IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

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

25 APRIL 2022
DATE

SIGNATURE

CASE NO: 35401/2013

In the matter between:

GD IRONS CONSTRUCTION PROPRIETARY LIMITED

(Reg No. 1981/001324/07) Plaintiff

and

THUMOS PROPERTIES (PTY) LTD

(Reg No. 2007/010860/07) First Defendant

THUMOS PROPERTIES 1 (PTY) LTD

(Reg No. 2007/014113/07) Second Defendant

THOMAS GEORGE NELL N.O. Third Defendant

NEUKIRCHER J:

Background

1. The plaintiff's claim has its origin in a Principal Building Agreement (the Agreement) entered into on 1 December 2008. The claim is for the balance due in respect of certain interim payments certificates which were issued, but have not been paid – the amount the plaintiff alleges is owing is R249 440 879-45. The contentious issue is which of the first and/or second defendants is liable for payment under the Agreement and whether or not the plaintiff is entitled to rectification of the Agreement of 1 December 2008. Although the defendants admit the failure to pay the amount of R249 440 879-45, they deny liability.

Certain common cause facts and the disputes

2. On 1 December 2008 the plaintiff entered into the Agreement with the first defendant[1]. The Agreement was to the effect that the plaintiff would construct a suburban shopping mall in the east of Pretoria, at the intersections of De Villebois Mareuil Drive and Delmas Roads, known as "The Villa"[2]. The plaintiff's claim is this one in respect of remuneration for work done and materials supplied on the construction of the Mall. It is

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1 Thumos (Pty) Ltd. The company's name was originally Capicol (Pty) Ltd and a name change was later effected to Thumos (Pty) Ltd.
In this judgment the first defendant is referred to as Capicol or "the employer" interchangeably

2 Interchangeably referred to as "The Mall" or "the Villa project" herein

common cause that the plaintiff gave notice to suspend the building works on 27 August 2010 because of the defendants' failure to make payment of the interim payment certificates issued by the principal agent.

3. It is common cause that the principal agent was a company known as Osglo Pretoria (Pty) Ltd (Osglo) and that, under the hand of Ronell Scheepers, it issued a series of interim payment certificates to the plaintiff. It is also common cause that the first 6 interim payment certificates reflect Capicol as the employer, whereas the remainder of the interim payment certificates reflect the second defendant[3] as the employer.

4. It is common cause that the plaintiff has received payment in the amount of R578 321 731-91 in respect of the work carried out by it and that it is claiming an amount of R249 444 435-45[4] in respect of the balance owing on the issued interim payment certificates and the latter then founds the claim against the defendants. The plaintiff also claims default interest in terms of clause 31.11 of the Agreement in an amount which is equivalent to the capital balance owing.[5] The interest is capped by virtue of the *in duplum* rule, from April 2018.

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3 Thumos 1 (Pty) Ltd. The company's name was originally Capicol 1 (Pty) Ltd and a name change was later effected toThumos 1. In this judgment the second defendant is referred to as Capicol 1

4 Per the Rule 28 amendment effected as of 2 September 2021

5 Clause 31.11 reads: *"Where the building contractor does not received payment of the amount due by the due date [31.9], the* ***employer*** *shall be liable for default interest on the amount without prejudice to any other rights the Agreement****or*** *may have. Such interest amount shall be compounded monthly from the due date for payment up to and including the date on which the Agreement****or*** *is to receive and included in the* ***recovery statement*** *[33.0]. The* ***principal agent*** *shall calculate such default interest at the rate of one hundred and sixty percent (160%) of interest.".*
According to clause 31.9, the interim payment certificates were to be paid within 7 days of issue by the principal agent

5. In the meantime, Capicol 1 has been placed in business rescue with effect from 15 March 2021. The third respondent (Nell) was appointed as the business rescue practitioner (BRP). On 15 June 2021, the BRP, through his attorneys, consented to the action continuing[6] and indicated[7] that he abided by the decision of this court. Thus, any reference to the defendants in this judgment is a reference only to the first and second defendants.

6. At the time that the Agreement was entered into, the "face" of both Capicol and Capicol 1 was a Kyriacou (Kyriacou). He was the director of both companies and remained so throughout the period of the Agreement was.

The dispute

7. The main dispute that informs the present proceedings, the evidence and the remainder of the arguments is:

   7.1 who was the employer under the Agreement? It is as a result of this dispute that the plaintiff has sought rectification of the Agreement;

   7.2 although the main claim is against Capicol 1, the plaintiff also frames a claim in the alternative against Capicol;

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6 In terms of s133(1) of the Companies Act 71 of 2008:
"133. (1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—
(a) with the written consent of the practitioner..."

7 On 21 July 2021

7.3 that the Agreement should be rectified[8] to reflect the employer as Capicol 1;

7.4 whether Capicol 1 was Capicol's undisclosed principal when the building contract was concluded;

7.5 if Capicol 1 was the employer:

7.5.1 whether the amounts paid by Capicol for the first 6 payment certificates should be deducted from the amount owing by Capicol 1;

7.6 in the alternative to the main claim, and in the event that it is found that Capicol is the employer:

7.6.1 whether the plaintiff repudiated the Agreement and whether Capicol has cancelled the Agreement;

7.6.2 whether the plaintiff is entitled to recover the total amount of R672 057 419-09 reflected in payment certificates 7 to 23, given that these reflect Capicol 1 as the employer; and

7.6.3 whether Capicol is estopped from relying on the fact that payment certificates 7 to 23 reflect Capicol 1 as the employer, as a defence to the plaintiff's claim alternatively whether Capicol is bound by its election to direct that these payment certificates reflect Capicol 1 as the employer and accepting some payments pursuant thereto.

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8 The claim for rectification is based on the common, but *bona fide*, error of both parties

7.7 whether, as pleaded by the defendants, the above alterative claims are inconsistent and mutually destructive.

8. Whilst the plaintiff initially also claimed, in the alternative to its contractual claims, that Capicol 1 had been unjustifiably enriched at the expense of the plaintiff, this claim was withdrawn shortly prior to trial.

9. When the action was instituted, plaintiff originally sued only Capicol. It was only pursuant to an amendment to its pleadings on 30 November 2020 that this claim became the alternative to a main claim against Capicol 1.

The evidence

10. The plaintiff called 3 witnesses:

10.1 David Pieterse, who was the project manager on the project;

10.2 Ronell Scheepers, who is an architect and a director of Osglo. She is the author of the interim payment certificates; and

10.3 Pieter Rüde, a civil engineer and the managing director of the plaintiff. He represented the plaintiff when the Principal Building Agreement (the Agreement) was concluded on 1 December 2008, and it is his signature to be found on that contract.

11. The defendants closed their case without calling any witnesses.

12. The context within which the Villa Mall came to be developed is the following: a feasibility study was conducted and according to that there was a need to develop a shopping mall on the eastern side off Pretoria where residential development had flourished. As a result of this, Pieterse identified property on the corner of DeVillabois and Delmas Roads. He was of the view that it would be ideal to build a mall there with international tenants to compete with the like of Sandton City in Johannesburg.

13. The development would require the purchase of approximately 74 properties and the acquisition of the properties would be in the name of Capicol 1. The properties were transferred into Capicol 1's name during 2008.

14. The idea was to put the construction of the Mall out on tender and for that purpose, McLachlan Du Plooy Gauteng (Pty) Ltd were appointed as the Quantity Surveyors (QS) and they drew up the bill of quantities for the Villa project. On 21 August 2008 the QS gave notice of a site inspection/meeting in respect of the bid, to be held at the offices of Capicol[9]. The completed bids had to be delivered to the offices of Capicol and would be opened in the boardroom of Capicol. On 9 September 2008 the QS then gave notice of certain changes to the tender and bill of quantities. What is important regarding this is that the notice (and additions to the bid document and bill of quantities) was given *"on*

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9 This is specifically stated in the notice

behalf of the developer Capicol (Pty) Ltd" and this addendum[10] had to be signed by the bidder. In fact, each addendum to the bid documents reflected the developer as Capicol.

15. The plaintiff was the only bidder which indicated that it would be able to complete the building works in the required 24-month period, and it was therefore awarded the bid.

16. The Agreement was signed on 1 December 2008. According to that document, the plaintiff was represented by Mr Rüde and Kyriacou represented Capicol. The Agreement defines the "employer" as *"The party contracting with the Agreement* ***or*** *for the execution of the* ***works*** *as named in the Agreement* ***data****."* Pieterse stated that he was also present when the Agreement was signed.

17. The Agreement also sets out who the contracting parties are: they are specifically described as follows: Capicol as 'the employer' and the plaintiff as the contractor.

18. Nowhere in the Agreement is the name of Capicol 1 to be found.

19. On 12 January 2009 the plaintiff took occupation of the site and as work progressed Scheepers (on behalf of Osglo) started issuing the interim payment certificates which initially reflected the name of Capicol in accordance with the Agreement.

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10 Which the notice refers to as "Addendum 3"

20. On 15 January 2009, Capicol 1 concluded a Sale of Business Agreement with Brookfield Investments 246 (Pty) Ltd[11] (the January 2009 agreement). In terms of this agreement, Capicol 1 sold *"the rental enterprise conducted by the Seller[12]as a going concern and income earning activity of the Property as at the Closing Date and which Business comprises of - the Property[13]; the Leases[14], all fixtures and fittings on the Property of a permanent nature..."* to Brookfield for the amount of R2,9 billion.

21. On 8 May 2009 an email was received from Lizelle Tromp, the personal assistant of Kyriacou, in which she informed all stakeholders and agents as follows:

"Invoices to Capicol

Please note:

From this month [your] invoices must be made out to the correct Company name, Reg nr and Vat nr in order for us to do payment;

For projects;

Zambesi Ph 3 and Erf 310

Capicol (Pty) Ltd

Reg nr: 2007/010860/07

VAT nr: 4850201478

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11 Later renamed Villa Retail Park Investments (Pty) Ltd
12 Capicol 1
13 Described as Erf764 and Erf 764 Wingate Park , Extension 1
14 Ie the leases to be concluded by Capicol 1 with the prospective tenants

The Villa

Capicol 1 (Pty) Ltd

Reg nr: 2007/014113/097

VAT nr: 4840245262

Zivania Village

Capicol 2 (Pty) Ltd

Reg nr: 2007/014071/97

VAT nr: 4870245265"

22. Accordingly, as from May 2009 the invoices issued by the plaintiff reflected the name of Capicol 1 instead of Capicol – and until the project ran into funding issues, the plaintiff was paid.

23. In 2010 the project ran into funding issues and funding dried up and although they were contractors on site because there was an occupation deadline, there was no funding with which to complete the construction.

24. On 2 February 2011, Brookfield (now known as Villa Retail) entered into, what they termed, a "Settlement Agreement" (the Settlement Agreement) in order to settle disputes which had arisen between them. The core function of the Settlement Agreement was to cancel the January 2009 agreement and to allow Capicol 1 to register a second covering bond in favour of Brookfield over a 37,4% undivided share in

the properties[15] in the amount of R1,590 billion. Capicol 1 also undertook to complete the development of the Mall with further development funding of R1,4 billion which it was still to secure.

25. However, on 14 July 2011, Capicol 1 and Brookfield then entered into a "Sale of Business Amendment Agreement" (the July 2011 agreement) in terms of which the January 2009 agreement was revived, and Capicol 1 sold 80% undivided share to the property and business enterprises conducted by it in respect of the property to Brookfield. Interestingly enough, in the July 2011 agreement it appears that a large portion of the payment to be made by Brookfield was to be put to use in paying what the July 2011 agreement refers to as "Capicol 1 contractors". It is specifically recorded in par 7.1.2.2.2 of the July 2011 agreement that an amount of R300 million would be paid to the plaintiff, and this payment is specifically referred to in the July 2011 agreement as *"the GD Irons R300 million payment"* and the contract specifically states that *"...the rand value of the indebtedness in respect of the GD Irons R300 Million payment will remain capped at such amount of R300 Million and will reduce upon any portion or portions thereof being paid..."*.

26. But it was prior to the latter two agreements that the issue of whether Capicol or Capicol 1 was the employer raised its head. By this stage, the funding of the construction had become problematic and dried up. On

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15 See fn13

11 October 2010, Bredells[16] sent a letter of demand, in terms of Section 345 of the Companies Act, 1973, to Capicol. It was met with a response from Bert Smith Inc[17] dated 18 October 2010 which states the following:

"Our instructions are to advise that our client disputes being indebted to your client as alleged, or at all, and to record that Capicol 1 (Pty) Ltd is in fact the party that your client had contracted with.

We hold firm instructions that should your client elect to proceed to take action or bring an application against our client with respect to the indebtedness that you elude to in your said letter we will bring an application for rectification of the said Agreement."

27. On 2 November 2010, Bredells replied as follows:

"Our client contracted with Capicol (Pty) Ltd. Our client denies that it was the true intention of the parties that the building contract should have been concluded with Capicol 1 (Pty) Ltd. Hence an application for rectification will be opposed."

28. On 9 November 2010 and in response to this, Capicol's attorney records the following:

"We...wish to request that your client gives serious consideration to its current stance on this matter.

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16 Plaintiff's attorneys of record
17 Defendants' attorneys of record

It is our submission that if your client had in fact contracted with Capicol (Pty) Ltd, which fact we dispute, your client would have no builders lien on The Villa building works as same would not have been contracted and the improvements to The Villa property would have been done at the expense of Capicol (Pty) Ltd at your client[s] expense (Gouws v Chesterpools).

If however your client persists and proceeds to bring an action to [liquidate] Capicol (Pty) we will have no choice but to bring an application for rectification."

29. It is common cause that plaintiff did launch the application for liquidation which failed. There is no application, or counterclaim for rectification brought by either of the defendants that was placed before me and, in fact, they oppose the claim for rectification in this action.

The action under case no 29072/2013

30. This is an action brought by Quebec Electrical Contractors CC (Quebec) against Capicol 1 in 2013. Quebec was one of the subcontractors on the Villa project and it sued Capicol 1 for the amount of R5 718 974-68 plus interest and costs for electrical work done on the Villa project.

31. The context and relevance of this action is that Pieterse gave evidence in this matter on behalf of Qeubec and, in cross-examination of the matter before me, the defendants used the judgment in Quebec to lay a basis for their argument that rectification could not be granted.

32. In Quebec, Kubushi J granted judgment in favour of the plaintiff against Capicol 1. She did so based on, inter alia:

32.1 Capicol 1 was mentioned as the land owner and developer of the Mall in the agreement between the engineer and the City of Tshwane;

32.2 performance guarantees were issued in the name of Capicol 1;

32.3 Quebec's letter of appointment referred to Capicol 1;

32.4 although Pieterse testified there that *"the professionals in respect of the Villa Mall project were appointed by Capicol"*[18], he also stated that " ... *he was employed by Kyriacouyriacou as a project manager of Capicol and duly authorized to act in all the projects, including The Villa Mall project which belonged to Capicol 1...*";

32.5 In the context of all the relevant witness and documentary evidence, she found that it was clear that Capicol 1 was liable for the payment.

The evidence

Mr Pieterse

33. Mr Pieterse testified that he attained an Advanced Project Management diploma through UCT in 2017 and has been a project manager and a development manager for approximately 30 years. He was also a director of Capicol for a period of approximately 10 months from 14 June 2010 to 1 March 2011. His company, Daseeh Property

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18 At paragraph 22 of the Quebec judgment

Consultants (Daseeh), had a written contract with Capicol in terms of which he managed all of Capicol's projects including those regarding the Villa Mall and the Zambesi Mall. He had no contract with Capicol 1, the developer and the owner of the land was in fact Capicol 1

34. Upon initiation of the Agreement in 2009 a mistake crept in in the reflection of the employer's name in the Agreement as the employer is reflected as the Capicol instead of Capicol 1. He admitted that this was, in all likelihood, his mistake. He stated that it was an "honest mistake" and that it is clear from the Brookfields agreement that Capicol 1 was the true contractor because it is the owner of the properties. This mistake perpetuated itself until May 2009 until it was rectified per the email of 8 May 2009.

35. It would appear that the QS also missed this mistake and he conceded that neither he, nor anyone else on behalf of Capicol or Capicol 1, informed the plaintiff that they are contracting with Capicol 1 and not Capicol.

36. Pieterse's evidence against the defendant was sought to be explained away by the defendants in cross-examination as stemming from the so-called "bad blood" between them as he had not yet been paid for the project.

37. It is indeed so that Pieterse has given contradictory evidence in the Quebec matter and this matter. In the former, it appears that he gave evidence that Capicol was the responsible party; in this matter whilst he conceded that the Agreement was in the name of Capicol, he sought to lay responsibility at the door of Capicol 1.

38. Whilst his evidence is contradictory, and he sought to absolve himself of the blame of the confusion regarding the actual contracting party, his evidence cannot be seen in isolation of the remainder of the evidence placed before me.

Ronelle Scheepers

39. She is a registered and Practising architect at Osglo which was appointed as the principal agents of the Villa project. They were approached in 2007 by Kyriacou to put a together for the Mall - at the time, Osglo were the principal agents for the Zambezi Mall project.

40. She put together draft drawings for the project, Kyriacou acquired the land for the project, and the draft drawings were submitted to the City Council for approval. The pro forma title deed submitted to the City Council also reflected Capicol 1 as the owner of the land.

41. The principal agents are the "*employers watchdog*," and Osglo had full authority to represent the employer. All the interim payments made throughout the project were authorised by her and she had authority to issue them.

42. Each payment certificate[19] is issued in a standard format. The first 6 interim payment certificates reflected the employer as Capicol and the plaintiff as the contractor. From certificate number 7 the employer is reflected Capicol 1.

43. Her evidence was that she had worked on various projects on behalf of Kyriacou and Capicol, and back then she was only aware of the existence of Capicol. It was only when the land was purchased and transferred into Capicol 1's name that she became aware of its existence; and it was only in May 2009 when the payments were allocated to different projects and they had instructions to change the payment certificates that she became aware of the various entities within the Capicol group. She then began issuing the interim payment certificates in the name of Capicol 1. The clear import of her evidence was that, were it not for the notification on 9 May 2009 on the specific instructions of Kyriacou, she would have continued to issue the interim payment certificates in Capicol's name[20].

44. Osglo was paid from a Standard Bank account with the reference "Capicol" but there was no specific indication other than this as to which company had made payment, and that a claim has been lodged

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19 The certificate will reflect a summation of the work done and the materials used.
20 She did not specifically state this – this is the deduction made from her evidence

with the BRP's for monies outstanding to it. The claim has been received but there's no indication as yet as to whether it has been approved.

45. The Agreement also makes provision for 160% interest to be charged on amounts outstanding in respect of the interim payment certificates. She used the Reserve Bank's website for the rates to be applied to calculate the interest and she applied the in duplum rule as from April 2018. She conceded that she has no personal knowledge of the actual rates of interest and that she has not verified the correctness of the interest rates reflected on the reserve bank website.

46. I found Scheepers to be a good witness. She did not prevaricate, she was clear in her answers and made the correct concessions which she needed[21] to do so. I cannot find in any respect that her evidence was not relevant or cogent, nor can I find that she was not a reliable witness.

Mr Rüde

47. Mr Rüde was the last witness called by the plaintiff. He is a civil engineer with an Honors degree in Construction Project Management from the University of Pretoria. He has been the managing director of the plaintiff for the past16 years. Prior to this he worked at Murray & Roberts for 30 years.

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21 For example, the issue as to whether or not she has verified the details of the interest rates set out on the Reserve Bank website

48. His evidence was that tenders were put out for the Villa project during mid-2008 and the plaintiff submitted a bid. The Agreement was signed on 1December 2008 - he signed it on behalf of the plaintiff and Kyriacou on behalf of the Capicol. The Agreement was witnessed by the commercial director of the plaintiff and Pieterse on behalf of Capicol.

49. At the time that he entered into the agreement he was unaware of the fact that there were different companies within the Capicol group.

50. The plaintiff's VAT invoice was based on the interim payment certificate issued by Scheepers. On receipt of the interim payment certificate, the plaintiff would issue out a tax invoice and submit it for payment.

51. He confirmed that pursuant to an email dated 8 May 2009, received from Kyricaou's personal assistant, the plaintiff's invoices changed to reflect Capicol 1 (with Capicol's VAT number) and no longer Capicol. His evidence was that this change was of no moment to him as it often happens during the course of a contract that invoices are changed to reflect a specific entity - for plaintiff, whether it was made out to Capicol or Capicol 1 was of no importance. And indeed, plaintiff was paid (yp to a point) on the interim payment certificates issued by Capicol, and later Capicol 1.

52. During approximately June 2009 the plaintiff was asked to work slower because of financing issues experienced by the employer but it could not do so for two reasons: firstly, because of the timelines contained in

the Agreement itself and secondly, because equipment and materials had to be pre-ordered so that the building works were not held up by a lack of necessary materials. To accommodate the financial issues experienced by the employer at the time, and because plaintiff was assured that the cash flow issues were only temporary and would be resolved quickly, the plaintiff agreed to adjust the interim payment certificates so that they would be for a maximum amount of R40 million each. The fact that plaintiff had a builder's lien over the property[22] also meant that its risk exposure was minimal.

53. During July 2018/August 2018 the plaintiff realised that all the finance promises were no good and the plaintiff gave notice that it needed an extension of time within which to finalise the building project because of the delays. On 27 August 2010 the plaintiff gave final notice that it was suspending the construction until the finance issues were resolved. Plaintiff then exercised its lien over the property.

54. Various attempts have been made to recover the outstanding money from the defendants both via letters of demand and via liquidation proceedings but, thus far, to no avail.

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22 The plaintiff was not provided with a payment guarantee by the employer and so was required to reply on its builder's lien

55. As the plaintiff's legal representatives only consulted with Pieterse in 2018 they only then became aware of the true position as regards which defendant was liable.

56. Although the plaintiff instituted a claim with the BRP's, apparently that claim has not been recognised but Rüde was not sure why.

57. Rüde's evidence is that, at the time the Agreement was concluded, he was not aware of the existence of any other company in the Capicol group other than the first defendant. His evidence was that it was only in October 2010 that he became aware of the existence of Capicol 1 as a result of the position the defendants had taken up as regards liability on the Villa project in the correspondence between the respective attorneys. This was cemented in the abortive liquidation proceedings against Capicol. However, his position is that it is either the one or the other of the defendants that remains liable for payment to the plaintiff and that the common mistake perpetuated by the parties is that the Agreement should reflect Capcol 1 as the employer.

58. When it was put to him in cross-examination that, in actual fact, the plaintiff had never had the intention to conclude the Agreement with Capicol 1, his response was that the plaintiff had the intention to conclude the Agreement with the owner of the property and that the developer that represented the owner was Capicol. As the owner of the

property was Capicol 1, the Agreement should have reflected it as the employer.

59. Whilst Rüde was, on occasion argumentative, that does not detract from the overall impression of his evidence or him as a witness. It is very clear that he was not concerned with the nitty-gritty of the name of the entity with which plaintiff was contracting – he was interested in entering into an Agreement with the owner of the land. He was under the impression that Capicol owned the land, and this impression remained until evidence demonstrated the contrary.

60. I found Rüde to be a consistent witness in his evidence.

Evaluation of the evidence

61. In my view, the direct and circumstantial documentary evidence presented by the plaintiff in support of its claims cannot been seen each in isolation: each witness's evidence either corroborated, supplemented or enhanced the evidence of another or the documents placed before me during the evidence. As such, it is this evidence which must be evaluated as a whole to determine whether the plaintiff can succeed on either of its main or its alternative claims.

Re : rectification

62. To succeed with a claim for rectification, the plaintiff must allege and prove the following:

62.1 that an agreement was concluded between the parties and reduced to writing;

62.2 that the agreement does not reflect the true intention of the parties – this requires that the common continuing intention of the parties as it existed at the time when the agreement was reduced to writing be established;

62.3 an intention by both parties to reduce the agreement to writing;

62.4 a mistake in drafting the agreement, which mistake could have been the result of an intentional act of the other party or a bona fide common error;

62.5 the actual wording of the true agreement.[23]

63. The defendants argue that rectification cannot be granted as:

63.1 Pieterse's evidence was to the effect that Capicol 1 had intended to be bound as the employer when the Agreement was concluded in 2008;

63.2 Rüde's evidence was that the plaintiff had intended to conclude the Agreement with Capicol;

63.3 as a result, Capicol 1 and plaintiff did not share a common continuing intention to be bound at the time the Agreement was concluded on 1 December 2008 and therefore the plaintiff had failed to prove that the Agreement does not reflect the true intention of the plaintiff and Capicol 1;

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[23] Propfokus 49 (Pty) Ltd and others v Wenhandel 4 (Pty) Ltd [2007] 3 All SA 18 (SCA) at para 13; Amlers Precedents of Pleadings 7th edition at p336-338

63.4 that the case in the pleadings is that of a bona fide common error – it is not one based on a mistake brought about by the intentional act by Capicol 1. The evidence was to the effect that the error was brought about by confusion and this is insufficient to found the claim for rectification.

64. Mr Hartzenberg argues that the mechanics of a mistake are irrelevant as is whether the mistake is a reasonable error or not. Once the court is satisfied that the written agreement is not the same as the actual agreement arrived at, the court will grant rectification.[24] The point is that

"[T]he broad underlying principle of the doctrine of rectification is that in contracts regard must be had to the truth of the matter rather than to what has been written, and the mistake must yield to the truth."

65. In this matter, the totality of the evidence in my view supports the argument that rectification should be granted as:

65.1 Pieterse's evidence is that Capicol 1 was the employer, Capicol1 was the developer and Capicol 1 owned the land on which the development was to be done;

65.2 the evidence was unchallenged that at the time the tender was put out, the logo that was used was that of Capicol, the meetings were held at Capicol's boardroom, the developer was stated to be

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[24] Offit Enterprises (Pty) Ltd and others v Knysna Development Co (Pty) Ltd and another 1987 (4) SA 24 (C) at 27D-E

Capicol, the Agreement described the employer as Capicol. It is important to note that it was the defendants who were responsible for issuing all the documentation;

65.3 all the events subsequent to par 65.2 supra pointed to Capicol 1 as the employer ie the email of 8 May 2009, payment certificates 7 to 23, the invoices issued by the plaintiff subsequent to the email of 8 May 2009, the Brookfield Agreement, the Settlement Agreement and (especially) the July 2011 agreement;

65.4 Rüde's evidence was that he had intended to conclude an agreement with the owner of the property. It is not disputed that Capicol 1 was the owner of the property.

66. In **Lazarus v Gorfinkel**[25] the court stated

"In the instant case the only available evidential material as to defendant's state of mind is circumstantial in nature. This being a civil case, it is not necessary for plaintiff to prove that the inference which he asks the Court to make is the only reasonable inference. He will discharge the onus resting on him if he can convince the Court that the inference which he advocates is the most obvious and acceptable from a number of conceivable inferences...

And where there are several equally acceptable possible inferences, defendant's failure to testify would justify the selection of the one which

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25 1988 (4) SA 123 (C) at 135C-E

was adverse to defendant, on the application of the principle in Galante v Dickinson..."

67. The fact is that it was the defendants attorneys of record insisted that Capicol 1 is the party that contracted with the plaintiff and repeated this assertion in the letters of 18 October 2010 and 9 November 2010.

68. Of course, the evidence of Kyriacou on this issue would have shed more light – but he elected not to testify. In **Galante v Dickinson**[26] the court stated:

"In the case of the party himself who is available, as was the defendant here, it seems to me the inference is, at least, obvious and strong that the party and his legal advisers are satisfied that, although he was obviously able to give very material evidence as to the cause of the accident, he could not benefit and might well, because of facts known to himself, damage his case by giving evidence and subjecting himself to cross-examination."

69. Thus the failure of Kyriacou to give evidence as to the identity of the employer and true contracting party in terms of the Agreement with the plaintiff must be seen in the context of **Lazarus v Gorfinkel** and the facts of this matter.

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26 1950 (2) SA 460 (A) at 465

70. I am satisfied that it was, in fact, Capicol 1 that was the employer in terms of the Agreement dated 1 December 2008.

71. The question is now: how must the amounts of certificates 1 to 6 be dealt with. These amount to R147 204 872-73. The evidence was that these certificates were paid during 2009 and no not form part of the aggregate amount of unpaid certificates for which plaintiff claims. There is also no counterclaim for repayment. This being so, there is no necessity to deal with this issue in the determination of the issues between the parties.

The interest calculation

72. Scheepers' evidence as to the interest using the repo rate reflected on the website of the Reserve Bank, was not truly challenged by the defendants. The highwater mark of the evidence was that she had not sought to independently verify that information as correct. No evidence was put before me to challenge the evidence and the *in duplum* rule capped the interest as of April 2018 – this was also not challenged by the defendants. In any event, the manner in which the judgment is framed makes any challenge to her evidence superfluous.

The claim

73. There was no challenge mounted to the calculation of the amount claimed by the plaintiff in its pleadings.

One last aspect

74. A month after the hearing and argument was concluded in this matter, and on 13 October 2021 a Mr Myburgh addressed correspondence to me through my secretary. In this he informed me that he is an attorney of this court and that he represents Villa Retail Park Investments (Pty) Ltd (ie Brookfield) and he is approaching me as *"amicus curiae"* in regard to this trial. It appears, from his letter that he has intimate knowledge of the evidence led and the defences mounted by the defendants during this trial. As such, he wanted to bring certain information to my attention as regards dealings he had had with the BRP's and affidavits filed specifically on behalf of Capciol 1 and Kyriacou in the liquidation proceedings. His email to me was not copied to any of the parties in this action.

75. Given the irregular nature of this, I immediately caused my secretary to forward the email, and its attachments to the parties for their comment.

76. On 22 October 2021, the plaintiff sent a response in which it objected to the email and the attachments. The defendants elected not to respond.

77. In my view, Mr Myburgh, on his own version, is an attorney and an officer of this court. As such he is aware of the rules regarding admitting further evidence once the matter has been finalized and before judgment is handed down. He has brought no application to be

admitted as *amicus*, nor has he brought an application to re-open the trial and lead further evidence. This is important as it affects the rights and interests of the actual parties to the litigation of which he is not one. As stated, Mr Myburgh is neither a party to the litigation, nor does he represent any of the parties in this litigation, nor has he applied to be so joined and his clients (Villa Park Retail) have also never sought to be joined in these proceedings. It is therefore unclear what mandate he has from his clients to direct any correspondence at all.

78. In my view, the emails and affidavits he placed before me are not evidence and cannot be afforded that weight. They are, as is his email, not taken into account for purposes of the evaluation of the actual evidence presented.

Conclusion and order

79. I am therefore of the view that the plaintiff must succeed on its main claim against the second defendant and accordingly the following order is granted:

79.1 judgment is granted in favour of the plaintiff against the second defendant as follows:

79.1.1 an order that the building agreement between the plaintiff and the second defendant is rectified in the following respects:

79.1.1.1 rectification of the JBCC Series 2000 agreement which forms part of the

building agreement between the plaintiff and the second defendant to record the name of the employer at page 1 thereof to be "Capicol 1 (Pty) Ltd";

79.1.1.2 rectification of the name of the employer set out in paragraph 1.1 of the Contract Data section of the agreement to be recorded as "Capicol 1 (Pty) Ltd";

79.1.1.3 rectification of the name of the principal agent set out in paragraph 1.2 of the Contract Data section to be recorded as "Osglo Pretoria (Pty) Ltd";

79.1.1.4 rectification of the name of the developer/employer in each of the documents, letters and addendums which formed part of the building agreement, to be recorded as "Capicol 1 (Pty) Ltd" and not "Capicol (Pty) Ltd";

79.1.2 payment of the amount of R249 444 435-45;

79.1.3 interest on the sum of R249 444 435-45 calculated and compounded monthly at 160% of the repo rate of interest charged by the South African Reserve Bank to registered banks from time to time, from 20 November 2010 to date of payment;

79.1.4 costs of suit.

B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 25 April 2022.

APPEARANCES:

For The Plaintiff	: Advocate CJ Hartzenburg SC
Instructed by	: WN Attorneys Inc
For the 1st and 2nd Defendants	: Advocate PG Cilliers
Instructed by	: Hills Incorporated
Date of hearing (MS Teams)	: 14 September 2021
	Further heads of argument filed by plaintiff on 27 September 2021 and by the first and second defendants on 1 October 2021. Further correspondence between the plaintiff dated on 22 October 2021.
Date of judgment	: 25 April 2022