

JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA

DATE: 5/4/2007

NOT REPORTABLE
In the matter between

CASE NUMBER: 18080/2004

DOTCOM DEBTPACK JOINT VENTURE
Plaintiff

and

CAPRICORN DISTRICT MUNICIPALITY
Defendant

JUDGMENT

De Vos, HJ AJ

1.

In this matter plaintiff, a partnership known as Dotcom Debtpack Joint Venture, claims payment in the sum of R4 225 575,08 from the Capricorn District Municipality, a local authority, for services rendered by plaintiff in regard to the collection of approximately 7500 outstanding accounts of levy payers up and until 30 June 2002.

2.

Plaintiff's claim is based on a written agreement entered into between plaintiff and defendant dated 7 December 2000. In terms of the contract it was inter alia agreed between the parties that plaintiff would render certain specified services to defendant in regard to the collection of outstanding regional council services levies, dating back to 1996.

3.

It is common cause between the parties that Capricorn District Municipality (hereinafter referred to as “CDM”) was statutorily created during the year 2000. This was the result of new demarcations of the areas of jurisdiction of the previous regional councils’ area of jurisdiction. CDM was the successor in title of five districts which were previously part of the Northern District Council. The Northern District Council consisted out of a much larger area and included various other municipalities/districts inclusive of the five districts which became the area of jurisdiction of the defendant. The delimitation and restructuring was done in terms of the provisions of Act 117 of 1998.

1.1 In terms of section 12 of Act 117 of 1998, the Municipal Structures Act, a Notice 308 was published in the Northern Province Provincial Gazette, No 615, dated 2000/10/01 in terms whereof the Northern District Council established in terms of Provincial Proclamation No 51 dated 31/07/1995, was disestablished.

1.2 Section 5 of the said notice reads as follows:

“Legal succession

5. *A district municipality and a local municipality within the area of the district municipality, supersede the district municipality or municipalities to the extent that the existing municipality or municipalities fall within that area, and the district and local municipality or municipalities depending on the specific assets, liabilities, rights and obligations are allocated to the district and local municipalities respectively in terms of this Schedule.*

Transfer of assets, liabilities, rights and obligations

- 7(1) *The assets, liabilities, rights and obligations of a disestablished municipality, in so far as they were, immediately before the effective date, predominantly deployed in respect of, or related to, the performance by that municipality of a function or functions in a specific area, are hereby, subject to sections 16(1) and 84 of the Act, transferred to the new municipality (if any) which, on the effective date, has sole responsibility for the performance of the said function or functions in the*

said area.

7(2) For the purpose of sub-clause (1) 'function' include a power.

7(3) Administrative and other records relating to the assets, liabilities, rights and obligations referred to in sub-clause (1) vests, as from the effective date, in the municipality to which the respective assets, rights, liabilities and obligations are transferred in terms of the said sub-sections.

7(4) Assets, liabilities, rights and obligations other than those referred to in sub-clause (1) are hereby transferred as from the effective date to the new local municipality in whose area the administrative unit responsible for the administrative control of such assets, rights, liabilities and obligations, immediately before the effective date, is located.

7(5) A new municipality shall, pending the review referred to in sub-clause (6), in exercising its powers, performing its functions and discharging its duties, make use of the assets and rights that were associated with such activities immediately before the effective date.

7(6) The transfers mentioned in this clause must be reviewed and

dealt with by the IDRC and the DRC referred to in clauses 11 and 12 of this Schedule.

*IDRC: Inter District Restructuring
Committee*

*DRC: District Restructuring
Committee"*

- 1.3 The agreement between the parties was entered into on 7 December 2000. Five local municipalities, which previously formed part of the Northern District Council, namely Aganang, Polokwane, Molemole, Blouberg and Lepelle-Nkumpi became the area of jurisdiction of the defendant.

1.4 When the contract was entered into between the parties on 7 December 2000 the defendant was only entitled to enter into a contract in regard to levy payers residing within its area of jurisdiction. It seems to me to be quite clear that it was the intention of the legislature that after delimitation of the various new municipalities it was intended that the IDRC and the DRC referred to in section 7(6) in Notice No 308 referred to above should have divided the specific assets, liabilities, rights and obligations of the disestablished NDC to the various new municipalities created in terms of section 5 of the said Act. No evidence was placed before me by either the plaintiff or the defendant in regard to such division. From what will appear later on it appears that such division never took place.

1.5 Defendant's income depended inter alia on the amount of levies collected from taxpayers or to be collected in

terms of the Regional Services Councils Act, Act 109 of 1985. These levies included levies that should have been allocated in terms of the division and transfers envisaged by Notice 308 referred to above as well as the continuous collection of levies from levy payers in terms of the Regional Services Councils Act.

- 1.6 In terms of the Regional Services Councils Act, 1985 every levy payer registered with the council is obliged to pay levies. In this regard section 10(3) of the Calculation and Payment of Regional Services Levy and Regional Establishment Levy, published under Government Notice R340 is relevant and reads as follows:

“Where a Council is satisfied that any person is or will become liable for the payment of the regional services levy or the regional establishment levy, it shall register such person as a levy payer and, where it is satisfied that any person who is registered as a levy payer, has ceased to be liable for the payment of any such levy, it may cancel such person’s registration as a levy payer.”

- 1.7 A council is further assisted by the provisions

of the Schedules published in terms of section 13 of Act 109 of 1985 under Government Notice R340 in Government Gazette 10613 of 17 February 1987 (as amended by Government Notice R783 published in Government Gazette 11838 dated 21 April 1989 and further amended in terms of Government Notice 1296 published in Government Gazette 13299 dated 14 June 1991), which determine the manner in which the regional services levy and the regional establishment levy shall be calculated and paid in a specific region.

- 1.8 Paragraph 9(i) Part IV of the Schedule provides that the regional services levy and the regional establishment levy shall, subject to the provisions of sub-paragraph (2), be paid within a period of 20 days, or such further period as the council concerned may allow, after the end of every month during which:

(i) in the
case of

the
regional
services
levy-

(ii) any remuneration is paid or becomes payable by any employer to any employee;

(iii) any drawings takes place in relation to any carrying on an enterprise as contemplated in ...

b) in the case of the regional establishment levy, any leviable amount is determined in terms of paragraph 5 in relation to any enterprise.

1.9 Paragraph 9(2) of the Schedule provides that where the monthly amount of regional services levy and regional establishment levy for which a levy payer is liable, is less than R50 in total the council may recruit the levy payer to pay such levies within a period of 20 days after the end of every period of a year or such shorter period as the council may determine.

1.10 Paragraph 9.3 of the said Schedule provide that every payment of levy shall be accompanied by a return in such a form as the council may determine and paragraph 9.4 provides that such return shall be returned by the levy payer within the period referred to in paragraph 9(1) and/or 9(2).

1.11 Paragraph 11 of the said Schedule deals with assessments. Paragraph 11(1) provides that:

“(i) Where any registered levy payer has failed to furnish any return referred to in paragraph 9(4) within the relevant period allowed, the council concerned may estimate (my underlining) the amount of any levy, which in its opinion is probably payable in respect of the relevant month or period, and may make an assessment of the amount of the unpaid levy.”

1.12 Paragraph 11(4) of the Schedule provides that:

“The amount of any unpaid levy shown in any such assessment shall, subject to the levy payer’s rights of objection and appeal in accordance with the applicable provisions of this Schedule, be deemed to be an amount of levy which is properly payable under the Act, and may be recovered by the council by way of judicial process in a competent court, and it shall not be competent for any

levypayer in any such process to question the correctness of any such assessment notwithstanding objection and appeal may have been lodged thereto."

1.13 Paragraph 12 of the Schedule makes provision for refunding of a levy payer by the council if payment was affected by such levy payer in excess of the amount due inclusive of any interest paid by the levy payer.

1.14 Although the council is responsible for the administration of the provisions of Part IV of the Schedule, the council is specifically not empowered (in terms of the provisions of paragraph 13) to require any person to produce any books, records accounts or other documents in relation to any regional services levy and regional establishment levy or to require any return submitted by him in connection with such levy.

1.15 Paragraph 13 of the Schedule further provides that where a council has reason to believe that any levy payer has not paid in full any levy for which he is liable

in terms of the Act, the council may submit the matter to the commissioner of Inland Revenue Service for such action he may deem fit.

1.16 The powers of the Commissioner of Inland Revenue is dealt with in paragraph 13(3) which provides that the Commissioner shall be entitled to conduct such audits of the affairs of a levy payer as he considers necessary, and that the Commissioner may require any person to produce for examination any books, records or accounts or other documents for the purpose of determining the liability of such person. Paragraph 13(4) of the Schedule provides that if the Commissioner is of the opinion that a levy payer has not paid in full he may direct the council concerned to make an assessment in terms of the provisions of paragraph 11. For purposes of any assessment the Commissioner is entitled to estimate the amount upon which such levy is payable.

1.17 In terms of the written agreement it was agreed that the defendant would render the following services to plaintiff which included the collection of overdue debts (levies). Clause 2.1 read as follows:

"Overdue Debt Collection Services

2.1.1 to attend to and supervise the completion of all relevant documentation for the registration of overdue debt collection;

2.1.2 the collection of all overdue levies;

2.1.3 the provision of information regarding levy payers;

2.1.4 credit adjustments to the debtor's account, prior to the contractor handing a debt back to the client, shall be construed as a payment."

1.18 Clause 5 of the written agreement determined the extent of the services and provided that:

"EXTENT OF SERVICE:

5.1 The contractor shall appoint its own personnel to render the service as required in terms of this agreement. The contractor shall do all things reasonable and necessary to ensure that its personnel at all times act in the best interest and advantage of the

Council. The parties hereto agree that this clause constitutes a material clause that goes to the root of the agreement, the breach whereof will entitle the District Municipality, without prejudice to any other rights which the District Municipality may have in terms hereof or in terms of the common law, to cancel this agreement.

5.2 The contractor and its personnel shall have a good and thorough experience of the working and implementation of all relevant legislation, regulations and provisions with regard to the financial and other related aspects of the district municipality and shall at all times strictly act in terms hereof.

5.3 The contractor shall treat all information gathered in terms hereof as strictly confidential and shall under no circumstances divulge any information to any other person, natural or legal, institution, governmental organization, etc. except to the District Municipality for the purposes and in terms of this agreement. To this extent the contractor shall ensure that all its

personnel completed a declaration of confidentiality before accepting any employment with the contractor. The contractor's failure to produce this declaration of confidentiality from his personnel shall not relieve the contractor of this obligation of confidentiality.

5.4 The contractor hereby indemnifies the District Municipality and undertakes to hold the District Municipality harmless against any loss, damages, costs, expenses, etc. which the contractor, his personnel and third parties may suffer as a result of the services rendered by the contractor to the district municipality in terms of this agreement.

5.5 The District Municipality shall on a continuous basis, and in conjunction with the contractor, monitor the standard of service rendered by the contractor. If the contractor fails to comply with the standard of service required by the District Municipality"

1.19 Clause 3 of the agreement deals with the area of service

and reads as follows:

"3. AREA OF SERVICE

3.1 The area of service shall be all local municipalities in the jurisdiction of the district municipality, namely Aganang, Polokwane, Molemole, Blouberg and Lepelle-Nkumpi. The contractor's appointment is limited to the local municipalities within the area of jurisdiction of the district municipality and shall not be amended without prior written consent.

3.2 The contractor shall familiarise itself with the area of jurisdiction of the district municipality and the district municipality shall under no circumstances be liable for any mistakes, costs expenses, etc. suffered by the contractor with regard to such area."

1.20 Clause 2.4 deals with the duration of the contract and determined that this agreement shall commence on date of signing and shall continue for a period of two years.

1.21 Clause 6 deals with the remuneration to which plaintiff is entitled to. Clause 6 reads as follows:

"6. COLLECTIONS:

6.1 The joint venture shall receive a collection commission on monies collected from the client's debtors handed over to Debtpack's debt management system as follows:

- collected individual amounts R0-R150 000.*

15% of actual amount collected.

- Collected individual amounts R150 000 – R500 000.*

12% of actual amount collected

- Collected individual amounts more than R500 0000*

10% of actual amount collected

6.2 The parties agree that the client

(defendant - own insertion) shall receive all debtor payments and that the joint venture commission shall be due and payable upon presentation of the invoice. It is agreed that any credit adjustment to the debtors account prior to the joint venture handing a debt back to the client shall be construed as payment.

6.3 *The contractor shall invoice a district municipality monthly for amounts actually paid over to the district municipality and the compensation, shall be paid by the municipality within 10 working days from the date upon which the invoice was delivered to the district municipality."*

1.22 After the said contract was allocated to plaintiff, plaintiff set up offices in Polokwane and appointed staff members.

1.23 The only information received by the plaintiff regarding outstanding debtors from plaintiff was a printout pertaining to the levy payers registered with the disestablished Northern District Council. This document did not contain the full contact details regarding the specific levy payer or its indebtedness to the defendant.

Mr Kokott, a director of plaintiff, testified:

1.24 *"The addresses, telephone numbers or any other contact information and in some cases the names of that document were of such a nature we could not immediately identify the name of the levy payer and then secondly it only reflected balances in the 60, 90 and 120 day column. There was no information on the periods to which the arrear levies related to. ... We were required to collect arrear levies dating back to 1996."*

1.25 On 14 January 2001 a letter was addressed by plaintiff to the defendant requesting the electronic transactional history backing up the original (NDC) printout. The reason for this request was that it would be a time consuming and costly exercise to transfer some 7500 individual names appearing on the list manually into plaintiff's computerized system. It was further requested that plaintiff be given on-line access to defendant's system which were not allowed in terms of the contract. Mr Kokott also testified that if such request was granted, a routine could be written by plaintiff to download (to create an interface between) the said information from the Venus Financial System which was used by the defendant to plaintiff's Debtcom Debt Collection System. This request was refused by defendant.

1.26 On 27 January 2001 plaintiff prepared a report to the executive mayor of the Capricorn District Municipality with a similar request. To substantiate the request plaintiff also referred the mayor that in terms of the contract levy payers would make payment directly into defendant's trust account. As levy payers were paying

by various means, ie some by electronic transfers, some I presume in cash and/or cheque and some only in part it was necessary for defendant to receive electronic information from the defendant to determine which payments had in fact been made.

1.27 On 1 February 2001 plaintiff wrote a letter to defendant confirming that they received an electronic version of the original list from defendant. This list was e-mailed by defendant to plaintiff. It was also confirmed in the said letter that plaintiff identified each of the files attached to the e-mail and that the total amount referred to in the various files amounted to R157 million. As a result of this information received plaintiff's IT manager then wrote a routine which would facilitate the Debtpack System recognizing the data produced by the Venus System.

1.28 It should be noted that in terms of the contract that:

- a) defendant wasn't obliged to make the electronic download available to

plaintiff as requested;

- b) that the information contained in the original printout (NDC list) contained the same information that was electronically downloaded onto plaintiff's Debtpack system;
- c) that many of the information contained in the electronic download was irrelevant or outdated as it also included levy payers now residing outside the area of jurisdiction of the council.

1.29 That, if any of reliance was to be placed on the electronic download it was subject to proper proof of the correctness of the information contained therein in so far as it related to levy payers residing within the jurisdiction of the defendant.

1.30 Once this information was downloaded into the Debtpack System, plaintiff devised a strategy as to how they would go about collecting arrear amounts reflected on the various files. Plaintiff divided the debtors into groups according to the amount outstanding, namely R50 000 and above; R10 000 - R50 0000 and amounts below R10 000. On the high value amounts plaintiff immediately commenced phoning the debtors if they had their contact numbers; where they had their postal addresses, a letter of demand was directed at the levy payer together with an invitation to contact plaintiff if they felt that they have either paid or there was some query on the account. The letter of demand was prepared by plaintiff in consultation with the defendant.

1.31 On 5 February 2001 plaintiff requested some additional information from defendant. The type of information

required included the registered name of the business and/or employer, the trade name if it was different from the above, type of enterprise, details of the person responsible for payment, the payment option, the period the levy is due, the rand value owed, any interest outstanding and the percentage. Furthermore detailed addresses and contact details attached to each file was requested.

- 1.32 On 30 April 2001 plaintiff prepared its first quarterly report to the defendant. In this report reference is again made that there was a delay in performance in terms of the contract due to the delay in obtaining the above-mentioned requested information from the defendant. Reference is again made to a total of 7534 accounts valued at R157 million handed to plaintiff for collection. Mr Kokott also stated that their efforts to collect outstanding levies have been frustrated by the lack of detail. Mr Kokott explained that the composition of the total levies outstanding included levies dating back to 1996 together with interest and unallocated transactions. Plaintiff received only 80 transactional histories. Only a small number of these 80 accounts

dated back to 1996 whereas the bulk dated back to 1999.

1.33 In the same report plaintiff referred to certain accounting difficulties that they have identified during their work to date. I quote from this report:

“1. Provisional levies

CDM have frequently made provisional estimates of levies but has not amended their records to reflect the actual levies against which payments were made; resulting in un-reconciled levies and payments on debtors accounts.

2. Non-reaction to notification of a levy payer’s status:

In our communications we received numerous copies of correspondence by debtors notifying CDM of a change in their status as levy payers to which CDM has not reacted but has continued to levy estimates of amounts due. Such changes include: business which have been relocated outside of CMD’s

jurisdiction; business have changed names; the new name is taken on as a levy payer but the old one's are not deleted and the provisional levies are raised on the new and old accounts. Business which have been consolidated previously are not separately registered entities, and entities that have never commenced business although they have registered with the Regional Services Council (this happened especially in matters where businesses) need to tender for government business and had to provide proof of registration on the RSC1 form on which they keep estimates of their turnover and payroll. In many instances the business was unsuccessful with their tender whereafter the said business failed to deregister but the provisional estimates continued on the municipal system.

3. Payments not recorded:

We have proof of payments from debtors but the payments do not reflect on the transactional history.

4. *Changed bank accounts*

From the proof of payment given to plaintiff it is evident that CDM changed bank accounts but debtors continued paying into the original CDM bank account. The payments since the change of banks do not reflect a transactional history of the debtor.

5. *Incorrect data input:*

Instances were identified where levies or payments captured are clearly data input errors. The errors had not been corrected and the levy payers have paid on returns resulting in material un-reconciled differences.

6. *Interest*

The above un-reconciled errors of differences have resulted in an amount owing interest has been levied against these amounts compounding monthly."

1.34 The report also contains a summary of actions taken by plaintiff. A summary of the detail action per debtor was also attached which included a listing of a debtor, the account number and the amount collected as well as proof of payment and in certain instances RSC 4 forms were attached. As far as the sums collected plaintiff provided copies of the proof of payment be they cheques or electronic funds transfer documents.

1.35 The report further stated that plaintiff has secured payment totalling R3 million plus. Of this amount R108 633.20 was recovered by their inspectors and R2.9 million was proved previously paid but that such payments did not appear on the debtors' accounts.

1.36 The report also indicates what further steps are intended by plaintiff and ends with the final heading:

1.37 *"Recommendations, ie steps to be implemented to speed up the collection process:*

1. *An electronic copy of the debtor's transactional history.*
2. *Committed assistance to resolve debtors' queries.*
3. *An identification and reconciliation of the temporary or suspended accounts or unallocated receipt accounts."*

The rest of the steps to be taken are irrelevant for purposes of this judgment.

1.38 On 30 April 2001 plaintiff also submitted his first account to defendant in an amount of R366 848.89. This account describes the services rendered by plaintiff as “monthly management fees”. Mr Kokott testified that this description is totally incorrect. This description is automatically put on their invoice by their accounting system. It should have stated that the fees claimed was commission on the amounts collected in terms of the contract. The invoice sets out in various columns a summary relating to each levy payer from whom levies were collected. It highlights the debtor’s name, account number, the percentage commission, the collection and the commission, tax payable on the collection as well as the period to which those collections refer. In the final column, there is a subtotal per levy payer and the commission arrived at was an amount of R321 000.00 plus a supplementary invoice in the amount of R2 588.00.

1.39 Prior to the hearing of this matter and on instructions of Mr Kokott certain amounts under the commission column were removed, totalling an amount of R33 802.90. Included in this amount was commission

pertaining to Checkers Shoprite. I will revert to the Checkers Shoprite account when I deal with the second account submitted by the plaintiff.

The first claim was therefore reduced to R333 045.99. In corroboration and in verification of this claim plaintiff referred the court to a summary of various invoices contained in bundle A, section A page 19-23 together with proof of statements given to plaintiff by levy payers and in certain instances to RSC forms which were attached.

1.40 Mr Kokott testified that government departments were also liable to pay levies in terms of the relevant legislation. From the R150 million to be collected by plaintiff an amount of R70 million were owed by government departments. Letters dated 10 May 2001 were sent to each of the government departments owing money to the defendant. No response was received, whereupon members of plaintiff's staff were sent to the financial offices of the various departments in an attempt to get access to their records in order to assist plaintiff to reconcile their accounts and to determine what amounts had been paid and what was still due. Plaintiff received no co-operation from the various departments and the departments took exception to plaintiff's staff arriving at their offices without proper identification. Copies of the letters addressed to the various departments were given to Mr Mabatha, an employee of the defendant. Mr Mabatha then passed plaintiff's correspondence on to the relevant state departments.

1.41 On 30 May 2001 plaintiff issued a second invoice to defendant accompanied by a summary of the accounts

of the various levy payers referred to in order to corroborate the levies collected for the month in an amount of R1 919 690.82. VAT included in this claim amounted to R268 756.71. Mr Kokott testified that an amount of R204 274.00 (bundle A, A page 31) which formed part of the global amount was actually collected manually by plaintiff's staff. A summary of the manual collection appears on pages 27-31 of the bundle. The rest of the amount excluding the VAT component consisted out of credit adjustments. As in the case of the first invoice summaries of the levy payer's name, the capital paid, the period relating to payment and the commission applicable, proof of payment and when available the RSC 4 forms were attached.

1.42 Mr Kokott explained how credit adjustments were arrived at. On 28 May 2002 plaintiff received the electronic download of the transactional history that supported the age analysis referred to above. This transactional history reflects payments made by the debtors (levy payers) that were handed over to plaintiff for collection. The date of processing of these transactions was after the download date of 28 January 2002. He said: *"we therefore, concluded that these payments reflected on the transactional history were creditor adjustments to the debtors' accounts and handed down to us for collection."*

1.43 Mr Kokott further explained the working of the so-called suspense account. In plaintiff's communication with levy payers it became clear that many of them had in fact paid their levies. An enquiry with the defendant as to where this money was, disclosed that these payments were not reflected in the transactional history. It then became clear that this money was deposited into a suspense bank account and had not yet been allocated to the debtor's transactional history and were therefore not reflected in the download given to plaintiff. These amounts were now subsequently allocated and reflected on the transactional history as per the second electronic download. Court bundle B, pages 76-87 contains a summary of the credit adjustments made by plaintiff after receiving the electronic download dated 28 May. The manual collections are referred to in the same court bundle from pages 88-92. Pages 93-94 of bundle B contains accounts with queries on which plaintiff did not claim commission. The commission claimed by plaintiff referred to in the second invoice amounted to R446 962.83 excluding an amount that refers to the De Beers account. Shortly after the delivery of the second invoice a dispute arose between the parties as to the

commission claimed by plaintiff. The nub of the dispute was whether plaintiff has complied with the terms of the agreement.

1.44 On 7 June 2001 Mr MDT Thindisa, the chief financial officer employed by the defendant, requested a list of accounts to whom reminder letters were sent. According to Mr Thindisa's letter this would enable the defendant to upgrade their records.

1.45 On 11 June 2001 Ms Santie Dekker, an employee of plaintiff, wrote a letter to defendant confirming that proof of payment and RSC 4 forms on the accounts mentioned in the April invoice, would be forwarded to him on or at the latest on Thursday 13 June 2001. It is further stated in this letter that "*proof of payment and RSC 4 forms must accompany all new cash payments and/or reconciliation done by us on which we claim commission*". This letter was a confirmation of a telephonic discussion between Ms Santie Dekker and Mr T Mpiwa with regards to proof of payment and RSC forms.

In the same letter reference is made to credits already

passed by the defendant as per the electronic download.

I quote: *"all the credits already passed by you which are coming through the interface we do not need to provide you with this detail because you already have the detail whilst you would not have processed it at all."*

1.46 On 25 June 2001 a meeting was held between representatives of the plaintiff and defendant. Mr Kokott wasn't present at this meeting. Ms Ursula Cronje, an employee of the plaintiff testified that this meeting was attended by Mr Dikaledi Thindisa on behalf of defendant and the said Ms Cronje and Mr Frasier Johnson, on behalf of the plaintiff. Ms Cronje in the interim married and testified under the surname Fouché. During the period May/June 2001 she was the manager of the defendant's office in Polokwane. Before that date she was employed by Debt Pack, one of the plaintiff's partners. Before she took over as manager she was based in Pretoria and regularly went to Pietersburg (Polokwane) on a weekly basis but sometimes more than once a week. She was the direct manager and had senior supervision from Pretoria in the form of one of her directors, one Estelle Hoffman. She explained the problems encountered by the plaintiff in collecting the outstanding levies. She referred to the memorandum of agreement dated 7 December 2001 which provided that "*the contractor will not be provided with on-line access to any of the district municipalities' financial administrative or any system*". As a result of the lack of access defendant did not receive a monthly

or daily or weekly transaction download which is normally required in a situation where the defendant has a volume of accounts to collect. As a result of this clause a letter was written on 14 January 2001 by defendant to the plaintiff requesting that this clause be deleted from the memorandum of agreement as the defendant experienced problems with the lack of on-line access and data. The lack of a regular database reflecting a monthly or daily or weekly transaction download caused a lot of follow-up work on accounts because an account might become paid up before the next action was due. In that regard she referred to a document prepared by Mr Johnson, noting all the payments or proof of payments that he had received from various levy payers. These payments were either done by cheque or direct deposits into defendant's account. This document contains all the information referred to in the first invoice generated by the plaintiff at the end of April 2001 and deals specifically with payments collected by the defendant.

1.47 She also referred to a spread sheet prepared by Mr Frazier Johnstone, plaintiff's manager

in Polokwane which formed the basis for plaintiff's first account.

1.48 The spreadsheet prepared by Mr Johnson wasn't acceptable to her and she did redo the documentation at the request of the defendant in order to incorporate the specific period the levy payer had paid for and secondly, to reflect to the levy payers individually who made payments during the specific period and not to globally reflect a total amount that was paid. The revised invoice was produced in column form starting on the left hand side with the levy payer's name. In the next column the account number allocated by the defendant pertaining to the specific levy payer appears. The next column sets out the commission structure applicable as well as the collected amount, namely the amount paid by the levy payer.

1.49 The amounts collected by the plaintiff with reference to each specific levy payer are reflected in a list handed to the court contained in bundle "B" (pp 22-24). At this stage I must draw attention to the fact that a difference should be drawn between levies manually "and actually"

collected. Manually means levies collected by plaintiff's employees. "Actually" means payments reflected on the electronic download after the date which the contract was signed, ie 7 December 2000.

- 1.50 The first levy payer referred to on this list is SA Breweries and the amount actually collected amounts to R56912.80. In support of their claim the witness also referred to a document received from SA Breweries as it appears in bundle B page 26 which contains a breakdown of amounts that were paid by SA Breweries to the defendant.

In order to convince the defendant that plaintiff did some work in regard to this levy payer and that payment was in fact collected, the plaintiff made a printout of the transaction. The breakdown contains a cross reference to the period applicable and the payments made by SA Breweries. A comparison was then made according to the information contained in the Debtpack System. Applying the Debtpack System it was possible to eliminate payments that had been processed and one's that had not been processed. According to Fouché's

evidence the invoices submitted to the defendant included the RSC 4 forms as well as the proof of payment, be it a cheque or a copy of a cheque or a direct deposit slip made into the bank account of the defendant. Similarly, the documents referring to each individual levy payer were attached to the said invoice.

1.51 According to the reconciliation of payments (contained on page 22 of the bundle) the amount payable by SA Breweries on 1 May 2001 amounted to R56 912.80. According to the proof of payment such payment was made by SA Breweries on 1 May 2001. At the end of April 2001 plaintiff claimed commission on this amount. This indicates that this amount was collected before 1 May 2001. No evidence was placed before me to proof that when payment in the amount of R56 912.80 was made that SA Breweries's account was overdue. No evidence was placed before me as to the time lapse between the actual payment by the levy payer and the time it took defendant to process such payment. The court was also left in the dark as to when such payment was made into the suspense account and/or defendant's normal account and/or the NDC account pending their proper allocation to the various levy payers' account.

1.52 In order to comply with the provisions of the contract plaintiff had to proof that for a specified period a certain amount was overdue and that such overdue amount was paid as a direct result of plaintiff's actions in terms of the said contract. I say this for the following reasons.

Plaintiff had to collect overdue levies. Payments by levy payers which wasn't overdue falls outside the scope of the contract.

1.53 Ms Fouché also referred to the other accounts referred to on pages 22-25 as supplemented by the documentation contained at pages 26 onwards.

1.54 One of the levy payers mentioned in plaintiff's second invoice is Shoprite Checkers referred to before. Shoprite Checkers's name appears on page 22 under account number 800 76243 (the second reference to Shoprite Checkers in the list). Plaintiff's claim in regard to this levy payers is based on the following facts. The contract was awarded on 7 December 2000. Downloading of the information pertaining to the different levy payers and possible outstanding levies was only done at the end of January 2001. The deposit slip appearing on page 27 clearly shows that a deposit in the amount of R74 626.19 was made on 15 December 2000 and that such an amount was deposited in the name of the Northern District Council. Plaintiff claimed commission on this amount.

1.55 Ms Fouché also referred to another levy payer, Blyde Products and explained that the amount appearing on page 1, refers to the printout of November 2001. The sum outstanding on the 60 day balance does not coincide with the sum that was outstanding in January 2001. The reason being that the download would have been on the disc from January 2001 and due to the timeframe that have lapsed certain transactions could either have gone in or out. On 7 November the outstanding balance with reference to Blyde Products was given as R5 239.70. On the Venus System given to her in January the sum was R6 070.78. Fouché also confirmed that Blyde Products was also a debtor in arrear on the Venus System.

1.56 In order to proof that Blyde Products was overdue in paying levies, Ms Fouché referred me to bundle A, section B, page 3. This is a text file format of the converted data from the Venus disc into a format which is readable into the Debtpack System. This page also contains a reference to Blyde Products with the outstanding balance as R6 070.78 (the reference in the typed record of R60 670.78 is clearly wrong).

See: Record p 408

- 1.57 This indicated to the witnesses that the amount that was given to them on the Venus disc is the amount that was imported into the Debtpack System with the same account details.
- 1.58 Fouché, also referred to page 4 of bundle A, section B which also contains a reference to Blyde Products. Page 4 is an Excel spreadsheet that plaintiff used together with the information created by plaintiff in the text file which is on page 3. In the middle of the page there is a reference to Blyde Products. The outstanding balance is again indicated as R6 070.78.

1.59 Page 5 of bundle A, section B also refers to Blyde Products. It is a copy of a snap shot of the Debtpack system reflecting the debtor Blyde Products with a debtor number which would be the Capricorn account number and its details. This appears on the top part of the page which is a copy of what one can see on the computer screen. The middle section refers to the transactions which had taken place against this account. The bottom section refers to the amount that was loaded onto the system which would be the claim in the amount of R6 070.78. The witness also referred to a "current cycle" which appears on this document. According to her the plaintiff categorized the data brought into the system into certain criteria. The relevant cycles were linked to certain actions. In this instance the specific account went to a cycle called "bulk accounts" which were listed under collections less than R10 000.00 and which was determined by the value of the account to be collected as explained by Mr Kokott. The middle section refers to two payments made by the specific debtor in an amount of R725.27 each, which was effected on 17 January 2002 for the period May and June 2001,

respectively, and which was processed on 8 February 2002. The middle section also refers to two payments made by Blyde Products in an amount of R798.64 each. According to the Venus System the defendant had processed the information on 8 February 2002. The payments were for the periods July and August 2001 respectively. There is also reference in the middle section to two payments in an amount of R879.95 each processed on 19 April 2002 respectively for the periods September 2001 and October 2001. This document reflects a debit of R6 070.78 and a credit of R4 789.21.

1.60 Me Fouché referred to the Debtpack System and explained that the minute an account is opened on Debtpack or loaded on Debtpack it would log a message that would say “open file” which would then refer to what date the debtor was loaded on the system and for what amount. The total debits would be the capital amount referred to in the debit column. The total appearing in the credit column would indicate payments made. The Debtpack system would also indicate actions taken against the debtor. The history column shows that on 25 April 2002 a letter was generated by plaintiff to

request information from this levy payer.

1.61 Fouché then referred to pages 6 to 8 of bundle A, section B with regard to Blyde Products which deals with invoice details. This contains an itemized breakdown of the information contained in the Venus System pertaining to this levy payer's account which was given to plaintiff to do the necessary loading of this debtor's particulars onto the Debtpack System. She testified:

1.62 *"Periodically for each period, in other words monthly, and as you see page 6 starts off with the year 2000 for the period April 2000. The first item of the first line would refer to regional services and then it refers to a process date, 4 February 2002, with a transaction amount of R6 070.78. The next line (line 2) refers to a payment that was made on 18 July 2000. The transaction date is 11 July 2000 and a credit amount of R279.04. Further along there is a breakdown of an establishment levy and a services levy for the period May 2000 and for the rest of the term.*

Page 6 also contains a reference to the establishment and services levies respectively in the amounts of R150.21 and R31.14 each, which according to the witness, was not paid or there was no payment allocated for the specific period referred to. Therefore the balance started accruing a debit balance. The left-hand column indicates under the May 2000 column “establishment levy” (PROV). This is an abbreviation for “provisional”. The witness explained that in the event of non payment provisional sums were levied (as debits) by the defendant and all these were carried through to the last column.

- 1.63 The debit balance was then calculated and (page 8 of bundle A, section B) the total debits outstanding amounted to an amount of R6 437.91. This according to the witness was the outstanding amount payable by the levy payer. The reason for the difference between the amount handed over (R6 070.78) and the final amount of R6 437.91 is due to the fact that the document refers to everything until the date the plaintiff received the Venus download and stated “and out of the scope of our requirement which was the end of January there would

be a difference in the value”.

1.64 At that stage of the witness' evidence the court adjourned because the witness suffered from a severe cold and it was very difficult to hear what the witness was saying. She returned the next day and carried on with the evidence in regard to page 6 of bundle A, section B. She explained that this document is a breakdown from the May disc taken from the Venus system. It reflects all amounts debited or credited to a specific levy payer's account. The May disc was in fact the second electronic download from the defendant's Venus System. She explained that on the left-hand corner it starts off with a period (in other words the period applicable for a transaction). The transaction description would give all the particulars as to what the transaction is about. It shows payments, establishment levies, service levies, interest etc. The third column gives a date on which the information was processed into the Debtpack System. For example the first date on page 6 is 4 February 2002. That is the date that the transaction or debtor was downloaded into Debtpack System in an amount of R6 070.78. In the first

column on the left-hand side there is a date, April 2000. The first item recorded in the second column is a payment on 18 July 2000 with a transaction date, 11 July 2000, and the amount R279.04. According to the last column there is no balance left. The second line deals with May 2000 and indicates a provisional establishment levy as well as a provisional service levy. Again there is no balance left. The information pertaining to May 2000 was processed on 27 June 2000 and shows a balance of R150.21 in regard to establishment levy (provisional) and R31.14 for the service levy (provisional). It is indicated in the third column that the process date was 27 June 2000 and the transaction date was 20 June 2000.

- 1.65 In the fourth column there is a reference to the so-called base amount. The provisional amount to generate the levy was based on the value of the base amount. The base amount is an amount which the Council (defendant) according to the witness estimated the turnover of this specific levy payer to be. According to a formula applicable the levy was then worked out based on the base amount and it came to an amount of

R150.21 as an establishment levy and an amount of R31.14 for a service levy. The last column deals with the amounts outstanding.

The witness again explained the discrepancy between the amount of R6 437.81 and the amount of R6 070.78 by reference to page 7 and the six items noted from line 16 from the bottom under the date 2002/01. These amounts were generated on the Venus system as on the date of handover and therefore the difference in the value. No commission was claimed on the difference.

1.66 Pages 9 and 10 contained the itemized information from the Venus System which was downloaded as appears from pages 6-8 on the Debtpack version of the same document. The information contained on pages 9-10 was imported on the Debtpack database as a referral document.

1.67 I compared pages 6-8 with pages 9-10. It appears to contain the same information. What amazes me however is how the estimated turnover of the said levy payer

changed for the period 1999 until December 2000. Before March 2000 the establishment levy was calculated on an amount of R109 803.60 and the service levy on an amount of R40 520.00. This was the position since 1999. In November 1999 the base amount for the service levy was reduced to R9 104.00 and the amount for the establishment levy remained the same. In March 2000 the establishment levy base amount was increased to R183 828.00 and the service levy was further reduced to R8 060.00. This was the position until July 2000 when the base amount of the establishment levy was raised to R578 288.00 and the service levy was increased to R16 120.00. In September 2000 the establishment levy base amount was reduced to R375 351.00 and the service levy base amount to R9 875.00. However, in October 2000 the establishment levy base amount was again increased to R578 288.00 and the service levy to R16 120.00.

- 1.68 According to Fouché's evidence if actual payment was affected it would be accompanied by an RSC 4 form. For example in October 2001 the levy payer paid an amount of R861.95 (see page 10). Where the levy payer failed to

pay for a specific month only a provisional amount would appear.

1.69 Me Fouché accepted that an amount of R6 071.78 regarding Blyde Products BK was handed over to the plaintiff for collection. A letter, “request information” dated 25 April 2002 was sent off to Blyde Products CC by plaintiff. In this particular case payment had been received and subsequently imported into the database via the Venus disc. In some instances levy payers would dispute the amount payable and in some instances do not react at all. Depending on the circumstances, additional information was obtained from the various levy payers through the inspectors employed by plaintiff.

1.70 A copy of “a remittance advice applicable to Blyde Products” appears on page 11 of bundle A, section B. The top part, being what the council’s (defendant) system generates, and the bottom part that has to be completed by the levy payer. The bottom part also contains space where the levy payer calculates the levy to be paid. This appears on the right-hand bottom side of page 11. In this instance the period for which

payments were made was for the period May 2001 and June 2001 respectively. Page 12 of bundle A, section B contains a similar "remittance advice" for the period July/August 2001. Page 13 also contains a similar remittance advice for the period September/October 2001.

Blyde Products CC completed the 3 remittance advices referred to above and the payments were for the following months: May/June 2001 - R1 450.54, July/August 2001 - R1 597.27, September/October 2001 - R1 758.90.

As each payment was for a period of two months, the said payment was split in half allocating half of the payment for the period May 2001 and the other half for the period June 2001 as appears from bundle A, section B, page 7. Similarly, the last two payments were allocated for the periods July/August 2001 and September/ October 2001 respectively. When the last payment referred to on page 13 was made there was an amount of R17.50 short on the payment and, according to the inscription on the document, would be taken into account with the next payment.

1.71 Page 14, bundle A, section B contains a copy of a cheque dated 7 January 2002 drawn by Blyde Products CC and made payable to the “Noordelike Distriksraad” in an amount of R3 047.81. This payment was made directly into the defendant’s and/or its predecessor and/or the suspense account. Copies of all these documents referred to were collected from the said levy payer.

1.72 Page 15 of the same exhibit refers to the information which is listed or captured on the Debtpack database. It contains a printout of exactly what steps have been taken against the debtor and is referred to as a progressive collection report. It is a reference to the Blyde Products CC account. The Debtpack number appears on the right-hand side of this document and contains the same account number as the one allocated by Capricorn (defendant) or its predecessor to Blyde Products CC. This document was drawn of plaintiff’s electronic system on 11 July 2005. In other words that was the date on which it was printed. The first entry is dated 4 February 2002 called “open file”. It is the date this levy payer or debtor had been loaded onto the Debtpack System. The amount given for “collection” is

given as R6 070.78. There appear a couple of further inscriptions referring to the cycle which is not relevant for this judgment. The last six inscriptions, two dated 16 April 2002 and the other four dated 17 January 2002 are relevant. Both the 16 April 2002 inscriptions were processed on 19 April 2002. The first inscription processed on 19 April 2002 deals with the period September 2001 and the second inscription processed on the same date refers to the period October 2001. For the period September 2001 an amount of R879.45 was credited to the levy payer's account and for the period October 2001 an amount of R861.95 was credited. The other four inscriptions are all dated 17 January 2002 and all of them were processed on 8 February 2002. It deals respectively with the periods May/June 2001, July/August 2001. Against each inscription a specified amount was credited to Blyde Products CC's account. If all the credits are added together in the credit column the total amounts to R4 789.21 These amounts paid by the levy payer for the periods May 2001 until October 2001 amounts to R4 806.71. The shortfall of R17.50 makes up the difference. Me Fouché also explained that these documents were collected by plaintiff from the specific

levy payer but that they didn't hand the documentation that they received to the plaintiff as the Venus download in May reflected that this information had already been captured onto the plaintiff's system. No explanation was given to the court why the first payment was allocated to the months September and October 2001 and the last payment for the months May until August 2001.

- 1.73 According to Me Fouché plaintiff claimed commission on the amount of R4 798.21. I presume it should read R4 789.21 as appears from page 15 of bundle A, section B. From the same page it appears that the first step taken by plaintiff to collect outstanding levies from this levy payer occurred on 25 April 2002 when a "request information letter" was sent to "Blyde Products CC". All the payments allocated to the Blyde Products CC account and on which commission is claimed occurred before this date. It will be observed from page 5 that the file in regard to the levy payer was opened on 4 February 2002 and on 25 April 2002 a "request information letter" was noted as appears from the diary of the Debtpack System.

1.74 I have perused page 102, the original Northern District Council printout, which contains the name of Blyde Products BK. It reflects an outstanding amount of R5 239.70 as on 7 November 2000. This document however has no column for payments and contains no information as to when payments were made or how the outstanding amount was calculated and arrived at.

1.75 The information processed on 8 February 2002 (page 15) indicates that payment (levies) was received from the levy payer between the period 7 November 2000 and 8 February 2002.

1.76 None of the parties appearing before me drew any attention to the fact that the remittance advices (pp 11-12 of bundle A, section B) are not remittance advises issued by the defendant (Capricorn District Municipality) but remittance advices issued by its predecessor, the Northern District Council. The remittance advice indicates that estimated assessments were made for the period June 2001 (pp 11-12) referred. The periods of assessment refers to the year 2001. In 2001 the

Northern District Council has already ceased to exist and could not issue assessments.

1.77 From the information contained in these remittance advices I cannot infer that the defendant made any assessments in regard to this specific levy payer (Blyde Products BK) as envisaged by the Act. The wording of the Schedule is clear. The council may make a provisional assessment. The Council empowered to do so were entitled to claim levies from the levy payer and the levy payers were obliged to make payments in return. A close study of the remittance advices appearing on pages 11-12 (supra) further reveals that these two remittance advices are duplicate copies of each other issued for the period June 2001. There is no provision for an estimated assessment as is indicated on the remittance advice.

1.78 Soon after the contract was implemented plaintiff must have realized that the paperwork of the Northern District

Council could not be relied upon. I say this for the following reason:

1.79 In terms of clause 5.2 of the contract the contractor (plaintiff) and its personnel were obliged to “have a good and thorough experience of the working and implementation of all relevant legislation, regulations and provisions with regard to the financial and other related aspects of the district municipality and shall at all times strictly act in terms thereof.”

1.80 The information received by plaintiff via the download from the defendant was in fact the same information appearing on the original NDC list which included levy payers outside the area of jurisdiction of the Capricorn Municipality.

1.81 The first report prepared by plaintiff dated 30 April 2001 as referred to in paragraphs 3.18 and 3.19 supra clearly confirms that the information received could not be relied upon to determine the indebtedness of a levy

payer.

- 1.82 The information regarding Blyde Products referred to above confirms this inference.

4.

- 1.83 Mr le Roux, acting on behalf of the plaintiff, summarized Fouché's evidence in the following terms:

"So can I summarize your evidence like this? You received the R6000 odd rand for collection, you loaded it onto your system, you contacted the levy payer. The levy payer then made payments to the Council after the date of handover and you determined from their Venus System which you received on 28 May that this levy payer handed over to you in fact paid? ... That is correct."

- 1.84 As I have pointed out the said levy payer made some of these payments even before plaintiff opened this file or made any contact with the levy payer.

5.

1.85 In further support of their claim plaintiff also referred to the account of Coin Security. According to the NDC's printout an amount of R31 360.56 was outstanding on 7 November 2001. When the Venus System was downloaded in January 2002 an amount of R32 062.06 was outstanding. The January disc which was downloaded from the Venus System onto the Debtpack System indicates that an amount of R32 062.06 was outstanding as appears from Bundle A, Section B (p20). The difference in the outstanding balance was according to Fouche's evidence due to the fluxion of time between the two sets of information received. She testified that no payments were received during the period that the two sets of information were processed. The original amount appearing on the first printout would increase monthly on the basis of the provisionals that are being added.

1.86 Page 21 contains a screen shot of the Debtpack database referring to the Coin Security account. It shows the Capricorn account number, a street address which is

given as Plot 21, Dalmada and a personal address given as a post office box in Sunnyside, 3201. According to the left-hand bottom corner the claim amount was for an amount of R32 062.06. The first step taken against this levy payer was on 24 May 2002 when a request for information letter was sent out. On 29 May 2002 there was a message locked onto the system saying that Liana Steyn an employer of Coin Security phoned their Pietersburg office, a message was taken by defendant's staff to inform Mr Fraser Johnston to return her call. The following day, 30 May 2002, a note was put on the system to say "Will fax POP (which refers to proof of payment) from 0102000. This according to Fouché's evidence reflects that Mr Johnston returned the call and that they (Coin Security) had undertaken to fax us proof of payment.

1.87 Pages 22-28 is once again the historical breakdown of the levy information on the Venus System which had been imported into the Debtpack System for reference purposes. Page 22 indicates payments made by the said levy payer, provisionals added for

establishment levy and service levy respectively as well as interest added. Similar information appears on pages 23-25. Due to an overrun on the computer pages 26, 27 and 28 were erroneously added to this levy payer's account. For the period April 1998 until 25 June 1999 the levy payer did not submit his RSC 4 forms, did not make any payments and his account was debited with provisionals.

- 1.88 Since July 1999 payments are reflected on the printout as appears from page 25. Payments for this period were only processed on 25 March 2002 in other words after the debt was handed over to the plaintiff. When the processing took place, the provisional levy raised for July 1999 was overwritten according to the information contained in the RSC 4 form that was submitted by the levy payer together with his payment. The provisional amount on the system would then disappear and be substituted with the amount of the actual payment. The provisional levies that existed for the period July 1999 (see page 25) until August 2001 were all extinguished

when actual payment was received which took place on 8 March 2002 and which was processed on 25 March 2002. The information pertaining to this payment was processed after the collection of outstanding levies was handed over to plaintiff. Fouché's evidence was that from July 1999 until August 2001 the municipality's system would have raised provisionals for that whole period and that after plaintiff got involved, they contacted the levy payer, determined what the correct position was and that was then rectified in the Council's system and that is why it was processed on 25 March 2002.

1.89 In confirmation of her evidence she referred to page 21 of the bundle which stated "request information letter". I pause to make the following remark: Page 21 clearly indicates that the request for information letter was dated 24 May 2002. This is some time after 25 March 2002 when these transactions were processed. It was only on 29 May 2002 that Mr Fraser Johnston was requested to call Liana Steyn from Coin

Security. On 27 January 2003 (see page 29) a fax was received by plaintiff from Coin Security together with proof of payment made by the said levy payer. According to Fouché this document was first faxed according to the cover sheet on 5 July 2002 to the plaintiff and subsequently faxed to them again on 27 January 2003.

1.90 Page 30 of the bundle contains a summary prepared by Coin Security of all the alleged outstanding levies for the period July 1999 until July 2001 as appears on pages 31-48. It covers the exact period reflected in the processing date of 25 March 2002 as set out on pages 25, 26 and 27. The information contained in these documents were not submitted to the Council as they were already in possession thereof as the Venus System had already been loaded with this information.

1.91 Mr le Roux in chief interrupted the sequence of Fouché's evidence and asked the following question: *"There is one instance where I think you know why a levy payer was captured as owing whilst in fact he paid. Not so? ...*

That is correct. That is SA Breweries? ... Correct." He then returned to the sequence of the levy payer Coin Security by asking her the following question:

1.92 *"Sorry, I just want to get one thing clear. In regard to Coin Security do I understand your evidence to be that they only rectified the position by paying the outstanding levies, say round about 25 March 2001 or do you say they might have been paying that amount but it was not captured in the system or it was wrongly allocated in the books of the Council, or don't you know? ... My Lord, it was not rectified on 25 March. It was captured on their system for some or other reason.*

Mr le Roux: So this is not where you actually collected the money, it had been paid and Coin Security proved that to you and you proved that to the Council? ... Correct.

So somewhere in their system something was wrong? ... Yes."

1.93 I understand this evidence to mean that Coin Security has in fact paid their levies on the due dates. For some inexplicable reason these payments were not reflected in defendant's books or their predecessor's books. The effect of this evidence is that it reconfirms the view that very little or no value can be attached to the information contained in the Venus System which was downloaded onto the Debtpack System.

1.94 Fouché also testified that Coin Security paid its levies into a Standard Bank account where the majority of all the other levy payers were paying into a First National Bank account. The witness could give no other explanation as to the reason why the payments made by Coin Security was not reflected in the Council's books. The witness stated that in the matter of Coin Security the information supplied to the defendant was not a credit adjustment but an actual payment that was collected.

1.95 Plaintiff's counsel then referred the witness to bundle A, section B, page 50 which contains a progressive collection report

prepared on the Debtpack system which is a reference to Coin Security. When the file was opened on 4 February 2002 there was a debit of R32 062.06. At the bottom of the page there is a total of R23 000.83 under the credit column. The witness confirmed that commission was claimed on the amount of R23 000.83.

1.96 Page 52 of the same bundle contains a breakdown pertaining to the Coin Security account as received from the Venus System of all payments and credit adjustments that have been made and allocated. According to Fouché this information was lodged with plaintiff's invoice when they claimed their commission. The commission claimed amounted to R3 450.12.

1.97 The information contained on page 52 is actually a document retrieved from the defendant's discovery. Next to the name, Coin Security, appears a mark as well as what seems to be an acknowledgement in the form of a correct mark next to R23 000.83. There is also a date on the right-hand side indicating 03/02. The court then

asked Mr le Roux "Now you say acknowledgement. Acknowledgement by whom?" Mr le Roux: "We will find out. It comes from defendant's discovery my lord."

1.98 No further evidence to prove plaintiff's claim was placed before me. I am of the opinion that plaintiff has failed to prove that commission was payable in terms of the contract. Plaintiff was supposed to collect overdue levies. If a levy payer has made payment into one of the defendant's bank accounts, his indebtedness ceased. The reconciliation of defendant's books which is clearly in a mess, does entitle the plaintiff to claim commission. Although clause 2.1.4 of the agreement makes provision that "credit adjustments to the debtor's accounts, prior to the contractor handing a debt back to the client, shall be construed as payment", such payment in my view must be in regard to a real outstanding debt and doesn't include a debt that was already settled.

1.99 Fouché also referred to another levy payer - DSE Structural Engineering. In Bundle A, Section B, page 53 appears a copy of the old NDC list dated 7 November 2001. The information contained in the Venus disc

appears on page 54 as it was loaded down in January 2002. Page 55 contains the information transcribed in the Debtpack format. When the information on the Venus System was downloaded it indicated a debit amount of R42 808.19 which was also transferred to the Debtpack system as it appears on page 56. Page 57 indicates the steps taken by the plaintiff and more in particular that the file was opened on 4 February 2002. A request letter was sent out on 6 May 2002 and a message was received on 9 May 2002 "Wilson Pop's (proof of payment) by 24 May". Pages 58-59 contains the breakdown of the information as received from the Venus disc as and when it was downloaded in May 2002.

1.100 This list also indicates that provisionals were levied against this levy payer for the period September 2000 until November 2000, ie the first six items on page 58. Provisional levies were also raised for October 2001 as well as January 2002. The provisionals aforementioned doesn't appear on the hard copy dated November 2001. The witness testified that plaintiff's claim for commission relates to

credit adjustment of payments received prior to 28 January 2002. The credit adjustments referred to on which commission is claimed appears on page 60 of the bundle which is the Venus version of the document which has been transcribed on pages 58-59 into the Debtpack format. The bottom half of page 60 refers to DSE Structural Engineering and Contractors.

1.101 It will be noted that provisionals were levied against this levy payer for the period September, October and November 2000. Page 63 contains information received from the said levy payer covering the period September 2000 until August 2002. Fouché testified that they claimed commission on the amounts paid for August 2001 in the amount of R4 288.95; September 2001 in an amount of R6 543.48; November 2001 in an amount of R3 389.62 and January 2002 in an amount of R1 456.17.

1.102 The transaction date, according to page 58, the Debtpack System's invoice details is stated to be 18 September 2001. However this information was only

processed on 25 March 2002. The transaction date for the payment due in September 2001 is given according to page 58 as 16 October 2001 and the date of process 3 May 2002. The transaction date for levies payable in November 2001 is given on page 59 as 19 December 2001 processed on 3 May 2002. The transaction date for levies payable for January 2002 is given as 13 February 2002 processed on 25 March 2002. The witness testified that with reference to the outstanding levy for the period August 2001 which was paid on 18 September 2001 that such payment was only acknowledged by the Council as a result of the plaintiff's endeavours which led to it being processed on 25 April 2002.

1.103 In support of her contention that plaintiff is entitled to claim commission she referred to the request of information letter as it appears on page 64 - the Progressive Collection Report dated 6 May 2002.

1.104 I must emphasise that all these payments referred to above were made prior to the date on which the request letter was sent off. Upon receipt of the request of information letter the levy payer obviously reacted as

the progressive collection report indicates that on 9 May 2002 a message was received "will send proof of payments by 24 May". The progressive collection report does not indicate whether this information was received or not, but what is interesting is the fact that on 13 May 2002 the progressive collection report indicates that the cycle was changed from bulk accounts to reconcile account. This could only have happened after proof was received that the levy payer was up to date with his payments. The same cycle change happened with Coin Security on 30 May 2002 as appears from page 50 of bundle A, section B and Blyde Products BK which occurred on 13 May 2002.

- 1.105 Page 65 contains the information regarding the commission claimed by the plaintiff on the amount of R15 676.22 which is the total amount paid by DSE Structural Engineering for the periods August 2001, September 2001, November 2001 and January 2002. It sets out the percentage of commission and the commission value of R2 350.41. It is clear from the above that the plaintiff claimed commission on credit adjustments notwithstanding the fact that at that stage

the levy payer has already paid his levies in terms of the relevant Act.

1.106 For the same reasons as set out before it is my finding that plaintiff is not entitled to claim commission for credit adjustments of a non-existing debt. In terms of paragraph 9(1) of the Schedule to the Act a levy payer is obliged to pay his levy within a period of 20 days or such longer period as the council may allow. All the payments on which commission was claimed were made before the expiry of 20 days.

1.107 Fouché also referred to another levy payer OW de Klerk H/A Gate Tronics CC whose particulars were explained in the same manner as it appears in Bundle A, Section B from pages 67 onwards. The address of this levy payer is given on page 69 as Wessels Straat 26, Bendore, Pietersburg. The witness testified that the two cheques that appear on page 80, the one dated February 2000 in an amount of R1 449.08 and another cheque dated 26 March 2002 in an amount of R1 449.03 were collected from the levy payer by the plaintiff. The witness qualified herself when plaintiff's counsel, Mr le Roux, asked the

following question: "Were these two cheques or copies of that and this document handed over to the Council... They were". I am still in the dark whether original cheques or copies of the original cheques were obtained from OW de Klerk t/a Gate Tronics CC.

1.108 The progressive collection report on page 81 does not refer to any steps taken by the debtor against the said levy payer. Plaintiff claimed commission on these two cheques and such claim was included in plaintiff's invoice dated 1 June 2002 as it appears on page 82 of the record. This invoice was accompanied by a breakdown referring to different levy payers and which sets out the total amount collected for the period May 2002 and the amount commission claimed on the amount collected. It was stated in this reconciliation document that levies in an amount of R2 092 926.48 was collected by the plaintiff and that the plaintiff was entitled to commission of R313 938.91. Two invoices were sent to the defendant, one for

R204 274.17 and as a result of short billing another account of R109 664.14 on 1 June 2002. Fouché testified that she delivered this documentation at the offices of plaintiff.

6.

- 1.109 Fouché also testified that there was a general complaint from levy payers about the lodging of the RSC 4 levy forms which got lost or was not captured on the system. One levy payer even stated in a handwritten note *"Please rectify. 23 request."* Another levy payer stated that his account was paid up to date.

7.

- 1.110 From the four examples referred to by Fouché I cannot make a finding or draw an inference that any monies referred to in the invoices were in fact collected by the plaintiff.
- 1.111 Fouché evidence is tantamount to the effect that they reconciled the defendant's books and that plaintiff is therefore entitled to commission. This finding is also corroborated by plaintiff's own description in its tax

invoices submitted to the defendant for example bundle A, section B, page 82 which describes the services rendered as *“monthly management fees Gauteng”*. Although several of the plaintiff’s witnesses testified that these words were wrongly placed on the invoices as a result of the programme used by them, their version can be rejected.

- 1.112 The statements by several levy payers that their accounts were paid up to date further confirms that the so-called “outstanding debts” handed to the plaintiff in the form of the printout dated 7 November 2001 as well as the subsequent electronic downloads which contained the same basis information does not constitute proof that any levy payer mentioned in that list or subsequent printouts were in fact in arrears with their levy payments when such information was handed to plaintiff.

8.

Fouché also referred to various other problems experienced by the plaintiff in regard to their working relationship with the defendant as well as a lack of co-operation from the defendant. I don’t find it necessary to refer to this evidence in detail except to make the

following few points in regard thereto:

1.113 A copy of the letter sent out by the plaintiff to various levy payers was handed in which reads as follows:

1.114 *"Our company, Debtpack Dot Com, has been instructed by Capricorn District Municipality to assist with the reconciliation of their accounts and the collection of all outstanding regional and establishment levies.*

1.115 *The record handed over indicates an outstanding amount of R_____ on your account*

Should the factual information (pertaining to your business) contained herein be incorrect, please supply us with the correct details.

Kindly pay the abovementioned outstanding amount as soon as possible. Should you already have settled the account, please

*provide the writer hereof with
proof of such payment.”*

1.116 It is clear from this letter that plaintiff was fully aware of the fact that the factual information submitted to them might be incorrect. This letter further amplifies Fouché’s evidence that in order to determine whether a debt was due, the relevant account had to be reconciled in order to establish whether a true debt was in existence.

1.117 On several occasions during the existence of the contract plaintiff handed documentation pertaining to levy payers referred to in the invoice to the defendant. At some stage there was a denial by the defendant that such documentation was received which led Fouché to insist that on submission of the third account, it had to be signed for by the defendant’s staff. Meetings were also held to discuss the problems encountered by the plaintiff and requests were made by the plaintiff that access is required by Debtpack to the suspense account.

This account is a Standard Bank account. This request was motivated by the fact that many debtors paid their levies into this account.

1.118 The minutes of a meeting held on 25 June 2002 indicates that the reminder letters sent by the plaintiff to various levy payers were discussed. At that meeting Dikholedi, an employer of the debtor who received the invoices for May 2002 from the plaintiff, requested that the wording of the “request information letter” be amended to include the word “provisional”. The mere fact that this request was made together with plaintiff’s request to have access to the Standard Bank account as well as plaintiff’s own knowledge regarding so-called outstanding debts which were in fact paid, reconfirms that soon after the plaintiff started performing in terms of the contract it was realized that the debts referred to in the various downloads were only provisional debts and that the information contained in the downloads were unreliable as in many instances payments were in fact made.

1.119 It is common cause that after the initial two payments

were made by defendant, defendant refused to make any further payments and subsequently informed plaintiff that unless supporting documents were submitted, no further payment can be made.

9.

1.120 Under cross-examination Fouché was referred to a letter written by plaintiff dated 30 April 2002 under the heading:

1.121 *"Summary of success: We have secured proof of payment totaling R3 022 290.91. Of this amount R108 633.20 was recovered by our inspectors and R2 913 657.61 was proved as having been previously paid but the payments do not appear on the debtors accounts."*

1.122 Fouché confirmed that the correctness of what was said in the letter and stated that she and her team acted as debt collectors. *"The outstanding amount referred to in the Debtpack database was the amount handed over and this had to be collected by themselves."*

1.123 The enquiries made by plaintiff were based on the acceptance that the outstanding debt referred to was correct.

1.124 It was put to Fouché that as part of the contract it was incumbent upon the plaintiff to attend and supervise the registration of arrear debts, in other words overdue debts. The witness' understanding was that they (plaintiff) had to ensure that collection is affected of the amount that is reflected on the system. She conceded that this was an assumption that she made. She also conceded that she personally had no knowledge of the Regional Services Council legislation although she was the manageress in charge of this project. She also had no knowledge about the municipality's own credit collection policies. She also denied having any knowledge that it was a credit policy of the municipality that letters of demand were only to be sent to debtors where the debt had been outstanding for a period of 120 days and over. When defendant's witnesses were called no one confirmed or referred to defendant's credit policy as envisaged by the Act and the Regulations pertaining thereto.

1.125 According to Fouché's evidence plaintiff's inspectors paid regular visits to various levy payers who had outstanding accounts. For the purpose of a visit the inspector would take the invoice details of the specific debtor (as is reflected for example in bundle A, section B, page 22) with him. The invoice details sets out all the transactions since 1996 applicable to such levy payer. Two examples were referred to. The inspectors were remunerated on a commission basis. Five inspectors were employed by plaintiff's Polokwane office. She testified that about two thirds of plaintiff's claim as set out in the particulars of claim was for the reconciliation of the defendant's account. In cross examination defendant's counsel requested Fouché to show proof to the court of the actual collections done by plaintiff's inspectors. This would entail the documentation pertaining to each manual collection. Fouché was only able to draw the court's attention to one such account appearing on page 80 of bundle A, section B (also referred to as document 6). This document contains information regarding two outstanding levies

accompanied by 2 cheques the one dated for February 2002 and the other for March 2002 and both were made out in an amount of R1 449.03.

1.126 The witness testified that there was another document that she could remember with reference to Afguard Security. For the rest of the manual collections she was unable to refer the court to any documentation as the documentation that plaintiff had were handed to the defendant. She conceded that she was not in possession of any documents which forms part of the court documents in order to prove that the plaintiff paid any of its inspectors and/or if indeed an inspector existed and/or what went on, on a weekly basis.

1.127 The witness conceded that in order to comply with clause 5.1 of the contract it would have been necessary for that inspector to determine or to establish the actual turnovers of a particular debtor and in order to do that they had to enter into a one to one negotiation with individual debtors. In further compliance with this clause it would be in the best interest of the Council that the inspector should have determined the true debt

outstanding in contrast with a provisional debt. It was also conceded by this witness that a debt in terms of this contract would be a debt that had not been paid before the lapse of 30 days after the debt became due. Inspectors were required to physically visit levy payers in order to gain access to the relevant information and/or to determine whether a levy payer still existed and/or moved his premises and/or changed his name.

1.128 In cross-examination Fouché was also referred to the letter prepared by Debtpack dated 30 April 2002 (record bundle A, section A, pages 16-17) under the heading “actions due in May 2002. In this letter plaintiff states:

“All final demands provided for 14 day periods during which a debtor may query the account, failing which a summons will be issued. In the absence of payment of a legitimate query a total of 1340 summonses will be issue during May ...”.

1.129 Not a single summons was issued as Fouché rightly conceded “Once we started ascertaining with regard to the feedback

from the general levy payers, that the information that we had received we needed to either make sure that the amount was actually due and so forth, we realized that we could not issue summons." It was put to the witness that if plaintiff's inspectors did indeed visit levy payers and had one to one negotiations with them, the information so obtained would constitute a debt. The witness however maintained that plaintiff was entitled to claim commission on credit adjustments.

1.130 It was further put to Fouché that in order to comply with the terms of the contract plaintiff was obliged to ensure that levy payers whose particulars appear on the database are in fact still in existence and liable to pay levies to the defendant. In that regard plaintiff's letter dated 30 April 2002 (paragraph 2) was referred to as well as the clause that dealt with in the best interest of the client.

1.131 Fouché readily agreed to the submission that to have acted in the best interest of the council it was necessary for plaintiff's inspectors to conduct physical inspections at the debtors. She was unable to say how many debtors were visited as Mr Frazer Johnston was in charge of the agents. She also agreed with the submission that it would not have been in the best interest of the council if the inspector worked merely on a provisional. Ms Fouché also stated that the meaning of a debt is "anything owing to anybody that has not been paid on due date, which was 30 days after the end of the period of the assessment". She also confirmed that of the R3.22 million paid by levy payers at the end of April

2002, only R108 633.20 was manually collected by their inspectors. The rest would be credit adjustments.

11.

1.132 Jurisdiction was also placed in issue by defendant's counsel. Broadly speaking and as I understand the questions pertaining to it, certain levy payers remained in the jurisdiction of the defendant whereas some other levy payers (after the demarcation of the area) fell outside the area of jurisdiction. The defendant was only entitled to enter into a contract with plaintiff regarding levy payers within its own area of jurisdiction. Therefore, and even if levies were collected from levy payers outside the area of jurisdiction, the defendant was not entitled to it even if he might have received payment on behalf of other municipalities. In this regard the witness was referred to several levy payers whose addresses fell outside defendant's area of jurisdiction.

1.133 It was also put to Fouché that levies collected from levy payers who fell outside the area of jurisdiction of the defendant would not entitle plaintiff to claim commission on those amounts as it was not in the best interest of the

defendant. Fouché also referred to the accounts of Butterfields Phalaborwa, Transnet Tzaneen and another one that falls under “Mopane” which contained a clear indication that these businesses were conducted from areas outside the area of jurisdiction of the plaintiff. This witness then attempted to take the court through a whole list of names that appears to be within the parameters of the Capricorn Municipality. I considered this evidence to be pure speculation. The debtors list referred to by plaintiff originally originates under the first hard copy received from the Northern District Council which refers to “District Pietersburg/POL” (which is Polokwane). It is common cause that areas such as Tzaneen, Palaborwa and Musina were explicitly excluded from the new Council’s area of jurisdiction. The same confusion seemed to exist in regard to state departments, for example the Department of Justice, Pretoria, as a debtor in the database.

- 1.134 Fouché conceded that the payments which were in fact received from the Department of Justice might have been deposited in the suspense account. The witness further conceded that payments were received from

some levy payers even before the demand letter was sent out. She further conceded that in the case of the Department of Justice payment was effected even before the amount was due, ie before the 30 days have lapsed as contemplated by the Act. She further conceded that the plaintiff clearly understood its mandate to be the collecting of outstanding arrear levies. It is not necessary to deal with the details of the other witnesses evidence called in this case.

12.

1.135 Against this background of Mr Kokott and Ms Fouché's evidence read together with defendant's version, clause 2.1.4 of the contract must be interpreted. Clause 2.1.4 provides that "*the District Municipality agrees that any credit adjustment to the debtors account prior to the contractor handing a debt back to the client shall be construed as a payment.*" It is my conclusion that this clause should be interpreted as follows. If nothing was outstanding on an account there cannot be a debt. Therefore, no debt can be handed back to the Council. It was clearly within the contemplation of the parties that the plaintiff had to determine whether a debt existed.

For that reason inspectors had to approach the individual levy payers etc in order to determine whether a levy payer was obliged to pay levies to the defendant and whether such levy was due. If a debt existed but was not payable because the 30 day period had not lapsed, the plaintiff would not be entitled to claim commission even if he did collect same, as such amount was not due.

1.136 Clause 2.1.4 only makes sense in the context of the contract if it is read with the other sub-paragraphs of clause 2 which sets out the service to be rendered by the plaintiff.

1.137 In order to perform in terms of the contract all the information contained in the suspense account had to be integrated into the Venus System before it was transferred to the Debtpack System. When that was done, plaintiff had to establish whether the debt reflected against an account was a true debt and that the said levy payer conducts his business within the area of defendant's jurisdiction. On the facts proved by plaintiff it is impossible to determine whether a

particular levy payer was in arrears or not. Fouché concluded in cross-examination *“the problem was we never had access to the information with regard to the suspense account. We did request it though”*. It is also abundantly clear that plaintiff is unable to proof that the levy payers referred to by way of example do in fact fall under the jurisdiction of the defendant.

1.138 Kokott’s evidence was also very unsatisfactory pertaining to the steps taken to establish which debt fell inside and which fell outside the jurisdictional area. Record vol 1, p 98. He said *“the assumption was that if Capricorn District Municipality handed us a list of overdue debts that those debts, certainly initially, would be construed as debtors owing to Capricorn ...”*. The whole process of debt collecting by the plaintiff therefore started on the wrong footing, and the plaintiff, throughout the trial, did not set it right.

1.139 Kokott’s explanation is that *“.. at the date of that being handed to us we would have assumed that the Municipality themselves had already taken steps to separate the financial accounts of the levy payers into*

the correct jurisdictions ...” (vol 2, p 93). The assumption that he had was already wrong and not in accordance with the provisions of the contract regarding the service the plaintiff had to render.

- 1.140 Although the plaintiff had the opportunity to present evidence before the court to indicate which debtors on the list on which its claim is based, fell inside and which fell outside, it did not clarify this uncertainty. It is therefore clear that the plaintiff only relied on its “faulty” acceptance that the list given by the defendant to plaintiff was in fact a correct list of the (CDM and not the NDC), and that the list contained “overdue levies”.

Therefore the plaintiff did not endeavor to make the task of the court easier to place evidence before the court to indicate which levy payers fall outside and can be ignored and which in fact do fall within the jurisdiction area. Neither did the plaintiff discharge the onus that rested upon him, in this respect.

- 1.141 Although I have sympathy for the plaintiff in regard to the expenses incurred, I cannot let sympathy overrule

the basic principles to be applied in the interpretation of a contract.

1.142 For purposes of the finding I am going to make I do not find it necessary to refer to the rest of the evidence accept for these two payments made by defendant to plaintiff as referred to above. Except for these two payments no further payments were made and on 17 February 2003 defendant in writing informed plaintiff that it cancelled the agreement in terms of clause 10 thereof.

13.

1.143 I will now refer to the pleadings before me. Plaintiff in its particulars of claim claims the sum of R4 225 575.08 from the defendant alleging that he has duly provided the services set out in the contract. This claim is based on credit adjustments made to the debtors accounts and all monies collected manually from individual debtors. The claim is further amplified by the information contained in the five invoices submitted to defendant.

1.144 Defendant in his plea denied the allegations made by plaintiff and more specifically that the plaintiff has rendered the services as contemplated in the provisions of the agreement in that:

1.145 plaintiff failed to collect all the overdue levies;

1.146 plaintiff failed to attend to and supervise the completion

of all relevant documentation for the registration of all overdue debt collection; and

1.147 plaintiff failed to provide the information relating to the levy payers who are obliged to pay levies.

1.148 The defendant also denied that the plaintiff was entitled to a monthly management fee and/or that plaintiff is entitled to claim commission on credit adjustments to debtors' accounts.

14.

1.149 It is common cause that the Capricorn District Municipality only came into existence during 2000 in terms of the Regional Services Council's Act, 109 of 1985. It took over the rights and responsibilities of the former NDC (Northern District Council) but only to its smaller jurisdictional area of Aganang, etc as set out in clause 3. Capricorn District Municipality obtained jurisdiction over a specific region with specific borders where it was required to exercise certain regional functions and supply certain regional services.

1.150 Section 31(1)(i) of the Act, 109 of 1985, further provides that: “ ‘A council’ shall be ‘a juristic person and shall, in respect of reach region be charged with such functions or any part of a function mentioned in schedule 2 ...’”.

1.151 Section 4(3)(a) of the Act reads:

“4. *Powers and duties of Council*

3(a) *A Council may, subject to the provisions of paragraph (b), enter into an agreement with the local body or any other person or institution irrespective of whether the area of jurisdiction of that body or person or institution is situated within or outside the region of that Council or within or outside the Republic, in terms of which*
–

(i) *that Council undertakes on behalf of that local body, person or institution to exercise a power or perform a duty which that local body, person or institution may exercise or is obliged to perform;*

(ii) *that local body, person or institution undertakes to exercise or perform any regional function or part thereof on behalf of the Council and may claim a levy contemplated in section 12(1)(a) on behalf of the Council”*

1.152 In terms of the regulations promulgated under section 12 of the Act by the Minister of Finance, the jurisdictional area of each council is further accentuated and defined. The Regional Services Councils Act, 109 of 1985, and more particular sections 2, 3, 4 and 8 thereof confirms that a regional council is operative only to a specific jurisdictional area.

1.153 Defendant’s council submitted that the nature of the contract between the plaintiff and the defendant is one of *loatio conductio operas* or otherwise put, the letting and hiring of work. Plaintiff’s council disputed this submission. I agree with the submission made by plaintiff’s council.

**See: Amlers Precedence of Pleadings, 3rd ed, by Harms
on page 190-102
Sifris and Another NNO v Vermeulen Broers**

1974

(2) SA 218 (TPD) at 221H-223F

- 1.154 In order for the plaintiff to succeed on its claim of this nature, the onus rests upon the plaintiff to prove that he has done all that was required for him to do in terms of the contract on which he sues.

See: Dalinga Beleggings (Pty) Ltd v Antina (Pty) Ltd
1979

(2) SA 56 (A)

- 1.155 As a general rule, the contractor's obligation to do the work antecedes the defendant's obligation to pay. In this instance the general rule applies, as it is clear that in terms of the provisions of the written contract between the plaintiff and the defendant, the plaintiff had to collect overdue levies, after which the plaintiff became entitled to a commission. As Wessels CJ put it in **Künig v Johnson & Co Ltd 1935 AD 262** *"It is an elementary principle of law and pleading that if a plaintiff claims money on a contract he must aver and prove that he has performed his part of the contract"*.

- 1.156 Clause 1 of the agreement deals with the method of payment by a levy payer via the plaintiff. This clearly confirms the obligation on the plaintiff to collect monies.

Clauses 2 and 6 deals with the services that had to be performed by the plaintiff and the remuneration he had to receive. Clause 2 entails overdue debt collection and to attend and supervise all relevant documentation for registration of "*overdue debt collection*". Clause 2.1.4 provides that credit adjustment to a debtor's account "prior to the contractor handing a debt back to the client shall be construed as a payment". A debt cannot be collected if a debt does not exist. The concept of credit adjustment is clearly "before a debt is handed back" and on a proper interpretation of the contract, implies credit adjustment in the process of collecting overdue levies.

1.157 In summarizing the plaintiff's witnesses' versions, it is clear from the evidence that except in two instances, their commission claim was based on credit adjustments of "provisional levies" which might already have been paid by the said levy payer although that information was not reflected on the database. The contract in my view does not make provision that the plaintiff is entitled to a commission on a credit adjustment in general, in the sense of a reconciliation of an account or in the process of management of accounts but only credit adjustments

in the process of collecting due debts. Before the plaintiff can in the first instance succeed in his claim he had to establish which debt or debts were overdue and had to collect those debts. If however such a debt is handed back to the CDM, and credit adjustment is effected, it would be regarded as a payment.

1.158 This interpretation is supported by clause 6 of this agreement which deals with the actual collection commission and not commission on credit adjustments. Clause 6.2 deals with the fact that the client (CDM) shall receive all debtor payments. The second sentence in clause 6.2 deals with credit adjustment to debtor's account "prior to the joint venture handing a debt back to the client". It reconfirms the mandate given to the plaintiff in terms of the provisions of the contract, namely that only credit adjustments effected in terms of really and truly overdue debts "prior to a debt being handed back" shall be construed as a payment.

1.159 If the provisions of the contract contained the intention that the parties have agreed that credit adjustments in general, in the sense of reconciliation, would be

regarded as a payment, the contract would have said so. The contrary is clear from the provisions of the contract, referred to above.

15.

1.160 In terms of the law of contract and evidence the plaintiff who claims relief must prove the facts on which his claim is based. If a defendant, for instance, in stead or merely denying the plaintiff's version of a contract, plead an additional term as a defence, the onus will remain on the plaintiff to prove his version of the contract in order to succeed in its claim, and this will involve proving a negative, that is, that the terms as alleged by the defendant, was not part of the contract Therefore, plaintiff has to prove his version of the contract to succeed and the onus of proof will remain with him even if it involves to prove a negative.

**See: Dave v Birrell 1936 TPD 192
Topaz Kitchens (Pty) Ltd v Naboom Spar
(Edms)
Bpk 1976 (3) SA 470 (A) op 472-474**

1.161 In **BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A)** at 420F Jansen JA held:

“ ... the general principal that one party to a bilateral contract cannot call upon the other party to perform his contract without himself performing his part to the letter”.

1.162 The contract makes no provision that the defendant should supply the plaintiff with any information in regard to levy payers in its area of jurisdiction. On the other hand however, no party can enter into an agreement to collect outstanding debts if he does not know who the debtors are or what is to be collected. The absence of a clause in this regard must be seen against the background that the defendant was a newly created entity who was dependent upon the data kept by the old Northern District Regional Council. It seems to me that the absence of a reference to the data kept by the old municipality and the unavailability of such information is a clear indication that both parties at the signing on the contract, were fully aware of the fact that the plaintiff did not rely on the information contained in the Northern District Council's list to prove existing debts. If the information contained in the old list formed the basis of the agreement it would have been specifically mentioned in the contract. The clear intention of the parties was that each individual levy payer in the area of jurisdiction had to be visited and according to the information obtained from such a levy payer a reconciliation had to be done in order to determine

whether such a debt existed.

- 1.163 Clauses 3 and 3.2 specifically confirms the obligation on the plaintiff to familiarize itself with the area of jurisdiction and that a defendant shall under no circumstances be liable for any cost, mistakes, etc, suffered by the plaintiff, in regard to such area.

16.

- 1.164 The defendant's version of the correct interpretation of the contract is based on the concept of credit adjustments. The contract states: "*credit adjustments to a debtor's account prior to the contactor hading a debt back ... shall be construed as a payment.*" The concept of credit adjustments referred to in clauses 2 and 6, must be interpreted in accordance with the ordinary rules of the interpretation of a written contract namely the ordinary grammatical meaning of the words as used in the contract and in the context in which they are used in the contract itself.

- 1.165 Credit adjustment refers specially to an existing debt. This was also conceded by Fouché. If no debt exists there cannot be a debtor. Circumstances however might

arise where the plaintiff's inspectors are busy investigating outstanding levies against a specific levy payer and before concluding the investigation the levy payer might decide to make payments directly to the Council. In such a matter a credit adjustment will be effected and plaintiff would be entitled to his commission.

- 1.166 The contract does not refer to levy payers who have paid their monies maybe erroneously into the suspense account or into the account of the previous council, and which monies had to be allocated subsequently to the account of the defendant. The suspense account is clearly a part of the assets of either the NDC which was either transferred to the defendant in terms of the regulations or it might even be part of the bookkeeping system applied by the CDM which reflects payments that still had to be allocated by the CDM to the correct levy payers account. Monies in the suspense account were therefore in the system of the CDM, only the allocation of such credits (payments) had to be done. It was the clear intention of the parties that plaintiff would be entitled to commission on overdue levies actually

collected through the efforts of the plaintiff. To pursue and collect the so-called overdue debt which is not truly and in real terms overdue, because the monies were already paid by a particular levy payer into the suspense account, the plaintiff then, not only disregarded the clear provisions of clauses 2, 3 and 6 of the contract by not collecting “overdue” levies, but also does not act in the best interest and to the advantage of the Council. Credit adjustments according to the contract therefore can only be effected in terms of the provisions of the contract if:

1.167 a debt does exist; and

1.168 such debt is capable of being handed back by the plaintiff to the Capricorn Municipality.

1.169 It is clear from the plaintiff's witnesses' evidence that they assumed that the outstanding levies (also called provisional levies) as downloaded were in fact due and payable. A provisional amount is not a liquidated amount and does not constitute a true debt. An unliquidated amount does not create proof of the existence of a debt as in the context of the evidence led might already have been extinguished as a result of payments received into the suspense account.

1.170 Plaintiff's counsel argued that the transactional history given by the defendant to plaintiff on 28 January 2002 entitles plaintiff to claim commission on all credit adjustments subsequent to the handing over of 28 January 2002 list. It was submitted that the plaintiff's claim regarding credit adjustments is simply a matter of interpretation of the contract. It was further submitted that in terms of clause 6.1 of the contract which reads as follows:

"The Joint Venture shall receive commission on monies collected from the clients' debtors handed over to Debtpacks Management

System.”

which entitles plaintiff to claim commission on all credit adjustments.

1.171 The subsequent handing over of the list confirmed the list of debtor accounts that had to be attended to. In this regard plaintiff relied on a letter dated 1 February 2002 confirming the electronic handover in the following terms:

“I hereby confirm that we have received the accounts that you have handed over to Dotcom/Debtack for collection”

1.172 As already stated before the list dated 28 January 2002 contained the same information that appeared on the NDC hardcopy given to plaintiff on 7 November 2000. As this list included levy payers outside the defendant's area of jurisdiction, it must have been obvious to plaintiff that the list wasn't meant to be an updated list of the defendant's debtors and that the information contained therein should be verified to such an extent that overdue levies payable to the defendant are collected. The overdue levies to be collected, is specifically referred to in clause 1 of the memorandum of agreement which reads as follows:

"The contractor shall accept payment from the levy payer in one or more of the following ways"

1.173 No reference is made in the memorandum of agreement that plaintiff was obliged to reconcile defendant's accounts and that such reconciliation would entitle the plaintiff to claim commission thereon. In this regard clause 2.1 specifically provides that the service to be rendered was an overdue debt collection service, which was to be collected from levy payers.

1.174 At the pre-trial conference plaintiff sought an admission from defendant that it handed over to plaintiff a list of outstanding debtors during or about the 1 February 2002. To this defendant responded that the list handed over was a list reflecting all debtors as per defendant's database but not a list reflecting outstanding debtors.

Plaintiff's council submitted that no reference was made that the list referred to constituted a list reflecting the levy payers of the Northern District Council; that the list was a provisional or incorrect list; or that the list was merely a guideline. These arguments doesn't detract from the fact that plaintiff must have been aware of the fact that the information in the list was the same as that which was originally handed to him as a list of the

Northern District Council.

1.175 Plaintiff's council also submitted that although it was put to Mr Kokott during cross-examination that Mr Makololo (a witness called by the defence) told Mr Maas that the list was incorrect and didn't reflect those levy payers that needed to be dealt with; the said Mr Maas denied this allegation and that Mr Makololo during his evidence never confirmed what was put to Mr Maas. This argument doesn't detract from what I have said namely that the plaintiff must have been aware that the information contained in the list was outdated and couldn't be relied upon. If the list contained the correct information I fail to see the reason why the defendant needed to contract the services of plaintiff to collect overdue levies as such objective could be achieved by ordinary legal process. Given the circumstances under which the agreement was entered into and the fact that a person's name appeared on an outdated list doesn't lead to the inference that such a person as liable to pay levies to the defendant. What the plaintiff simply had to do was to perform its obligations as stipulated in the agreement.

1.176 The non-variation clause in the contract in any event

prevents the plaintiff from relying upon any term or amendment thereof that was not put in writing and signed by both parties.

See: Sentrale Ko-op Graan Maatskappy Bpk v Shifren 1964 (4) SA 760 (A)

1.177 All along the plaintiff had its rights in terms of the contract to demand better co-operation from the defendant pertaining to more accurate information relating to levy payers. If the defendant did not co-operate in this regard, the plaintiff had it rights to demand from the defendant such better information as was required and if necessary claimed such relief as would be appropriate under the circumstances.

17.

Clause 2 of the agreement in regard to the area of service is clear. The area of service shall be the local municipalities under the jurisdiction of the defendant as set out in clause 3.1. Plaintiff's appointment is limited to the levy payers within the borders of that specific mentioned local municipalities. In terms of the contract:

- 1.178 It was the plaintiff's duty to familiarize itself with the area of jurisdiction of the defendant and the "defendant" shall "under no circumstances be liable to the plaintiff for any mistakes, costs, expences etc suffered by the plaintiff with regard to such area.
- 1.179 The handing of an outdated list in my view doesn't alter the clear terms of clause 3 of the agreement.
- 1.180 Plaintiff's reliance on the list handed to it didn't entitle the plaintiff to merely accept that all such debtors contained in the list were debtors of the defendant. Plaintiff's council argued that the memorandum of agreement does not limit credit adjustments to levy payers residing solely within the jurisdictional area of the defendant. I do not agree with this submission as referred to above. The wording of the contract is clear what the exact area of services is.
- 1.181 Based on the premises that the electronic download as well as the subsequent electronic downloads received by plaintiff contained the names of every levy payer registered with the defendant in terms of the provisions

of section 10(3) of the Calculation and Payment of Regional Services Levy and Regional Establishment Levy published under Government Notice R340, it was argued by plaintiff's counsel that such registered levy payer was obliged to keep on paying such levies to the defendant until it (the council) is satisfied that any person who is registered as a levy payer has ceased to be liable for the payment of any such levy, it (the council) may cancel such person's registration as a levy payer.

1.182 Therefore, it was argued that it was irrelevant whether a specific levy payer fell outside the area of jurisdiction of the defendant. As long as his name was registered on the list he was obliged to pay his levies to the defendant.

1.183 I do not agree with this argument. Section 10(3) of Government Notice R340 clearly envisaged a list of levy payers prepared by a specific council for a specific jurisdictional area. It does not refer to an old outdated list prepared by a council that ceased to exist. The fact that defendant kept on using this information regarding levy payers registered within the jurisdictional area of the NDC, and subsequently made that information

available to plaintiff, does not entitle plaintiff to claim commission on all the levy payers mentioned in the list. The memo-randum of agreement clearly stipulated the area of jurisdiction of the defendant. Plaintiff would have been entitled to claim commission in regard to levy payers liable for the payment of the regional services levy or regional establishment levy “collected from the clients debtors handed over to Debtpack Management (Management) System ...”. Clients’ debtors are those levy payers conducting their business in the jurisdictional area of the defendant. If the defendant collected levies on behalf of other District Municipalities, such collections falls outside the ambit of the contract.

1.184 During cross-examination of Mrs Fouché several levy payers were identified as possible falling outside the jurisdiction of the defendant. See record p 534-541. Of these the plaintiff filed by way of example two exhibits, ie exhibit 10 and 11. Plaintiff relied on the addresses given on the download to proof that the levy payers fall within the jurisdiction of the defendant as well as the fact that the defendant kept on receiving levies and in fact credited the levy payers’ accounts with payments.

I am not convinced on the evidence led before me that the two examples filed, create sufficient proof on a balance of probabilities that these two levy payers are in fact liable to pay levies to defendant. In order to prove their claim I would have expected plaintiff to proof that the said levy payers in fact conducts their businesses within defendant's area of jurisdiction. The address appearing on the download might have been a postal address in contrast to a business address. The fact that levies was received by defendant also doesn't proof anything as it is common cause that levy payers kept on paying levies into the NDC account as if it was still in existence. The request information letter send out by plaintiff also doesn't assist him at all. It doesn't disclose to levy payers that they might fell outside the jurisdictional area of the defendant and it does not request the levy payers to reconfirm that he is conducting his business within the new demarcated jurisdictional area of Capricorn District Municipality. The letter written by plaintiff to defendant dated 30 April 2002 confirms that the information contained in the hard copy dated back to 1996, a time when defendant wasn't in existence. It also states that a total of 7534 accounts

to the value of R157 plus million was handed to them which is I assume, approximately the same number of accounts and approximately the same value that was derived from the electronic download (see court witness bundle, p 16). Payments made and which subsequently shown on defendant's database doesn't prove that all such payments related to levy payers who were obliged to pay levies to the defendant. Mrs Tindiza, a witness who testified on behalf of the defendant, revealed during her testimony that the defendant collected levies on behalf of other district councils.

The above inference is corroborated by the information supplied by the plaintiff in its letter dated 30 April 2002 (bundle A, section A, pp 16-17) and the report dated 20 September 2002 (exhibit AA, p 51A and 51B). In the letter of 30 April the plaintiff indicated in numbered paragraph 2 thereof that "certain businesses have relocated outside the CDM jurisdiction. In the report dated 20 September 2002 the plaintiff deals with accounts in the write off cycle: being inter alia "not within Capricorn's district". From the abovementioned two documents it is clear that the plaintiff was aware

that some of the levy payers whose particulars they received from the defendant on the list fell outside defendant's area of jurisdiction. This identification by the plaintiff itself, being levy payers which fell outside the CDM jurisdictional area, flies in the face of plaintiff's argument as referred to above.

During the first postponement of this case, it was intimated by plaintiff's council that the purpose of such postponement was to clarify the jurisdictional area pertaining to the list of levy payers on which plaintiff claims commission. This lack of particularity and lack of clarity in the plaintiff's case was never rectified.

18.

It is my conclusion that the plaintiff failed to prove on a balance of probabilities that it performed its mandate in accordance with the provisions of the contract and therefore the plaintiff is not entitled to commission as claimed. Neither did plaintiff prove that any part of such commissions claimed (and if so, which part) is due and payable by the defendant

19.

1.185 The defendant instituted a counterclaim in the sum of R113 826.76 as well as a declarator that the agreement to have been validly cancelled.

1.186 No evidence was produced by the defendant in proving any of these counterclaims and therefore these claims have to be dismissed. Very little time, if any, was spend in respect of the two counterclaims.

20.

I therefore make the following order:

1.187 The plaintiff's claim is dismissed with costs.

1.188 The defendant's counterclaim is dismissed.

1.189 It is ordered that the plaintiff pays the defendant's costs including the cost of two counsel.

HJ DE VOS
ACTING JUDGE

5 APRIL 2007

HEARD ON: 25/7/2005

FOR THE PLAINTIFF: ADV A LE ROUX SC, ADV R FERGUSON

INSTRUCTED BY: GROSS, PAPADOPULO & ASS, PTA

FOR THE DEFENDANT: ADV N CASSIM SC, ADV A J H BOSMAN

INSTRUCTED BY: MATABANE INC, PTA