IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 825/2012

In the matter between:

UNICORN CONCEPTS (PTY) LTD **Plaintiff**

and

ROYAL SWAZILAND SUGAR CORPORATION **Defendant**

Neutral citation: ***Unicorn Concepts (Pty) Ltd. v Royal Swaziland Sugar Corporation (825/2012) [2015] SZHC 120 (30th June, 2015)***

Coram: **M. Dlamini J.**

Heard: **23rd February 2015**

Delivered: **30th June, 2015**

- *The quotation was part of the terms of the contract. It described the obligations to be preferred by the contractor – plaintiff.*

Summary: By means of action proceedings the plaintiff claims E312,000 plus interest as sum due and owing arising from services rendered at the behest of defendant. Defendant refuses to pay on the basis that the services rendered by plaintiff were substandard and files a counter-claim by reason that it had to engage a third party to rectify the defects.

Viva voce evidence

[1] The first witness on behalf of plaintiff was Busalive Richard Bhembe. On oath, he identified himself as the managing director of plaintiff. Plaintiff was involved in the construction industry. He pointed at defendant as plaintiff's long time client.

[2] He testified that in February 2012, he received a call from one of defendant's managers, Rodney Ndzinisa enquiring whether plaintiff was still renovating tennis courts. He replied to the positive. Rodney then invited him to inspect two tennis courts *viz*., at Mhlume and Simunye. He proceeded to Rodney's office and he was given a foreman, Leviston Dlamini to go with him to identify the tennis courts. Rodney informed him that Sicelo Tembe would show him the tennis court which was at Simunye. He, together with Leviston went to inspect the Mhlume court. It was, according to this witness, severely damaged. He took photographs and later produced a quotation. A similar process with Sicelo Tembe took place at Simunye court. He then took the quotations to Mr. Ndzinisa. He received a call advising him that his quotation had been accepted. He should commence work.

[3] At Mhlume he was asked to renovate a tennis court and a basket ball court. All three courts were renovated to completion. Plaintiff faced a challenge

when he requested for payment. Mr. Ndzinisa informed him that there were complaints from his superiors that the renovations were substandard. He proceeded to defendant's offices and requested that the sites be inspected. They agreed. At the site, he asked defendant to point out the discrepancies *vis-à-vis* the quotation. It was agreed that everything was fine. He then asked Mr. Ndzinisa to pay. Mr. Ndzinisa advised him to speak to his superiors, one Mr. Joe Khumalo. He obliged. Mr. Khumalo advised him that defendant would not pay because the work was not well done. He insisted that the work was according to quotation and they had previously renovated other tennis courts for defendant in the same fashion and they were paid. He asked that they be paid and if they desired a different specification, then he would do another quotation. Mr. Khumalo declined.

[4] It was Mr. Bhembe's evidence that they did the work according to specification as appearing in the quotation and that defendant did not give him specifications on how the courts ought to be renovated. This was so even when he spoke with Mr. Khumalo at the end.

[5] This witness was cross examined. I will refer to his cross examination later in this judgment. The plaintiff then closed its case.

[6] The defendant called three witnesses. The first witness on behalf of defendant was Sicelo Ezra Tembe and he gave evidence on oath. He informed the court that he had a site meeting with Mr. Bhembe, PW1, where they discussed the scope of work to be done at Simunye. They agreed that plaintiff would fill up spaces where water was stagnant, resurface or rescreed the floor and paint one court with markings for basket ball and the other for tennis. Plaintiff was also to open a gate between the

two courts and paint the fence in order to match the new fence. PW1 then left and prepared a quotation. Thereafter PW1 was given an order based on the quotation. DW1 referred the court to terms and conditions of the contract but stated that he did not know if PW1 received the same.

[7] PW1 ought to have delivered the material within three days. However this did not happen. When he eventually delivered the material, it was insufficient. At this stage he enquired from PW1's representative, Sicelo as to how many layers of resurfacing he would apply. He said that it would be two. He then called PW1 to enquire on the number of layers. PW1 responded that he would apply three to five layers.

[8] DW1 testified that plaintiff commenced work by scrapping off the vegetation and applied some weed poisoning. DW1 informed Sicelo that when they do the resurfacing, he should be invited as he wanted to observe how it was done. He came the following day and found that plaintiff had already started resurfacing. He enquired as to how plaintiff would address the issue of water stagnation. He was informed that the second layer would carter for that. He left.

[9] He returned sometime later and found plaintiff applying colour coating on the courts. He enquired as to when he would apply the second layer and also queried the rough surface. Sicelo said he would scrap the rough surface by using sand paper. It is then that he called Mr. Bhembe who told him that he could not come as he had transport problems. They agreed that the rescreening would stop. It was his evidence that he requested for a schedule from plaintiff to no avail. At this stage plaintiff asked for payment. He declined on the basis that the work was incomplete.

However, PW1 assured him that he would remedy the defects by applying a second coat and that he would add more material.

[10] He returned on site after two days and found Sicelo having painted the courts. He called PW1 and informed him that he was not satisfied with the work. PW1 came and he demonstrated to him the dangers of having a rough tennis court. He then ordered that the work should stop until the resurfacing was done. PW1 agreed. However, days went by without any progress. He called PW1 who, to his surprise, threatened them with legal actions on failure to pay.

[11] It was his evidence that the gate was not installed and the fence was of different sizes. Moreover, the country Manager complained that his fence had been stolen and identified the one used by plaintiff as his.

[12] The next witness was Rodney Bongani Ndzinisa, DW2. He took oath and informed the court that he was defendant's Estate Service Manager since 1998. He was responsible for maintenance of infrastructure, housing, stadium, game courts and swimming pools.

[13] In 2012 defendant engaged plaintiff to renovate four courts at Mhlume and Simunye, each area with two courts. Plaintiff was given terms and conditions together with an order. Each area had a foreman who was monitoring the work. They would occasionally hold meetings with the foremen and the plaintiff for a brief on the progress of work.

[14] When plaintiff commenced work, a schedule programme was prepared and handed by it to defendant. This programme entailed the details of the operations that were in the purchase order. Due to the urgency of the

matter, defendant requested that plaintiff renovate the courts simultaneously.

[15] While the work was going on, he received a report from the foreman at Simunye of defects. A meeting between him, PW1 and DW1 was arranged where PW1 was requested to rectify the rough texture of the court. Also present in this meeting was head of department, Mr. Joe Khumalo. Mr. Khumalo enquired *en passé* as to how the plaintiff would rectify the error. It is then that the tempers of PW1 and Mr. Khumalo flared. PW1 pointed out that he would not rectify the defect as the complaints by DW1 were illegitimate. The meeting dispersed with this witness emphasizing that plaintiff should remedy the situation. This meeting was followed by a letter requesting plaintiff to attend to the defects.

[16] DW2 testified that the work at Mhlume was also incomplete as plaintiff never made a handover to defendant. A second letter was written cancelling the contract. This witness produced both letters.

[17] Thereafter defendant engaged an assessor, to examine the work by plaintiff. They thereafter hired another contractor to remedy the defects. Both DW1 and DW2 were cross examined. I shall again refer to their cross examination later.

[18] The third witness for the defendant was Mandla Sandile Velangaye Shabangu. On oath he identified himself as a quantity surveyor under the employ of Ngwenya Wonfor Associates. He received instruction to inspect and assess work by a contractor from defendant. The deadline was 30th March. He proceeded to Simunye and met one Ishmond Fakudze.

[19] He examined the courts at Mhlume and Simunye. He compiled a report. He submitted his report to this court. He also produced photographs of the courts he had assessed.

Pleadings

[20] The plaintiff pleaded:

> "*7. The terms of the contract that are material to this action are that:*
>
> *7.1 The Plaintiff would refurbish /renovate or revamp the Defendant's Tennis Court situate at Hambanathi, Mhlume and Simunye club respectively and invoice the Defendant for the services rendered;*
>
> *7.2 The Defendant would immediately pay to the Plaintiff for the services rendered upon receipt of the invoice.*
>
> *8. The Plaintiff duly carried out the works and or rendered its services to the Defendant as per the agreement in fulfillment of its obligations in terms of the contract.*
>
> *9. In breach of the agreement aforesaid, the Defendant refused, neglected and or failed to pay to the Plaintiff the sum of E312,660 being in respect of the services rendered."*

[21] Respondent countered:

> *"5.1.2 It was a further term of the standard terms and conditions that should there be any defects in the works, the Defendant shall withhold all or part of any payments to cover such delay or defect until Plaintiff has completed such obligation or rectified each defect;*
>
> *5.1.3 Defendant pleads that it is entitled to withhold the payment as there are defects in the works. The Plaintiff was notified of the defects in the works but failed and / or refused to rectify such*

defects. In the circumstances Plaintiff is in breach of the agreement.

6.1 *Defendant denies that Plaintiff carried out the works and / or rendered its services in terms of the agreement. Defendant pleads that Plaintiff is in breach of the agreement in that it failed to undertake the works in a workman like manner and acceptable industry standards. In particular the works by Plaintiff have various defects which despite due notice the Plaintiff failed and / or refused to remedy.*

6.2 *Defendant further pleads that pursuant to Plaintiff's failure to fulfill its obligations in terms of the contract, Defendant suspended payment due to Plaintiff."*

Issue

[22] From the pleadings and evidence adduced, the question for determination is, "*Did plaintiff breach the contract to warrant defendant to resile from it*?"

Adjudication

[23] PW1, Mr. Bhembe testified that when he received the contract to renovate, he:

"*enquired from the foreman how they were intending to have them fixed*?"

The response was as follows:

"*He said I should decide on how they would be repaired*."

He also divulged:

"Same procedures happened at Simunye. Sicelo Tembe informed me that they did not have specifications. I would decide how I would fix them."

[24] PW1 proceeded to inform the court that he prepared a quotation. This quotation reflected what and how the refurbishment of the four courts (at Mhlume and Simunye) would be done. It was further his testimony that the quotation was approved and he performed the work according to the quotation.

[25] PW1 testified that when he had deliberations with Mr. Khumalo who was contending that the refurbishment was substandard, he pointed out:

"I asked him saying this was difficult because you didn't give me the standard and I had asked prior how I had to repair. It was left to me to decide."

[26] He also stated:

"When I was doing renovations at Mhlume, Mr. Leviston Dlamini was defendant's foreman while at Simunye it was Sicelo Tembe. They were there representing defendant. Both foremen never complained when I was doing work that it was below standard."

[27] PW1 was cross examined at length. Firstly, it was pointed out to the plaintiff that when the quotation was accepted, it was done so under defendant's terms and conditions which were well known by plaintiff. He was then referred to one of the terms and asked:

"*Mr. Z. Shabangu:*	"*What do you understand*?"
Mr. M. Bhembe:	*"It means if one fails to do or do in time the work, engineer may write and notify you of terminating the order as a supplier*?"

It was then put:

Mr. Z. Shabngu: *"Defendant upon being dissatisfied, it gave you notice to remedy the situation?"*

Mr. M. Bhembe: *"They told me that work was not smooth, it had leaves and it was substandard after completing work."*

[28] It was further pointed out to the witness for plaintiff by learned Counsel for defendant:

> *"Mr. Ndzinisa and Mr. Sicelo Tembe will come before the court and tell this court that before this letter was written, the works was not up to standard and you should remedy the works."*

[29] He replied that such would not be true. It was further put to him:

> *"Mr. Ndzinisa and Tembe will tell the court that they met with you and you had not at that time completed the work and that they asked you to remedy the work pursuant to a report written to them by the foreman."*

Mr. Bhembe responded:

> "*Not true. They never called me. My team was no longer on site."*

[30] Defendant did call two witnesses *viz*. Mr. Tembe and Mr. Ndzinisa. Mr. Tembe, who was the foreman at Simunye informed the court that the plaintiff commenced work with insufficient material and without a schedule. In constructing the floor, plaintiff ought to have built three to five layers before painting. Plaintiff failed to do so despite advice from him and his undertaking to do so. These three to five layers of concrete would carter, according to Mr. Tembe, for water stagnation. He was surprised to

find plaintiff having painted the courts without these layers of concrete. Mr. Ndzinisa on the other hand, informed the court that he received a report from Mr. Tembe complaining of defects. A meeting was arranged where plaintiff was requested to "*rectify the rough texture of the courts*." An analysis of DW1 and DW2's evidence points to a number of findings. I deal with them hereunder:

[31] Both witnesses' evidence refers to defects at Simunye courts. In fact, Mr. Ndzinisa under cross examination confirmed that he did not receive any complaints about Mhlume courts.

[32] The only witness who spoke on behalf of defendant about court at Mhlume was DW3. His evidence was, however startling under cross examination as he revealed that the courts at Mhlume which he was taken to for assessment had not been renovated at all. They were very old courts. There was disparity as to which court he had examined at Mhlume. His report reflected that he attended to Hlanganani court while before court PW1 testified that he renovated Hambanami. DW3 testified that when the case *in casu* was progressing in court, he learnt that his report ought to have read Hambanami and not Hlanganani. Defendant's case from the onset was not that he had failed to renovate the court at Mhlume but that his renovations were substandard. It follows therefore that from the evidence of DW2 that he never received any complaints about Mhlume and DW3's testimony that the court which he examined at Mhlume had not been renovated that there cannot be any substantive issue about the renovations at Mhlume. Mhlume courts stand to be eliminated from this suit and defendant is obliged to pay.

[33] This court stands only to adjudicate upon the court at Simunye. DW1, Mr. Tembe testified on defects:

> *"I then asked him how he was to address the issue of water that was stagnating as I could see him putting the mix without addressing the areas of my concern.*"

[34] It was his further evidence:

> "*When he came back he took about two days to finish both courts applying the first coat on both courts. … On the following day I went to see how he would address water stagnation. There was no activity."*

[35] He further pointed out that he stopped plaintiff from continuing with painting for the reason that water stagnation had not been addressed. Counsel for plaintiff directed to DW1 several times that it could not be true that he stopped plaintiff from carrying on with painting of lines at Simunye. DW1 stuck to his guns. However when pressed further on this issue, he retorted at the end:

> "*When he started painting I stopped him. He went and applied another resin before drawing the lines*."

Earlier in his evidence in chief, DW1 had stated "*resurfacing entails putting a layer of resin surface as they, the tennis courts, were already in existence. <u>That is, to restore the surface</u>*."

[36] From DW1's response that the plaintiff did do resurfacing, and this evidence finds corroboration from DW3, the expert, who testified, "*At Simunye the base was in good condition.*" It is clear that the only issue was the smoothness of the surface.

[37] DW1 proceeded to state: "*I also wanted to know how he would address the issue of rough surface as my understanding was that the first coat could be rough and then smooth it up with a second coat. He said he would sand them down and then apply the coloured court*." DW3 corroborated this evidence that he found that the

Simunye court needed "*power floating to smooth finish*." However, it is worth noting from his report that this recommendation follows a finding, "*concrete base screed was toweled in an untidy manner*." PW1 responded under cross examination that there were no complaints raised while he was carrying on the renovations. It was his testimony that defendant trumped up complaints upon plaintiff requesting for payment. The question here is therefore "*when was plaintiff advised of the defects - before or after completion of the renovations?*"

[38] The invoice for Simunye reflects a date of 24th February 2012. PW1 testified that plaintiff would not have submitted invoices without completing the work.

[39] DW2 informed the court that plaintiff submitted a work schedule which he complied with. DW1 by the way had testified that plaintiff failed to submit a schedule. However on 8th March 2012 defendant authored as follows to the plaintiff:

> *"Re: RESURFACING OF RSSC TENNIS COURTS – NOTICE OF BREACH*
>
> 1) *We refer to the above matter and the meeting held between RSSC and Unicorn Concepts at Mhlume Property Services conference room on 23rd February 2012.*
>
> 2) *As discussed at the meeting, we hereby inform you that the quality of the workmanship at both the Simunye Country Club and Hambanathi village tennis courts is below the acceptable industry standard.*
>
> 3) *Based on the above, we hereby give notice of breach of this agreement on the following grounds:*
>
> - *The acrylic re-surfacer is not smooth;*
> - *The Hambanathi court's colour coating seems to have been exposed to impurities e.g. leaves and debris;*
> - *The patch binder material used to fill, level and repair low spots and depressions has developed cracks; and*
> - *The green and maroon colour coats of the tennis courts are not uniform;*

- *The paint on fence and gates is of poor quality; workmanship.*

4) *We hereby request that the above be rectified in full and to the satisfaction of the Client, within 7 days of receipt of this letter. Failure to do so may result in RSSC terminating the contract between the parties."*

[40] Plaintiff responded:

"RE: refurbishments of tennis and basketball courts (Mhlume and Simunye)

Please note that your letter to us dated 08 March 2012, with subject Notice of Breach, has got nothing to do with the works which we quoted and did when revamping the Two Tennis courts at Simunye Club, one tennis court or Mhlume next to Stadium and one Basketball court at Mhlume next to Stadium.

All work has been done as per our approved quotations specifications. Only the Tennis courts nets are still to be delivered, and that is because our supplier delivered wrong nets which were returned and still to deliver the correct ones.

Everything mentioned in your letter are new specification which we can quote you and can be done once our quote is approved.

We are expecting our payment for all our work that is done. To us the Timing of your letter indicates that you are trying to avoid paying for the work done, which we cannot allow.

See also attached our progress report for what we quoted and the job we did and finished. Your Estate Service Manager instructed us to do the job Friday the 3rd February 2012, stating that we start the job as soon as possible since we will only have Two weeks to finish by March 2012 we should be done, in which we did.

In conclusion, all refurbishment were done and completed as per our approved quotations and we expect our payments, any other new specifications for further work we can gladly give a quotation."

[41] From this correspondence and the invoices submitted, it is clear that the works had been completed by the time the meetings were held between the parties discussing the defects. Further from the date of the invoice, no correspondence had been written to plaintiff pointing out defects in his work. This was so in the face of defendant's own terms and conditions that notification of defects should be in writing. In the light of these circumstances, the evidence by PW1 stands to be accepted that it is upon calling for payment that defendant came out with excuses of defects in the works. It follows therefore that the subsequent correspondence dated 15th March 2012 addressed to plaintiff was of no force and effect as plaintiff had fully completed his part of the bargain in terms of the contract of construction. What exacerbates this case is that this correspondence of 15th March 2012 does not dispute the allegations in plaintiff's letter of response that he had completed the renovations.

[42] Further, it is not in issue that the nets were subsequently delivered and accepted by defendant. When cross examined on the reason why defendant accepted delivery of the nets in the light of the defects, DW2 chose to say that they were delivered in his office. However, this response does not detract from the fact that defendant accepted the nets. This action should be taken to mean that defendant had no complaints concerning the work by plaintiff prior to the demand for payment.

[43] PW1 pointed out during his evidence that to reconstruct the court to the level defendant was now intending would cost much higher than the initial quotation. This piece of evidence was confirmed by DW3 who in his report pointed out that Simunye court would cost about E316,646.35 alone for the work defendant was proposing.

[44] DW1 was cross examined on the number of coats:

"O. Nzima:	*"This quotation was as per my verbal specifications*
DW1:	*"As per my verbal scope when I took him on site."*
O. Nzima:	*"This scope plaintiff was to apply two coats?"*
DW1:	*"Yes"*
O. Nzima:	*"Where does it appear in the quotation/"*
DW1:	*"It doesn't."*
O. Nzima:	*"Why?"*
DW1:	*"I wouldn't know. I did not prepare the quotation.*
O. Nzima:	*"You told the court that quotation was as per verbal agreement?"*
DW1:	*"Yes it was."*
O. Nzima:	*"I am taking you through the quotation."*
DW1:	*"It is stating exactly what I had required PW1 to do."*
O. Nzima:	*"You told the court that two coats do not appear in the quotation and yet you never queried the quotation."*
DW1:	*"Yes"*
O. Nzima:	*"My instructions are that plaintiff did renovate courts accordingly."*
DW1:	*"He did not finish the works. Mr. Bhembe said he would have done two to five coats while Sicelo spoke about two plus two."*
O. Nzima:	*"Where in the quotation does that appear?"*
DW1:	*"It does not appear in the quotation."*
O. Nzima:	*"The quotation was not according to what you verbally agreed?"*
DW1:	*"It is, but it is the operation on the ground which is missing."*

[45] This witness had testified in chief that plaintiff applied two coats while he was expecting three to five. It is not in issue that this quotation which was approved and is the basis of the contract between the parties refers to two coats. In DW1's own words two coats were applied. It is therefore not surprising that DW3 did not find anything amiss about water stagnation. In view of this evidence, it would be correct to conclude that DW1 expected plaintiff to do works outside the quotation. The contract was not so. The plaintiff was, therefore in law, bound to comply with the contract which is reflected in the quotation. Anything outside it and beyond, meant that the

parties had to re-negotiate. The quotation was part of the terms of the contract. It described the obligations to be preferred by the contractor – plaintiff.

[46] DW1 was cross examined further:

> "*O. Nzima: "Did he do the under coat?"*
> *DW1: "He did but it was rough?"*
> *O. Nzima: "Did he scrape and repair."*
> *DW1: "Yes."*
> *O. Nzima: "Did he apply top coat?"*
> *DW1: "Yes."*
> *O. Nzima: "He did everything in the quotation?"*
> *DW1: "Yes but he missed the under coating which is critical before it was smooth to my……"*

[47] PW1 during *inspection in loco* identified Simunye courts which were renovated by plaintiff. He informed the court that the court was as his renovations and that nothing had changed. The court observed that the fence was as described by PW1 in chief and there was no gate affixed as he stated so in his evidence in chief. When DW1 gave evidence, he informed the court that from the onset plaintiff was cash strapped and therefore demanded favours such as early payment in order to buy material and complete other projects. He also testified that the estate manager at Simunye identified the fence affixed as his. However, all this was not put to PW1 when giving evidence and it stand to follow that it should be considered as an afterthought and stands to be rejected.

[48] If I am wrong in the above, there is another aspect of this dispute over the texture of the surface which needs legal approach. **Wessels J** in **Hitchins v Breslin 1913 TPD 677** at 683 – 683 stated:

> *"But where the price is a lump sum, if the contractor has not yet completed his contract he cannot sue for the contract price. There are, however, exceptions to this proposition, and an important one occurs where the contractor has completed the work except as regards some minor details. In such a case the maxim, 'de minimis non curat lex' applies and the law will not deprive a man of his money merely because he has omitted some insignificant details.*"

[49] The learned Judge then cited **Gould v Henderson Cons. Corporation Ltd. 1980 T.S.** at page 980 by **Solomon J:**

> *"The mere fact that a small defect of that nature (value £1 10s) has been established in a contract involving an amount of £725 does not in my opinion justify the magistrate in holding that the work has not been completed, and that the retention money in the hands of the defendant could not be recovered by the plaintiff.*
>
> *In order to judge whether the defect is small or great we must consider the nature and object of the contract. If there is some trifling omission in a contract to build a house in the Court may hold that the building contract has been substantially carried out and award to the contractor the money due under his contract. If, however, the defect in a contract of a technical nature is small in appearance but great in its scope, the Court will not readily hold that the contractor has completed his contract.*" (my emphasis)

[50] DW3 stated of the surface: "*The top screed was untidy. It ought to be smooth."* No further evidence was advance to indicate that this "*untidy screed*" rendered the courts non-functional for its purpose or posed as a danger to its users. From the understanding of DW3's evidence, the *ratio decidendi* in **Hitchins** *supra* applies fully *in casu* by reason that the screed was only "*untidy"* and nothing further could be said of it with regard to the overall view of the work done by plaintiff.

Counter-claim

[51] Defendant on the other hand claimed that they subsequently engaged another company to remedy the defects. Some of the defects were the size of the fence affixed by plaintiff and the missing gate. However, the court found that these defects were still there. Defendant stated that they only engaged the other contractor in order to do the concrete only and it duly did. I do not think so if affixing the gate was necessary to make the tennis courts fit for use according to defendant. This is so because plaintiff pointed out that his mandate was to open a gate and not affix any. Putting a gate would at any rate disturb players. It is no wonder, therefore, that two years down the line there was no gate or change of fence. At the inspection *in loco* PW1 informed the court that the floor and its roughness was as one constructed by plaintiff. This evidence was not challenged under cross examination.

[52] No evidence has been led to demonstrate on a balance of probabilities that the defendant did engage a third party to remedy the defects.

[53] In the totality of the above, the following orders must follow:

1. Plaintiff's cause of action succeeds;
2. Defendant's counter-claim is dismissed;
3. Defendant is ordered to pay plaintiff:

3.1 the sum of E312.660;

3.2 interest at the rate of 9% per annum

4. Costs of suit.

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M. DLAMINI
JUDGE

For Plaintiff : **O. Nzima of Nzima and Associates**

For Defendant: **Z. Shabangu of Magagula Hlophe Attorneys**