B" p. 353
[56] Bundle "B" pp. 354 – 362
[57] Bundle "B" p. 352

4. On Quispiam's bank statements and Mrs van den Berg's own bank statements, the payments are described as "commission".[58]

[40] The timing of the supposed employment of Mrs van den Berg at Quispiam is important in unravelling the real reason for the payments made to her by Quispiam.

1. In response to the request for further particulars, Van den Berg stated that senior ITAM services were provided by Gorelick and Van Til between November 2009 and January 2010.[59] At his disciplinary hearing, Van den Berg said that Gorelick had played his role as the senior ITAM resource for about two months.[60] The contract only started on 23 November which effectively means that the two month period would last to the end of January 2010. That is supported by the fact that Van Til addressed an e-mail to Gorelick on 27 January 2010 terminating his role as the senior ITAM resource.[61]

2. At his disciplinary hearing, Van den Berg stated that there was then a period during which Van Til filled the role of senior ITAM expert while they were looking for another candidate. That process, if carried out with genuine intent, would have taken some weeks.[62]

3. It would follow from this chronology that Van Til would only have been asked to take on the role of senior resource some time during February. If Mrs van den Berg was then approached to lighten Van Til's burden in order to enable Van Til to take on the extra work as

[58] Bundle "D" pp. 273 and 282
[59] See excerpt from disciplinary hearing Transcript Volume 8 p. 758 lines 22 – 25; p. 759 lines 1 – 2
[60] Bundle "D" p. 207 line 10
[6161] Transcript Volume 8 p. 762 lines 5 – 10
[62] Transcript Volume 8 p. 767 lines 8 – 13

senior ITAM expert, she would have begun her employment from 1 March 2011. Even if she were taken on immediately, the time line puts this at mid-February. Conclusively, there would be no payment due to her for January 2010.[63]

[41] In order to justify the payment of a full salary to Mrs van den Berg for the month of January 2010:

1. The defendants attempted to place the removal of Gorelick and his replacement by Van Til in early January 2010.[64] Van den Berg evasively claimed that discussions about replacing Gorelick started in early January 2010.[65]

2. Van den Berg's claim that he had made the call to employ Van Til as the senior ITAM consultant in early January 2010 is inconsistent with the evidence he gave at his disciplinary hearing.[66]

[42] The timing of the payments made to Mrs van den Berg as monthly salary (or commission) is inconsistent with the defendants' version, but supports the plaintiff's version that the payments were merely disguised payments by Van Til to Van den Berg (via Mrs van den Berg's bank account) of Van den Berg's share of the proceeds from the Consultancy Agreement.

[43] No payments were made to her by Quispiam before 28 January 2010, and none were made after 26 April 2011. The period during which she received

[63] Transcript Volume 8 p. 779 lines 10 – 25
[64] Transcript Volume 8 p. 775 lines 22 – 25
[65] Transcript Volume 8 p. 776 lines 1 – 3
[66] Transcript Volume 8 p. 776 lines 10 – 25

payments matches the period of payments made by the JSE to Quispiam under the Consultancy Agreement.[67]

1. The analysis done by Greyling[68] reflects payments from January to March 2009 of R50 000.00, R23 237.00, R23 237.00 and R19 712.33. If the total of these payments is divided by five, it amounts to R23 237.00 per month. R23 237.00 is the net payment after deducting tax from a salary of R30 000.00.

2. It follows that the payments reflects a series of monthly payments of R30 000.00 starting from November 2009. This contradicts the improbable version put up by the defendants. The R50 000.00 constitutes the payment for November and December 2009 (with a marginal overpayment that is corrected by the payment of R19 712.33 for March 2009); the next R23 237.00 is in respect of January 2010; the next R23 237.00 for February; and the R19 712.33 is for March 2010 taking into account the overpayment that is included in the R50 000.00 referred to above. The R46 747.44 paid on 25 May 2010 is then for April and May 2010; the R23 000.00 for June; R23 237.00 for July 2010; and then R23 237.22 is paid for each successive month until April 2011.[69] The only unusual month is January 2011, which is when the R270 000.00 (less deductions) was paid, reflecting the payment for the third confirmation.

[67] Transcript Volume 1 p. 111 paragraphs 10 – 20; Bundle "D" pp. 254 – 272; first payment in Mrs van den Berg's bank account on p. 272 and the last payment is on p. 337; Payslips in Bundle "B" pp. 337 – 362 (There were payslips for the period May to December 2011, but Mrs van den Berg did not in fact receive payments over that period – see Transcript Volume 1 p. 120 and Volume 11 p. 1051 lines 2 – 25)
[68] Bundle "C" Volume 8 p. 817B
[69] Transcript Volume 8 p. 784 lines 2 – 10

[44] Quispiam discovered IRP5 forms for 2010, 2011 and 2012. The following appears from the forms:[70]

1. 2010 IRP5:[71] Mrs van den Berg was paid a total of R120 000.00 for the months of November 2009, December 2009, January 2010, February 2010 at the rate of R30 000.00 per month. Although the November 2009 payslip reflects an amount of R270 000.00 as the cumulative amount paid so far in that year, there were in fact no payments before January 2010.[72]

2. 2011 IRP5:[73] She is reflected as having been paid R360 000.00 for the period of twelve months (at R30 000.00 per month). A bonus of R240 000.00 was also paid.

3. 2012 IRP5:[74] She is further reflected as having received an amount of R150 000.00, i.e. five payments of R30 000.00 each.[75] However, Greyling was only able to verify two payments of net R23 479.80 each for March[76] and April 2011.[77] There was no evidence of the other three R30 000.00 payments to her.[78]

[45] Van Til claimed that Mrs van den Berg started working for Quispiam in January 2010, before the middle of that month. Quispiam then paid her the signing-on fee and the salary for January 2010. Despite agreeing to pay her a signing-on bonus of R60 000.00 (less deductions), plus the January salary, he

[70] Transcript Volume 1 p. 122; Bundle "A" pp. 305-6 (2011); pp. 307-8 (2010); pp. 309-10 (2012)
[71] Bundle "A" pp. 307-8
[72] Quispiam bank statement, Bundle "B" p. 462; first payment on p. 483
[73] Bundle "A" pp. 305-6
[74] Bundle "A" pp. 309-10
[75] These correspond with payslips in Bundle "B" Volume 4 pp. 353 – 357
[76] Bundle "D", p. 333, Mrs van den Berg's bank statement
[77] Bundle "D", p. 337, Mrs van den Berg's bank statement
[78] Transcript Volume 1 p. 123

paid her R50 000.00. In fact on Van Til's version, she was entitled to a gross payment of R90 000.00 in January 2010. Van Til claimed that the payment of R50 000.00 was an error.[79] He was evasive in providing an explanation as to why his so-called thumb-suck figure was R50 000.00 instead of closer to R70 000.00.[80]

[46] Not surprisingly, Van Til denied that the payments to Mrs van den Berg were a method of paying backhanders to Van den Berg. However, it would appear that of the R90 000.00 per month paid to Quispiam, R30 000.00 would be paid to the junior resources, R30 000.00 would be passed through to Van den Berg, and the balance of R30 000.00 would be for Van Til.[81] In my view, this is the most probable conclusion from the strange and vague evidence regarding the employment of Mrs van den Berg.

[47] The defendants, however, sought to explain the payment made to Mrs van den Berg in January 2011 on the basis that the amount constituted a bonus paid to her by Quispiam for her introduction to Quispiam of a consultancy agreement with ABSA (the Green IT contract). In terms of the Green IT contract,[82] the work authorisation indicates the start and end dates for both the resources (Van Til and Nicholas Howa) are 29 November 2010 and 28 February 2011 respectively.[83] The total fee due to Quispiam was R499 320.00.

[48] Clause 9, dealing with "Charges and Payment", reflects the earliest invoice date (in respect of the first payment of R125 000.00) as being 25 December

[79] Transcript Volume 11 p. 1039 lines 15 – 25
[80] Transcript Volume 11 p. 1040 lines 19 – 25
[81] Transcript Volume 11 p. 1041 lines 15 – 20
[82] Bundle "C" Volume 8 p. 863
[83] Transcript Volume 8 p. 797 lines 1 – 25; Bundle "C" Volume 8 p. 865

2010.[84] On the assumption that payment would be due not sooner than thirty days from date of invoice, the first payment would not be made before the end of January 2011.

[49] The improbabilities that this raises for the defendants' version are obvious:

1. Mrs van den Berg's alleged bonus of R240 000.00 was 48.065369% of the total amount (R499 320.00) payable – incredibly strange however it is considered.

2. She received the full bonus, based on the total amount payable in January 2011, after ABSA had, at best, made a payment of only R125 000.00 which is substantially less than the bonus paid. The version is accordingly that she received her full bonus at a time when three-quarters of the payments due under the Green IT contract had not yet been made.[85]

3. There is nothing in the documents provided that in fact supports the version that Mrs van den Berg was involved in the Green IT contract, or its conclusion. The Green IT contract itself provided that Van Til and Howa were each allocated 78 days of work.[86]

4. Van Til stated that he did a quick and rough thumb-suck to calculate 50% of the contract price less costs, and came up with a figure of R240 000.00. This is not only irresponsible, but highly unlikely. He sought to reconcile the calculations as follows:

[84] Bundle "C" Volume 8 p. 867
[85] Transcript Volume 8 p. 801 lines 9 – 13
[86] Transcript Volume 11 p. 1065 lines 9 – 11; Bundle "C" Volume 8, p. 865

4.1 He took the revenue of R499 320.00 and rounded it up to R500 000.00;

4.2 He then subtracted a costs guesstimate of R85 000.00 based on Howa's and his own fees for three months;[87]

4.3 That, he said, would leave a net revenue of R415 000.00, of which Mrs van den Berg would be entitled to half.

4.4 But 50% would only be R207 500.00.

5. The aforesaid amount of R207 500.00 is significantly below the amount of R240 000.00 which the defendants said was the bonus to which she was entitled. But the estimate of 78 days fees as being R85 000.00 is just ludicrous. Even if Howa worked alone for eight hours a day over his allocated 78 days, R85 000.00 pays him only R136.22 per hour. And that allows nothing for Van Til. Moreover, if the total cost was R85 000.00, that would imply a gross profit margin of an incredible 600%.

6. Confronted with the shortfall between R240 000.00 and R207 500.00, Van Til offered new information. He claimed that in addition to the bonus, Mrs van den Berg demanded the "normal" employee bonus (R30 000.00) which Quispiam had paid to other employees. He stated that she was wrong about this "but because she had done good work and because she was a permanent employee in that sense she asked for

[87] Transcript Volume 11 p. 1066 lines 15 – 20

a bonus, so we paid her a bonus."[88] The omission to pay her the normal annual bonus was dismissed by Van Til as "a simple oversight".[89]

7. Even this version, which is pregnant with internal improbabilities, fails to explain the figure of R240 000.00. The net amount of the "annual" bonus would be around R23 000.00. When that is added to the alleged profit share of R207 000.00, that explains an entitlement to R230 000.00, which is R10 000.00 short of the target figure of R240 000.00 actually paid. Faced with that shortfall, Van Til stated that in fact he had just "thumb-sucked" the figure of R240 000.00.[90]

8. Another telling improbability arises from the fact that the figure of R499 320.00 payable in terms of the purported Green IT contract is inclusive of VAT. The pre-VAT agreement figure is R438 000.00. Accordingly, even on the highly improbable calculations performed by Van Til, her bonus was calculated on a figure that included VAT.[91]

[50] I agree with the submission that this concocted version must be dismissed as a desperate *ex post facto* artifice. It follows from this conclusion that the payments to Mrs van den Berg constitute on a balance of probabilities a fraudulent front to divert funds from Quispiam to Van den Berg as his share of the fraudulent scheme.

[51] Further confirmation of the aforesaid conclusion is found in the response to a Rule 35(5) notice that was issued to the defendants for documents that showed the causa for the payments to Mrs van den Berg. A spreadsheet was

[88] Transcript Volume 11 p. 1067 lines 20 – 25; p. 1068 lines 1 – 4
[89] Transcript Volume 11 p. 1068 lines 22 – 24
[90] Transcript Volume 11 p. 1069 lines 4 – 15
[91] Transcript Volume 11 p. 1080 lines 5 – 15

prepared by Van Til.[92] Van Til provided a list of people whom he stated had been placed by her at ABSA. This was presented as the justification for paying her the amount of R30 000.00 a month as new business manager.[93] When it was pointed out during the cross-examination of Van den Berg that the people on the list had actually been at ABSA at all times before, during and after Mrs van Berg's alleged period of employment at Quispiam, Van Til realised he had to adjust his version. He accordingly prepared a new spreadsheet.[94] Van Til hesitantly claimed that he had created the new spreadsheet "last week, the last ten days." The new spreadsheet contained a list of Standard Bank placements.[95] Van Til conceded that Quispiam did not have a contract with Standard Bank for placements, but stated that the placements were in fact done through Expert, with whom Quispiam apparently had "an arrangement."[96]

[52] Mr van Til was unable to produce any documentation in support of this alleged arrangement, or Mrs van den Berg's role therein, despite accepting that there would have been "a reasonable body of e-mail correspondence and the like."[97] This is despite the fact that the JSE had asked for all documents evidencing the *causa* for the payments to her.[98]

[53] Given the various serious improbabilities put to Van den Berg and Van Til about the employment of Mrs van den Berg and payments made to her, one would have expected the defendants to call her as a witness to defend the version put up in relation to her employment. Significantly, and despite her availability, she was not called to testify. It can be inferred from the failure

[92] Bundle "C" Volume 8 p. 877
[93] Transcript Volume 11 p. 1045 lines 15 – 25
[94] Transcript Volume 11 p. 1046 lines 1 – 10
[95] Transcript Volume 11 p. 1048 lines 1 – 25
[96] Transcript Volume 11 p. 1049 lines 10 – 15
[97] Transcript Volume 11 p. 1056 lines 14 – 25
[98] Transcript Volume 11 p. 1050 lines 20 – 25

to call her that her evidence would **not** have supported the versions put up by Van den Berg and Van Til.

[54] At the very least on the probabilities, the inevitable conclusion is that the whole relationship, concluded between the JSE and Quispiam was the result of a planned course of conduct engineered as between Van den Berg and Van Til. Nothing about the relationship was open and transparent, and the JSE (as represented by Van Wamelen) was misled from start to finish. Also, there was a clear duty of care resting upon Van den Berg as employee of the JSE to protect it from as opposed to being involved in such a fraudulent scheme. The fact that some work was done and some progress was ultimately made in the establishment of an ITAM system was a coincidental and beneficial side-effect of the fraudulent scheme, resulting from the fact that the two innocent parties in the scheme, Ragubeer and Sithonga, actually worked very hard to perform their functions to the best of their unskilled abilities.

THIRD CONFIRMATION OF ENGAGEMENT

[55] Although the third confirmation was concluded for particular services to be rendered over the period 1 August 2010 to 31 October 2010, Van Wamelen for the JSE in fact only signed it on 14 December 2010. Strangely, Quispiam invoiced the JSE for the months of October to December 2010.

[56] As previously stated, Quispiam was to assign external legal counsel on a part-time fixed scope basis to provide to the JSE summaries of "all the software EULA's (end user licence agreements) to ensure compliance of our asset standards list".[99] It was common cause that the ostensible purpose of this engagement was to provide the JSE with **legally vetted** summaries of the

[99] Bundle "A" p. 508

end user licence agreements applicable to the various software packages used by the JSE.

[57] Once again, notably, the service fees payable by the JSE for the services to be provided under the third confirmation were in the (now familiar) amount of R90 000.00 per month (excluding VAT), being a total aggregate of R270 000.00 (excluding VAT) for the three months duration of the engagement. No logical reason was ever forthcoming to explain the similarity of fees as e.g. that the services to be rendered were similar as to time and skill requirements and therefore justified the same remuneration as the first two confirmations.

[58] There was really no defence put up by the defendants to the JSE's claim for the return of the amount of R270 000.00 plus VAT that was paid by it to Quispiam in respect of fees for the third confirmation of engagement. Van den Berg admitted that no "external legal counsel" had been engaged and Van Til, though maintaining that such counsel was available, admitted that no legal services had been performed under the third confirmation.[100] The explanation put up for effecting the payment despite being aware that the work had not been done was entirely unsatisfactory. Van den Berg said that he did not want to have to ask for the money to be put into the budget for the following year.[101] Van den Berg laid no basis for this patently ridiculous assertion. Whichever way one looks at it, the time for rendering the required services had lapsed with none of the services rendered. No extension of time for the provision of the services were either applied for or agreed to by the time the contract was terminated in June 2011. If no services were going to

[100] It was admitted on the pleadings that no legal resources were employed – Bundle "A" tab 2 p.p. 69 – 70 paragraph 6.1; see also Transcript Volume 7 p.p. 663 – 667
[101] Transcript Volume 7 p. 671 lines 14 – 18; Volume 11 p. 1024 lines 10 – 16

be rendered, there was no need for any amount to be incorporated into any future budget.

[59] Indeed, Van den Berg admitted that the JSE was entitled to repayment of the sum of R270 000.00 plus VAT that had been paid by the JSE in terms of the third confirmation.[102]

[60] Van Til, however, did not wish to concede that the JSE was entitled to repayment of the full amount. He doggedly maintained a stance that the fact that some EULA summaries had been drawn up, albeit it by non-legally qualified people, justified the payment by the JSE of some unspecified amount. He maintained this stance despite his admission that the relevant service to be provided in terms of the third confirmation was the vetting of EULA's by **legally** qualified people. His persistence in this contention was manifestly mendacious.[103]

[61] Van Til also sought to make a virtue of the fact that the invoices submitted under the third confirmation stated that the services were "80% complete". However, he conceded under cross-examination that the reference to "80% complete" was utterly meaningless, particularly as the full fee was invoiced, and it was Van den Berg who authorised the payment thereof.[104]

[62] The circumstances surrounding the conclusion of and payment under the third confirmation have greater significance for this matter than merely establishing a clear monetary claim by the JSE against the defendants. In my view the third confirmation is a **clear manifestation of a continuing fraud committed by the defendants on the JSE**. It is also a manifestation of

[102] Transcript Volume 7 p. 675 line 9 – p. 677 line 24
[103] Transcript Volume 11 p. 1020 lines 1 – 25
[104] Transcript Volume 11 p. 1021 lines 9 – 25 – p. 1022 lines 1 – 22

greed on the part of Van den Berg, aided and abetted by Van Til. As is so often the case, it was this greed that led to the scheme being uncovered.

[63] The contents of the third confirmation came to the attention of **Ms Rheeders**, employed in the JSE's legal department. She wondered why the JSE's approved lawyers, Webber Wentzel, had not been used, and wanted to see the product for which the JSE had paid. Despite trying to cobble some EULA's together himself over a particular weekend, Van den Berg could not hide the fact that no legally-vetted summaries existed and, ultimately, the charade was laid bare.[105] Van den Berg was then summoned to a disciplinary hearing, and his employment was eventually terminated.

[64] On balance it is, therefore, more probable that the flow of the R270 000.00 plus VAT from the JSE through Quispiam's bank account demonstrates that the amount was ultimately destined for and paid to Van den Berg (after deduction by Quispiam of amounts it would have to pay for tax and the like). This confirms the involvement of all three defendants in the fraudulent scheme.

[65] Finally, the JSE obtained the evidence of Coetzer, who had had dealings with Van Til and Van den Berg. However, the less said about his evidence, the better. In my view, his evidence did not advance either party's case.

DAMAGES

[66] The JSE could not and did not seek to demonstrate that a fee of R90 000.00 per month would be excessive for a true consulting service in terms of which an ITAM system was established by a senior professional consultant assisted by two junior skilled consultants.

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[105]Transcript Volume 3 p. 238

[67] However, that was not the service in fact rendered by Quispiam or received by the JSE. What the JSE received was the benefit of the services of two raw graduates, entirely unskilled in ITAM, working primarily under the direction of Van den Berg, with some (unquantifiable) input from a third party.

[68] Through its expert witness, Greyling, the JSE has sought to establish the reasonable value of the services it in fact received.

[69] Greyling initially conducted a hypothetical (though very detailed and well-researched) exercise to establish a reasonable gross profit margin that might properly have been charged by Quispiam on the amounts in fact paid to Ragubeer and Sithonga (R15 000.00 per month). This would reveal the portion of the total fee of R90 000.00 per month that was allocated to the senior resource, plus an appropriate profit margin thereon.

[70] After preparing his initial report, however, Greyling received Quispiam's financial statements for the period from which he could derive the actual gross profit margin that Quispiam had achieved historically. The relevance of establishing the reasonable gross profit margin that could be charged by Quispiam was to demonstrate that the amount of R60 000.00 per month received by Quispiam (after it had paid the two junior resources R15 000.00 each) was grossly excessive and therefore indicative of a relationship which was not concluded on an arm's length basis. It would also, as stated above, enable Greyling to consider the appropriateness of the fee allocated to the senior resource.

[71] However, having concluded that Van den Berg and Van Til colluded in order to defraud the JSE out of the fees paid under the Consultancy Agreement and the various confirmations of engagement concluded in terms thereof, the

assessment of the JSE's damages claim becomes somewhat less complex. The JSE is entitled to repayment from Quispiam of all amounts paid to it save to the extent that the JSE received a benefit from the payment of those amounts.[106] This is in fact the negative interest payable in delictual claims.

[72] The only benefit received by the JSE which can properly be attributed to the existence of the Consultancy Agreement, is the benefit received through the services rendered by Ragubeer and Sithonga. The value of those services is not in dispute, as the salaries paid to them are common cause. There is no better measure of the value of their services than the amount paid to them for such services.

[73] In his calculation of the damages suffered by the JSE, Greyling took account not only of the salaries paid to the junior resources, but also the mark-up thereon that he had calculated as being a reasonable mark-up due to Quispiam. This would be correct if the agreement with Quispiam was an arm's length one, where Quispiam had merely provided (and the JSE had accepted) part of the services contracted for, but not the balance. Here, however, Quispiam's role only exists as a result of the fraud perpetrated by Van den Berg and Van Til. In these circumstances, there is no basis for taking into account any mark up for profit to Quispiam. A contrary view would allow them to reap the benefits of their fraud, something that a court couldn't permit.

[74] Accordingly, the calculation of damages becomes a relatively simple one. The JSE is entitled to a repayment of all amounts paid under the first and second confirmations, less an amount of R30 000.00 per month over the full period, taking account also of the thirteenth cheque paid to Ragubeer and Sithonga in December of 2010.

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[106] Christie: "*The Law of Contract in South Africa*", 5th Edition, p.p. 295 – 299

[75] The total amount paid by the JSE to Quispiam in respect of the first and second confirmations was the sum of R1 636 200.00, from which must be subtracted the amount of R582 000.00 representing the salaries in fact paid to Ragubeer and Sithonga (including their December 2010 bonus). This calculation amounts to a claim for damages in the sum of R1 054 200.00. To that amount must be added the full amount of R270 000.00 paid under the third confirmation, totalling an amount of R1 324 200.00.

CONCLUSION

[76] I make the following order:

The defendants are ordered jointly and severally, the one paying the other to be absolved, to pay the plaintiff:

1. R1 324 200.00;
2. Interest on the aforesaid amount of 15.5% per annum as from 30 June 2011 to date of payment.
3. Costs of suit on an attorney and client scale which are to include the costs of two counsel.

DATED THE 6th DAY OF May 2014 AT JOHANNESBURG

C. J. CLAASSEN
JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: Adv J. P. V. McNally SC
Adv T. Mafukidze

Counsel for the Defendants: Adv H. H. Cowley

Attorney for the Plaintiff: Webber Wentzel

Attorney for the Defendants: Martin Hennig Attorneys

The Trial took place on: 18, 19, 21, 22, 25, 26, 27, 28 and 29 November 2013
Argument took place on 2 April 2014