



NOT REPORTABLE

CASE NO: SA 24/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ZHONG-MEI ENGINEERING (PTY) LTD

Appellant

and

GRAND TRADING CC

Respondent

Coram: SMUTS JA, FRANK AJA, MAKARAU AJA

Heard: 5 July 2023

Delivered: 18 July 2023

Summary: On 2 November 2014, the parties to this appeal entered into a written consultancy agreement (the agreement) in terms of which the respondent (Grand Trading) represented by Mr Mumbasha had to ensure that Zhong-Mei Engineering (Pty) Ltd's (represented by Ms Aijun at the time) bid for a tender issued in respect of the upgrading of a district road from Oshakati to Ongenga was fully compliant. The tender was valued at N\$216 800 289,87 (inclusive of VAT). In terms of the agreement, respondent would be entitled to an amount of N\$6 504 008,69 (plus VAT) in accordance with a payment schedule set out in the agreement if Zhong-Mei's bid was successful. These payments were agreed to be made into Grand

Trading's Nedbank account. The appellant was awarded the contract in respect of the tender, at which point Grand Trading became entitled to the contract amount of N\$6 504 008,69. The respondent instituted an action against the appellant in the High Court during 2018 alleging that, apart from a payment of N\$300 000 on 15 December 2015, it had received no further payment from Zhong-Mei. The appellant pleaded that the full amount claimed was paid to the respondent.

At the commencement of the trial, the respondent amended the amount claimed from N\$6 504 008,69 to N\$5 054 008,69 as it conceded that it had been paid an additional N\$1 150 000 in respect of the contract amount. The court *a quo* found that Zhong-Mei had proved payment of another N\$1 million and gave judgment in favour of Grand Trading in the amount of N\$4 054 008,69 plus interest and costs. The appeal is against this order of the court *a quo*.

On appeal, this Court must determine whether Grand Trading had been paid the full amount stipulated in its agreement with Zhong-Mei and whether Zhong-Mei had proved the payments it allegedly made. In terms of the agreement, Zhong-Mei was supposed to make payment to Grand Trading's Nedbank account. This never happened as all the payments by Zhong-Mei were made either to Mr Mumbasha personally in cash; to his private account at First National Bank or to the bank account of a corporation known as Joevani Properties CC. Joevani Properties CC and Zhong-Mei entered into a joint venture agreement on 9 September 2014 in respect of the construction of a head office for the Ministry of Fisheries in Windhoek, which contract was valued at N\$42 million in terms of which Joevani Properties CC would be entitled to 70 per cent of the profits generated therein. It is clear from the evidence that the initial contract between Mr Mumbasha and Zhong-Mei occurred with the then Managing Director of the latter, Ms Aijun. It further transpired from the evidence that Ms Aijun and Mr Mumbasha had developed a relationship over time during which co-operation between her (on behalf of Zhong-Mei) and Mr Mumbasha (on behalf of Joevani Properties CC) took place on the basis of oral agreements instead of being formalised in writing. This placed Mr Jiang (who took over as Managing Director from Ms Aijun) in an unenviable position of trying to piece these

verbal agreements together, and as it happened he could not successfully do this. Mr Mumbasha admitted in evidence that payments to the tune of N\$10 million were made by Zhong-Mei, but he insisted that the vast majority of these payments were in respect of other projects which Jovevani Properties CC was involved in with Zhong-Mei including the construction of the Ministry of Fisheries in Windhoek.

Held that, the invoices discovered and dealt with at the trial bear out the evidence of Mr Mumbasha and, apart from the three payments found by the court *a quo* to be related to the consultancy agreement, none of the other invoices have any reference to Grand Trading or 'consulting' but referred to construction work done with most of them directly referring to the Ministry of Fisheries or to Windhoek. Considering the invoices themselves and the uncertainty created as to the manner in which Ms Aijun dealt with Mr Mumbasha, Mr Jiang's version could not be said, on a balance of probabilities to be the preferred one.

Held that, although the court *a quo* made several adverse findings in respect of the evidence given by Mr Mumbasha, it was not such as to advance Zhong-Mei's case. It was clear that Mr Mumbasha was evasive and even untruthful with regard to the extent of the verbal agreements Jovevani Properties CC had with Zhong-Mei (ie his claim in respect of a project in Katima Mulilo which turned out to be false and his less than frank approach for the reasons for the substantial cash payments made to him). These aspects cannot seriously impact his credibility as a witness as no dispute arose over the cash payments paid to him.

Held that, there is clear evidence as to the agreements between Jovevani Properties CC and Zhong-Mei, (ie there was a project in Windhoek for the Ministry of Fisheries which was acknowledged by Mr Jiang and one in respect of the Swakopmund-Uis road as evidenced by a payment by Ms Aijun in respect of another project).

Held that, the criticism of the witness, Mr Mushamba, was such that his evidence could not be accepted unqualifiedly, but it did not mean that it could be rejected in total. Much of it was corroborated by documentation and by the evidence on behalf of Zhong-Mei. The criticism of Mr Mushamba, is not such as to bolster the case for Zhong-Mei who had to prove every payment to Grand Trading which it managed to do only in respect of the payments so found by the court *a quo* (the payment of the N\$1 million as a result of the criticism of the evidence of Mr Mumbasha). For whatever reason, the procedure followed for payments by Zhong-Mei is such that it cannot be said that more than the three payments identified by the court *a quo* were proved to be in respect of the consultancy agreement on a balance of probabilities.

The appeal is dismissed with costs.

APPEAL JUDGMENT

FRANK AJA (SMUTS JA and MAKARAU AJA concurring):

Introduction

[1] On 2 November 2014 at Windhoek, the parties entered into a written agreement in terms of which the respondent (Grand Trading) had to ensure that the appellant's bid for a tender issued in respect of the upgrading of a district road from Oshakati to Ongenga was fully compliant. The value of the project was stated to be N\$216 800 289,87 inclusive of VAT and it was agreed that if the bid of the appellant (Zhong-Mei) was successful and it was awarded the contract in respect of the tender that Grand Trading would be entitled to an amount of N\$6 504 008,69 (plus VAT) in accordance with a time line set out in the agreement. In terms of the agreement, the payments to Grand Trading had to be made to its bank account at Nedbank. In this agreement, Grand Trading was referred to as the 'consultant' and this agreement was at the trial referred to as the consultancy agreement.

[2] The bid of Zhong-Mei was successful and it was appointed as contractor in respect of the upgrading of the mentioned road. It thus follows that Grand Trading was entitled to payment to it of the contract amount of N\$6 504 008,69 plus VAT in accordance with the payment schedule set out in the agreement.

[3] Grand Trading instituted action in the High Court during 2018 against Zhong-Mei alleging that, apart from a payment of N\$300 000 on 15 December 2015, it had received no further payments. Grand Trading thus claimed the balance outstanding in terms of the consultancy agreement from Zhong-Mei.

[4] Zhong-Mei in its plea to the claim of Grand Trading denied that it owed the latter any amount and averred that it paid the full contract amount to Grand Trading. At the commencement of the trial, Grand Trading amended the amount of its claim to N\$5 054 008,69 as it conceded that it has been paid an additional N\$1 150 000 in respect of the contract amount by Zhong-Mei.

[5] At the end of the trial, the court *a quo* found that another N\$1 million payment had been proved by Zhong-Mei and gave judgment in favour of Grand Trading in the amount of N\$4 054 008,69 plus interest and costs.

[6] This appeal lies against the order of the court *a quo*.

Proof of payment

[7] The only issue that arose from the pleadings was whether Grand Trading was paid the amount stipulated in its agreement with Zhong-Mei. This meant that Zhong-

Mei had to prove the payments it allegedly made. This position is succinctly set out in *Christie's The Law of Contract in South Africa* as follows:

'When it is disputed whether payment has been made or not, the onus is on the debtor to prove that he has paid, and that his payment relates to the debt in question. If he fails to satisfy the court that there is a sufficiently strong balance of probabilities in his favour, judgment must be given against him. There can be no question of absolution.'¹

[8] In terms of the agreement between the parties, payment to Grand Trading had to be effected by way of payment into Grand Trading's Nedbank account. This never happened in the present matter as all payments allegedly made by Zhong-Mei were paid either to Mr Benhard Mumbasha personally in cash, to the private account of Mr Benhard Mumbasha at First National Bank (FNB) or to the bank account of a corporation known as Jovani Properties CC. This was done, according to Zhong-Mei, on instructions of Mr Mumbasha who designated these other accounts or the cash payments referred to. As the principle of these designations was not attacked at all, I accept for the purposes of this appeal that where payments were in fact made by Zhong-Mei in respect of the consultancy agreement to the mentioned designees, it can be accepted as payment to Grand Trading. It needs to be mentioned that Mr Benhard Mumbasha was at all relevant times to this litigation the sole member of both Grand Trading and Jovani Properties CC.

The evidence

[9] As there was only one issue for determination, namely whether Zhong-Mei made the payments as alleged and the onus in respect of this issue was on it, it

¹ R H Christie and G B Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) at 449.

should have commenced with its evidence.² This did not happen and the evidence of Mr Benhard Mumbasha on behalf of Grand Trading (the plaintiff *a quo*) was dealt with first. As the court *a quo* in its judgment duly applied the onus correctly, nothing turns on this fact. It may however have caused some confusion as after the evidence of Mr Benhard Mumbasha, counsel for Zhong-Mei lodged an application for absolution from the instance despite the fact that the onus was on his client and which could not be done as pointed out above.³ It was a waste of time and lead to an unnecessary judgment on this aspect. Fortunately, the application for absolution from the instance was dismissed with costs and nothing more needs to be said in this regard.

[10] From the evidence, it is clear that Jovani Properties CC and Zhong-Mei entered into a joint venture agreement on 9 September 2014 in respect of the construction of a head office for the Ministry of Fisheries in Windhoek. According to the uncontested evidence, this contract was to the value of N\$42 million. In respect of this agreement, Jovani Properties CC would be entitled to 70 per cent of the profits generated on this project.

[11] According to Mr Mumbasha, Jovani Properties CC had further agreements with Zhong-Mei in terms whereof payments on construction projects had to be made to it. These included agreements in respect of the Swakopmund-Uis road (with a value of about N\$735 million), a project in Katima Mulilo and a further project in the north. It is clear from the evidence that the Katima Mulilo project never got out of the starting blocks and can be ignored for purposes of this litigation. A witness on behalf

² Rule 99(2) of the Rules of the High Court.

³ R H Christie and G B Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) at 449 and cases there cited.

of Zhong-Mei denied further agreements but it is evident that an amount of N\$805 000 was paid in respect of the Swakopmund-Uis road by Zhong-Mei to Jovevani Properties CC during September 2016.

[12] In total, just over N\$10 million was paid to Mr Mumbasha and Jovevani Properties CC. According to Mr Jiang who was the sole witness for Zhong-Mei, this meant that Grand Trading was paid in full. Mr Mumbasha disagreed and stated that only two payments in respect of the debt owed to Grand Trading were made, namely an amount of N\$1 150 000 and an amount of N\$300 000. In respect of the N\$1 150 000, the invoice from Jovevani Properties CC expressly stated the amount was in respect of the 'Grand Trading Contractual Agreement'. In respect of the N\$300 000, Mr Mumbasha admitted this payment was in respect of the consultancy agreement. The court *a quo* held that a further payment of N\$1 million was made in respect of the Grand Trading Agreement despite Mr Mumbasha's denial because in respect of that project, Mr Mumbasha's receipt that he signed indicates that this amount was received 'for the consultation on a project'. The court *a quo* was of the view that the fact that the receipt was in respect of 'a consultation on a project' meant that the Grand Trading Agreement was indicated. This was because the other dealings referred to by Mr Mumbasha which, in main referred to the project for the construction of a building for the Ministry of Fisheries, all involved invoices of Jovevani Properties CC relating to construction, eg earth work, brick work, scaffolding and site clearance.

[13] From the evidence it is clear that initial contact between Mr Mumbasha and Zhong-Mei occurred with the then Managing Director of the latter, Ms Aijun who was

referred to in evidence as Ms Maggy. It is further clear that Ms Aijun and Mr Mumbasha developed a relationship over time during which co-operation between her (on behalf of Zhong-Mei) and Mr Mumbasha (on behalf of Juevani Properties CC) took place on the basis of oral agreements instead of being formalised in writing. Mr Jiang who took over as Managing Director from Ms Aijun had the unenviable task of trying to piece these verbal agreements together, and as it happened he could not successfully do this.

[14] It must be pointed out that Mr Mumbasha did not deny any of the payments made by Zhong-Mei amounting up to just over N\$10 million. He however insisted that the vast majority were in respect of other projects Juevani Properties CC was involved with Zhong-Mei and which, for purposes of the present appeal, related mostly to its engagement at the construction site of the Ministry of Fisheries in Windhoek.

[15] The invoices discovered and dealt with at the trial bear out the evidence of Mr Mumbasha and, apart from the three payments found by the court *a quo* to be related to the consultancy agreement, none of the other invoices have any reference to Grand Trading or 'consulting' but referred to construction work done with most of them directly referring to the Ministry of Fisheries or to Windhoek.

[16] Leaving aside the three payments found to be in respect of the consultancy agreement, there are no documents substantiating or establishing that any of the other payments were in respect of the consultancy agreement. Mr Jiang in his evidence stated some of the other payments were made in respect of the consultancy agreement but this was disputed by Mr Mumbasha. Further, the invoices

themselves and the uncertainty created as to the manner in which Ms Aijun dealt with Mr Mumbasha meant that the version of Mr Jiang could not be said, on a balance of probabilities, to be the preferred one according to the court *a quo*.

Payments

[17] I now turn to the payments Mr Jiang averred were made in respect of Zhong-Mei's indebtedness to Grand Trading.

- (i) An amount of N\$1 million paid in cash to Mr Mumbasha on 3 March 2015. According to the receipt signed by Mr Mumbasha this amount was 'for a consultation of the project'. Mr Mumbasha maintained this amount was in respect of another project but the evidence in this regard was not accepted by the judge *a quo* who held that this was a payment to Grand Trading. This was clearly correct on the evidence as Mr Mumbasha distinguished between the consultancy agreement and those where Jovani Properties CC was indeed rendering construction services in a joint venture with Zhong-Mei or in terms of another oral agreement to render such services. The reference to 'consultation' services at the time could only have been a reference to the Grand Trading agreement.
- (ii) An amount of N\$2,6 million transferred to Mr Mumbasha's FNB account on 10 April 2015. According to Mr Jiang N\$2,5 million of the amount related to the Grand Trading agreement and N\$100 000 to work done on the Ministry of Fisheries project in Windhoek. Apart from

the say-so of Mr Jiang there is no documentary evidence to suggest the payment of N\$2,5 million was in respect of the Grand Trading agreement. In fact the documentary evidence is to the contrary. The only invoice containing the amount of N\$2,6 million is an invoice from Jovevani Properties CC in March 2015 claiming the amount in respect of 'work done - Min. of Fisheries, Windhoek'. Mr Jiang states that he verbally informed Mr Mumbasha that as Jovevani Properties CC was not performing up to expectations in respect of the Ministry of Fisheries project, payment of the invoice would be made on the basis that N\$100 000 would be for the said project and the balance would be in respect of the consultancy agreement. Mr Mumbasha denied he was approached in that manner at all and that the N\$2,6 million payment was made in line with the invoice. If Mr Jiang indeed persuaded Mr Mumbasha to allocate the amount as indicated by him, why did he not get Mr Mumbasha to simply endorse such agreement on the face of the invoice or get him to sign a separate sheet of paper acknowledging that N\$2,5 million of this payment was in respect of the Grand Trading agreement or 'consultancy agreement' as was done in respect of the initial payment? It must be borne in mind that at the time of this payment, the Fisheries project was also ongoing and there was clearly money to be paid in respect of this project. The court *a quo* thus correctly could not find that Zhong-Mei proved that the payment of the N\$2,6 million was a payment of 'N\$2,5 million to Grand Trading'.

- (iii) An amount N\$580 250 was transferred to the account of Jovevani Properties CC on 8 May 2015. According to Mr Jiang N\$430 250 was in respect of the Fisheries project and N\$150 000 in respect of the consultancy agreement. Once again, apart from Mr Jiang's say-so, there is no indication on any document that part of the payment was not meant for Jovevani Properties CC. It is clear that, at the time, Jovevani Properties CC was entitled to payment in respect of the Fisheries project and the payment was made to it. In respect of this payment, there is no evidence that Mr Mumbasha was informed that the amount deposited into the Jovevani Properties CC account had to be split as indicated and the court *a quo* thus correctly found that the payment of N\$150 000 allegedly made to Grand Trading could not be taken as having been proved.
- (iv) Transfer of N\$420 000 to Mr Mumbasha's FNB account. This amount was stated by Mr Jiang to be N\$375 000 in respect of the consultancy agreement and N\$45 000 in respect of the Fisheries project. The same comments as had been made in respect of (iii) above applies. This payment can thus also not be said to have been proved as being in respect of the consultancy agreement.
- (v) A payment of N\$1 150 000 to Jovevani Properties CC on 28 October 2015. Here the invoice from Jeovani Properties expressly stated that the amount was due in respect of the 'Grand Trading Contractual Agreement' and payment to Jovevani Properties CC account was also authorised per e-mail from Mr Mumbasha. It is thus clear that this

amount related to a payment in respect of the consultancy agreement and in fact this payment was admitted as such.

- (vi) A payment of N\$300 000 to the FNB account of Mr Mumbasha on 15 December 2015 which was admitted as being done in respect of the consultancy agreement.

- (vii) A payment of N\$2 million to the FNB account of Mr Mumbasha on 24 January 2016. Apart from the bank statement indicating a credit in this amount, the only other documentary evidence relating to the amount is an invoice dated 25 January 2016 indicating that the amount is claimed in respect of 'work done. Min. of Fisheries, Windhoek'. There is also no evidence that Mr Mumbasha was orally informed (never mind in writing) that this amount was not meant to satisfy the invoice referred to but in respect of the consultancy agreement. This amount was thus correctly not accepted by the court *a quo* as payment of the consultancy agreement.

[18] Counsel for Zhong-Mei submits that the court *a quo* erred to find that Zhong-Mei did not discharge the onus resting on it to prove payments to Grand Trading and submits that the court *a quo* should have on the basis of credibility only found against Grand Trading.⁴

⁴ 'The hard case, which will doubtless by the rare one, occurs when a court's credibility finding compels it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail' – see *Hamutenya v Namboer Dordabis Actioneers CC* [2020] NAHCMD 366 (21 August 2020) paras 10 and 11. *Ahrendt v Ministry of Safety and Security* [2020] NAHCMD 401 (7 September 2020) para 17.

[19] In respect of the joint venture agreement between Zhong-Mei and Jovevani Properties CC relating to construction of the headquarters for the Ministry of Fisheries in Windhoek, counsel for Zhong-Mei submitted that a proper interpretation of this agreement means Zhong-Mei had no contractual obligation to pay Jovevani Properties CC anything other than its share of the profit made from the project. In respect of its alleged construction work, it was simply a creditor of the joint venture. The obligation to pay creditors was that of the joint venture. It is thus submitted that the invoices which, on the face of them indicated they were issued in respect of this joint venture, 'must therefore be accepted as reflecting payments related to the consultancy agreement' with Grand Trading.

[20] I cannot agree with this line of attack in view of the evidence from Mr Jiang that payments were made to Jovevani Properties CC in respect of the Ministry of Fisheries project. Whether this should have been done in view of the joint agreement is neither here nor there as such payments were clearly not intended to settle an indebtedness to Grand Trading and hence cannot be regarded as payments to Grand Trading.

[21] In an attempt to reject the credibility of Mr Mumbasha, counsel submitted that an adverse inference should be drawn against him for not producing a copy of an e-mail that would substantiate his version relating to the alleged Swakopmund-Uis project as well as a voice clip on his mobile telephone in this regard. In my view, the submission ignores the facts. Mr Mumbasha testified that he had an e-mail and a voice clip that supported his version of an agreement in respect of the Swakopmund-Uis project. It was put to him that there was no such agreement and there was never any payment in respect of such agreement. In his evidence-in-chief, subsequent to a

further discovery, Mr Jiang admitted an invoice from Jovevani Properties CC to Zhong-Mei in the amount of N\$805 000 in respect of the Swakopmund-Uis road and also conceded that that invoice was settled in two instalments during September 2016. He stated that the payments were made when he was not in Namibia and he was 'still dealing this with Maggy because from my side I think the payment is illegal without permission' (*sic*). From the evidence on behalf of Zhong-Mei, it is evident that Ms Aijun had some agreement with Jovevani Properties CC (Mr Mumbasha) in respect of the Swakopmund-Uis road and that it made payments in this regard to Jovevani Properties CC to the tune of N\$805 000. In essence, the documentary evidence substantiates the allegation in this regard by Mr Mumbasha and it is hardly likely that the evidence referred to in the e-mail and voice clip would state anything contrary to this. In these circumstances no adverse evidence as to the credibility of Mr Mumbasha flows from the neglect to disclose the mentioned evidence.⁵

[22] The criticism of the judgment *a quo* is that solely on the credibility findings, the court should have found in favour of Zhong-Mei because Mr Mumbasha conceded that the Grand Trading agreement did not provide for any construction work. Thus, none of the Jovevani Properties CC invoices could relate to the Grand Trading agreement. The latter criticism is not understood. As pointed out above Jovevani Properties CC expressly stated in one invoice that it was in respect of the Grand Trading agreement and one payment was accepted in writing to be in respect of 'consultation'. It is clear on the evidence of Mr Jiang that he understood that Jovevani Properties CC's invoices also, on occasion, reflected amounts owing to Grand Trading. For example, in respect of the invoice from Jovevani Properties CC for an

⁵ *Webranchek v L.K. Jacobs & Co. Ltd* 1948 (4) SA 671 (A) and *Munster Estates (Pty) Ltd vs Killarney Hills (Pty) Ltd* 1979 (1) (SA) 621 (A) at 624.

amount of N\$2,6 million he stated it had to be read that N\$2,5 million was for Grand Trading and the balance in respect of the Ministry of Fisheries project.

[23] Whereas it is correct that the court *a quo* made certain adverse findings in respect of the evidence given by Mr Mumbasha, it was not such as to advance the case of Zhong-Mei. It was clear that Mr Mumbasha was evasive and even untruthful with regard to the extent of the verbal agreements Jovani Properties CC had with Zhong-Mei. Thus his claim in this regard in respect of a project in Katima Mulilo turned out to be false. He was also less than frank as for the reasons for the substantial cash payments made to him. However as no dispute arose over these cash payments paid to him, this aspect cannot seriously impact on his credibility as a witness. When it however comes to agreements between Jovani Properties CC and Zhong-Mei, it is clear there was more than one such agreement as on the evidence, there was a project in Windhoek for the Ministry of Fisheries which was acknowledged by Mr Jiang as one agreement and one in respect of the Swakopmund-Uis road as evidenced by the payment by Ms Aijun. I have already pointed out, Zhong-Mei had to prove payments to Grand Trading and as no payments were made to its Nedbank account it had to show that Grand Trading designated that these other alleged payments had to be made to other persons. There is simply no evidence, save for the say-so of Mr Jiang in this regard. Unfortunately, he was mistaken as to the extent of the agreements Jovani Properties CC concluded with Ms Aijun. This meant his stance that only two agreements were relevant namely the Joint Venture Agreement and the Grand Trading Agreement cannot be relied upon. Furthermore, where he split-up invoices from Jovani Properties CC – like the N\$2,6 million mentioned above which

indicated that the amount was in respect of 'work done – Min. of Fisheries Windhoek' – how would Joevani Properties CC know that he had done that? From its perspective, the amount was paid for the work done and not in respect of the consultancy agreement. This was clear from the invoice which reflected it was in respect of work done by Joevani Properties CC and not in respect of the consultancy agreement. A mental reservation in respect of the division between Joevani Properties CC and Grand Trading by Mr Jiang could not change the effect of the payment by Zhong-Mei.⁶

[24] Shortly put, the criticism of the witness, Mr Mushamba, was such that his evidence could not be accepted unqualifiedly, but it did not mean that it could be rejected in total. Much of it was corroborated by documentation and by the evidence on behalf of Zhong-Mei. The criticism of the witness, Mr Mushamba, is not such as to bolster the case for Zhong-Mei who had to prove every payment to Grand Trading which it managed to do only in respect of the payments so found by the court *a quo* (the payment of the N\$1 million as a result of the criticism of the evidence of Mr Mumbasha). For whatever reason, the procedure followed for payments by Zhong-Mei is such that it cannot be said that more than the three payments identified by the court *a quo* were proved to be in respect of the consultancy agreement on a balance of probabilities.

Conclusion

[25] It follows that the appeal stands to be dismissed with costs inclusive of the costs of one instructing legal practitioner and one instructed practitioner.

⁶ See the general principles relating to the appropriation of payments set out in *Christie's Law of Contract in South Africa* at 444.

FRANK AJA

SMUTS JA

MAKARAU AJA

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