CHALLENGE WISDOM PAWANDWA MUKAMBA
T/a MUKAMBA ARCHITECTURAL PRACTICE
versus
CHRIST EMBASSY ZIMBABWE

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 20, 21, 22 January, 2, 3, 4, 5 March, 28, April, 15, 29, May, 31 August, 7 September, 2, 3, 4,5, November 2009, 18, 19, 21 October, 11 November 2010, 2 January, 12 May, and 16 November 2011

Civil Trial

Mr *M Foroma* for the Plaintiff
Mr *G. Machingambi* for the Defendant

UCHENA J: The plaintiff who runs an Architectural Practice sued the defendant, a Church for fees he claimed he earned when he provided architectural services in designing the defendants, church building.

The plaintiff was initially contracted by one Huni a member of the defendant's church in his personal capacity to design drawings of the defendant's proposed church building for purposes of persuading the City of Harare to sell a church stand to the defendant. He performed that task to Huni's expectation, and was paid the agreed fee. The defendant as a result got a church stand from City of Harare. The defendant then approached the, plaintiff in May 2007, through Mr Anthony Parehwa who was the chairman of its Building Committee. The plaintiff claims they agreed on a contract through which he would render to the defendant architectural services, and eventually rendered such services to final design stage, which entitles him to 7% of 25% of the cost of the defendants' building's construction costs. The defendant says it did not enter into a contract as they were still waiting for the plaintiff to furnish them with the fees he was going to charge for his services.

The plaintiff claimed:

1. $170 341 795 000,00 being capital

2. $170 341 795 000,00 being interest at ZABG"s overdraft lending rates,
3. interest on the sum of $340 683 590 000,00 at ZAB's overdraft lending rate from time to time in force with effect from the date of judgment to date of payment.
4. Costs of suit.

At the beginning of the trial the plaintiff applied to amend its prayer by the deletion of the above and its substitution by a claim of US$210 000,00. The application for an amendment was opposed, but the parties agreed that the trial should proceed without a decision being pronounced on the amendment as the parties wanted time to research and be able to make submissions on case law on whether or not a claim for services rendered on the basis of a contract in Zimbabwe dollars can be amended into one in United States dollars.

Mr *Foroma* for the plaintiff then called Mr Mukamba who testified for the plaintiff to the following effect. He was initially contracted by Mr Huni to prepare drawings for the defendant's church for purposes of persuading Harare City Council to allocate the defendant a stand. He and Mr Huni performed their respective obligations leading to the defendant being allocated a stand. He was later approached by Mr Parehwa together with other Architects and asked to bid for a contract to provide architectural services for the defendant's proposed church building in Harare. He and the other Architects advised the defendant's Building Committee that their regulations do not allow them to bid for architectural work. The defendant's Building Committee chairman Mr Parehwa phoned him on 16 May 2007 to advise him that they had chosen him to be the Architect for the defendant's proposed church building. The following day he attended a meeting with the defendant's Building Committee at the defendant's offices, were the defendant's Building Committee advised him of the defendant's intention to engage him and the need for him to state his proposed fee, to be included in the contract agreement the defendant was to prepare. He advised them that architect's are not allowed to charge a specified fee but a percentage of the construction cost. The building committee then agreed with him on 7% of the construction cost. They congratulated him, after which Mr Parehwa took him to Pastor Ruth Musarurwa, and introduced him as the

architect for the church's building project. Pastor Musarurwa congratulated him and impressed on him the urgency of the project, after which he left.

The building Committee instructed him that they wanted a church building for 10000 people. He advised the Committee that, such a project would need, structural engineers, civil engineers, quantity surveyors, electrical engineers and mechanical engineers, for the work to be neatly and diligently coordinated. The committee advised him that they wanted the church up by the end of the year. He advised them that, that was not possible, but they insisted saying that God would provide. He believed that was their way of expressing the urgency but still insisted such a project could not, by world standards, be completed in less than a year.

He said, the second paragraph, of the defendant's letter of intent, was over taken, by events, as he at the meeting, explained, to the defendant's, building committee, that architects, do not, charge a specified fee, but a percentage, of the cost of the building. He therefore explained to them the statutory requirements for engagement which they accepted. He told them his fees would be 7 % of the cost of the building. He estimated the building costs to be US$10 000 000. The agreement was therefore the standard architect's agreement on the blue forms. The chairman then instructed him to proceed to the next stage, the preparation of the design brief. He summed up by saying a verbal agreement was entered into though it was not followed by a written agreement signed by both parties. He forwarded the agreement forms to the defendant who did not send back to him a signed agreement.

He said he was requested by the defendant to arrange for a project definition workshop. He said that could not have been possible if they had not yet entered into a contract. He said the project, had began. He thus on the day following the meeting he had with the Building Committee, wrote to the Committee informing it of his acceptance of the verbal agreement. He then prepared a design brief which was signed by Mr Parehwa, Mr Shumba of the Building Committee and by Pastor Ruth Musarurwa. He said the design brief is like a reference document with details like how many toilets, offices etc are required. He held 10-15 meetings with the defendant's building committee before he produced the final design brief, which was signed by the church on 3 July 2007. He then

proceeded to the preliminary design stage, where he prepared design sketches, feasibility studies and operations like calculating the number of people in the congregation and technical details. He during this stage recommended a church building which could accommodate 6000 people. He further recommended increasing the number of floors upwards or downwards if the church insisted on a sitting capacity of 10 000 people. The church settled for a 7500 capacity church. He then revisited the designs by adding one upper gallery and fine tuned the rest of the design. He told the court that the preliminary design stage and final design stage overlap to a level when other consultants come on board. He then required the input of structural engineers, civil engineers, electrical engineers, mechanical engineers and quantity surveyors. These had to be engaged directly by the client, but, the architect makes recommendations if the client does not have specific people for such appointments. He said in making these recommendations he was discharging part of his mandate. He recommended Mahachi and Gwaze for quantity surveyors, and Overup and Partners for electrical and mechanical engineers. He however did not get their input as they were not formally appointed by the defendant. Defendant requested that they give a fee proposal based on the design he had produced, so they could calculate the fees charged by the consultants. This was done and forwarded to the defendant together with their conditions of engagement. Defendant did not advise him of its decision on the presentations he had made. He on 25 October 2008 presented his fee claim invoice based on the quantity surveyor's estimates. His fee claim was based on 25% of the quantity surveyor's estimates. He said the quantity surveyor had estimated a cost of US$12 million equivalent to Z$8.4 trillion.

When asked to tell the court the work he did, he said he researched on similar projects, in-coperating the client's requirements, considering the site conditions, designing a structure that conforms, with local authority by laws and a structure that is ecstatically pleasing, functional and conforms, with safety regulations for a place of public assembly.

He produced exhibit 2 (a) to (g) as proof that he did that work. He said it took him four month of dedicated work to produce these diagrams. He said exhibit 2 (a) to (g) represents final designs. He to arrive at this stage had worked on this project with the

defendant's approval from end of May to November 2007. This he said completed the initial stage of his mandate for which he was entitled to claim 7% of 25% of the construction costs of the project. He said according to the quantity surveyor the construction was to cost US$12 000 000-00, or an equivalent amount of Z$8.4 trillion. He billed the defendant in the sum of Z$$170 341 795 000,00 which is 7% of 25% of Z8.4 trillion. He said the referral to US dollars was merely for giving the cost in a stable currency as architects were then not allowed to charge in foreign currency. They were then only allowed to transact in Zimbabwean dollars.

He forwarded his claim to the defendant's building committee and waited for payment. He was given several excuses ie that the pastor was out of the country or was busy. He despite being patient hoping that he would eventually be paid, did not get paid leading to his writing a letter of complaint to the chairman of the building committee copied, to pastor Musarurwa. Mr Parehwa the chairman of the building committee, took offence and threatened that plaintiff would not be paid unless he withdrew the letter of complaint copied to the pastor. The plaintiff believing that he was entitled to raise the complaint refused to withdraw the letter, leading to his not being paid and to this litigation.

He denied the defendant's allegation that he was to render free services for the design brief and sketch plans, pointing that Architects are prohibited by statute from rendering free services unless, one first seeks the approval of the Architect's Council.

He denied receiving the letter on page 9 of exhibit 4, the defendant's bundle of documents, in which the defendant insisted on being given his fees in definite figures.

The plaintiff was, for several days, skillfully and extensively cross examined by Mr *Machingambi* for the defendant. He during cross examination told the court that, he prepared for Mr Huni plans with layouts and perspective views though that was not necessary for the purposes for which the plans were then required. He said Mr Huni required them so that Council would see what the church building would look like. He conceded that paragraph two of the letter of intent he received from the defendant's building committee on the day he says they verbally agreed to engage him, requested him to submit his proposed fee and terms of payment. He agreed that in the last paragraph he

was requested to arrange for a project definition workshop for an exhaustive scope of the project. He said the fact that they had entered into a contract is proved by his sending to the defendant a letter of acceptance dated 31 May 2007. He said temporal structures in preparation for the project were built under his supervision and were part of his mandate. He denied receiving the defendant's letter dated 5 June 2007 in which the defendant indicated it required a definite figure for the contract to come into existence as the project was a public one, for which the terms of engagement had to be clear for a contract to be accepted and signed. He conceded that the contract was not concluded in terms of the memorandum of agreement. He does not know whether or not the defendant had signed the memorandum of agreement. He conceded that the memorandum of agreement is part of the conditions of engagement and that it was important for the conclusion of the contract but that they sometimes work on trust and verbal assurances in anticipation that the contract will be signed. He conceded he did not have a statutory legal support to bill in US dollars. He said he did not give the defendant budgetary figures because he was not asked to do so. He admitted that section 13 (2) of the Architect's regulations provides that an architect should advise the client of fees before he starts working for the client. He agreed that if an architect does work without the client's acceptance of the fees chargeable there will be no contract, but maintained that he had informed the defendant that his fees was 7% of the building's cost of construction and the defendant had verbally agreed to that. He admitted that no Electrical, Structural, Mechanical Engineers or Quantity Surveyors made any input as they were never appointed He thus conceded that the cost estimates do not include the work of other experts. He admitted that he asked for the Quantity Surveyors estimates and briefed him through his drawings. He admitted that the input of other experts affects the cost. He admitted using the gross floor area of 10 000m2 to estimate costs but conceded that the defendant had not agreed to that. He also conceded that Mahachi Gwaze Quantity Surveyors in their letter on page 78 of exhibit 1 the plaintiff's bundle of documents pointed out that the method used to arrive at the estimated costs was not accurate. He agreed that the Quantity Surveyor gave the estimated cost of US$12 Million as the equivalent of 8.4 trillion Zimbabwe dollars, but said he does not know how he calculated it. He however maintained that his calculation

of the fees he claimed was correct and accurate. He did not dispute that the official exchange rate was US$1.00 to Z$30 000-00 He conceded that at the time he billed the defendant architects were not licensed to charge in US dollars, but they are now licensed to do so. He concedes that the Quantity Surveyor said the cost appears unrealistic. He said the Quantity Surveyor needed more information for him to be able to give an accurate estimate. He also agreed that the Quantity Surveyor said the building could be as cheap as the defendant wanted it to be. When asked why he did not follow the Quantity Surveyor's request for more information for the estimates to be accurate, said in his opinion the estimate was adequate to be used as it was. He maintained that section 14 (3) (b) of Architects Regulations allows them to use estimates. He conceded that the diagrams produced as exhibit 2 (a) to (g) do not have dimensions. He conceded that the contract in issue was entered into after 30 May 2007, but his diagrams refer to April 2006. He disputed the defendant's allegation that the drawings he produced in court were those he prepared for Mr Huni in 2006. He conceded that the cost of the building will never be known as the project is not going to be completed, but said section 14 (3) (b) 1-3 of the Architects conditions of engagement provides for such a situation.

Under reexamination the plaintiff said the meeting where the plaintiff and other architects were asked to bid for the work took place on 16 May 2007. He also said on 3 July 2007 the defendants signed the program of works signifying the existence of the contract. He denied receiving a letter from defendant dated 5 June 2007. He does not know whether or not the memorandum of agreement was signed by the defendant, but it was not returned to him. He said he worked on the design brief with the defendant's Mr Parehwa and sister Tariro over several weeks. He said the design brief is the same as project definition workshop. He said an architect does not get involved in such work before engagement as it is part of the overall work as indicated in the 3rd schedule of the memorandum of agreement. He said the estimated cost by a Quantity Surveyor must consider, Civil works structural works, and any other works which form an integral part of the building or project. As an architect he can do his own estimate of costs. He infact did his own estimates and arrived at an estimate of approximately US$ 14 million. He did so before the dispute arose. He said there is no direct relationship between a US$ estimate

and a Z$ estimate as each is based on quotations from local and foreign suppliers of the building materials. He said Mr Parehwa initially had no problem with the bill and had promised it would be paid once signed by the Pastor. He later said Mr Parehwa on coming back from Nigeria where he had gone with the Pastor to source funds, said the cost was too much for one person. He was however not stopped from continuing with the work, but stopped on his own due to none payment. Plaintiff eventual wrote a letter of complaint copied to the Pastor over none payments. The letter offended Parehwa who felt it victimized him. He demanded that it be withdrawn so that it would not expose him on the delays he had caused on the payment of the bill and be replaced by a toned down one, if the plaintiff wanted to be paid. He refused to retract the letter as it represented the truth of what had happened. He said while a written agreement is preferable in architecture a verbal agreement is binding. He said when he recommended other professionals the defendant asked that they indicate their proposed fees before the agreements could be finalised.

Under re-cross examination on Exhibit 3 the plaintiff's delivery book which was produced during re-examination on condition the defendant's counsel would be allowed to cross examine the plaintiff on it the plaintiff said the following. That the document labeled proposal which was on work in progress, dated 28/6/07 was not signed for. He however insisted that the documents were delivered as the delivery book could have been left at the office. He admitted that the letter on page 52 of the plaintiff's bundle of documents was not signed for in exhibit 3. The same applies to the letter of 10/7/09 referred to on page 71. The plaintiff then said not all letters were being entered in the delivery book, as some were being delivered without being recorded in the delivery book.

The plaintiff's evidence established that he did not fully comply with the architect's conditions of engagement, as he should not have started work before the contract document was signed, but said at times one can work on trust or verbal assurances. This tends to show that the plaintiff appreciates that he did not act diligently in this case. He admitted using a gross floor area of 10 000 squire meters for costing the construction of the building, without the defendant's consent .This seriously compromises the total building cost, which had already been put in doubt by the quantity

surveyors comments on the accuracy of the estimate he had given after working with inadequate information. The plaintiff also agreed that costs can never be accurate now that the work is not going to be completed. He personally estimated the construction of the church building at US$ 10 million, but later changed to US$ 14 Million. He admitted that the factors complained of by the quantity surveyor had not been corrected. The above concessions makes it difficult to find that the fees claimed by the plaintiff, are justified This, is further complicated, by his admitting that the drawings and diagrams exhibit 2 (a) to (g), had errors. The errors are not consistent with his claim that he had put in four to five months of serious work into their preparation. In the result it can not be said that the plaintiff proved that the defendant owes him the amount claimed in respect of services rendered.

The defendant called Antony Taengwa Parehwa as its only defence wittiness. Parehwa told the court that he is the chairman of the defendant's building committee. He has been a civil Engineer since 1990. He holds several certificates and diplomas in that field. He is currently studying for a Masters degree in Business Administration with the University of South Queensland Australia. He also said he is studying for the same Masters degree with Zimbabwe Open University. He said his committee's mandate is to recommend to the Pastor and the church on the construction of the proposed church building. He admits his committee met the plaintiff in May 2007, to obtain from him the cost of his services so that they could recommend his appointment to the pastor.

They asked the defendant to give them his fees and to do a project definition workshop. He admits receiving the plaintiff's notional brief and final brief, but says these were done so that the plaintiff could give them a quotation for his services. He said the final brief originated from his committee as the church's wish list of what was to be in the church building. The plaintiff then prepared a final brief from it and he and the pastor signed it to confirm their wish list, as plaintiff had requested for their signatures. He conceded that the plaintiff prepared the programme of works without any input from his committee, but said the plaintiff needed it so that he could budget his time for purposes of giving them a quotation of his fees. He said they wrote the letter of intent on page 7 of exhibit 4 so that they could get the proposed fee and terms of payment and to intimate

and discuss everything about the project. He acknowledged receipt of the plaintiff's letter of acceptance but said it did not conclude a contract between the parties as they had in their letter of intent informed him that they wanted him to give them the actual fee he was to charge for the church building. He said his committee's mandate was limited to negotiating the fee after which it would recommend the appointment of the plaintiff to the Pastor who would then enter into the contract with the plaintiff. He said he responded to the plaintiff's letter of acceptance by his letter dated 5 June 2007 in which he reiterated that the contract could only come into existence if he gave them his actual fees for the services he was going to render to the defendant. He said the plaintiff did not hold a project definition workshop with the building committee at which they would have discussed with him the type of church building they wanted which had a bearing on the cost of the project and his fees.

On the drawings presented in evidence by the plaintiff he said they had no dimension or key to explain them. He also said there having been no definition workshop it was not possible for the plaintiff to proceed, into drawings without having discussed the type of church the defendant, wanted, and the attendant details. He denied the plaintiff's allegation that the defendant had chosen other experts for the project. He said the defendant did not receive the letters on the appointment of other contractors. He said the estimates of the Quantity Surveyor where not reliable and the defendant had not appointed him. He said the estimate is based on 10 000 square meters, which the defendant never gave to the plaintiff, as the defendant had only told the plaintiff that they wanted a church with a sitting capacity of 10 000 people. They were to be quoted in Zimbabwe dollars as they had not discussed the use of foreign currency. He denied telling the plaintiff to go ahead with performing the duties of Architect as they had not yet concluded the contract. He was shocked when he received the plaintiff's invoice. He denied discussing quantities to be used in the building with the quantity surveyor and the plaintiff. He denied, discussing, the drawings, with the plaintiff nor receiving them from him. He does not know the signature of the recipient of documents recorded in exhibit 3. He said the drawings could not have been used by anyone as they do not have dimensions, and do not refer to any site. He also said exhibit 2 (a) to 2 (c)'s scale of 1 is

to 1 is grossly erroneous. He said the scale of 1 is to 1 means the drawing on paper should be of the same size as the actual building which can not be possible. He maintained that there are no dimensions to exhibit 2 (a) to 2 (g). He said the drawings, are dated April 2006, long before they ever discussed doing any business with the plaintiff. He said in view of the fact that there is no site plan or stand number on the drawings they could be the ones the plaintiff drew for David Huni in 2006 before the defendant had acquired a stand. He denied ever agreeing with the plaintiff on the interest rate to be used or legal costs to be charged in the case of a dispute between the parties. He maintained that a contract had not yet been entered into.

He under cross examination admitted that the plaintiff's letters dated, 30/ 5/07, 1/6/07, 8/6/07, 26/6/07, 19/7/07, 16/8/07, 19/8/07, 18/9/07 and 25/10.07, were addressed to him , but denied receiving some of them. He said those which he received were handed to him by plaintiff as they had not discussed the means of communication which should have been discussed at the definition workshop. He acknowledged receipt of the letters of 28/10/07, 3/7/08, 25/9/07, 31/10/07, 11/1/08 and 11/2/08, directly from the plaintiff and not through exhibit 3. He admitted knowledge of Tariro Mutepare whose signature seems to be on signed exhibit 3, whom he said is a church member. He however said on the last page of exh 3 the receptionist said she could not sign on his behalf. He said he did not receive the letter of 19/7/07 though its in defendant's bundle of documents. He said it was given to his lawyers as part of further particulars. He admitted receiving the letter on page 68 of exhibit 1, and having a meeting with plaintiff, and says that's when he brought to him a list of the building areas in terms of their functions, after which the plaintiff told him he would with that information be able to give them the quotation they required. He denied that there was a clerk of works called Sister Tariro in spite of her having been mentioned in various documents by the plaintiff's bundle of documents. He said the program of works was not actual but a proposal as proved by its title and the accompanying letter. He denied telling plaintiff that the church building should be up by November 2007, and that when told by plaintiff that was not possible his committee said God would provide. He said he had previously been given quotations by Architects who gave their fees in actual figures. He gave an example of Architect Vernon

Mwamuka, in respect of the building of Time Bank's Head Quarters. He admitted that when he wrote the letter of intent Mr Mukamba had not yet agreed to be their project Architect. He agreed that an agreement can be oral and that they were in the process of drafting the agreement. He also agreed that for one to start drafting an agreement the parties will already have agreed. He denied introducing the plaintiff to the pastor, but ended up saying he does not recall everything he did.. He admitted that plaintiff had told him that fees would be as per the Council of Architects in Zimbabwe, but said they had not accepted that position, and had told plaintiff they wanted his fees in actual figures not percentages. He said the plaintiff had promised to try and give them his quotation in the form they wanted it. He later admitted that the Architect's Regulations require that fees be quoted in percentages and that the plaintiff's letter of the day after the meeting was referring to fees in percentages. He pointed out the irregularities on the alleged appointment of the Quantity Surveyor by referring to the Quantity Surveyor's letter of 18 October 2007, Plaintiff's letter of 25/10/07 seeking the appointment of the Quantity Surveyor, and plaintiff's letter of 30 October 2007 claiming fees calculated on the basis of the Quantity Surveyor's letter of 18 October 2007 written before his appointment was sought. Asked why he did not respond to the letters dated 18 and 25 October he said they did not respond because over and above these letters they had also been on 30 October billed by plaintiff, an Architect they had not appointed. He received the letter dated 19 September on 25 October 2007. Commenting on page 14 of exhibit 4 he agreed to having attended a meeting with plaintiff and sister Tariro a works clerk, but said the plaintiff was with the lady, and the meeting was at the plaintiff's office. On the definition workshop, he said the Architect's Regulations in section 10 (3) require an Architect to hold such a workshop with client to obtain his requirements and scope of work to be done. He said such a workshop would have informed the plaintiff of the following, the site at which the church was to be built, the church's practices, the type of church they wanted hall or conference centre type, materials to be used, the type of finishes required, the churches budget, procurement methods, human resources, whether the structure would be prefabricated or made locally, which would have enabled the plaintiff to calculate the fees he was to charge. When it was put to him that he obtained the information he

required from the schedule of accommodation they gave him he said that could not be a substitute for a definition workshop. When it was put to him that he requested the plaintiff to submit his fee claim he denied ever making such a request to the plaintiff.

Under re-examination Mr Parehwa identified page 22 of exhibit 4 as the 2000 Edition of the recommended Architect Memorandum of Agreement he received from the plaintiff. He said it was not signed by both parties. He said exhibit 2 (a) to 2(g) are sketch drawings which depict pictures of an auditorium. Commenting on page 54 of exhibit one he said he does not know what plaintiff meant when he wrote "site not up" and "building to be up by November", as there was no agreement with the plaintiff for the church building to be up by November. He pointed out that according to exh 4 p 14 the building project was to be completed by 22/11/08. Though no such agreement had been entered into between the plaintiff who wrote the letter, and the defendant. He said he did not attend the meeting mentioned on page 53 of exhibit I, and does not know the individuals there mentioned. Commenting on a letter from Delta quarries he said Mr Huni was acting subject to the direction of the church but on his own.

The evidence of Mr Parehwa is corroborated by the plaintiff's on the following aspects;

1. That there was no agreement between the parties on the building being of 10 000 squire meters.
2. That the quantity surveyor whose estimates the plaintiff used had not been appointed by the defendant
3. That the diagrams exhibit 2 (a) to (c) had a scale of 1 is to 1.
4. That the drawings and diagrams exhibit 2 (a) to (g) did not relate to the defendant's church site and were dated April 2006, a period before the defendant discussed the possibility of contracting the plaintiff with him.
5. That the estimates prepared by the quantity surveyor had shortcomings.

The above supports the defendant's challenge to the amount claimed by the defendant. The defendant's wittiness was not a perfect wittiness. He at times became unnecessarily argumentative, and denied things which he should not have admitted. In spite of these deficiencies his testimony on whether or not the parties had concluded a

contract is more probable than the plaintiff's if considered in light of the communication exchanged by the parties.

The issues which were referred to trial are;

1. Whether Defendant entered into an agreement with Plaintiff in terms of which Defendant engaged Plaintiff as the Architect for the planning design and erection of defendant's church building.
2. What where the terms of the agreement?
3. Whether Defendant owes Plaintiff the amount claimed in respect of services rendered?
4. Whether Plaintiff is entitled to demand interest at the ZABG overdraft lending rate on the amount outstanding?

The issues will be considered on the evidence led as supported by documental evidence.

The Agreement

The plaintiff's evidence is that he entered into a verbal agreement with the defendant's building committee on 30 May 2007. He said he was at that meeting given a prewritten letter of intent to appoint him as the plaintiff's project's Architect. He said that letter had been overtaken by the subsequent verbal agreement when it was handed over to him. He thus on 1 June 2007 wrote to the defendant accepting his appointment by it as its project's Architect.

The defendant disputes the plaintiff's allegation that they entered into a verbal agreement, but states that it on 30 May 2007 wrote a conditional letter of intent to the plaintiff informing him that it intended to appoint him as its project's Architect, but he had to before such appointment give them his fees in definite figures. The defendant admits receiving the plaintiff's letter of acceptance but responded to it by its letter of 5 June 2007.

The intention of the parties to contract is not in doubt, but the issue is whether or not they entered into a contract without the plaintiff having to comply with the defendant's letter of intent. The letter of intent in exhibit 1 page 48 reads as follows;

> "Following our recent discussion we are pleased to confirm our intention to engage you as Architect for the design of our church building on our site being Stand Number 18094, STL Harare.
>
> We request you to submit to us your proposed fee and terms of payment so that these may be considered for incorporation into the main agreement which is currently being drafted.
>
> More details on your engagement will be made available in the contract of engagement. In the mean while please arrange for a project definition workshop for an exhaustive exchange on the scope of the project."

The letter is headed "Re: Letter of Intent". The heading and paragraph 1 of the letter tends to show that what was being communicated to the plaintiff was an intention to engage him after the conditions mentioned in paragraph two had been met. The fact that the letter conveyed an intention to engage, and not an engagement, seems to have been appreciated by the plaintiff who had to rely on a verbal agreement he says was entered after the letter had been written and when he had a meeting with the building committee on 30 May 2007. This leaves the plaintiff with the onus to prove that the letter was overtaken by subsequent events. That places the plaintiff in a situation where he has to disprove written testimony of what the defendant asked him to do in writing, with what he alleges the defendant subsequently verbally agreed to orally. The scale of justice starts heavily tilted towards what is written, and admitted by the plaintiff. It is generally difficult to challenge a written document whose contains are beyond dispute with an alleged subsequent verbal alteration which is strenuously disputed by the other party. I will thus have to closely examine the other documental exhibits the plaintiff alleges, proves the alteration of the written position.

The plaintiff says because of his discussion and subsequent agreement with the defendant's building committee on 30 May 2007, he wrote a letter of acceptance to the defendant on 1 June 2007. The letter which is on page 49 of exhibit 1 reads;

> "Reference is made to your letter of intent dated 30 May 2007. Mukamba Architectural Practice gladly accepts the commission to undertake architectural services for the abovementioned project.

> As previously communicated to you our conditions of engagement and scale of fees will be those stipulated by the Architects council of Zimbabwe. A copy of the agreement form has already been issued to yourselves for perusal and familiarisation.
>
> We also wish to advise that work on the temporary office structures and boundary wall are in progress. We have also started preparing the design brief for your final comments and adoption. Also be advised that preliminary feasibility studies have began.
>
> We thank you in anticipation of a mutually beneficial professional and spiritual relationship"

The plaintiff's letter is clearly headed 'Letter of acceptance." If there was a definite offer of engagement there would have been no doubt that it had been accepted. Mr *Foroma* for the plaintiff argued that the plaintiff was responding to both the letter of intent and the subsequent verbal agreement reached at his meeting with the defendant's building committee on 30 May 2007. Mr *Machingambi* for the defendant, on the other hand argued that there was no verbal agreement and that the letter of acceptance, shows there was a common mistake between the parties as to what they were communicating to each other and therefore no contract came into existence.

An examination of the plaintiff's letter of acceptance reveals that it was a response to the defendant's letter of intent. It specifically says, 'Reference is made to your letter of intent dated 30 May 2007." It then refers to previous communication in which defendant had advised the plaintiff of their condition of engagement being based on a scale of fees. There is no reference in the letter to a meeting of the 30th May having resulted in a verbal agreement. If it was so it would have been expected that the plaintiff in his letter written a day after such an important meeting would have referred to its having resolved the issue of the plaintiff's fees instead of referring to generalized previous communication In the result I would find that the plaintiff's allegation that there was a verbal agreement is improbable, while the defendant's claim that they were waiting for the plaintiff to give them his fees so that they would enter into a contract with him is probable. The reference to the building of a temporary structure and boundary wall, while

tending to show a contract had been concluded, is denied by the defendant who said it responded to the letter of acceptance by their letter of 5 June 2007 which reads as follows;

> "We acknowledge receiving your letter of 1 June 2007. In our letter of 30 May 2007 we indicated to you that the church requires a more definite figure of your design fees to enable the committee to make a recommendation to the whole church.
>
> We already supplied you with our requirements in terms of the total accommodation required. Please note that this is a public project for which the terms of engagement have to be very clear for a contract to be accepted and signed. Once you have given us your proposed fees and terms of payment, we can then proceed to finalise the agreement given to us".

This letter puts beyond doubt that the defendant wanted the fees in definite figures, and payment terms for the consideration of the church. It makes it clear that if that was not done the contract documents they had been given would not be signed. I appreciate that the plaintiff said he did not receive this letter. The letter is however consistent with the defendant's conduct and evidence in court. It did not sign the agreement given to it by the plaintiff. If it had verbally agreed as suggested by the plaintiff, and was willing to pay as testified by the plaintiff until he wrote the offending letter, why would the defendant not have signed the agreement. The probabilities favour the defendant. The defendant's insistence on definite figures is confirmed by the plaintiff when he said the defendant refused to conclude contracts with other consultants as it insisted on being given actual figures. It seems to me that the defendant had resolved to only do business with those who would give it quotations of their fees in actual figures. Its position remains stronger than the plaintiff's.

The plaintiff produced other exhibits in support of its position. It is therefore necessary for purposes of clarifying the court's view of the position from the three initial letters, to consider the additional exhibits. These are the design brief, proposed programme of works, letters on the appointment of other consultants, the drawings and diagrams exhibit 2 (a) to (g). An analysis of these documents should prop up or rest the party's respective positions.

The design brief was forwarded to the defendant accompanied by a letter dated 8 June 2007. The letter reads as follows;

> "Please find enclosed a notional design brief for your perusal and comments;
>
> In the design of places of worship each individual diocese or sect has guidelines for its own church but local regulations on places of assembly should always be observed.
>
> We have made provision for a church with a sitting capacity of about 6 000 people. Kindly note that due to the size of the site of the stand a higher sitting capacity will require upper level galleries and the reduction in the building coverage to accommodate additional parking space for the increased capacity.
>
> The options of having underground parking or high level parking could be explored but the marginal increase in parking capacity may not justify the high costs of construction. The need to afford the complex with adequate parking for a large building capacity will also impact on green and landscaped spaces.
>
> The resultant church capacity and the number of permanent staff members to occupy the offices will also affect the overall design and configuration of the church. We have provisionally included a sketch drawing showing the extent covered by a 6 000 capacity church building in relation to the parking bays for better appreciation.
>
> We kindly request feed back on the final brief at your earliest convenience"

The second paragraph of the letter exhibit 1 page 52 gives the impression that the design of the church to be built had not yet been discussed and agreed. If it had it would not have been necessary for the plaintiff to bring this issue to the attention of the defendant. This paragraph therefore supports the defendant's evidence that this issue was still to be discussed. This is further corroborated by the plaintiff's evidence to the effect that the defendant wanted a building that could accommodate 10 000 people.

Paragraph three reveals that the sitting capacity of the church was still to be agreed. This again favours the defendant's position that they had in their pre-contract discussions told the plaintiff they wanted a 10 000 capacity church. If a contract had been finalised it would have been impossible for the plaintiff to unilateral change the sitting capacity to 6 000. It would also not have been possible to negotiate the sitting capacity if

the contract had been finalised. In his evidence the plaintiff wavered between a sitting capacity of 6 000 and 8 500 which the defendant said had not been agreed upon.

The fourth paragraph talks about options of under ground and upper level parking again signifying that parties had not yet finalised their agreement. These are expected to have been in the description of the designs the plaintiff was to draw if the agreement had been finalised. A contract could not have been concluded without the correct identity of the thing on which the contract of service was to be based.

The fifth paragraph talks of the resultant church which was obviously to be settled on using the information given in the preceding paragraphs. That again supports the fact that an agreement was still to be concluded as vital details of the building to be designed was not yet at hand. The defendant told the court, that they had asked for a project definition workshop with the plaintiff were they were to discuss with him what they wanted to be included in the building. The plaintiff said a project definition workshop performs the same functions as a design brief for which he admitted the defendant had given him their wish list. It seems a lot of things had to be agreed on before the plaintiff could perform the contract he claims he had entered into with the defendants. That does not favour his version but that of the defendant.

It is not in dispute that the defendant signed for the design brief. It said it did so in acceptance that its wish list had been correctly captured in the plaintiff's design brief. The plaintiff said it signifies acceptance of the work he had done in pursuance of the contract. I am persuaded that the defendant's position is consistent with the reality of the circumstances.

On 26 June 2007 the plaintiff wrote exhibit 1 page 68, to the defendant, a letter which accompanied his final brief and proposed Program of Works. It reads;

> "Please find enclosed the amended design brief as per the meeting held at our offices on the 23rd of June 2007 and a draft proposal of the Program of Works for your attention.
>
> Please feel free to amend the proposed Program Of Works as you see fit, bearing in mind the scopes of work involved on a project of this nature. We feel that the project deserves ample time and attention to ensure a professionally and diligently executed product.

> Your timeous responses to key & pertinent issues during the course of the project will go a long way in the swift and successful implementation of the project. The appointment of consultants as proposed bellow should be addressed as a matter of urgency.
>
> We propose the appointment of the following consultants;
> a) Structural and civil Engineers
> b) Mechanical and Electrical Engineers
> c) Quantity Surveyor
>
> Should you require assistance in the identification of the above, we will gladly recommend appropriate consulting firms for the various aforementioned disciplines.
>
> We kindly request feedback at your earliest convenience."

This letter suggests that the parties had a meeting after the first design brief which led the plaintiff to continue working on the final brief. The fact that there had been meetings is confirmed by the defendant's Pastor and Chairman of the building committee signing the Schedule of accommodation and program of works. See exhibit 4 pages 15 and 16 in the defendants own bundle of documents, and compare with exhibit 1 page 69 and 70. If the parties had not had the meeting of the 23rd June the defendant would have been expected to protest and not sign the accompanying documents.

In paragraph two the defendant was told to feel free to amend the program of works, but chose to sign it showing its approval of it as presented by the plaintiff.

Paragraph three deals with the way forward during the implementation of the program of works, and the appointment of other consultants. The signing of the program of works tends to show acceptance of the communication and the program of works. Mr *Foroma* for the plaintiff submitted that this is indicative of the implementation of the contract. Mr *Machingambi* for the defendant on the other hand submitted that the parties were merely exchanging information which would enable the plaintiff to come up with the fees they wanted to know about before they could conclude a contract with him. Both arguments are persuasive and indicate the respective views of it by the parties. Mr *Machingambi* further submitted that the parties could have been operating at a tangent, and plaintiff could have been mistaken that they had concluded a contract while the

defendant believed they were in the pre contract stage and was co operating with the plaintiff so that he could give them the required fees. This view could be possible in view of the defendant's letter of intent, and the lack of the required details for a contract to have come into existence. On the other hand the plaintiff may have mistakenly believed they had concluded a contract as he was no longer talking about their contract but was urging the defendant to engage other consultants giving the impression that the existence of a contract between him and the defendant was no longer an issue.

A mistake, as to whether or not the parties have entered into a contract, occurs where there is an apparent agreement between the parties, a case where it appears that the parties are in agreement, but where owing to a misunderstanding of some kind or another, no agreement has in fact been reached. The mistake must be a material or essential one for it to vitiate the contract. The parties' minds must not have met on the thing they were to agree on because of the misunderstanding. In this case the first three letters exchanged by the parties tend to show there should have been no mistake, as the parties stated what they wanted for a contract to come into existence. The plaintiff wanted to contract using a percentage of the total cost of building the defendant's church. The defendant wanted the actual fee the plaintiff was to charge for the contract to come into existence. They both clearly stated their positions. There was at that stage no room for a mistake. The contract could only come into existence if one of them abandoned his position and agreed with that of the other Both parties said this did not happen as each said he stuck to his position In the circumstances there could not have been a mistake but a yielding of position by one of the parties. The defendant who is said to have yielded his position denied doing so The agreement form the plaintiff gave to the defendant was never signed. It seems to me that the plaintiff must have remained aware that the contract had not yet come into existence. This gives strength to the defendant's argument that it was still waiting for the plaintiff's fee for it to conclude a contract with him.

The plaintiff on 19 July 2007 wrote to the defendant exhibit 1 page 71, which reads as follows;

"Please find enclosed preliminary design as per the approved brief.

> Kindly note, that due to the site constraints and the site of the stand, we managed to provide a total sitting capacity of about 8 500 people instead of the preferred 10 000.
>
> Please study the submitted drawings and feel free to comment as appropriate. Also bear in mind that some of the provisions made are to enable the building to conform with the local authority Bye-Laws and standards.
>
> We also would like to inform you that at this stage, the services of other consultants as previously communicated to you is now critical as structural, mechanical electrical considerations need to be co-opted into the design.
>
> We kindly request feedback at your earliest convenience."

The first paragraph of this letter reveals that the sitting capacity of the building had not been settled. The plaintiff was not even able to categorically state how many people his drawings could accommodate. He talks of about 8 500 people, while acknowledging that the defendant wanted a sitting capacity of 10 000 people. There is no mention of his earlier suggestion of building underground or upper level parking. He also does not say why he could not design a double story building which accommodates 10 000 people as he had earlier suggested. All this demonstrates to the defendant's favour that the parties were still not yet agreed as to the type and capacity of the building. The cost of a building will obviously depend on its size, its nature, the complexity of constructing it and the type of materials to be used. It seems the parties had not yet agreed on these and therefore its unlikely that the parties had entered into a contract. It is common cause that the defendant, wanted the other consultants' actual fees, long after it had demanded the same from the plaintiff. That tends to show that the defendant remained adamant on its demand for the actual fees and therefore the contract did not come into existence.

The defendant denied ever receiving the drawings referred to in the above paragraph. When they were produced in court Mr Parehwa who testified for the defendant said they could have been downloaded from the internet, or be the ones the plaintiff prepared for Mr Huni before the defendant had secured the stand on which the church is to construct the building over which this dispute arose. He criticised the

drawings for having been labeled April 2006, a period before they had had any discussions with the plaintiff. The diagrams have a scale of one is to one meaning the building would be no bigger than it appears on paper which does not make any sense. The diagrams and the drawings do not refer to the stand on which the building was to be constructed. These criticisms are factual. An analysis of exhibit 2 (a) to (g) confirms them. This seriously damages the plaintiff's credibility, as it gives the impression that he did not do the work for which he claims the fees for the final design stage. It also raises the possibility of cheating especially in view of the fact that the date of the diagrams and drawings is consistent with the period during which the plaintiff prepared drawings for Huni on behalf of the proposed church of the defendant. The absence, of reference to, the defendant's stand strengthens that belief. Mr *Foroma f*or the plaintiff submitted that the defendant should have called Huni to testify as to whether, the drawings and diagrams are the ones which where drawn for him. The onus was on the plaintiff to prove that he did the work for which he claimed fees. All the defendant had to do was to rebut his allegations. I am satisfied that the defendant has rebutted the plaintiff's claim that he drew those drawings and prepared diagrams for it, as they do not relate to the period during which it had communicated with him for that purpose and does not relate to its church's stand

In the result the plaintiff has failed to prove that it concluded a mandate of service with the defendant. There is therefore no need to determine the other issues. His claim is therefore dismissed with costs.

Messers Sawyer & Mkushi, Plaintiff's Legal Practitioners
Messers G Machingambi Legal Practitioners, Defendant's Legal Practitioners.