IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Not Reportable

Case No: 3320/2007

In the matter between:

INDIZA INFRASTRUCTURE SOLUTIONS (PTY) LTD **Applicant**

And

MEC FOR EDUCATION OF KWAZULU-NATAL **1st Respondent**

MOTSWEDI OUTSOURCING (PTY) LTD **2nd Respondent**

And in the counterclaim between:

MOTSWEDI OUTSOURCING (PTY) LTD **Applicant in Reconvention**

and

INDIZA INFRASTRUCTURE SOLUTIONS (PTY) LTD **Respondent in Reconvention**

And in the Rule 13 proceedings between:

MOTSWEDI OUTSOURCING (PTY) LTD **2nd Respondent**

and

MEC FOR EDUCATION OF KWAZULU-NATAL **3rd Party**

ORDER

1. In respect of the second respondent's claim in reconvention (or counter application), an order of absolution from the instance is granted.

2. Case 4957/2007 is enrolled and the interim interdict granted in that matter is discharged.

3. The first respondent's attorney of record, namely the State Attorney, KwaZulu-Natal, is directed to pay to the applicant all the monies held by it in trust pursuant to the order issued in this matter on 4 March 2016, inclusive of interest.

4. The second respondent is directed to pay the applicant's costs in case numbers 3320/2007 and 4957/2007, such costs to include the costs of senior counsel where employed.

JUDGMENT

Delivered on: 16 October 2018

Gorven J

[1] This matter has had a long and tortuous history. It concerns a tender for an Integrated Management System to deliver learner and teacher support materials (LTSM) to schools in KwaZulu-Natal for the 2006 and 2007 academic years. It began as an application in early 2007. In this Indiza claimed payment of R128 million from the Department. Motswedi was joined as the second respondent. Motswedi brought a counter-application against Indiza and delivered a third party notice to the Department. The applications were referred to trial. Despite this, the parties continued to refer to themselves as in the application and I shall do the same. LTSM shall be referred to as stationery. The applicant shall be referred to as Indiza, the first respondent as the Department and the second respondent as Motswedi. I was requested to decide the counter-application. The Department delivered a notice that it would abide the decision of the court on this issue.

[2] The Department called for two tenders for the academic years in question; one for stationery and the other for textbooks. The closing date for submission was 25 April 2005. Indiza and Motswedi agreed to jointly submit tenders for both and did so. On 19 May 2005, the Department informed Indiza–Motswedi that their tender for stationery only had been successful. No more need be said about the tender for textbooks. An unsuccessful tenderer appealed the award. The Department suspended the tender pending the outcome of the appeal. The appeal was resolved in December 2005. All of the parties to this matter concur that an SLA was to be concluded before the tender could be put into effect. It is common ground that this did not happen and that no work was done pursuant to the tender.

[3] Stationery had to be delivered to schools by no later than 31 October for each following academic year. Orders had to be placed by no later than the end of August or beginning of September. The Department perforce decided to conclude an interim arrangement for the 2006 academic year. It was concerned that if it did not do so, there would be a danger of delays in the provision of stationery. It concluded an agreement (the interim arrangement) for this purpose with Indiza. An interim Service Level Agreement (Interim SLA) was signed. Pursuant to the interim arrangement and Interim SLA, stationery was delivered to schools for the 2006 academic year. This extended into the 2007 academic year. Certain payments were made by the Department to Indiza. In January 2007, Indiza indicated an intention to terminate any agreement with the Department. It then claimed in this application what it said was due to it by the Department.

[4] In the counter-application, Motswedi claims a partnership agreement came into effect between itself and Indiza. It says that Indiza breached its fiduciary duty to Motswedi arising from the partnership. Motswedi accordingly claims an account and disgorgement of profits made by Indiza from the interim arrangement. Motswedi correctly accepted the onus in the counter-application and the duty to begin. When it closed its case, Indiza applied for absolution on the counter-application. This judgment deals with the question of absolution. The test is uncontroversial:
‘(W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a

Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff.'[1]

[5] Any claim is founded on pleadings and evidence. Two aspects of Motswedi's pleaded counter-application are relevant; the terms of the partnership and the alleged breach of fiduciary duty. The relevant terms pleaded are as follows:

'6.2.1 Indiza and Motswedi would conduct business with the department in partnership with each other.

6.2.2 The name of the partnership would be *Indiza–Motswedi*.

6.2.3 Indiza and Motswedi would pool their expertise in *Indiza–Motswedi* to provide the following goods and render the following services . . . to the department.

6.2.4 Indiza would:

6.2.4.1 provide its expertise to render supply chain and project management services and to procure, manage and distribute (stationery) to the department . . .; and

6.2.4.2 be responsible for the day-to-day management of *Indiza–Motswedi* and communication with the department; and

6.2.4.3 attend to the operations side of the partnership, such as management and delivery of (stationery).

6.2.5 Motswedi would provide its expertise to customise, install, implement, maintain and support a computerised (stationery) system for the department and, if and when required to do so, train users thereof . . . .

[1] *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H.

6.2.6 *Indiza–Motswedi* would tender to provide the goods and render the services as set out in the department's request for tender . . . .

6.2.7 *Indiza–Motswedi* would comply with such requirements as the department may have, including the preparation and timeous submission of a tender.

6.2.8 *Indiza–Motswedi* would be a 50/50 joint venture partnership alternatively, Indiza would provide management services and Motswedi would provide IT services and the net profit earned would be shared equally, further alternatively Indiza would receive the net profit earned in respect of the management services and Motswedi would receive the net profit earned from the IT services.'

It appears from this that the agreement between Indiza and Motswedi related to the submission and performance of the tender. It was submitted on behalf of Motswedi that it went beyond the tender to include any agreement with the Department concerning stationery. Assuming, but without deciding, that this was the case, the question is whether the evidence of Motswedi supported that the agreement extended this far.

[6] The only witness for Motswedi was its managing director, Mr Matsoso. I will base my discussion of this aspect of the matter on what he said in his evidence in chief. As will appear later in this judgment, his later evidence contradicted material aspects of that given in chief. He testified that he and Mr Maboso, the managing director of Indiza, were introduced to each other by a mutual associate. This person knew that Motswedi was involved in IT and that Indiza was looking for an IT partner so as to submit the tenders to the Department. An oral agreement was reached between the parties. He testified that he and Mr Mabaso agreed on the structure of their response to the request for tenders. They would tender as a joint venture known as Indiza–Motswedi. The tender essentially comprised two aspects; an integrated management system and procurement services. Motswedi would supply the system. It was a shareholder in Motswedi IFS (IFS), a company held by IFS AB of Sweden. IFS dealt in top tier enterprise management software. This could be customised to meet the specific needs of the project in question. Motswedi would licence the software, customise it, train users from Indiza and the Department and maintain and back up the system. Indiza would provide users of the system. It would

perform all the procurement roles assigned to the successful tenderer. It would capture information concerning stationery, place orders with suppliers, manage warehousing and deliveries and account to the Department for all the financial aspects of the project. It was further agreed that each party would recover the direct costs incurred in the performance of their duties. After they had recovered the direct costs, Indiza and Motswedi would share profits on a 50-50 basis. The detailed operational requirements of the Department would subsequently be included in an SLA. Such an SLA would need to be concluded before the tender could be given effect to. If this required one party to incur higher costs, they could renegotiate the 50/50 profit share.

[7] The evidence in chief of Mr Matsoso on what was done under the agreement was as follows. Indiza and Motswedi each prepared an estimate of their direct costs. They combined these in a management fee included in the tender of approximately R19 million for each of the two academic years. They completed the tender documents, including a self-assessment of their ability to fulfil its requirements by rating their ability to perform in the areas included in annexure 'A' to the tender document. Both parties were involved in presentations in support of the tender. The tender was submitted on time. Some training of Indiza personnel took place before they were told that the tender had been suspended pursuant to the appeal.

[8] That is what the agreement between the parties encompassed and what was done under it according to the evidence in chief of Mr Matsoso. He did not testify that any agreement was reached on matters outside of the submission and performance of the tender, if awarded. If the pleaded terms can be said to go beyond the submission and performance of the tender, this was not supported by that evidence.

[9] The agreement was pleaded as being a partnership. In *Pezzutto v Dreyer & others*,[2] the *essentialia* of a partnership set out by Pothier were accepted as correctly stating our law:

[2] *Pezzutto v Dreyer & others* 1992 (3) SA 379 (A).

‘The three essentials are (1) that each of the partners bring something into the partnership, whether it be money, labour or skill; (2) that the business should be carried on for the joint benefit of the parties; and (3) that the object should be to make a profit (Pothier *A Treatise on the Contract of Partnership (Tudor's* translation) 1.3.8). . .’.[3]

Pezzutto went on to hold:

‘The business need not be a continuous one; a joint venture in respect of a single undertaking can amount to a partnership provided the *essentialia* of a partnership are present . . .’.[4]

Accepting the evidence in chief of Mr Matsoso at face value, it is clear that the partnership goes no further than one in respect of the single undertaking of the submission and performance of the tender. It concerns no activity conducted outside of the tender. It does not extend to any other contractual arrangement concluded by the Department concerning stationery for the academic years in question.

[10] In *Robinson v Randfontein Estates Gold Mining Co Ltd*,[5] Innes CJ dealt with the basis for an action arising from the breach of a fiduciary duty:

‘Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty.’[6]

And, he went on to explain:

‘For it rests upon the broad doctrine that a man, who stands in a position of trust towards another, cannot, in matters affected by that position, advance his own interests (*eg*., by making a profit) at that other's expense.’[7]

This is not limited to traditional examples of principal and agent, guardian and ward and so on:

‘Whether a fiduciary relationship is established will depend upon the circumstances of each case.’[8]

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[3] *Pezzutto* at 390A-C.
[4] *Pezzutto* at 390D-F.
[5] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.
[6] *Robinson* at 177.
[7] *Robinson* at 179.

[11] The parties could not perform the tender until an SLA was concluded. This was accepted to be the position at the time the interim arrangement was concluded and throughout. The crisp question is whether, that being the case, Motswedi had any interest in the interim arrangement. Only if it did, would Indiza have had 'a duty to protect the interests' of Motswedi in it. In other words, did Indiza stand in a position of trust toward Motswedi concerning the interim arrangement?

[12] Clearly if Indiza had concluded the SLA required by the tender after the award was finalised and performed the obligations of the partnership testified to by Mr Matsoso in his evidence in chief under the tender and made a profit without involving Motswedi, this would amount to a breach of fiduciary duty. On this basis, I would have no difficulty finding that Indiza had a duty to protect the interest of Motswedi in the tender once it was finalised and put into effect. Any action on the part of Indiza to frustrate or delay that process would amount to a failure to protect this interest and, accordingly, a breach of this fiduciary duty. Mr Matsoso disavowed any contention that the failure to conclude an SLA required to perform the tender could be laid at the door of Indiza. He said that it was the Department which delayed this.

[13] However, I do not see how the duty extends beyond protecting the interest of Motswedi to submit and perform the tender once it was able to be performed. In my view, any fiduciary duty on the part of Indiza was limited to the submission and performance of the tender. Even based on the version of the agreement testified to by Mr Matsoso in chief, I cannot see how a duty extended to the interim arrangement.

[14] This approach is borne out by the manner in which Motswedi pleaded that Indiza had breached its fiduciary duties. It pleaded a number of conjunctive breaches, meaning that all of them together constituted the breach relied upon. The first of theses was that 'Indiza carried out the awarded tender to the exclusion of *Indiza–Motswedi* and for its own benefit . . .'. In other words, the alleged breach is that Indiza performed the tender to the exclusion of Motswedi. But the tender was not performed. As already mentioned, it could not be put into effect without an SLA

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[8] *Robinson* at 180.

being concluded. This did not happen. No work was done pursuant to the awarded tender. This much is common ground and was accepted by counsel for Motswedi in argument. The only work done was in terms of the interim arrangement between the Department and Indiza. The fact that the work which was done overlapped or was even entirely coextensive with that required under the tender does not mean that the tender was 'carried out'. Apart from bearing out the evidence in chief of Mr Matsoso that the agreement between the parties extended only to the tender, the pleaded breach was thus not established. It cannot, accordingly, constitute an actionable breach of fiduciary duty on the part of Indiza.

[15] In case it was found that the conclusion of, and performance under, the interim arrangement constituted a breach of fiduciary duty, Indiza pleaded that Motswedi consented to this or waived its right to participate. I will deal with this point in case I am wrong on the issue of the scope of the fiduciary duty of Indiza based on Mr Matsoso's evidence in chief.

[16] The onus on this issue rests in Indiza. In relation to agency, the test is that:
'There is only one way by which such transactions can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent.'[9]
This applies equally to all fiduciary duties.[10] Indiza thus has to show that it made a full disclosure concerning the interim arrangement and that Motswedi consented to it.

[17] Mr Matsoso initially claimed that he was kept in the dark by Indiza that it was performing work included in the tender. The persistent complaint by him was that Mr Mabaso should have let him know that it substantially overlapped the work to be done under the tender. He claimed that all that he was told that, on an interim basis, Indiza was doing work for the Department which was entirely unrelated to the tender. Mr Mabaso had approached him to tell him this and to enquire whether Indiza could acquire only the accounting module of the IFS system. However, this enquiry came to nought. After exhaustive cross-examination, Mr Motswedi conceded that, after receiving a letter dated 1 July 2005 from Indiza, he had known that the latter was

[9] *Robinson* at 178.
[10] *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA) para 31.

doing much of the work required to be done under the tender. All of the documents referred to in evidence bear out this later version.

[18] As indicated, after the suspension of the tender pending the appeal, Indiza had been requested by the Department to ensure the delivery of stationery for the 2006 academic year. The interim arrangement was concluded. The Interim SLA was signed by Indiza on 29 June 2005 and by the Department on 7 July 2005. On 30 June 2005, Messrs Matsoso and Mabaso met. There is a dispute as to what took place at that meeting. The following day Mr Mabaso addressed a letter dated 1 July 2005 to Motswedi and to Mr Matsoso in particular. It purported to record an agreement reached between them concerning Motswedi participating in the interim arrangement.

[19] It will lend clarity to quote extensively from the letter:

'We refer to your meeting of yesterday with Mr Jabulani Maboso . . . where agreement was reached on the scope of Motswedi's involvement in providing software and back office solutions to Indiza for the entire stationery implementation project in the province of KwaZulu-Natal, the general principles and basic terms of which are set out below:

1. The parties acknowledge and confirm that this arrangement is a separate interim arrangement that falls completely outside of what was initially awarded to the parties in the form of a Joint Venture relating to the supply and distribution of stationery to schools for the KZN Department of Education.

. . .

3. For purposes of clarity and with specific reference to this arrangement, hardware may be excluded. Motswedi will however be given an equal opportunity to submit quotations for the hardware component of this project.

. . .

5. Motswedi is required to supply software and back office solutions, incorporating the IFS based software, including certain customisations for Indiza to manage the entire stationery implementation process effectively.

. . .

7. A comprehensive project plan will be agreed upon. In the interim, the business processes supported by this solution and the software capabilities required are:

7.1 General HR and finance;

7.2 Database administration;

7.3 School administration;

7.4 Requisitions;

7.5 Distributing agent management;

7.6 Stationer management;

7.7 Supplier orders;

7.8 Stationer and other potential payments;

7.9 Inventory management;

7.10 Reporting functionality; and

7.11 Support services.

8. The above list is not intended to be exhaustive and may be subject to change depending on the requirements of Indiza, which will only be confirmed at a later stage.

9. Finally, it is agreed that Indiza is responsible for capturing certain catalogue data in a generic Excel database which can be imported and tailored for use in the IFS software.

10. Therefore, should all information contained in this correspondence be agreeable, it is understood that this arrangement will be amplified in a legally binding agreement.

11. In the interim and in order not to delay progress unnecessarily, we request that you confirm your agreement with, and acceptance of all information, including terms and conditions contained in this document, by initialling each page and signing in the space provided.'

[20] Mr Matsoso accepted that the letter related to the interim arrangement. He was aware that the tender could not be given effect to and that this letter did not relate to the tender. This must be correct. There is repeated reference to the interim arrangement encompassing 'the entire stationery' project or process. By this time the parties had suspended any work done pursuant to the tender. Mr Matsoso also accepted that, even if it was not clear from the letter whether this was entirely coextensive with the work required under the tender, it mentioned that the interim arrangement concerned a substantial part of that work. In the light of this letter, his concession that he knew of this at this stage was correct. He response was that no agreement as recorded had been reached in that meeting. He testified that, instead of attempting to deal with his points of disagreement, he decided to meet with Mr Maboso.

[21] Indiza thereafter addressed a letter to Motswedi dated 29 July 2005. Two different letters of that date were included in the bundle. It was accepted that only one of the two was sent. Each letter, however, complained that no response had been received to the letter of 1 July 2005. Also that a meeting had been arranged by the office of Mr Matsoso for 28 July 2005 but that this had not been attended by him. Prior to that, numerous attempts had been made to contact Mr Matsoso and extract information from him but that nothing had been forthcoming. It was indicated that, if Indiza had not received a draft agreement from Motswedi by 1 August 2005, Indiza would have no option but to make alternative arrangements.

[22] Indiza then addressed a letter dated 2 August 2005 to Motswedi. It referred to a meeting held the previous day. It conditionally withdrew the correspondence of 29

July 2005. It confirmed again that the arrangement was a separate interim arrangement falling outside of the tender. The intended partnership would resume when the tender resumed. It requested acceptance of the matters dealt with in the letter, including a draft agreement setting out Motswedi's costs, by noon on 3 August 2005. Should this not take place, Indiza would have to make alternative arrangements. No acceptance was forthcoming.

[23] By letter dated 15 August 2005, Indiza referred to a meeting of 10 August 2005. It sought to confirm various points arising from that meeting dealt with in the following paragraphs:

'2. Having considered the draft options presented to Indiza prior to and in the above-mentioned meeting, we hereby confirm our withdrawal and immediate cancellation of the proposed interim arrangement for reasons, amongst others, that at this point it is not commercially viable for Indiza to proceed given the potential financial constraints and non negotiable delivery deadlines.

3. It must be stressed that this is the withdrawal of the interim arrangement only and our partnership will resume in full, pending the outcome of the tribunal and once the tender has "resurrected" itself.'

[24] By letter dated 23 August 2005, Indiza confirmed that a further meeting would take place between itself and Motswedi on 31 August 2005. By letter dated 31 August 2005, Motswedi addressed the Department in the following terms:
'Indiza–Motswedi consortium was awarded tender **ZNT1373E**, which was subsequently put on hold. Meanwhile, we have learnt from Indiza that the Department has entered into a separate arrangement (agreement) with Indiza and that Indiza is participating in the procurement of stationery for the schools. This was also confirmed by an official in the department.
How does this arrangement between the Department and Indiza impact on tender **ZNT1373E**. What is the status of the tender? Please advise.'
It should be noted that this is the only correspondence generated by Motswedi during the entire period.

[25] Minutes of a meeting on 28 September 2005 between Motswedi and Indiza were prepared. These included the following excerpts:

'(Jabulani Maboso) started by giving a background since their last meeting and the reasons for Indiza being contracted outside of the tender with a separate agreement. JM stated that he wanted Motswedi involved, even in the interim or separate arrangement.'
and
'JM made it clear that the interim temporary arrangement now excluded the technology side of the system and the client's requirements.'
A letter dated 7 October 2005 was sent by Indiza to Motswedi concerning that meeting. It requested a price for Indiza to purchase a system customised by Motswedi to date together with support services. Mr Matsoso testified that no such agreement to purchase the system was reached.

[26] All of the above shows that Indiza was doing its level best to include Motswedi in the interim arrangement. It also shows that Motswedi was frustrating agreement on any form of participation in the interim arrangement. With the full knowledge that Indiza was giving effect to the interim arrangement, Motswedi at no stage demanded from Indiza or the Department that this cease because it contravened the partnership agreement. No such letter was addressed, no verbal demand was made and no application to court was brought. Correspondence was addressed in one direction only. In my view, it can only be concluded that, fully aware of the fact that there was major overlap between the interim arrangement and the tender, Motswedi freely consented to Indiza proceeding. It abandoned any right it may have had to participate.

[27] What I have said concerning the terms of the agreement took at face value the evidence in chief of Mr Matsoso. However, Mr Matsoso and this version did not fare well under cross-examination. He had been adamant that the agreement between Indiza and Motswedi was that of a 50/50 profit share partnership. In document after document, however, Motswedi itself referred to Indiza as the 'Prime' contractor and Motswedi as the sub-contractor. Mr Matsoso initially described this as being totally inaccurate but could proffer no explanation for why he, in affidavits, his

attorney in correspondence, he in correspondence and Motswedi in a document describing the respective work to be done during the tender on a draft Term Sheet, described Motswedi as the sub-contractor. He also conceded that, in fact, it was agreed that Motswedi would sell to Indiza the system from IFS and not that this would be a cost to be jointly recovered from the Department within the joint venture for the tender. In none of the documents is the word 'partnership' used to assert or describe the relationship between Indiza and Motswedi. This Mr Matsoso was also constrained to concede.

[28] A meeting was held between Mr Matsoso and Mr Gwala, an official of the Department on 24 January 2007. A few days thereafter, Mr Gwala wrote to Mr Matsoso, recording what he considered to have been discussed at the meeting. One of the main items recorded related to the question of Indiza being the prime contractor and managing agent, and Motswedi being the sub-contractor. He recorded that Mr Matsoso told him this at the meeting. His response was that he had not understood it that way and had perused the tender document, finding no such reference. He requested Mr Matsoso to confirm in writing that Motswedi was a sub-contractor.

[29] Mr Matsoso denied that this had been raised in the meeting. However, later in his cross-examination, he confirmed that the letter had correctly recorded that Mr Matsoso told Mr Gwala:

'that you never intended as Motswedi to be the prime contractor, Indiza was the prime contractor.'

'Your role was to provide the IT system and never intended to be part of the operational issues. Your understanding was that the tender documents provided that Indiza was the prime contractor.'

In addition, the letter of Mr Gwala said the following:

'However I requested you to write a letter to us confirming that you are not the prime contractor. You advised me that you would contact your legal adviser on this issue and would come back to me.'

'I further confirm that we agreed that if it was found that you were not the sub-contractor your position in relation to KZN DoE and Indiza would change.'

This prompted a response by Motswedi's attorneys including the following:

‘. . . it was always understood that Motswedi would install and implement the LTSM Software System and Indiza would be the managing agent.’
‘The question of prime vs sub-contractor was to be finalised when the tender award was presented and SLA concluded.’
‘. . . Indiza would be the managing agent dealing with the processing of requisitions, procurement and distribution of stationery.’
All of the above is entirely at odds with the earlier testimony of Mr Matsoso.

[30] What eventually emerged from his testimony, after long and excruciating questioning, is that Indiza was to invoice the Department and Motswedi was to invoice Indiza for work done. He conceded that Motswedi was, in fact, to be regarded as a sub-contractor and Indiza as the prime contractor and managing agent. Motswedi would have no direct claim against, or contract with, the Department. This clearly does not amount to a partnership in which the two parties were to contract as a partnership with the Department. This position is consistent with a document prepared by Motswedi as early as 23 June 2005 concerning the work to be done by Indiza and Motswedi. In it, Indiza is described as the entity appointed as the managing agent by the Department. It also refers to Indiza as the prime contractor. It was to raise a purchase order to Motswedi for the work to be done by Motswedi. It also indicated that Indiza would enter into a SLA with Motswedi defining the type of support and response times for the operational phase. As a consequence of this evidence of Mr Matsoso, it is not possible to find that the agreement between Motswedi and Indiza constituted a partnership agreement as he testified in his evidence in chief.

[31] I am aware of the test for absolution set out above. I am also aware that this seldom involves an assessment of the acceptability or otherwise of the evidence of the plaintiff. However, when the evidence has shifted from one form of agreement to another, it cannot be held that a court might find that the subsequently contradicted earlier testimony is sufficient.[11] This, in particular, when that earlier evidence is entirely inconsistent with the documents referring to the events, without those documents having been challenged at the time. It seems to me that there is no basis

[11] *South Coast Furnishers CC v Secprop 30 Investments (Pty) Ltd* 2012 (3) SA 431 (KZP) para 15.

on which a court, applying its mind reasonably to the evidence, could or might find for Motswedi.

[32] In summary, therefore, the following is the position. Taking the evidence in chief of Mr Matsoso at face value, it does not establish that the partnership contended for extended beyond the submission and performance of the tender. That being the case, even if that version of Motswedi's case is to be accepted, no fiduciary duty arose in relation to the interim arrangement. Even if such a duty arose, Motswedi had full knowledge of the alleged breach and failed to challenge the conduct of Indiza or the Department. In addition, it was invited to participate in the interim arrangement but declined to do so. These together amounted to free consent for Indiza to pursue the interim arrangement alone. Finally, taken as a whole, the evidence of Mr Matsoso at the end of the case contradicted his earlier assertion of there having been a partnership. The relationship was that Indiza was the principal contractor with the Department and Motswedi was a subcontractor to Indiza. No direct contractual relationship was to come into effect between Motswedi and the Department within a partnership structure. Certainly no basis remained for contending that the two together were to contract with the Department. In the result, there must be absolution from the instance on the counter-application brought by Motswedi against Indiza.

[33] Motswedi obtained an order under case no. 4957/2007 interdicting the Department from making any payment to Indiza pending the outcome of this application. This interdict must be discharged because the effect of absolution from the instance on the counter-application finalises the present application. The costs in case no. 4957/2007 were reserved for decision in this application. An order was made in the main application that a certain sum of money be deposited in trust with the State Attorney pending the outcome of this matter. This must be paid out to Indiza since I have found that Motswedi has not succeeded in its counter-application. There is no issue that the costs of the two applications should follow the result or that, where senior counsel was used, those costs should be allowed. Both parties utilised senior counsel at the trial.

[34] In the result:

1. In respect of the second respondent's claim in reconvention (or counter application), an order of absolution from the instance is granted.

2. Case 4957/2007 is enrolled and the interim interdict granted in that matter is discharged.

3. The first respondent's attorney of record, namely the State Attorney, KwaZulu-Natal, is directed to pay to the applicant all the monies held by it in trust pursuant to the order issued in this matter on 4 March 2016, inclusive of interest.

4. The second respondent is directed to pay the applicant's costs in case numbers 3320/2007 and 4957/2007, such costs to include the costs of senior counsel where employed.

Gorven J

Dates of Hearing: 8, 9, 10, 11, 12, 15 & 16 October 2018

Date of Judgment: 16 October 2018

Appearances

For the Applicant: GME Lotz SC
Instructed by Norton Rose Fulbright South Africa Inc.
Locally represented by Tatham Wilkes Inc.

For the 2nd Respondent: JP Coetzee SC
Instructed by Ellis Coll Attorneys.
Locally represented by Hay & Scott Attorneys.