

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

13/1/2017
CASE NO: 50288/2013

| | |
|-----------------------------------|--|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES / NO |
| (3) | REVISED. |
| 13/1/2017 DATE | |
| [Redacted Signature] SIGNATURE | |

In the matter between:

ENTSIKA CONSULTING SERVICES (PTY) LTD,
previously known as
INCLINED STRATEGIC BUSINESS
CONSULTING (PTY) LTD

First Plaintiff

MKHIZE: ZAKHELE

Second Plaintiff

and

BACKHOUSIA CONSULTING SERVICES CC

Defendant

J U D G M E N T

KEIGHTLEY, J:

INTRODUCTION

- [1] This matter involves a contractual claim in terms of which:
- [1.1] the first plaintiff seeks an order against the defendant that it is entitled to a statement and debatement of account, and to payment of 50% of the profit in respect of the defendant's contract with Eskom, known as the NEC3 Professional Services Contract; and
- [1.2] the second plaintiff seeks an order declaring that he is entitled to payment of his salary for the months of May 2013 to December 2013 in the sum of R600 000. 00.
- [2] The plaintiffs also claim ancillary relief, including an order amending the first plaintiff's name from Inclined Strategic Business Consulting (Pty) Ltd to Entsika Consulting Services (Pty) Ltd, being its current name. As first plaintiff was referred to throughout the trial by its former name, I will refer to it by the abbreviation ISBC. I will refer to the second plaintiff as Mr Mkhize, and to the defendant as Backhousia.
- [3] Both ISBC and Backhousia are suppliers of recruitment and related consulting services. Mr Mkhize is one of the directors of ISBC. Backhousia was established by Enica Hunadi (Honey Girl) Mokoena (Ms Mokoena). She is the managing principal or director of that entity. Both Mr Mkhize and Ms Mokoena gave evidence at the trial for the plaintiffs and defendant respectively.

[4] The claims relate to an alleged verbal agreement in terms of which the plaintiffs claim that ISBC, alternatively Mr Mkhize, entered into a joint venture agreement with Backhousia for purposes of putting a proposal to Eskom with a view to Eskom awarding them a tender. The plaintiffs allege that the agreement was entered into during or before June 2011. Mr Mkhize represented the plaintiffs and Ms Mokoena represented the defendant.

[5] The plaintiffs aver that the relevant material terms of the agreement were as follows:

[5.1] ISBC prepared a technical and financial proposal which led to the defendant being awarded the Eskom Kusile Project Recruitment and Skills Development Tender ("the Eskom tender");

[5.2] Mr Mkhize, together with Backhousia, in response to the Eskom tender, prepared the proposal that led to the tender being awarded to Backhousia;

[5.3] The profit and loss in respect of the Eskom tender would be shared equally between the first plaintiff and the defendant, alternatively Mr Mkhize and Backhousia ("the profit share");

[5.4] ISBC alternatively the second plaintiff would invest R125 000,00 into the joint venture, which money would be paid to Backhousia;

[5.5] The contract in terms of the award of the Eskom tender would be conducted under Backhousia's name;

- [5.6] Mr Mkhize would be employed by Backhousia, alternatively by the joint venture at a monthly salary of R75 000,00 (“Mr Mkhize’s salary”);
- [5.7] Mr Mkhize’s salary would be paid by Backhousia and taken into account when calculating the profit share;
- [5.8] Mr Mkhize would contribute to the joint venture by providing strategic direction and guidance required to implement the Eskom tender, and would lead the work stream responsible for the skills audit, general project governance and support required for the implementation of the tender;
- [5.9] The business of the joint venture conducted through Backhousia would be ring-fenced by Backhousia and kept separate from its other business; and
- [5.10] Backhousia would open a separate bank account through which the business of the joint venture would be conducted and all the income received in relation to the Eskom tender would be deposited into such account.
- [6] The plaintiffs claim that pursuant to the conclusion of the agreement, Mr Mkhize paid the sum of R125 000. 00 to Backhousia. However, Backhousia breached the terms of the joint venture agreement in that it failed to account for, and to pay to ISBC or Mr Mkhize 50% of the profit earned from the Eskom tender. In the alternative, Mr Mkhize claims that Backhousia failed to

pay his salary for the months of May 2013 to August 2013, amounting to R300 000. 00.

[7] Backhousia denies the plaintiffs' averments in this regard. It states a positive defence to the claims to the effect that:

[7.1] Backhousia and Mr Mkhize entered into a verbal agreement during or about July 2010 in terms of which:

[7.1.1] Backhousia would engage the second plaintiff as a project governance director to focus exclusively on the financial aspect of the Eskom tender;

[7.1.2] Mr Mkhize would be engaged on condition that Backhousia was awarded the tender.

[7.2] The tender was subsequently awarded to Backhousia in about June 2012.

[7.3] Subsequent to the award of the tender, Backhousia agreed with Mr Mkhize that he would be paid R75 000. 00 per month for the services rendered by him as the project governance director.

[7.4] Mr Mkhize's engagement terminated on or about May 2013.

[8] It is common cause on the pleadings that the parties entered into an oral agreement related to the Eskom tender. It is also common cause that the tender was awarded and that Eskom paid Backhousia in terms thereof. What is in dispute is the terms of the agreement. In particular, was the

agreement in the form of a partnership or joint venture agreement (as claimed by plaintiffs), or was Mr Mkhize simply “engaged” by Backhousia as the governance director of the project on a salaried basis (as claimed by Backhousia)?

[9] The three essential requirements for the establishment of a partnership are:

[9.1] each of the partners must bring something into the partnership, whether it be money, labour or skills;

[9.2] the business should be carried on for the joint benefit of the parties; and

[9.3] the object should be to make a profit.¹

[10] It has been held that:

“In determining whether or not an agreement creates a partnership a Court will have regard, inter alia, to the substance of the agreement, the circumstances in which it was made and the subsequent conduct of the parties.”²

[11] Mr Mkhize testified on behalf of the plaintiffs. He is a chartered accountant and has an MBA. His connection with ISBC (now Entsika) started during the course of his MBA. At that time he was looking for new ventures and business opportunities. Through ISBC he teamed up with other individuals with similar interests and related skills. However, ISBC did not have

¹ Pothier, A Treatise on the Contract of Partnership (Tudor's translation) 1.3.8
² *Pezzutto v Dreyer and Others* 1992 (3) SA 379 (A) at 389

experience as a company. As Mr Mkhize explained it, ISBC did not have any relevant history that would permit it to compete for government tenders, such as BEE certificates, tax clearance and references that they could submit as a company. However, each of them involved in ISBC had individual skills and experience that could be put to good effect in competing for and completing tender work. Mr Mkhize's particular experience was in finance and in business strategy.

[12] The model that ISBC adopted was to look for business opportunities where they could look to form a business partnership with entities who had the requisite company history to compete for tender projects. At the same time, ISBC, through the individual skills of those involved, could add the requisite value to the overall project. They looked at joint ventures with more established entities as a mechanism for these partnerships. Their strategy involved going in at risk with a partner, i.e. doing the necessary work on tender submissions with no payment up front, with a view to sharing in the profits with the partner should the tender be successful.

[13] Mr Mkhize testified further that this had remained ISBC's strategy from inception and it presently continues to operate on this basis. He testified that since leaving his salaried employment and going into ISBC, he has worked only on this basis, and has never undertaken further salaried work.

[14] Mr Mkhize's testimony regarding ISBC's history and its business strategy was not materially challenged.

- [15] In approximately 2009 Mr Mkhize and his ISBC colleagues met Mr Moalusi, or "Bra John", as he was referred to by both Mr Mkhize and Ms Mokoena in their evidence. Ms Mokoena also knew Bra John from the business environment. Bra John had a business called Bridge the Gap ("BTG") that also focused on among other things tender projects.
- [16] It is common cause that Ms Mokoena has established connections in the Emalahleni business sector. When Eskom started consulting in the area around the proposed Kusile project Ms Mokoena realised that as a Black woman with an established record in the recruitment arena she was ideally placed to pursue relevant opportunities. It is also common cause that Bra John introduced Ms Mokoena and, among other people, Mr Mkhize, in the context of possibly working together on a forthcoming Eskom Kusile tender.
- [17] This was in 2010. Ms Mokoena at that stage had inside knowledge that a tender was forthcoming. According to Mr Mkhize, Bra John told him that Ms Mokoena had information about a tender that was to be advertised, and she needed help putting it together. Bra John invited a group of people whom he knew, and who had related skills to meet with Ms Mokoena to discuss the opportunity. They met at BTG's offices. Ms Mokoena explained the project and confirmed she needed their assistance. Mr Mkhize says that even at this early stage it was discussed and agreed between them (Ms Mokoena, BTG, Mr Mkhize and the other participants) that those involved in the tender would do so on a joint venture basis, with profits being shared should the tender opportunity come to fruition.

- [18] At this stage the tender was not yet out. Ms Mokoena exchanged some emails with information to the group of people Bra John had brought together pertaining to the expected tender. In early February 2010 the tender came out and Ms Mokoena shared more details about it. There appears to have been three main components, the details of which are not necessary for present purposes. One was recruitment, the other was procurement and another component was a skills audit.
- [19] Ms Mokoena had a meeting in the first week of February 2010 with a group of those who had been involved from the first meeting at BTG. Mr Mkhize was still employed at Cadbury and was not able to attend that meeting. However, it is common cause that he subsequently worked on the tender submission that was made to Eskom in relation to the project. It is common cause that a number of others who had attended the first meeting at BTG also provided electronic input to the tender proposal on particular areas. Ms Mokoena and Mr Mkhize worked over the weekend at his office at Cadbury to get the proposal finalised. Ms Mokoena's sister was also present.
- [20] There was some dispute about exactly what Mr Mkhize had contributed to the proposal, with Ms Mokoena suggesting that he had simply pulled everything together from information provided by her and others and formatted the final document. However, it is clear from the evidence that while other people sent through input by email, Mr Mkhize also contributed some important sections, in relation to the project tools, project planning, project resources and the project financials sections. Mr Mkhize testified that while they were working on the project proposal over that weekend, he

and Ms Mokoena confirmed that should the tender be accepted, the project would run on a joint venture basis with profits being shared.

[21] The project proposal was submitted under Backhousia's name. Subsequent to that Ms Mokoena forwarded an email to Mr Mkhize attaching a request for clarification from Eskom on certain financial aspects of the proposal.

[22] As it turned out, nothing came of the project proposal, as Eskom withdrew its original tender, split the tender into two separate tenders, and re-published them for new submissions. This is common cause. It is also common cause that Ms Mokoena and Mr Mkhize worked together in submitting a new proposal for one of the tenders, viz. the recruitment tender. This involved adjusting their original tender proposal to align it with the more limited scope of the new tender. The financial, work stream and project plan were changed by Mr Mkhize to fit the new scope. Ms Mokoena worked in particular on the technical sections of the tender proposal, given that her expertise was recruitment.

[23] It is not disputed that at more or less the same time Mr Mkhize and Bra John worked on submitting a proposal for the second of the new tenders, focusing on procurement. This proposal was submitted under BTG ("the BTG project"), and it was successful. It is also not disputed that the BTG project was conducted on the basis of a joint venture between ISBC and BTG, with both parties sharing the profit. The agreement was originally verbal, but after the tender was awarded BTG and Mr Mkhize, on behalf of ISBC, entered into a written agreement to this effect.

- [24] Ms Mokoena was originally part of the team that worked on the BTG tender proposal, but she subsequently withdrew from it as she was concerned about a conflict of interest. Mr Mkhize testified that he had some trouble pinning Bra John down to formalize their relationship by way of a written contract, as they had agreed to do. Mr Mkhize had shared his frustration in this regard with Mokoena. She assured him that he was not to worry because it would not happen with the agreement between the two of them. She said that if the recruitment contract was awarded to them, she would put their agreement in writing. According to Mr Mkhize, this was further confirmation of the existing verbal agreement between him and Ms Mokoena, viz. ISBC and Backhousia would share the profits of the project in the event of Backhousia being awarded the tender. I will deal with Ms Mokoena's version on this aspect of Mr Mkhize's evidence later.
- [25] The recruitment tender proposal was submitted to Eskom in September 2010. Once again, Backhousia was the entity under whose name the proposal was submitted. One of the requirements of the tender was that the supplier had to be 100% Black women owned. The declaration of shareholding in the proposal submitted reflected Ms Mokoena as being 100% shareholder in Backhousia.
- [26] Ms Mokoena signed the tender proposal as the "Managing Principal". Details of the "key persons" associated with the proposal included Ms Mokoena, in this capacity; Mr Mkhize as "Chief Financial Officer"; Mickey Harmsey as "Recruitment Specialist"; and two other persons.

- [27] The tender proposal was successful, and Backhousia signed a contract with Eskom on 23 June 2011. According to the testimony of both Mr Mkhize and Ms Mokoena they had to “hit the ground running” so to speak as soon as the contract was signed. Eskom was holding an exhibition of its suppliers in Emalahleni. As a formal contractor, Backhousia was expected to participate in the exhibition and to be present to meet with other contractors and possible employees etc. They also had to start recruiting staff and securing resources, such as computers. There is no real dispute between the parties in this regard.
- [28] Backhousia had rented offices in Emalahleni, and Ms Mokoena took Mr Mkhize there to introduce him to the staff. There is some dispute as to how he was introduced. Mr Mkhize says he was introduced as Ms Mokoena’s business partner on the Eskom project. Ms Mokoena denies this. Ms Harmsey, who also testified for Backhousia, does not recall how he was introduced in any detail. This is not surprising, given the lapse of time since the events in question.
- [29] It is not contested that capital was required to actually start the Eskom project around the end of June 2011. Backhousia did not have the capital available at that stage. Mr Mkhize testified that he had been paid an amount of R180 000. 00 for work he had recently completed on another, unrelated project. He and Ms Mokoena agreed that they would each make a capital injection to the project to cover their start-up costs. He made a contribution of R100 000. 00 from the money he had earned on his other project. It is not disputed that Mr Mkhize made this contribution. However, in her evidence,

Ms Mokoena said that this was nothing more than a personal loan from Mr Mkhize's wife, and that Mr Mkhize had simply offered the loan to Backhousia on this basis. This version was not put to Mr Mkhize under cross-examination. It is also not disputed that Mr Mkhize made further contributions to the costs of the project in the early days in a total amount of approximately R25 000. 00.

[30] Ms Mokoena and Mr Mkhize continued to meet and work together in June and July 2011 after the project had started. Mr Mkhize's version of events is that during this period they worked on the project financials and the budget forecasts. They agreed on staff salaries, and on the amounts each of them (Mr Mkhize and Ms Mokoena) would be paid under the project. Initially, they agreed on an amount of R75 000. 00 each per month for the two of them. This was not strictly speaking a salary, but was an allowance to be set off against the periodic sharing of profits between them. They agreed that profits would be shared every three months, and that their respective monthly salaries would be deducted from the profit share when this accounting was done.

[31] Different versions of the financial projections were handed in as evidence at the trial. Mr Mkhize's version is that both he and Ms Mokoena discussed the figures and he drew up the documents based on their discussions, with her input. The first document, headed "payroll/HR" reflects the salary of both Mr Mkhize and Ms Mokoena as "R75 000. 00 per month. Mr Mkhize explained that this was in line with their initial agreement. In addition, they had also discussed and agreed on the three-month accounting of profits between

Backhousia and ISBC, which were to be shared 50/50. He testified that he captured this in a document headed "Project Cash Flow Forecast (12 months). The first version of this document records, among other things (and excluding the figures):

[31.1] "Profit available for sharing – Backhousia 50%; ISBC 50%";

[31.2] "Profit share every 3 months / After audit";

[31.3] "Note, Zakhele (Mr Mkhize) and Hg (Ms Mokoena) out of the project payroll."

[31.4] "Project to keep a separate bank account"

[31.5] "Audited every three months for the profit payout".

[32] A similar document, with the same heading, was also produced in evidence. Once again, it reflects a 50%, 50% share of profits between Backhousia and ISBC. In addition, the document recorded:

| | |
|----------------------|---------------|
| "ISBC | 50% |
| Already paid to ISBC | R51 000. 00 |
| Due to ISBC | R386 875. 33" |

[33] Mr Mkhize testified that this reflected that an amount of R51 000. 00 had been advanced from the profits to ISBC. This constituted his first salary, less tax. As the agreement between the parties was that Mr Mkhize's and Ms Mokoena's salaries would be for the account of their respective entities, an adjustment was needed to the amount of the profit due to each.

[34] On Mr Mkhize's testimony, everything he recorded in these project cash flow and projections documents was based on discussion and agreement with Ms Mokoena. He explained that Ms Mokoena's salary was subsequently changed from R75 000. 00 to R85 000. 00 as a result of her taking advice from her "silent partner", after which she said that, as project director, she should be entitled to R10 000. 00 more than Mr Mkhize. According to Mr Mkhize, he had no difficulty with this as the salaries that he and Ms Mokoena were to be paid was, in terms of the agreement between them, for the ultimate cost of each of their respective entities, and set off against the profit to which each was entitled. This change is reflected in a document headed "Backhousia High Level Cost Projection". The same document also records:

[34.1] A "loan from ISBC (Home Loan) R100 000. 00"

[34.2] A "loan from Elisa R22 000. 00"

[34.3] A "loan to HG/Credit Card R50 000. 00"

[35] Mr Mkhize explained that the ISBC loan was a reference to his contribution to the up front capital costs of the project, discussed earlier. He also testified that the loan to "HG" (Ms Mokoena) was an advance to her from the project as she needed to pay her credit card, and that this was to be set off later against profits due to Backhousia. None of this was materially challenged, save for Ms Mokoena's own testimony (which was not put to Mr Mkhize) that the R100 000. 00 loan was a personal loan by Ms Mkhize's wife, and that he had simply volunteered the loan. The reference to "Elisa" is a reference to

Mr Mkhize wife. The balance of the R125 000. 00 he claims against loans to the project is more or less made up by this amount.

[36] According to Mr Mkhize, once the project was off the ground the parties intended to reduce their agreement on these issues to writing. Ms Mokoena undertook to contact her attorney, Mr Mchunu, to put everything that they had agreed to in a written agreement. He waited for the whole of July for this to happen, but there was no progress. Mr Mkhize put together a discussion guide to this end in August 2011. It recorded everything that the parties had already agreed about their joint venture, and to identify issues that still needed clarification.

[37] Mr Mkhize sent an email to Ms Mokoena on 24 August 2011 stating:

"Hi Hg

Please find attached the Recruitment project JV discussion guide, the objective of the guide is to channel our discussion tomorrow and document what we agree on.

Lets discuss all the points and send it to your Attorney's to draft an agreement for us, I will also invite my Attorney's to the meeting to speed up the process.

You can add points that you also like to discuss, Hope we can have an agreement ready for signing by the end of next week-> 2 September 2011.

Thanks

Zak"

[38] A document entitled "JOINT VENTURE AGREEMENT DISCUSSION GUIDE" ("the JV guide") was attached to the email. On Mr Mkhize's testimony the JV guide recorded what the parties had already agreed to verbally, including the following (as recorded in the document):

- [38.1] The parties agree that the business of the Joint Venture in relation to the implementation of the Eskom-BSC Contract shall be conducted under the Backhousia company name.
- [38.2] The objects of the joint venture are, among others, to implement the terms of the Eskom-BSC Contract; and to look for other business opportunities with Eskom and its contractors.
- [38.3] The profit and/or loss of the Joint Venture shall be shared in the following proportions- Backhousia 50%; ISBC 50%.
- [38.4] The contributions of each Backhousia and ISBC, both in securing the project, and in proceeding with the project are detailed.
- [38.5] The business of the joint venture will be ring-fenced by Backhousia and kept separate from its other business.
- [38.6] Backhousia will operate a separate bank account through which the business of the joint venture will be conducted.
- [38.7] Mr Mkhize and Ms Mokoena were to form the Management Committee, with the chair "to be confirmed".
- [38.8] A cost exclusion was recorded regarding "buying of immovable property" on the basis that the cost was "not directly related to the project.
- [38.9] Project executives (Mr Mkhize and Ms Mokoena) to remain on their company payroll system.

[38.10] Various items were listed for discussion, or to be added, viz. intellectual property, social investment project etc.

[39] On Mr Mkhize's version, save for the items specifically listed as for discussion or to be added, everything else simply recorded what the parties had already reached agreement on verbally between themselves. He explained the reference to "buying of immovable property" as being a cost exclusion, relating to the intended purchase of a building. He said Ms Mokoena had wanted to purchase a building for Backhousia out of the project income. However, he did not agree to this as it was not a project cost, but rather one for Backhousia alone. According to Mr Mkhize, the JV guide reflected their agreement on this.

[40] Mr Mkhize and Ms Mokoena met on 25 August 2011. According to Mr Mkhize, there was no disagreement on the 50/50 basis of the partnership. Ms Mokoena had some issues. One of these was the fact that the Eskom project required a contractor who was 100% owned by Black women. Mr Mkhize explained that this was an issue they wished to discuss with the attorney as they were now at the stage where the agreement between Backhousia and ISBC was to be reduced to writing.

[41] On 26 August 2011, following their meeting, Mr Mkhize sent Ms Mokoena the discussion guide and project financials with revised projections in relation to the latter.

[42] Mr Mkhize testified that he met alone with Mr Mchunu, the attorney, on 30 August 2011. This was as a precursor to Mr Mchunu drafting the formal joint

[42] Mr Mkhize testified that he met alone with Mr Mchunu, the attorney, on 30 August 2011. This was as a precursor to Mr Mchunu drafting the formal joint venture agreement. Mr Mchunu wrote an email to Ms Mokoena at 10:13 on that morning saying:

"Dear Honeygirl

Many thanks for the appointment and the deposit. I have just been running around so badly since we met. We will certainly be happy to be of assistance in respect of the areas of law identified in our letter. I have also just had a brief meeting with Mr Mkhize. He will brief you."
(my emphasis)

[43] Ms Mokoena responded to Mr Mchunu at 11.41 am saying:

"Hello Babu Mchunu

Mr Mkhize and I met and we seem to be reaching consensus. Is it possible that we meet with you tomorrow at 9h30 in our offices?" (my emphasis)

[44] The parties indeed met with Mr Mchunu the following day. Mr Mkhize's evidence as to what transpired in that meeting is as follows:

"M'Lady, myself and Honeygirl went to Ms Mchunu. When we got there we then started a discussion, it was the three of us, we gave the background of the project, where we started, how much we have been working together. We shared with Mr Mchunu what we have already agreed, that is per what is on the discussion guide. I am not sure, M'Lady, if we had the discussion guide in our possession, but we shared with him what we have already agreed, the terms, the 50% sharing as a JV, ring-fencing it. (O)n what we needed from Mr Mchunu, which Honeygirl also shared the concerns on the Eskom contract, the issue of black woman empowerment, the issue of sub-contracting, of forming a JV, and we needed guidance from Mr Mchunu on how do we then legally work around what we have already agreed. M'Lady, at that time Mr Mchunu was then going to come back to us, M'Lady, the both of us, and I must say that was the last time I spoke or heard anything from Mr Mchunu."

[45] It is common cause that Mr Mchunu did not produce a written agreement. On 25 October 2011, Mr Mkhize instructed De Kooker attorneys to write to Mr Mchunu on behalf of ISBC recording that:

[45.1] It had always been the intention of Mr Mkhize and Ms Mokoena to record their agreement regarding the Eskom project in writing.

[45.2] Mr Mokoena had undertaken to have her attorney, Mr Mchunu draft the agreement. However, he had failed to do so.

[45.3] Mr Mkhize had made substantial contributions of skill and finances to the project, including payment of an amount of R125 000. 00.

[45.4] The terms that had been agreed on by the parties included the 50% profit share between Backhousia and ISBC.

[45.5] Mr Mchunu was requested to provide a written contract within seven days.

[46] Mr Mchunu responded on 27 October 2011 on the instructions of Backhousia. In this letter Backhousia:

[46.1] denied any dealings with ISBC;

[46.2] denied any discussions between Ms Mokoena and Mr Mkhize concerning the Eskom project;

[46.3] denied that ISBC had made any contribution towards the project;

[46.4] asserted that Mr Mkhize was engaged by Backhousia as a governance director on the Eskom project on a consultancy basis for a monthly remuneration of R75 000. 00.

[47] The letter also recorded that it was not correct that Mr Mchunu had failed to draft an agreement since June 2011, *"as we only got involved in this matter towards the end of August 2011 and, in fact, only met with Mr Mkhize for the first time on 30 August 2011."* The letter stated further in paragraph 3.5 that:

"... Mr Mkhize, and not your client, has made certain proposals to our Client, which our Client has been happy to consider and we, as Mchunu Attorneys, have also had an open discussion with Mr Mkhize alone and also together with our Client in order to consider what option/s would be appropriate for the parties under the circumstances."

[48] There were no further exchanges between the attorneys. Despite this, the project continued and Mr Mkhize continued to work on it with Ms Mokoena. Mr Mkhize moved to Emalahleni from Johannesburg for this purpose. The project was supposed to be for a period of one year. However, it was subsequently modified and extended until 24 December 2013. Mr Mkhize worked on the extension to the project as well. This is not disputed. The last payment to him was R75 000. 00 in May 2013. This was preceded by an email from Ms Mokoena saying, among other things:

"After careful consideration and taking into account your decision to limit your interactions with Backhousia, I wish to say that we can no longer justify paying you a total package of R75 000 a month since the only task you are performing for Backhousia on a monthly basis is to send claims and invoices only. Therefore am (sic) going to request that we pay you by the hourly rate you put into the task and on a consultancy basis."

[49] This prompted a response from Mr Mkhize pointing out that the parties had agreed on a profit share, and that Ms Mokoena had confused him with being one of her employees. Needless to say, by this stage the relationship was no longer cordial and constructive. Mr Mkhize testified, and this was not disputed, that at this stage, which was towards the end of the project, Backhousia had billed Eskom almost R30 million, and the project activities were much reduced.

[50] Before dealing with Ms Mokoena's version of events, it is necessary to note that on both parties' evidence, they explored further options to work together on other opportunities. In other words, they kept the door open to working together in the future. One of the options they considered in this regard was Mr Mkhize becoming a shareholder in Backhousia. However, this did not eventuate, and nor did they successfully work together on any project other than the Eskom project.

[51] Under cross examination counsel for the defendant put the following version to Mr Mkhize on the material issues:

[51.1] Ms Mokoena would deny that there was ever an agreement as contended for by the plaintiffs.

[51.2] She would say that from the first time they met with Bra John in early 2010, the only agreement between those present was that they would all work together on the tender proposal and that, if it was successful, each person would take responsibility for a

particular work stream and would be paid on a basis still to be agreed.

[51.3] This is why the Eskom tender was put in under Backhousia's name. It was a Backhousia tender and project, and there was no agreement with ISBC or Mr Mkhize on the project.

[51.4] Ms Mokoena would testify that the only discussion she and Mr Mkhize ever had about a joint venture was after the tender was awarded. More particularly, it was when Mr Mkhize sent Ms Mokoena the email of 24 August 2011, attaching the JV discussion guide. This is an important point, to which I will revert later.

[51.5] As far as the financial projections and cash flow documents are concerned, Ms Mokoena would say that she had no input into these. Mr Mkhize simply produced them when they met on 25 August 2011.

[51.6] She would also testify that she and Mr Mkhize never went to see Mr Mchunu about drafting an agreement between them concerning the Eskom project. In fact, the subject matter of their dealings with Mr Mchunu was not the Eskom project at all, but rather a new entity ("the Newco") that they were thinking of establishing as a vehicle for pursuing further business opportunities. Mr Mchunu's references to "certain proposals"

made by Mr Mkhize, in his letter of 27 October 2011, was a reference to discussions around the Newco, not the Eskom project.

[51.7] Similarly, Ms Mokoena would say that when she emailed Mr Mchunu to the effect that they were reaching consensus, this was in relation to the Newco.

[52] Mr Mkhize disputed each of these averments.

[53] In her evidence in chief Ms Mokoena confirmed the version put to Mr Mkhize on each of these points. On her version, when they first met with Bra John in early 2010, the arrangement, as he explained it was that work opportunities would be shared with people like Mr Mkhize, who were consultants. They would assist putting the tender proposal together. They understood it was a risk game: *"So if you get the opportunity (tender), you hire them, you use them."* Later, she reiterated that if a tender proposal succeeds, *"you hire them. ...on a consultancy basis and hiring them specifically for the areas that you have engaged them on ..."* (my emphasis)

[54] Ms Mokoena testified as to the loan advanced by Mr Mkhize. She said that she had not budgeted to start the project and pay for it up front. She asked her mother for a loan. *"It just so happened"* that she was with Mr Mkhize at this time, he was next to her and he said to her: *"No man you don't have to worry. My wife has just received a bonus from her employment, and I can actually access that money. But just make sure that you pay that money within a certain period of time."* She initially told him that she would not be comfortable taking money that belonged to his wife, but Mr Mkhize told her it

was no big deal. After a couple of days she took him up on the offer. Ms Mokoena had difficulty deciding when they agreed that the loan was repayable. She seemed to waiver between the end of the month, and when Eskom made the first payment. As I have already indicated, none of this was ever put to Mr Mkhize.

[55] On the financial projections and cost flows, Ms Mokoena testified that she only saw them on 21 August 2011 when she and Mr Mkhize met. She made no input into them and saw them for the first time on that day. Ms Mokoena explained that she had a number of concerns about the projections. The first was her salary. She did not think that Mr Mkhize should be setting her salary. The second concern was that Mr Mkhize had not costed into the HR costs other Backhousia employees who were not engaged on the Eskom project. She had difficulty explaining why employees who were not part of the Eskom project should form part of the costs under the financials for the project. Her answers were not clear. She tried to explain that she was concerned that Mr Mkhize was taking over the function of doing cost projections for the whole of Backhousia. Why she would have thought so is not apparent. It was not a version that was put to Mr Mkhize or traversed in cross-examination with him.

[56] Ms Mokoena testified that the next thing that concerned her about the financial projections Mr Mkhize presented was the profit share. She saw that he had recorded a 50% split in profits each between Backhousia and ISBC. She had not heard about ISBC before. Mr Mkhize had never mentioned it. When she asked he said it was his company. Further, that she could not expect him to work for only R75 000. 00 per month. He was in it from the

start for a 50% share of the profits. When she said that he had never mentioned it before, he said that he was mentioning it now. At this point, she told him she would have to discuss it with her silent partners, and she had to discuss it with her attorney “because I don’t know who ISBC is”. He offered to draft a joint venture discussion guide to facilitate the discussions with her silent partners. Thereafter he sent her an email with the JV guide.

- [57] As far as the meeting with Mr Mchunu was concerned, Ms Mokoena testified in chief that their reason for consulting him was in relation only to the Newco. She stated in this regard that:

“I probably just need to mention at this stage that there were two different discussions that Mr Mkhize raised with me. The first was the joint venture discussion, and that particular one is something that I was not prepared to entertain with Mr Mkhize. The second part was us forming a new company. That particular discussion is a discussion that which I was prepared to discuss with Mr Mkhize. We then agreed that okay, let us now pursue the Newco discussion. ... We will also ask Mr Mchunu to assist us with that particular one. So the joint venture discussion .. which I was not prepared to entertain. But the one where we reached consensus and where we sort of agreed, we wanted to sort of try and explain was, the discussion of forming a new company together. That is the particular discussion I was prepared to enter with him.” (my emphasis)

- [58] Ms Mokoena stated that when she referred to “consensus” in her email to Mr Mchunu on 30 August 2011, it was with particular reference to consensus around the Newco, not to the joint venture.
- [59] Some important contradictions in Ms Mokoena’s version on these issues became apparent during the course of her cross-examination. The first relates to Ms Mokoena’s evidence that the parties did not consult with Mr

Mchunu in relation to drafting an agreement in respect of the joint venture. They saw him about assisting them with establishing the Newco. Ms Mokoena was adamant on this score in her evidence in chief. She was also adamant that the first time that the question of a joint venture and profit share was raised was in the project financials presented to her on 21 August 2011. In her evidence in chief she repeated a number of times that she had emphatically told Mr Mkhize that she was not prepared to discuss the prospect of a joint venture; all she was prepared to discuss was the Newco, and this is why they had gone to see Mr Mchunu.

- [60] Under cross-examination, Ms Mokoena was referred to Mr Mkhize's email dated the 24 August 2011 including a copy of the JV guide with his suggestion that they send it to Ms Mokoena's attorney to draft an agreement. The discovered documents reflect that Ms Mokoena forwarded this email to her attorneys after the action was instituted under cover of an email dated 15 May 2014. In the May 2014 email, Ms Mokoena writes to her attorneys of record as follows:

"Not sure if I did send you this email (from Mr Mkhize dated 24 August 2011) where Zakhele was proposing the discussions for the JV and the guide that he drafted to which I said I needed to take to my attorney for review. This was after the tender was awarded. After talking to Mr Mchunu and sourcing for his advice it was not prudent for me to go ahead. I think he's alleging the discussion were held before contract award." (my emphasis)

- [61] The email clearly indicates that, contrary to her earlier evidence, Ms Mokoena and Mr Mkhize did consult with Mr Mchunu about the joint venture. This was also contrary to her evidence that she had emphatically told Mr

Mkhize that a joint venture was out. In her words, she had told him “over and over and over again that the JV discussion was completely out”. She was asked about this under cross-examination:

“(Counsel for plaintiffs) – Now if it was completely out, why did you communicate to Mr Mkhize that you will take this discussion guide up for review with your attorney? (Ms Mokoena) – Because I wanted it to be explained to him. Because I had spoken to him so many times M’Lady, about the issue. And I felt that if he brings it up ... In fact I wanted him to get the satisfaction from my attorney, because it felt like to me, every time when I mentioned that to him he was not getting it. For me it became very imperative that it is something that an attorney probably could explain to him better, because when I say it to him, he was not getting me.”

[62] Ms Mokoena was then asked when were the other occasions where they had discussed the joint venture, and when she had told Mr Mkhize that it was out. Ms Mokoena prevaricated in her answer, leading counsel for plaintiff to say:

“So if I can ask you the question now again. You keep answering the question with reference to the new company. My question is not with reference to the new company, my question is with reference to the JV discussion guide, and the joint venture between Backhousia and ISBC. And you said you wanted the attorney to explain to him that the joint venture is not going to work, and you have told it over and over again. So my question to you was when did you have these other discussion with him with reference to the joint venture, where you told him that the joint venture is not going to work?” (my emphasis)

[63] Ms Mokoena continued to prevaricate on her answer for a further three full pages of the trial transcript. Eventually, she conceded that discussions about the joint venture were held as early as June 2011, at Mr Mkhize’s house. This is in direct contradiction with the version that was put to Mr Mkhize when he was under cross-examination. The version that was put to him was that Ms Mokoena heard about a joint venture for the first time when Mr Mkhize

sent her his email of 24 August 2011. It is also contradicts her earlier evidence to this effect.

[64] These are material contradictions. Consequently, the court must reject Ms Mokoena's version that:

[64.1] the proposal of a joint venture only surfaced on or about 24 August 2011;

[64.2] she emphatically rejected the idea of a joint venture and told Mr Mkhize as much; and

[64.3] the joint venture agreement did not form part of the parties' reason for consulting with Mr Mchunu.

[65] On Ms Mokoena's own admission, she and Mr Mkhize had held discussions about their relationship on the Eskom project since June 2011. Despite this subsequent admission, Ms Mokoena's version was that she only saw the financial projections on or about 21 August 2011. She said that Mr Mkhize had drawn them up on his own, without any input from her, and that this was the first time he had raised a 50/50 profit share between Backhousia and ISBC. The contradictions in her evidence render this version improbable. Why would the parties have avoided discussing the financial aspects of the project and of their relationship between June and August 2011? It must have been an important aspect of their relationship and of the project.

[66] There are further difficulties with Ms Mokoena's evidence in this regard. According to her, the issue of their salaries was discussed only after Mr

Mkhize had presented her with the first set of financials on 21 August 2011. She indicated that she was unhappy with her salary of R75 000. 00. Thereafter, he sent her the revised financials in which her salary was reflected as R85 000. 00. However, it was put to Ms Mokoena that Mr Mkhize had actually been paid on 13 August 2011, which was before she said that salaries were discussed for the first time. Evidence was produced to indicate that Backhousia paid Mr Mkhize an amount of R53 783. 00 on 13 August 2011. Mr Mkhize testified that this was in respect of his July 2011 salary. The figure was made up of his agreed salary of R75 000. 00, less tax. Normally, this would come to R51 000. 00. However, an amount of approximately R2 700 was added to the 13 August 2011 payment for expenses he had incurred by paying temporary staff out of his own pocket. He testified that this explained the difference between the payment of R53 000 on 13 August 2011, and R51 783. 00 at the end of August 2011. It is common cause that the latter payment was his August salary.

[67] It was put to Ms Mokoena that her version that the salaries were only agreed on 26 August 2011 could not be correct in light of Mr Mkhize's first salary having been paid on 13 August 2011. Ms Mokoena accepted he had been paid on this date. However, she denied that this was a salary payment. Her explanation was that this was an amount due to Mr Mkhize to reimburse him for payments he had made to temporary workers. If one looks at the evidence, this is improbable. It is common cause that Mr Mkhize had made up front payments to temporary workers from time to time, and he was reimbursed from time to time for this. However, these amounts were

relatively small, ranging between R2 000 and R3 000. It is most unlikely that he ever paid a substantial sum of R53 783 for temporary workers, particularly as by 13 August the project had been running for less than two months. Mr Mkhize's explanation of how the amount was made up makes rational sense. There is no evidence to back up Ms Mokoena's version in this regard.

[68] Ms Mokoena also testified that Mr Mkhize was not paid for July 2011. Even though he worked on the project for that month, he volunteered not to take a salary and offered his services for free. This seems highly unlikely, particularly when account is taken of the fact that he was paid an amount of slightly more than his exact salary on 13 August 2011. It was also not put to Mr Mkhize that this would be Ms Mokoena's version.

[69] The most plausible conclusion to draw from the evidence is that the 13 August 2011 payment was not for temporary workers as stated by Ms Mokoena. Her evidence in this regard must be rejected. I accept Mr Mkhize's version that the payment he received on 13 August 2011 was for his July salary.

[70] What leads from this is that Ms Mokoena's version that the salaries and financials were only discussed for the first time around August 2011 must also be rejected. For Mr Mkhize to have been paid his agreed salary on 13 August, there had to have been earlier discussion and agreement between the parties on the financial aspects of the project prior to that date.

[71] There is further evidence in support of this. I referred earlier to the specific cost exclusion in respect of a building recorded in the JV guide, and to Mr

Mkhize's evidence in this regard. Ms Mokoena denied under cross-examination that they had discussed this issue previously. She was asked how Mr Mkhize could have recorded that the cost of a building was to be excluded if the parties had never discussed this issue. Counsel put to her: "*So he just thought of it?*" to which Ms Mokoena responded: "*Ja*".

[72] Once again, Ms Mokoena's version is highly improbable. There is no reasonable explanation for why Mr Mkhize would have thought of this issue on his own and recorded it in the JV guide without the parties having discussed it. It makes sense that Ms Mokoena would have raised it. After all, the building was for Backhousia's benefit. Mr Mkhize had no direct interest in the building. It also makes sense that this was correctly recorded as being excluded from the joint venture, as it was not related to the Eskom project. The probabilities support Mr Mkhize's evidence in this regard. I accept that the parties did discuss the issue of the cost of the building and whether it should form part of the joint venture or not.

[73] Consequently, the court rejects Ms Mokoena's evidence that:

[73.1] she and Mr Mkhize did not discuss the financial aspects prior to 21 August 2011;

[73.2] she made no input on the financial aspects;

[73.3] Mr Mkhize acted on his own in recording them in the financial projections documents and in the JV guide; and

[73.4] this was the first time the 50/50 profit share was raised.

[74] Counsel for Ms Mokoena submitted in argument that despite these problematic aspects of her evidence, the plaintiffs still faced the difficulty of establishing that the parties had reached agreement that they would undertake the Eskom project on the basis of a joint venture between them, with the profits being shared 50/50. Counsel submitted that Mr Mkhize's version was equally improbable and that as plaintiffs bore the onus, absolution from the instance should be granted.

[75] Counsel for the defendant points out that Mr Mkhize failed to pursue his claim that the parties had reached a verbal agreement for a period of 21 months until he instituted proceedings. He also pointed to a "without prejudice" letter handed in as evidence at the trial which Mr Mkhize wrote to Ms Mokoena after the attorneys had exchanged letters in October 2011. This was after the relationship had begun to sour. Mr Mkhize referred to the dispute between them and stated that:

"However, if you are not willing to engage in any further negotiations in this regard I will accept that, you do not even have to share any profit or give me any bonus. Again, if you feel that we cannot work together any more and would rather terminate our working relationship, I will also accept that and tender my resignation from the project at no cost to you or Backhousia"

[76] Counsel for the defendant submitted that this letter made it plain that even in Mr Mkhize's eyes, the parties were still negotiating around the issue of a joint venture. He submitted that this is inconsistent with the plaintiffs' version that the parties had long reached agreement on this issue. As far as the letter is concerned, it is important to bear in mind that it was sent without prejudice at

a time when there was already a dispute between the parties over the whether Ms Mokoena had undertaken to instruct her attorney to proceed to draft a written agreement between the parties to formalize the joint venture. Thus, anything that may have been said by Mr Mkhize in that context is hardly indicative of his state of mind before the dispute arose, i.e. when he claims that the parties reached a verbal agreement. Furthermore, when I asked Mr Mkhize to explain in court what he had meant on this aspect of the letter he denied that what he had meant was that he was happy to walk away from the situation without any profit share. He explained what he had meant as follows:

"Yes, M'Lady, this was, firstly, it was not accepted. I had said, basically, if you want us to part ways, let us communicate and part ways, and than I said to her I am willing to still work on the project, I will hear from you, and I have never had anything from her concerning this letter, so the assumption is we continue on the same arrangement that we had before. ..."

and

"It is not that, M'Lady. If you are saying we are cutting the relationship at this stage, you give me the profit share from up until what we have worked on, you give me my salary, we share the profits, you continue. M'Lady, I was then not going to be involve in modifications and, and, and, going forward. ..."

[77] I accept Mr Mkhize's explanation in this regard as plausible. In putting the options to Ms Mokoena he was looking forward, not backward. He was suggesting ways in which to resolve the impasse that existed between them at that time by suggesting that they draw a cut-off line on profit sharing then and there: Ms Mokoena could continue with the Eskom project on her own, and any future profit would be for her, or Backhousia's account, alone. Mr

Mkhize's reference to "negotiation" should be seen in this context, rather than negotiations for a joint venture. His explanation, which I accept, is that he was not relinquishing, or going against his claim that the parties had verbally agreed to the joint venture. What he was saying was that he was willing to bring that arrangement to an end, with prospective effect. For these reasons, I do not find the without prejudice letter to be determinative of any of the issues. It must be read in the context in which it was sent, which was after, and not contemporaneous with, the agreement the plaintiffs allege was concluded between the parties.

- [78] Counsel for the defendant also submitted that Mr Mchunu's letter of 27 October 2011 totally refuted the allegation that there was agreement on a joint venture between Mr Mkhize and Ms Mokoena. However, if one looks carefully at this letter this is not the case. The language of the letter is not that clear. It is careful to place in dispute that there were any dealings between "your client", i.e. ISBC and Backhousia. The letter also denies that Ms Mokoena had been discussing and negotiating the Eskom project with Mr Mkhize, either since February 2010 or at any other stage. From Ms Mokoena's own evidence under cross-examination, we know that this denial was not true. The letter contains no direct or express denial of the allegation that Mr Mkhize and Ms Mokoena had verbally agreed to a joint venture on the Eskom project on a profit sharing basis. Had this been the case, Ms Mokoena surely would have instructed her attorney to record this in very clear terms. Furthermore, while the letter refers to "certain proposals" made by Mr Mkhize, and an absence of agreement "on some key issues", the letter

is vague about what these proposals and negotiations were about. They are not stated to be in connection with the joint venture agreement. We know that the parties were also considering working together in a different capacity in the future. That is common cause. The letter provides no clarity in this regard. It is also significant to bear in mind that on Ms Mokoena's own evidence, the discussions and proposals referred to Mr Mchunu were not about the joint venture, but rather the Newco.

[79] In the circumstances Mr Mchunu's letter does not provide an emphatic denial of the plaintiffs' case as set out in the letter from De Kooker attorneys, nor does it provide evidence, as counsel submitted, that the parties were still negotiating the joint venture agreement at that stage.

[80] One of the difficulties with a case like the present is that it revolves around an alleged verbal agreement in circumstances where, on the evidence of both Mr Mkhize and Ms Mokoena, the parties were used to adopting a less than formal approach in exploring business opportunities going into them together. There is nothing untoward in this. It reflects an entrepreneurial spirit towards business that has many positives. Unfortunately, it means that when the parties fall out, the court must make a determination by essentially weighing, as best it can, the probabilities of the two conflicting versions.

[81] In my view it is important to bear in mind the nature of the defendant's defence to the plaintiffs' claim. The defendant does not simply deny that a verbal agreement was entered into. Instead, it mounts a positive defence, viz. that there was an agreement between the parties, but it was not on the

terms averred by the plaintiffs. What the parties had agreed, says the defendant, is that Mr Mkhize would work as a project governance director for a flat salary of R75 000. 00 per month.

[82] What this means is that it has never been the defendant's defence that the parties were still negotiating a joint venture agreement, which agreement had not been concluded. This is not the defence as pleaded. Furthermore, if that was the defendant's case, then Ms Mokoena would simply have stated as much when she gave her evidence. Instead, as I have already indicated, she gave conflicting versions on key issues, she prevaricated in providing simple answers to key questions, and she gave improbable explanations for evidence going against her version. She was not an impressive witness. Her answers were often not directed at the question at hand. They were long-winded and not to the point. She gave the impression that she was trying to avoid straight answers, and she made no concessions, even when it would have been desirable for defendant's case for her to have done so. One must ask why? Was it to avoid the uncomfortable truth about a joint venture arrangement between the parties?

[83] Coupled with these worrying aspects of Ms Mokoena's evidence is the fact that there is no evidence, save for her oral testimony, to support the defendant's case that the parties had agreed that Mr Mkhize would be contracted ("hired", in Ms Mokoena's words) on a salaried basis. It is common cause that Mr Mokoena was not an employee. It is not disputed that he conveyed this in writing from the early days of the project. Furthermore, the defendant's attorney recorded that Mr Mkhize was not an

employee in a letter to his attorney. It is common cause that Mr Mkhize did not sign any contract of employment, consultancy or anything of that ilk in his personal capacity. The defendant discovered a draft letter of appointment for Mr Mkhize. It was not on a letterhead, dated, or signed, and had obvious inconsistencies. Mr Mkhize testified that he had seen it for the first time at discovery. It does not constitute cogent evidence of any agreement that between Mr Mkhize and Backhousia in this regard.

[84] Ms Mokoena was not able properly to explain on what basis it had been agreed that Mr Mkhize would work for Backhousia. She agreed that he was not an employee. On her testimony, at the first meeting with Bra John, she understood that the agreement was that the various individuals would come into the project as consultants. However, the draft contract discussed above does not define Mr Mkhize's position as being that of a consultant. Furthermore, in her letter of May 2013 to Mr Mkhize, Ms Mokoena records that his position henceforth will change to that of consultant. This indicates he was not a consultant before.

[85] It is also implausible that someone engaged on a purely salaried basis by a corporate entity would be willing to volunteer to make a substantial interest-free loan to the company up-front, with imprecise re-payment terms even before he or she was paid a salary. Effectively, this is what the defendant contends Mr Mkhize was happy to do. What is more probable is that someone with a substantial stake in the project will be willing to contribute start up capital, without any form of security, as he knows that in the long run

he will share in the profits. In this regard, Mr Mkhize's version is more probable.

[86] In this case the parties rely on competing versions as to what the agreement was between them. The defendant says that Mr Mkhize was engaged on a salaried basis on the project. The plaintiffs say that Mr Mkhize worked on the project on the basis of a joint venture agreement between the defendant and ISBC, alternatively, Mr Mkhize. It must be one version or the other. I have already indicated that material aspects of Ms Mokoena's evidence in this regard fall to be rejected. On the evidence I find that the defendant has not succeeded in proving its positive defence, i.e. that Mr Mkhize was engaged solely as a salaried project governance director.

[87] This means that the probabilities must favour the plaintiffs' version unless that version is inherently improbable or does not go far enough to meet the plaintiffs' onus. I am satisfied that the plaintiffs' case does not fall at this hurdle.

[88] As I have already indicated, Mr Mkhize testified that the whole thrust of ISBC's strategy was to focus on joint venture opportunities with entities that had a more established history in this arena. This is not in dispute. It is also not in dispute that ISBC and BTG entered into a joint venture on the Eskom procurement tender. This is not irrelevant to the present dispute. It provides confirmation of Mr Mkhize's evidence that when the broader group met with Bra John at BTG at the beginning of 2010, when the prospect of a tender

was first mooted, this was the model upon which everyone understood their involvement would be based.

[89] After the original tender was split and re-advertised, Mr Mkhize and Ms Mokoena were the main role players involved from the first group who had worked on the initial tender, save for one other person, Sandile, who was referred to in evidence now and again. At the same time, ISBC and BTG entered into a joint venture on the procurement tender. Ms Mokoena confirmed under cross-examination that she was involved in the negotiations with Eskom on that tender until she withdrew. While she claimed that she had no idea of the basis on which BTG and Mr Mkhize had arranged their relationship on the procurement tender, she confirmed that Eskom would have been interested in those arrangements during the course of the negotiations. I find that it is probable that Ms Mokoena was aware of the basis on which Mr Mkhize and BTG conducted their business in relation to the procurement tender, despite her protestations to the contrary.

[90] There was nothing untoward or unexpected about Mr Mkhize working through ISBC in this respect. In fact, Bra John worked through his corporate entity, BTG, and Ms Mokoena did the same with Backhousia. The payment of R100 000. 00 to Backhousia for start-up capital was paid from ISBC's bank account. This is common cause. Furthermore, the financial projections and related documents referred specifically to ISBC, indicating that this was the entity with a stake in the project. Ms Mokoena was part of the team that attended negotiation meetings with Eskom involving the BTG project, with whom ISBC formed a joint venture. In all of these circumstances, it is

unlikely that Ms Mokoena in fact was unaware of ISBC, its link with Mr Mkhize and its role in the Eskom tender, as testified by her.

[91] When the Eskom tender was awarded to Backhousia, Mr Mkhize threw himself fully into the project from the word go. This is not disputed. He was introduced to the Backhousia staff; he provided start-up capital, through ISBC, to Backhousia so that they could fund the initiation of the project; and he was prepared to uproot himself from Johannesburg to Emalahleni for the project. This is consistent with someone who is heavily invested in the project for something more than a monthly salary. I accept Mr Mkhize's evidence that the R100 000.00 he put into the company via ISBC was part of the agreement with Ms Mokoena that the business partners should each make an investment in the project to kick-start it. I reject Ms Mokoena's evidence to the effect that this was simply a personal loan from Mr Mkhize or his wife.

[92] I accept Mr Mkhize's evidence that once the contract had been awarded the parties commenced settling the details of their business arrangement. This arrangement was based on the initial discussion among the broader group of potential participants going back to the first meeting with Bra John. I accept that these discussions took place over June and July 2011.

[93] The sharing of profits was a key element of a joint venture between them. I have already indicated that Ms Mokoena's evidence to the effect that this was not discussed between the parties until 21 August 2011, when Mr Mkhize unilaterally included the sharing of profits in the financial projections,

falls to be rejected. Mr Mkhize's evidence must be accepted in this regard. His evidence was that all of the details that found their way into the financial projections and the JV document were discussed and jointly decided upon between him and Ms Mokoena over June and July 2011. If one looks at the details in the financial projections certain key issues are clearly recorded: sharing of profits 50/50; salaries of the partners; the fact that these salaries would be set-off against the profits on a periodic basis; the ring-fencing of a project bank account (to keep the project finances separate from Backhousia's income from its other activities); the recordal of an amount of R51 000. 00 having been advanced already to ISBC (as Mr Mkhize's first salary) etc. This is all in line with a business arrangement in terms of which the parties had agreed to treat the project on the basis of a joint venture between them. The points identified in the JV discussion guide are also consistent with the financial arrangements recorded in the financial projections.

- [94] The next step was to have these verbal arrangements reduced to a written agreement. The probabilities are, as Mr Mkhize testified, that the JV guide was intended to record the principles upon which the parties had already reached agreement, which principles would form the basis of the formal written agreement. This was consistent with the manner in which BTG and ISBC had conducted their affairs in respect of the Eskom procurement tender, i.e. the verbal arrangement was subsequently set down in writing after the award of the tender. Mr Mkhize's version is that he shared with Ms Mokoena his frustration with Bra John in getting their agreement formalized in writing,

and that she assured him that the same would not happen between the two of them. I find this version to be more probable than Ms Mokoena's version that she and Mr Mkhize did not discuss the prospect of a joint venture at all until Mr Mkhize produced the idea out of the blue on 21 August 2011.

[95] Furthermore, that Backhousia was the formal contractor under the Eskom tender was also consistent with ISBC's business strategy. Backhousia had the necessary business history and credentials to fulfill the tender requirements. ISBC, through Mr Mkhize had the requisite skills to add to the partnership.

[96] Mr Mkhize's covering email on 24 August 2011 is consistent with his version that the parties were, by that time, in agreement in principle on the key elements of their partnership, and that the purpose of the JV guide was to pre-empt the next step, viz. a written contract. His email clearly records that he fully expected that Mr Mchunu would be able to provide the written contract for signature in the next week. There is no response from Ms Mokoena to the contrary. It is probable that this was the reason for the meeting with Mr Mchunu, viz. to give him instructions on the written contract and, as Mr Mkhize testified, to ensure that there were no legal impediments to what the parties had agreed verbally in view of the 100% Black women requirement imposed by Eskom. The exchange of emails with the projected financials and JV guide fits in with this.

[97] For all of these reasons, I find the plaintiff has succeeded in establishing on the probabilities that there was a verbal agreement between Mr Mkhize and

Ms Mokoana on the key elements necessary to establish a partnership, on the basis of a joint venture, between them in respect of the Eskom project. In terms of that agreement, the profits from the Eskom project were to be shared between the parties equally on the terms identified in the particulars of claim. This agreement was reached between June and July 2011. Mr Mkhize acted on behalf of ISBC in concluding this agreement with Ms Mokoena, who acted on behalf of Backhousia.

[98] In terms of the agreement, Mr Mkhize was entitled to a salary of R75 000. 00 per month for the duration of the Eskom project. It is not disputed that Ms Mokoena terminated payment in April 2013, and that the project ended at the end of December 2013. Accordingly, Mr Mkhize is entitled to payment of the salary due during this period, such amount to be set off against the amounts ultimately payable to the ISBC in terms of the debatement of account between the parties.

[99] It is common cause that the defendant has never accounted to either of the plaintiffs for the profit earned from the Eskom project. In terms of the trite principles of partnership, ISBC is entitled to a debatement of account and to payment of all amounts due it under the partnership, together with such ancillary relief as may be appropriate.


ORDER

[100] I make the following order:

1 The plaintiffs' pleadings are amended as follows:-

- 1.1 the citation of the first plaintiff is amended to “*Entsika Consulting Services (Pty) Ltd, previously known as Inclined Strategic Business Consulting (Pty) Ltd*”;
- 1.2 the defendant’s citation is amended to “*Backhousia Consulting Services CC*”;
- 1.3 paragraph 3.1 of the plaintiffs’ particulars of claim is deleted and replaced with the following:
- “3.1 a closed corporation duly registered and incorporated in accordance with the Close Corporations Act of the Republic of South Africa”;
- 1.4 the date of August 2013 in paragraph 8.3 of the plaintiffs’ particulars of claim is replaced with the date “*December 2013*”, and the sum of R300 000,00 is replaced with the sum of “*R600 000,00*”.
- 2 The first plaintiff is entitled to a statement and debatement of account, and to payment of 50% of the profit after such statement and debatement of account in respect of the contract which the defendant had with Eskom known as NEC3 Professional Services Contract.
- 3 The second plaintiff is entitled to payment of his salary for the months of May 2013 to December 2013 in the sum of R600 000,00.

- 4 The defendant is ordered to render to the plaintiffs an account of all partnership transactions for the period 24 June 2011 to date, duly supported by proper vouchers.
- 5 A person to be agreed upon by the parties in writing within 14(fourteen) days of this order, failing such an agreement, a practicing chartered accountant to be nominated by the Chairman for the time being of the South African Institute of Chartered Accountants (SAICA) to attend to the statement and debatement of account and to determine the 50% profit payable to the first plaintiff by the defendant after statement and debatement of account.
- 6 The defendant is ordered to pay the cost of suit.



R M KEIGHTLEY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard: 1 – 4 August 2016; 8 November 2016

Date of Judgment: 13 / 11 / 2017

Counsel for the Plaintiffs: A J R Booysen

Instructed by: De Kooker Attorneys

Counsel for Defendant: B L Manetsa

Instructed by: Mchunu Attorneys