REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no**:** HC-MD-CIV-ACT-CON-2018/04238

In the matter between:

NAMIBIAN ELECTRICAL SERVICES CC **PLAINTIFF**

and

PD THERON & ASSOCIATES **FIRST DEFENDANT**
ANDRIES VAN VUUREN **SECOND DEFENDANT**
ANDREW CORBETT **THIRD DEFENDANT**

Neutral Citation*:* *Namibian Electrical Services CC v PD Theron & Associates* (HC-MD-CIV-ACT-CON-2018/04238) [2022] NAHCMD 486 (16 September 2022)

Coram: SIBEYA J
Heard: **1 – 3 February 2021; 18 March 2021; 11 May 2021; 16 – 20 November 2022; 10 March 2022.**
Delivered: **16 September 2022**

Flynote: Action proceedings - Negligence of legal practitioners discussed – Legal Ethics – Legal practitioners are obliged to act within the parameters of their

mandate - Failure to do so is tantamount to negligence – Law of Evidence – Mutually destructive versions restated.

Summary: During September 2013, the electrical works contract was awarded to the plaintiff by the City of Windhoek. The electrical works contract commenced on 19 November 2013 and it had a 10 months stipulated construction period. The completion date was thus 19 September 2014. The electrical works contract continued beyond the completion date of 19 September 2014 by 18 months. The plaintiff at all material times maintained that the delay was not due to any fault on its end.

Despite the plaintiff's contention, the City of Windhoek imposed delay damages against the plaintiff, which were purportedly deducted from the payment certificates issued by the plaintiff to the City of Windhoek.

The plaintiff contented that the impasse reached on the delay damages required to be urgently resolved for the plaintiff could continue to work on the project.

It was due to the gridlock reached on the delay damages that the plaintiff approached the first defendant for legal advice and services. The first defendant subsequently instructed the second and third defendants. The said instructions culminated in the present action for damages instituted by the plaintiff against the defendants.

The plaintiff alleges that the defendants did not have the necessary skill and knowledge to execute the mandate and as a result of the negligence by the defendants, the plaintiff suffered damages in the amount of N$ 110 203.28, being the legal fees paid to the plaintiffs.

The action is presently only against the first defendant, as the plaintiff reached settlement with the second and third defendant. The first defendant vehemently denied such allegations.

It was the first defendant's plea that the plaintiff's initial instructions were to use all means necessary in terms of the law to bring the City of Windhoek to the adjudication, arbitration or mediation of the dispute regarding Project M.64/2011. The first defendant pleaded further that the plaintiff later changed the instructions in that summons be issued against the City of Windhoek for delayed damages which the City was not entitled to deduct.

It was further the first defendant's plea that on 03 November 2015, the plaintiff terminated the instructions to the first defendant for legal assistance and on 04 November 2015, the plaintiff thanked Mr Schurz (who was employed as a professional assistant at the first defendant and provided the required legal services to the plaintiff) and stated that it was a pleasure to work with him and in future if plaintiff needs to fight the bad people again, it will definitely contact Mr Schurz.

Held that, the evidence have established that Mr Schurz lacked the necessary skill and knowledge to render adequate legal services to the plaintiff.

Held further that, there are no cogent reasons why Mr Schurz did not follow the plaintiff's instructions to reverse the penalties by appointing the DAB to adjudicate the dispute in terms of the FIDIC contract. Mr Schurz and his employer, the first defendant did not advance the objects of the plaintiff. The option to seek to institute proceedings in the High Court to recover the penalties constituted a wrong forum which resulted in a waste of time and money and with no reasonable prospects of succeeding. The first defendant can, therefore, not escape liability.

Held further that, the plaintiff's claim succeeds and the first defendant must pay to the plaintiff an amount of N$57,677.03;

ORDER

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1. The plaintiff's claim succeeds.

2. The first defendant must pay to the plaintiff an amount of N$57,677.03.

3. Interest thereon at the rate of 20% per annum calculated from date of judgment to date of final payment;

4. Costs of suit;

5. The matter is regarded as finalized and removed from the roll.

JUDGMENT

SIBEYA J

Introduction

[1] Before I dwell into the genesis of the dispute giving rise to this judgment, I deem it imperative to sound a word of caution to newly admitted legal practitioners practicing as such and that is: once a legal practitioner undertakes the representation of a client, it becomes his or her obligation to exercise proper care to safeguard the client's interest. When a legal practitioner accepts instructions in a matter with which he or she is unfamiliar, the legal practitioner is under a legal and ethical obligation to study the necessary papers and authorities in order to make himself or herself competent in the subject. If a legal practitioner totally lacks the required knowledge and skill to carry out the instructions, such legal practitioner is duty-bound to sincerely inform the client that the instructions are beyond his or her capabilities, whereafter the client may approach another legal practitioner with knowledge and skill on the subject.

[2] With that said, I adopt the Disciplinary Rules of the American Bar Association which state that “a lawyer shall not handle a legal matter without preparation adequate in the circumstances”.

[3] Where a legal practitioner proceeds with a matter where he or she is at sea on what is required, he or she may be liable for negligent conduct.

Parties and representation

[4] The plaintiff is Namibian Electrical Services Close Corporation, a close corporation with registration number CC/99/291, duly registered and incorporated in terms of the relevant provisions of the Close Corporation Act 26 of 1988 and having its registered business at 33 Jordan Street, Pionerspark, Windhoek, Republic of Namibia.

[5] The first defendant is PD Theron and Associates, a law firm and partnership of legal practitioners, duly registered and/or incorporated in terms of the relevant laws of the Republic of Namibia, with its business address situated at C/O Armstrong & Noble Street, Old Power Station Building, Shop 50, 2nd Floor, Windhoek, Republic of Namibia and shall be referred to as ‘first defendant’.

[6] The second defendant is Mr Andries van Vuuren, a male legal practitioner, practicing as a member of the Society of Advocates, and further practising as a sole proprietor under the name and style of Advocate Andries van Vuuren, with his place of business situated at 2nd Floor, Namlex Building, 333 Independence Avenue, Windhoek, Republic of Namibia. The second defendant shall be referred to as either the ‘second defendant’ or as ‘Advocate van Vuuren’ depending on the context.

[7] The third defendant is Mr Andrew Corbett, a male legal practitioner, practising as a member of the Society of Advocates, and further practising as a sole proprietor under the name and style of Advocate Andrew Corbett, with his place of business situated at 2nd Floor, Namlex Building, 333 Independence Avenue, Windhoek, Republic of Namibia. The third defendant shall be referred to as either the ‘third defendant’ or as ‘Advocate Corbett’ depending on the context.

[8] The first, second and third defendants defended this present action instituted by the plaintiff. However, on 18 February 2019, the action against the second defendant was withdrawn pursuant to a settlement agreement entered into with the plaintiff. It is also essential to mention at this stage that, even though the third defendant defended the application, he did not partake in the proceedings. It can be deduced from the papers filed of record that the matter between the plaintiff and third defendant was settled between the parties. The live issue between the parties is, therefore, the dispute between the plaintiff and the first defendant.

[9] The Plaintiff is represented by Mr Marcus while the first defendant is represented by Ms Garbers-Kirsten.

Background

[10] In 2011, the City of Windhoek issued a tender bearing number M64/2011 (TIPEEG – Project Code 18582) for the electrical services for Otjomuise Extension 10, as a selected subcontractor to the principal works contractor.

[11] During September 2013, the electrical works contract was awarded to the plaintiff by the City of Windhoek. In November 2013, the electrical works contract was separated from the principal works contract. It became a stand-alone contract, independent from the principal works contract.

[12] The electrical works contract commenced on 19 November 2013 and it had a 10 months stipulated construction period. The completion date was thus 19 September 2014.

[13] The electrical works contract continued beyond the completion date of 19 September 2014 by 18 months. The plaintiff at all material times maintained that the delay was not due to any fault on its end.

[14] Despite the plaintiff's contention, the City of Windhoek imposed delay damages against the plaintiff, which were purportedly deducted from the payment certificates issued by the plaintiff to the City of Windhoek.

[15] The plaintiff contended that the impasse reached on the delay damages needed to be resolved urgently for the plaintiff to continue to work on the project.

[16] It was due to the gridlock reached on the delay damages that the plaintiff approached the first defendant for legal advice and services. The first defendant subsequently instructed the second and third defendants. The said instructions culminated in the present action for damages instituted by the plaintiff against the defendants.

[17] The plaintiff alleges that the defendants did not have the necessary skill and knowledge to execute the mandate and as a result of the negligence by the defendants, the plaintiff suffered damages in the amount of N$ 110 203.28, being the legal fees paid to the plaintiffs.

[18] As alluded to hereinabove, the case between the plaintiff and the second and third defendants has been settled. The plaintiff proceeds with the claim against the first defendant for the refund of the outstanding legal fees paid to the first defendant in the amount of N$57 677.03. Thus, the present action is proceeding only against the first defendant. The first defendant vehemently denied such allegations.

[19] It was the first defendant's plea that the plaintiff's initial instructions were to use all means necessary in terms of the law to bring the City of Windhoek to the adjudication, arbitration or mediation of the dispute regarding Project M.64/2011. The first defendant pleaded further that the plaintiff later changed the instructions in that summons be issued against the City of Windhoek for delayed damages which the City was not entitled to deduct.

[20] It was further the first defendant's plea that on 3 November 2015, the plaintiff terminated the instructions of the first defendant for legal assistance. On 4 November 2015, the plaintiff thanked Mr Schurz (who was employed as a professional assistant at the first defendant and provided the required legal services to the plaintiff) and stated that it was a pleasure to work with him and in future if plaintiff needs to fight the bad people again, it will definitely contact Mr Schurz.

<u>The pre-trial order</u>

[21] This court in *Mbaile v Shiindi*[1] discussed the importance of listing issues in dispute between the parties, and remarked as follows in para [10]:

'The stage of the pre-trial hearing is arguably the most crucial procedural step leading to the trial. It requires of the parties or their legal representatives to analyse the pleadings and documents filed of record with an eagle eye and in order to unambiguously lay the factual issues in dispute before court. Inevitably, at this stage, the pleadings would have been closed and discovery occurred.[2] The parties are therefore duty bound to strip the pleadings and documents filed of record to their bare bones in order to identify the real issues for resolution by the court. Parties should further be mindful that they are bound to the issues which they bring to court for determination. It is not the responsibility of the court to navigate through various issues raised for determination in order to pinpoint what is relevant, but that of the parties to bring forth their disputes and point out the issues for determination from their dispute.'

[22] In the same vein, just as it is important for the parties to list the issues in dispute, so is it vital for the parties to set out unambiguously issues that are not in dispute or which are common cause between them. This will certainly avoid sending a court on a wild goose chase for a fact-finding mission on matters that are common cause between the parties. The parties are duty-bound to focus on the real issues in dispute between them and should assist the court to identify the undisputed facts way before the commencement of the trial. The parties are further bound to the issues listed for determination and the listed undisputed issues.

[23] The parties, in a joint pre-trial report dated 26 June 2020 (varied), which was made an order of court on 28 July 2020 by agreement, listed the following issues for determination by the trial court:

Issues of fact

(a) What were the instructions given by plaintiff to first defendant when it accepted the mandate on 11 February 2015?

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[1] *Mbaile v Shiindi* (HC-NLD-CIV-ACT-DEL-2018/00316) [2020] NAHCNLD 152 (22 October 2020).
[2] Rule 26 of the Rules of the High Court.

(b) Was the work done by the first defendant in line with the mandate or instructions or both the mandate and the instructions given?

(c) Was the mandate executed by defendant?

(d) Did the plaintiff change its instructions to first defendant, to the effect that summons against the City of Windhoek must be issued to recover delay damages?

Issues of law

(a) Did first defendant fail to carry out plaintiff's instructions and/or its mandate?

(b) Did first defendant lack the necessary skills and knowledge to execute plaintiff's instructions and its mandate?

(c) Is the plaintiff entitled to recover the legal expenses paid to first defendant, on the basis that the services rendered are wholly useless to the plaintiff?

(d) When did the plaintiff's claim against the first defendant arise?

(e) Has the plaintiff's claim against the defendant prescribed?

Agreed facts by the parties, are inter alia, the following:

(a) On 12 February 2015, Mr Marco Schurz, an employee of the first defendant, acting within the course and scope of his employment, or risk created by such employment, accepted the instructions on behalf of the first defendant from the plaintiff.

(b) On 19 February 2015, first defendant orally appointed the second defendant as counsel to provide legal services to the plaintiff.

(c) On 8 April 2015, the first defendant and/or second defendant orally appointed the third defendant to provide legal services to the plaintiff.

(d) The plaintiff accepted the appointments of the second and third defendants based on the advice of the first defendant that such appointments were necessary given the alleged complexity of the case.

(e) That the defendants would render legal services in a proper and professional manner, and would exercise the skill, adequate knowledge and diligence expected of an average legal practitioner in executing the instructions, without negligence.

(f) The plaintiff provided the defendants with instructions to execute the mandate, and paid for the services rendered.

(g) The plaintiff paid for the invoices issued by the defendants which included the invoice of N$57 677.03 issued by the first defendant.

(h) On 21 October 2015, the second and third defendants withdrew as counsel for the plaintiff.

(i) On 3 November 2015, the plaintiff terminated the mandate of the first defendant.

(j) The case between the plaintiff and the second and third defendants was settled.

(k) The plaintiff proceeds with the claim against the first defendant for the refund of the legal fees paid to the first defendant in the amount of N$57 677.03.

(l) The parties admit all letters, emails written and text messages sent to each other and documents prepared by the second and third defendants.

(m) The FIDIC contract (1st edition) applied to the dispute between the plaintiff and the City of Windhoek relating to Project M.64/2011.

(n) The dispute resolution mechanism prescribed by FIDIC is adjudication and arbitration.

[24] I deem it appropriate at this stage to consider the evidence led in order to determine whether the plaintiff's claim was proven or not.

Plaintiff's case

[25] Mr Plamen Petrov, the sole member of the plaintiff, testified on behalf of the plaintiff. He said that on 11 February 2015, he approached Mr Marco Schurz (a legal practitioner and employee of the first defendant) to assist the plaintiff to successfully complete project M.64/2011 Otjomuise Extension 10, which the plaintiff had with City of Windhoek. The implementation of the project by the plaintiff had stalled, because of the decision by the City of Windhoek to impose penalties, due to an alleged delay by the plaintiff to finalise the project, hence the plaintiff sought legal assistance in that regard.

[26] Mr Petrov testified further that the first defendant was instructed to follow the prescribed procedure stipulated in the FIDIC (*Federation Internationale des Ingenieurs-Counseils, 1999 firs ed*.) contract, in order to have the penalties for the delay damages that the City of Windhoek had imposed reversed, so that the invoices submitted by the plaintiff could be paid in full. The release of the funds was crucial to the continuation of the project by the plaintiff.

[27] Mr Petrov testified further that he verbally briefed Mr Schurz on the situation surrounding the project, and the penalties for the delay damages imposed by the City of Windhoek. Mr Schurz accepted the instructions.

[28] Mr Petrov testified further that on 12 February 2015, Mr Schurz, without his knowledge, instructed Advocate van Vuuren to take on the matter. The instructions from Mr Schurz to Advocate van Vuuren were to urgently advise on how to proceed with the matter, possibly arbitration in terms of the building contract alternatively an

application to compel.[3] Advocate Corbett, was appointed as the senior advocate on the case.

[29] Mr Petrov stated that Mr Schurz, at all times, maintained that Advocate Corbett's involvement was necessary as the case was complex and further that Advocate Corbett was experienced in dealing with similar cases.

[30] On 19 February 2015, Mr Schurz, in an email, wrote to Mr Petrov, *inter alia*, that:

'…I am busy with a letter to the Municipality and Burmeister to appoint a "dispute resolution board" (arbitrator) in terms of the conditions of the contract so that the matter can be heard and we can come to some sort of agreement to, at this point, urgently attend to the matter and possibly avoid court.

Please give me the name of the Arbitrator that you mentioned who is also an electrical engineer?'[4]

[31] Mr Petrov responded via email as well on the same date that:

'I don't know how legal is for you to push them to appoint DAB. I also consider this way as time wasting and purpose made by FIDIC in the contract to provide for enough time for the engineer to make a decision while the contractor is obliged to continue with the works in conditions not favourable to him… In you *(sic)* letter to CoW you should make clear that we are about to close the site at the end of February 2015 because of lack of funds…
The name of the person is Henning Seelenbinder … I will forward you also the letter from B& P with him proposed as available arbitrator.'

[32] Mr Petrov testified that on 5 March 2015, he provided a summary of the case to Mr Schurz, where he pointed out the content of clause 20.2 of the FIDIC contract to Mr Schurz.[5] Clause 20.2 deals with the appointment of the Dispute Adjudication Board (DAB). Mr Petrov testified that he brought to the attention of Mr Schurz that Mr

[3] Exhibit "PP2".
[4] Exhibit "PP3".
[5] Exhibit "PP6".

Henning Seelenbiner should be appointed as the adjudicator for the DAB process as he is provided for in the FIDIC contract.

[33] Mr Petrov testified that on 11 March 2015, Mr Schurz wrote to the engineer Burmeister & Partners demanding immediate adjudication of the dispute failing which the High Court will be approached for urgent relief.[6] Burmeister & Partners was unmoved and responded on 24 March 2015, *inter alia*, that: "you are reminded to refer to the Conditions of Contract and note the procedures pertaining to both Contactor's claims, as well as obtaining Dispute Adjudication's Board's Decision." Mr Petrov testified that this was a reminder to Mr Schurz to adhere to the terms of the FIDIC contract.

[34] Instead of following the terms of the FIDIC contract, as advised by Burmeister & Partners, the junior advocate in the matter instructed the senior advocate, so Mr Petrov testified.

[35] Mr Petrov testified that on 17 and 24 April 2015, he had consultations with Mr Schurz on the possibility of accepting the payment certificates from the City of Windhoek on a without prejudice basis for the much needed payment to be made to the plaintiff. The consultations further explored available options to the plaintiff in the event that the City of Windhoek refused to agree to the appointment of an adjudicator. Mr Schurz advised that if the City of Windhoek refuses to agree to the appointment of an adjudicator then, the High Court could be approached to appoint an adjudicator and this required that summons be prepared.

[36] Mr Petrov testified further that, Mr Schurz, in a letter of 29 April 2015, confirmed a round table meeting to be held on 7 May 2015 with the Burmeister & Partners, Mr Petrov and Mr Schurz at Advocate Corbett's chambers.[7] Burmeister & Partners responded on 6 May 2015 and stated that they will not attend the meeting scheduled for 7 May 2015 and will further not attend any meeting which falls outside the contractual procedures.[8]

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[6] Exhibit "PP7".
[7] Exhibit "PP15".
[8] Exhibit "PP16".

[37] Mr Petrov testified further that on 10 June 2015, Mr Schurz wrote to Burmeister & Partners and stated that, should the dispute proceed to arbitration or litigation the conclusion of the project will be delayed and will prejudice all parties and therefore proposed that the dispute be referred to mediation.[9] On 3 September 2015, Mr Petrov inquired on the progress made to appoint a mediator. Mr Shurz responded that they have not heard from Burmeister & Partners. Mr Schurz proceeded to state that: “It appears that they are not willing to cooperate with the mediation thing, so I am of the opinion that we should stop wasting time with negotiations … We should proceed with the summons as we already discussed in June.”[10] The advice was that if the parties failed to agree on an adjudicator then the court should be approached to appoint the adjudicator.

[38] On 4 September 2015, Mr Petrov instructed Mr Schurz to proceed to prepare summons.[11]

[39] On 21 September 2015, Mr Petrov wrote an email to Mr Schurz to inquire about the progress in the matter and whether the mediation will commence. Disturbed by passage of time with no desired results, Mr Petrov wrote another email to Mr Schurz on 28 September 2015, inquiring about the progress on the issuing of summon and the court-connected mediation.[12] On 29 September 2015, Mr Schurz responded and stated that he will afford Burmeister & Partners another seven days to respond to the request for mediation failing which summons will be issued, which Advocate van Vuuren was busy preparing. Mr Schurz further stated that he informed the advocates that if they fail to provide the summons as soon as possible, he will look for other counsel.[13]

[40] Mr Petrov stated further that, on 16 October 2015, Mr Schurz sent him a memorandum and the summons preared by counsel.[14] He was also informed of a meeting scheduled for 21 October 2015. Mr Petrov conveyed his disappointment with the work of the instructed counsel in an email sent to Mr. Schurz, as the

[9] Exhibit “PP19”.
[10] Exhibit “PP22”.
[11] Exhibit “PP23”.
[12] Exhibit “PP25”.
[13] Exhibit “PP36”.
[14] Exhibit “PP35”.

documents prepared were not in line with his instructions and they contained a lot of factual and technical mistakes.

[41] After 8 months on the case, February to October 2015, Advocate van Vuuren and Advocate Corbett withdrew from the case in October 2015, citing lack of trust as the main reason. By then, there was no adjudication in terms of the FIDIC contract and the case was nowhere near adjudication. Mr Petrov testified that the plaintiff was in no better position than it was in February 2015.

[42] Mr Petrov emphatically stated that, after due consideration and discussions with other lawyers, he realised that Mr Schurz was not competent to attend to the case and decided to terminate the mandate of the first defendant on 3 November 2015. He subsequently appointed Chris Brandt Attorneys.

[43] It was Mr Petrov's testimony that Chris Brandt Attorneys immediately 'kick–started' the dispute resolution process. In January 2016, the plaintiff declared a dispute and requested that a sole member DAB be activated and selected one of the two nominated engineers in the contract documents. The dispute adjudication agreement was signed by the City of Windhoek on 22 April 2016. Disagreements between the parties on the modalities of the appointment of the DAB took another 4 months, before a dispute adjudication agreement was finally signed in August 2016.

[44] A first preliminary meeting took place on 30 November 2016, where a programme for the steps comprising the adjudication was agreed to commence in January 2017. After an exchange of papers, the DAB decision paper was delivered on 7 July 2017, awarding the plaintiff a refund N$5 827 581.21 for the delayed damages and other related expenses, so Mr Petrov testified.

[45] The City of Windhoek, however, failed to pay in terms of the award, resulting in proceedings being instituted in the High Court. On 11 February 2019, the court ordered City of Windhoek to give effect to the DAB decision. Mr Petrov testified that the City of Windhoek complied with the order and made payment to the plaintiff.

[46] In summation, Mr Petrov concluded his testimony by stating that, it was only after he handed over the case to Chris Brandt Attorneys that he realised that Mr

Schurz and/or the first defendant, lacked the necessary skill and knowledge to execute the plaintiff's instructions or were negligent in executing the instruction.

[47] Mr Petrov's main contention was that Mr Schurz and/or the first defendant were acting merely as a 'post office box'. They did not bring an independent legal mind to bear on the case. No assessment was done of the work performed by instructed counsel, much less on whether the case was heading in the right direction or not. Furthermore, the advice given by the instructed counsel, and the work done was not assessed whether it was in line with the instructions given by the plaintiff. As such, the plaintiff is entitled to recover the legal costs paid to first defendant in the amount of N$57,677.03, plus the legal costs incurred in the process followed to bring the first defendant to court, as the firm failed to execute its mandate and the instructions of the plaintiff and/or lacked the necessary skills and knowledge to do the work.

[48] It was the testimony of Mr Petrov that he is not a legal practitioner and relied on Mr Schurz for legal advice. He knew that what was required was to institute adjudication proceedings but after appointing the first defendant he trusted that the first defendant will diligently with the required knowledge and skill advise him properly. The instructions that came from the plaintiff about approaching the court was the advice received from Mr Schurz.

[49] Mr Petrov testified further that the adjudication process set out in the FIDIC contract is conducted locally and is not an expensive exercise. If the dispute is not settled at adjudication then arbitration may commence.

[50] In cross-examination, it emerged that when Mr Petrov instructed Mr Schurz, he informed Mr Schurz telephonically that he tried to bring the people to adjudication but failed and therefore needed legal assistance to do so. It was his instruction on 11 February 2015 to Mr Schurz that he must put his efforts to bring the City of Windhoek to adjudication process. In the same breath, Mr Petrov testified that his instructions to Mr Schurz were based on the knowledge and experience of Mr Schurz, to find any way to break the dispute.[15]

[15] Record p 125.

[51] Mr Petrov further testified in cross-examination that before he approached Mr Schurz he wrote to the then President of the Republic on 16 January 2020 ("the President") and complained about the hostile approach of Burmeister & Partners and requested the President's intervention failing which the plaintiff will have no choice but take the matter to court as he presumed that this was the way to go.[16] The letter to the President is amongst the bundle of documents provided by Mr Petrov to Mr Schurz.

[52] When pressed in cross-examination, Mr Petrov insisted that his initial instructions to Mr Schurz were to get the dispute adjudicated upon as per the contract. The subsequent instructions were on the advice of Mr Schurz as Mr Petrov thought that this was right.

[53] Although both parties agreed that the email below does not constitute an instruction, Mr Petrov stated as follows in an email of 24 March 2015:

> 'Hi Marco
>
> I will forward to you all latest correspondence coming from B&P to keep you updated. On this particular one attached I am of the opinion to ignore their condition for committing on new dates on the project and to continue with our urgent application for release of all penalty amount. Only after this can we agree on arbitration. Let me know about your opinion.'[17]

[54] When Mr Petrov was asked as to what he wanted Mr Schurz to do in reaction to the above email of 24 March 2015 (Exhibit "MS13"), Mr Petrov said that: 'Anything up to his knowledge.' On the reference to the urgent application in the email, Mr Petrov said that he took the urgent application aspect from an email previously mentioned by Mr Schurz. Mr Petrov said he copied and pasted the urgent application aspect from previous correspondence which was provided to him as an option in a previous matter where the plaintiff was represented by Advocate Totemeyer and Mr Schurz where the dispute was speedily resolved.

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[16] Exhibit "MS1".
[17] Exhibit "MS13".

[55] Ms Garbers-Kirsten put it to Mr Petrov that he informed Mr Schurz about mediation to which Mr Petrov denied ever informing Mr Schurz about mediation.

[56] Mr Petrov had difficulties to follow the English language, but he was adamant that the lawyers advised for arbitration yet such process can only be resorted to after adjudication fails. The lawyers drafted particulars of claim to recover delayed damages. Mr Petrov referred to the draft particulars of claim as brilliant material but still said that such particulars of claim did not provide for adjudication and only to be arbitrated on failure of adjudication. He said that the particulars of claim were not useful to the plaintiff. He took a different route when he consulted Mr Brandt.

[57] Mr Petrov testified that time period lost from February to November 2022 resulted in the wastage of valuable time to the plaintiff, financial difficulties, and producing a document that is useless to the plaintiff. In response to a question by Ms Garbers-Kirsten, Mr Petrov said that the lawyers discussed the issuing of summons and that if the matter becomes opposed, then it will be referred to court-connected mediation and he agreed with them based on their advice. Mr Petrov further said that he also believed that the mediation court process could occur. He further said that his instructions were for adjudication. Even when questioned about the content of the letter of 15 October 2015 from Mr Schurz and Advocate van Vuuren, suggesting the issuing of summons, Mr Petrov was adamant that, where he agreed to issuing summons, that was based on the advice of the legal practitioners.

First Defendant's case

[58] Mr Schurz testified that he was enrolled as a legal practitioner of this court on 24 May 2014 and was employed as a professional assistant at the first defendant. He testified that in February 2015, Mr Petrov telephonically contacted him with the request to assist him and by extension the plaintiff, regarding legal action that the plaintiff sought to institute against the City of Windhoek and other role players relating to project M.64/2011. On 11 February 2015, Mr Petrov forwarded various emails and several documents to him for perusal regarding the plaintiff's claim which he perused.

[59] Mr Schurz, testified that Mr Petrov knew what the issues were and his instructions from the outset was that the FIDIC contract is applicable to this matter which requires the appointment of a Dispute Adjudication Board ("DAB").

[60] Mr Schurz testified that, Mr Petrov informed him that the plaintiff was 'cash trapped' and it had no time for testing the adjudication process. The plaintiff wanted an urgent solution to its money that was withheld as penalties.

[61] Mr Petrov requested Mr Schurz to consider bringing an urgent application for the urgent release of the penalties that were unlawfully imposed. Mr Petrov elaborately discussed the merits of the matter with Mr Schurtz during the telephonic conversation and Mr Schurz, already at that point in time formed the opinion that the matter is complex as DAB is applicable, but client wanted consideration for bringing an application for urgent relief.

[62] Mr Schurz further testified that having considered Mr Petrov's concerns, the contents of the contracts applicable to the matter and all communication between the parties it was the advice of counsel to institute action in the High Court of Namibia (for the same amount in dispute) as the new High Court rules just came into operation. In terms of these rules, once the action became opposed, the matter will be referred to mediation. This would force the parties involved to take part in court-connected mediation and there exists a possibility that the matter might settle during this mediation. The legal practitioners, therefore, stated that summons will be issued in the hope that the matter will become settled at court-connected mediation. It was further the advice of counsel that an alternative claim based on the Conventional Penalties Act 15 of 1962 was included in the particulars of claim which will prevent the defendant from successfully instituting a special plea.

[63] Mr Schurz during examination in chief reiterated an email that was addressed to him which he forwarded to Mr Petrov on 15 October 2015, regarding the draft particulars of claim.

[64] Mr Schurz testified that once it becomes evident to him that a client wants urgent relief, he, as a practicing attorney (still today, 6 years later) always instructs counsel. He testified that it is not viable and practicable for him, as an instructing

attorney, to set aside all the work that he is involved with at the time that the urgent application surfaces in order to attend to the urgent application in person. He at that point in time realised that the plaintiff's case required urgent and special consideration. Mr Schurz highlighted the fact that it was also the view of Advocate Van Vuuren, who is a junior advocate, that the matter was complex.

[65] Mr Schurz, during cross-examination, conceded that he had misinterpreted the FIDIC contract by labouring under the impression that the employer had to appoint the DAB.

[66] Mr Schurz testified that it was always the instructions of Mr Petrov that the matter is urgent and the legal practitioners should do everything in their power to put the matter in motion so that the plaintiff could obtain relief. Mr Schurz testified further that he applied his mind and assessed the work carried out by counsel and he spent his time and energy on this matter. He was in constant communication with Mr Petrov telephonically (calls and text messages), through emails, and Mr Petrov's physical visits to his office for updates. He further stated that he instructed counsel with the knowledge of Mr Petrov. Mr Schurz's testimony was, by and large, that the DAB adjudication was not followed because the plaintiff changed the instructions.

Arguments for the plaintiff

[67] Mr Marcus submitted for the plaintiff that there is no reason why the FIDIC procedure provided for in the contract to establish the DAB in the event of a dispute was not followed where there were clear instructions by the plaintiff to follow such procedure.

[68] Mr Marcus submitted further that when Mr Schurz took the stand, his lack of knowledge was too apparent. He had absolutely no clue of the steps required to establish the DAB. He wrongly held the view, even 6 years later that the DAB is appointed by the employer. Given the lack of knowledge on the procedure prescribed by the contract, Mr Schurz was unable to give any meaningful advice to the plaintiff. The advice to the plaintiff should have been that, the DAB is not appointed by the employer and that the related concerns about bias by the employer are for that reason unwarranted.

[69] Mr Marcus submitted that writing a letter in compliance with what was required in terms of the FIDIC contract was not difficult and this was conceded by Mr Schurz. Mr Schurz did not advise the plaintiff about its remedies in terms of the FIDIC contract.

Arguments for first defendant

[70] Ms Gabers-Kirsten submitted that the plaintiff wanted an urgent solution to its money which was withheld as penalties and therefore requested Mr Schurz to consider bringing an urgent application. The plaintiff further wanted to avoid the FICDIC contract as it was time-consuming, submitted Ms Garbers-Kirsten. It is on such request that Mr Schurz appointed counsel. This was the first time that Mr Schurz dealt with a FIDIC contract.

[71] Ms Gabers-Kirsten, submitted on behalf of the first defendant that Mr Schurz's mis-interpretation that the employer was the one who is empowered to establish the DAB did not have any material consequence to the end result. She submitted further that Mr Schurz rightly referred the matter to junior counsel to assist with the consideration of the possible urgent application for the release of the penalties. After the discussion of the terms of the FIDIC contract and consideration of Mr Petrov's further concerns of the possible abuse of the DAB process by the plaintiff together with the allegations of bias, it turned out to be the correct step to have been taken to appoint junior and senior counsel to find a way to get around the stipulations of the FIDIC contract. Junior counsel concluded that the matter was complex and that the services of senior counsel were needed.

Analysis and discussion of the evidence

[72] I had the opportunity to consider the issues of law and issues of fact set out by the parties. Certain issues of law and fact overlap or are intertwined, therefore, in this part of the judgement, I shall only concentrate on the issues that I deem relevant to the determination of this matter.

Issues of fact

What were the instructions given by plaintiff to first defendant when he accepted the mandate on 11 February 2015?

[73] Mr Marcus submits that, it is apparent from the evidence in its totality, that the consideration of the instructions indicate that the first defendant was instructed to resolve the dispute through the mechanisms outlined in the FIDIC contract, which entailed the appointment of DAB. Ms Garbers-Kirsten concedes that, that was indeed the instruction but that the plaintiff had doubts about this route as it might be biased and similarly requested urgent relief.

[74] I am reminded of an agreed fact between the parties which forms part of the pre-trial memorandum and was made an order of court, that the parties agreed that: 'the FIDIC contract (1st edition 1999) applied to the dispute between plaintiff and the City of Windhoek relating to project M.64/2011. The dispute resolution mechanism prescribed by FIDIC is adjudication and arbitration.'

[75] I find that despite Mr Schurz obtaining clear instructions from the plaintiff to follow the FIDIC contract, he deviated therefrom, based on his understanding of the FIDIC contract; the advice from Advocate van Vuuren and Advocate Corbett and the urgency of the relief sought by the plaintiff. As this judgment unfolds, I shall address whether such deviation then attributes negligence to Mr Schurz and by extension on the first defendant.

Was the work done by first defendant in line with the mandate or instructions or both the mandate and the instructions given?

[76] It is evident from the plaintiff's testimony, that of Mr Schurz and the documentary evidence before the court, that the plaintiff had concerns about the time periods set out in the FIDIC contract and the alleged bias of the process stipulated in the FIDIC contract.

[77] I am of the view that this gave the defendants the free hand to adjudicate the matter and to follow any route available to adjudicate the matter. It is evident from various exhibits and also Mr Petrov's testimony that the plaintiff agreed to the institution of an action in the High Court after he was so advised.

Did first defendant fail to carry out plaintiff's instructions and/or mandate?

[78] The following was said in Amler's Precedents of Pleadings, 8th Edition p.242 by LCT Harms:

'The relationship between an attorney and client is based on a contract of mandate, and such contract imposes fiduciary obligations on an attorney. An attorney owes a duty of care towards the client, the court, and third parties although the nature of this duty has not been clearly defined.'

[79] With that said, the legal question that now arises is whether an attorney's duty of care towards his client, can extend to advising a client to the contrary, if an envisaged course of action is not viable in the circumstances of a case? The answer will always be in the affirmative, especially in the instance where the legal practitioner concerned has conducted the necessary research and analysis.

[80] Mr Schurz claimed that Mr Petrov allowed him a free hand to resolve the dispute in any manner possible and urgently. To this, Mr Petrov testified that the instruction to Mr Schurz was to resolve the dispute in any manner possible in terms of the FIDIC contract.

[81] Clause 20.2 of the FIDIC contract provides that disputes shall be adjudicated by a Dispute Adjudication Board (DAB).

[82] Clause 20.4 of the contract describes a dispute as:

'(of any kind whatsoever arising) between the parties in connection with, or arising out of, the Sub-Contract or the execution of the Sub-Contract Works, including any dispute, as to any certificate, determination, instruction, opinion or valuation of the Contractor…'

[83] It is common cause that the first defendant did not seek to invoke the dispute resolution mechanism provided for in the FIDIC contract. This was, notwithstanding the agreement by the parties that the FIDIC contract applied to the dispute between the parties and the mechanism prescribed by the FIDIC contract is adjudication and arbitration.

[84] In view of the above agreement between the parties, it is apparent that the dispute resolution mechanism provided for in the FIDIC contract constitutes the starting point in an attempt to resolve the dispute between the parties. That is the agreement between the parties. It does not come as a surprise, in my view, that Burmeister & Partners laughed at the threat made by Mr Schurz to have the dispute immediately adjudicated, failing which urgent relief would be sought at the High Court and with an adverse costs order because this was outside the terms of the FIDIC contract. Burmeister & Partners responded by making reference to the conditions of the contract and the procedure to obtain a DAB decision.

[85] Considering that the FIDIC contract regulates the dispute between the parties, why then did the first defendant not follow the terms of the FIDIC contract? Mr Schurz testified that Mr Petrov instructed that the court be approached for urgent relief as the DAB would be a waste of time and there was bias on the part of the engineers. The plaintiff disagrees and insists that its instructions were to resolve the dispute in terms of the FIDIC contract.

[86] The versions of Mr Petrov and that of Mr Schurz are at material variance and cannot co-exist, therefore, they are mutually destructive.

[87] The court's approach to mutually destructive versions was set out in the Supreme Court of Appeal of South Africa in *SFW Group Ltd and Another v Martell Et Cie and Others,* where the court remarked that:[18]

'The technique generally employed by our courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues, a court must make findings on (a) the credibility of the various factual

[18] *SFW Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA) at page 14H – 15E.

witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That, in turn, will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or what was put on his behalf, or with established fact and his with his own extra-curial statements or actions; (v) the probability or improbability of particular aspects of his version; (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. . .'

[88] In *National Employers' General Insurance v Jagers*,[19] Eksteen AJP said the following while discussing the approach to mutually destructive evidence:

'In a civil case … where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probability that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected.'

[89] Guided by the above principles I consider the evidence of Mr Petrov and Mr Schurz on the difference of instructions. It is the defence of the first defendant that the plaintiff initially instructed that the adjudication process should be followed but then proceeds to state that the plaintiff changed its instructions hence the DAB adjudication process was not followed.

[90] It was contended for the first defendant that the email of 19 February 2015 contained instructions by the plaintiff to the first defendant that the plaintiff was no longer interested in the DAB process as it was time-wasting but sought alternative means to recover the penalties.[20] Confronted with the clear wording of the email of 19 February 2015, Mr Schurz retreated and said that such email was not an instruction to proceed with other avenues other than the DAB process.

[91] A reading of the said email, in my view, does not constitute an instruction to disregard the DAB process or at the very least to employ other means to resolve the

[19] *National Employers' General Insurance v Jagers* 1984 (4) SA 437 (E) at 440E-F.
[20] Exhibit "PP3".

dispute due to time-wasting. To the contrary, according to Mr Petrov he was simply sharing his views about the length of the decision-making process provided for in the FIDIC contract. It was conceded by Mr Schurz that the email did not constitute the insinuated instruction. The said concession wipes out attempts to rely on the said email to the alleged change of instructions and the said email requires no further mention.

[92] Ms Garbers-Kirsten referred to the letter from the plaintiff addressed to the President where the plaintiff threatens court proceedings if the President does not intervene to assist the plaintiff as indicative of the position that at all times the plaintiff wanted to invoke court proceedings in this matter.[21]

[93] The letter to the President was part of the documents that were provided by Mr Petrov to Mr Schurz. It is not the evidence of Mr Schurz that he was instructed by Mr Petrov to follow the route suggested in the said letter to the President. It further appears nowhere on record that Mr Schurz should have followed the content of the letter to the President. Save to state, therefore, that the letter to the President sought the President's intervention, failing which court processes would be instituted, nothing more turns on such letter. I find that, it does not necessarily follow that because Mr Petrov threatened court processes in the said letter to the President, then he would always opt for court processes in an attempt to resolve the same dispute. Notwithstanding the content of such letter, Mr Schurz should have acted based on the instructions provided by the plaintiff.

[94] Mr Petrov insisted that his instructions were for the lawyers to follow the adjudication process provided for in the FIDIC contract. The decision to issue summons was made on the advice of the plaintiff's lawyers and they opined that it was the easiest route to get the desired relief and that if the claim was defended then the matter could go to court-connected mediation.

[95] Mr Schurz appeared to not have read the FIDIC contract and if he did, he did not understand it. In the brief which he prepared to Advocate van Vuuren on 12 February 2015, he, in my view, led the said counsel astray by instructing that urgent advice is required on how to proceed with the matter, possibly arbitration in terms of

[21] Exhibit "MS1".

building contract, alternatively an application to compel. Both proposed avenues are not in line with the FIDIC contract.

Alleged bias

[96] It was further the evidence of Mr Schurz that Mr Petrov felt that the DAB process was time-consuming, costly and biased because the City of Windhoek appointed the DAB.

[97] Mr Schurz laboured under a mistaken belief that it is the City of Windhoek that appoints the DAB. The FIDIC contract provides for appointment of a sole member/adjudicator. The parties have the right to select one from the two nominated adjudicators: H Seelenbinder and WH van Zijl. If the parties cannot agree on the appointment of the adjudicator, then the President of the Engineering Council of Namibia shall appoint the adjudicator.

[98] I find merit in the argument advanced by Mr Marcus that, any fears of bias attributed to the belief that the employer appoints the DAB are thwarted by the fact that the appointment of the adjudicator is not left to the City of Windhoek alone. I find that, in terms of the FIDIC contract, the appointment of the adjudicator is the responsibility of both parties and, in my view, the neutrality provided for during the appointment of the adjudicator suppresses the fears of bias that the plaintiff may have harboured.

[99] It was not Mr Schurz's case that he could not carry out the instructions from the plaintiff because he was inexperienced. Mr Schurz was adamant that he read the FIDIC contract, yet even at the time of testifying in this court (6 years after he was instructed by the plaintiff) he was still labouring under the wrong belief that it is the City of Windhoek that appoints the DAB. Ms Garbers-Kirsten submitted that the mis-interpretation by Mr Schurz that only the City of Windhoek could appoint the adjudicator has no consequence to the end result. I disagree.

[100] I premise my disagreement on the fact that it is the said alleged mis-interpretation that underlined the feeling of bias on the part of the City of Windhoek. If the DAB is biased, then its whole integrity, fairness and reliability is compromised.

It is a serious position which should not be ignored but rather once raised, bias, requires urgent and thorough examination in order to determine its reasonableness.

[101] I cannot understand why Mr Schurz could not inform Mr Petrov that the plaintiff can, in terms of the FIDIC contract, appoint an adjudicator, and this will cover the concerns of possible bias. The fact that Mr Schurz failed to inform Mr Petrov that the plaintiff can appoint the adjudicator and considering that even 6 years later, the provision for the appointment of the adjudicator was still foreign to Mr Schurz, I find that Mr Schurz did not know about the existence of the said provision or at the very least did not understand it. In my view, it is negligent of Mr Schurz to have failed to advise the plaintiff that it is authorised to appoint the adjudicator.

[102] Clause 5 of the Procedural Rules requires the DAB to act fairly and impartially between the employer and the contractor and further requires the DAB to adopt procedures which avoid unnecessary delays and expenses. Mr Schurz could not remember seeing this clause.

[103] In a letter of 10 June 2015, which Mr Schurz addressed to Burmeister & Partners, he called on the parties to refer the dispute to mediation while the FIDIC contact provides for adjudication by DAB and proposes the nomination of persons as mediator contrary to the provisions of the FIDIC contract. This further demonstrates that either Mr Schurz did not read the FIDIC contract or that he did not understand it.

[104] Mr Schurz testified that he could not remember if he considered that the adjudication could be in favour of the plaintiff. This is concerning as the FIDIC contract in clause 20.4 provides that a decision by the DAB is binding and has to be given effect to. Mr Schurz appeared to have no knowledge about this clause either.

[105] Mr Schurz admitted that he did not consider the procedural rules for the DAB provided for in clause 8 of the FIDIC contract. How Mr Schurz could determine the jurisdiction of the DAB without reading and understanding the procedural rules of the DAB is difficult to comprehend.

[106] A lawyer is expected to possess special knowledge and skill to be exercised with a degree of care and honesty towards a client. Lawyers, therefore, retain a duty

to investigate and explain the consequences of any decision or advice presented to the client, together with proposed strategies aligned to such decision or advice. In *casu*, it was incumbent on Mr Schurz to study the FIDIC contract including the provisions on dispute resolution and procedural rules and understand them and advise the plaintiff accordingly.

[107] It was submitted by Ms Garbers-Kirsten, that all and any criticism levelled against the particulars of claim boils down to mere speculation. It was Mr Schurz' perception that had the plaintiff proceeded to issue the summons the possibility existed that the order could have been obtained undefended and/or if the matter was defended that no special plea was raised and/or if the matter was opposed that it wiould settle during mediation.

[108] I find the above position of Mr Schurz to be ambitious. One should not issue summons in the hope that there will be no opposition or that no special plea will be raised or that the matter will be settled at mediation. Summons should be issued where there is merit to sustain the claim set out therein, failing which an adverse costs order should be considered, as that may constitute an abuse of the court process. Mr Petrov testified that the draft particulars of claim were not utilised.

[109] The success or failure of such particulars of claim cannot be conclusively determined in these proceedings, save to state that such an approach was contrary to the FIDIC contract. All that Mr Schurz could do was to draft a letter to appoint a DAB or write to the President of the Engineering Council to do so. Instead, Mr Schurz engaged in threatening Burmeister & Partners with urgent applications and adverse costs and preparation of particulars of claim which served no purpose at the end of it all and was not in accordance with the FIDIC contract. I must add that the said steps taken were also not in accordance with the instructions of the plaintiff.

[110] It was Mr Schurz's case that the matter in issue is complex. What Mr Schurz, however, failed to explain the complexity of the matter or the instructions. This court, in the ruling on the absolution from the instance remarked as follows regarding the alleged complexity of the matter:

'[27] *Prima facie*, it is difficult to comprehend the alleged complexity of triggering a dispute resolution process through a FIDIC contract. It was further testified by Mr. Petrov in a similar manner that after terminating the mandate of the defendant, it came to his knowledge that no specialized legal knowledge and expertise was required to commence the DAB process.'

[111] I hold the view that, except for the mere say so of Mr Schurz (supported by Adv. Van Vuuren) that the matter is complex in nature, there is no explanation tendered to explain the said complexity. To the contrary, it is not complicated to appoint the DAB for the adjudication to proceed.

Did first defendant lack the necessary skills and knowledge to execute plaintiff's instructions and its mandate?

[112] First and foremost, it is important to note that, as a general rule, an action against a legal practitioner for professional negligence is based on the contract between the client and the legal practitioner.

[113] By accepting the client's instructions and undertaking to provide them with the legal services necessitated by such instruction in exchange for a fee, a contract is formed between the client and the legal practitioner. It is implied in such contract that the legal practitioner represents to the client that they have the necessary skill, knowledge and diligence to perform their duties as would be expected of a legal practitioner with ordinary skill (see *Honey and Blanckenberg v Law* 1966 (2) SA 43 (R) at 46E-F).

[114] A legal practitioner will be guilty of negligence if he or she lacks such skill, care and diligence as would be expected of a legal practitioner with ordinary skill and, such lack of skill, care and diligence causes harm to their client (see *Honey and Blanckenberg* at 46F). Goldin J set out two riders to these principles in *Honey and Blanckenberg* (see 46H):

a) Generally, <u>the legal practitioner will not be guilty of negligence if they took and acted on the opinion of counsel.</u> (emphasis added)

b) The legal practitioner will not be guilty of negligence if they erred in judgment on legal or discretionary matters. This relates to, for example, instances where the legal practitioner might have erred in their determination of the legal nature of a document or in the interpretation of a statute (see *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A) at 123H-124A). Furthermore, this principle was qualified in *Mouton v Mynwerkersunie*, in that it will not excuse a legal practitioner where the error in judgment was due to the lack of skill, care and diligence as would be expected of an average legal practitioner (*Mouton v Mynwerkersunie* para 143A-143B).

[115] Goldin J went on to point out the inherent difficulty in making the value judgment of whether the legal practitioner has used reasonable skill, care, and diligence – the conclusion on this point was that it is ultimately a matter of degree *(see Honey and Blanckenberg at 47A)*. A good illustration of the degree at which the legal practitioner's conduct will not be accepted as being of ordinary competence is available in the case of *Mazibuko v Singer* 1978 (1) SA 839 (W), where a legal practitioner had allowed a client's claim to prescribe and Colman J concluded that 'no attorney of ordinary competence and diligence' would allow a client's claim, which was clearly of importance to such client to become prescribed. It can, therefore, be argued that a legal practitioner will be guilty of negligence for harm caused to a client owing to the lack of skill, care, and diligence only where such negligence is manifestly clear from the facts of the case.

[116] The failure to follow the instructions of the plaintiff to follow the FIDIC contract in the dispute resolution process to appoint a DAB demonstrates negligence on the part of the first defendant. This is so because the instructions are clear that follow the FIDIC contract in the dispute resolution and the FIDIC contract provides for the appointment of the DAB to adjudicate the dispute.

Is plaintiff entitled to recover the legal expenses paid to first defendant, on the basis that the services rendered are wholly useless to plaintiff?

[117] I find that, having regard to the totality of the evidence before this court, prospects of raising a successful special plea to the summons issued for reversal of penalties, are high. The applicability of the Conventional Penalties Act to the matter should be considered against the backdrop of the jurisdictional rules provided for in the Procedural Rules. Mr Schurz did not consider the Procedural Rules in this matter therefore leaving questions why he would argue the applicability of the Conventional Penalties Act. The process to have been followed is in accordance with the provisions of the FIDIC contract therefore rendering the particulars of claim irrelevant.

[118] It follows that for failure to follow the instructions of the plaintiff in pursuing the dispute resolution mechanism provided for in the FIDIC contract, the first defendant was paid legal costs by the plaintiff for services found to be wasted.

Refund of legal costs

[119] A lawyer is not entitled to any fees where the services rendered are of no use to the client. When proceedings are commenced in a wrong forum and when he or she might be reasonably presumed to have known better, he or she should not claim any remuneration for services rendered.[22]

[120] In *Heywood v Weller*,[23] the English Court remarked as follows:

'Now, I think the Judge was in error in thinking that the solicitors were entitled to recover any costs at all. There two reasons: In the first place, …the solicitors was an entire contract which they were bound to carry on to the end; and not having done so, they were not entitled to any costs, see *Underwood v Piper* (1894) 2 Q.B. 305. The law as to entire contract was put vividly by Sir George Jessel, Master of the Rolls, in *Hall v Bank* (1875) 9 Ch. D. at page 545. If a man engages to carry a box of cigars from London to Birmingham, it is an entire contract, and he cannot throw the cigars out of the carriage halfway there, and ask for half the money; or if a shoemaker agrees to make a pair of shoes, he cannot offer you one shoe and ask you to pay half the price.

[22] C H Van Zyl. *The duties and obligations and liabilities of attorneys*. (1898) 15 Cape LJ 157, page 751.
[23] *Heywood v Weller* [1976] QB 446, [1976] 2 WLR 101.

In the second place, the work which they did was useless. It did nothing to forward the object which the client had in view. It did nothing to protect her from molestation. Being thus useless, they can recover nothing for it, see *Hill v Featherstonhaugh* (1831) 7 Bing. 569, when Chief Justice Tindal said:

"If an attorney – through inadvertence or inexperience – for I impute no improper motive to the plaintiff – incurs which is useless to his client, he cannot make it a subject of remuneration. Could a bricklayer, who had placed a wall in such a position as to be liable to fall, charge his employer for such an erection?

Clearly not."'

Conclusion

[121] The evidence has established that Mr Schurz lacked the necessary skill and knowledge to render adequate legal services to the plaintiff. I have found that Mr Schurz did not read the FIDIC contract and if at the very least he read it, then he did not understand it, hence he did not advise the plaintiff of its rights, obligations and prospects of succeeding to reverse the penalties imposed by the City of Windhoek in terms of the FIDIC contract.

[122] There are no cogent reasons why Mr Schurz did not follow the plaintiff's instructions to reverse the penalties by appointing the DAB to adjudicate the dispute in terms of the FIDIC contract. Mr Schurz and his employer, the first defendant did not advance the object of the plaintiff. The option to seek to institute proceedings in the High Court to recover the penalties constituted a wrong forum, which resulted in a waste of time and money and with no reasonable prospects of succeeding. The first defendant can, therefore, in my view not escape liability.

Costs

[123] It is well established in our law that costs follow the event. No compelling reasons were placed before the court why the said principle should be departed from and I could also not find compelling reasons why such principle should be departed from. Consequently, the plaintiff is awarded costs.

Order

[124] In the result, I order as follows:

1. The plaintiff's claim succeeds.

2. The first defendant must pay to the plaintiff an amount of N$57,677.03;

3. Interest thereon at the rate of 20% per annum calculated from date of judgment to date of final payment;

4. Costs of suit;

5. The matter is regarded as finalized and removed from the roll.

_____

O S Sibeya

Judge

APPEARANCES:

PLAINTIFF:	Nixon Marcus Nixon Marcus Public Law Office Windhoek
FIRST DEFENDANT:	Hettie Garbers-Kirsten Instructed by Viljoen & Associates Windhoek