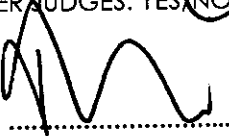


IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)  
REPUBLIC OF SOUTH AFRICA



Date of hearing: 28 April 2016

Case number: 34336/2015

(1)	REPORTABLE: YES / <input checked="" type="radio"/> NO
(2)	OF INTEREST TO OTHER JUDGES: YES / <input checked="" type="radio"/> NO
(3)	REVISED.
6/6/2016	
DATE	SIGNATURE

13/6/2016

In the matter between:

**THEMBA CONSULTANTS (PTY) LTD**

**Applicant**

and

**CITY OF TSHWANE**

**Respondent**

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**JUDGMENT**

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**BRENNER AJ**

1. This application involves a money claim by the applicant, Themba Consultants (Pty) Ltd ("Themba"), against the respondent, the City of Tshwane Metropolitan Municipality ("the COT"). The claim is for engineering services rendered to renovate roadworks and pedestrian areas in the inner city of Tshwane, to facilitate safer areas for vehicular and pedestrian movement, the project being called "Operation Reclaim". It is split into two amounts, namely, R3 782 283,66, and R1 109 715,79, plus mora interest and costs.
2. In determining whether Themba is entitled to an order for payment of money in motion proceedings, I was enjoined to consider whether the relief sought was sustainable, in fact and in law, and whether the COT had raised any material disputes of fact on the claim preferred against it.
3. The main application was served on 20 May 2015. On 30 June 2015, prior to the expiry of the dies for service of the answering affidavit, the COT served a combined notice in terms of rule 35(12) and 35(14) ("the discovery notice").
4. Following service of a formal reply to the discovery notice, Themba launched an application in terms of Rule 30A, for the discovery notice to be struck out. This application was served on 20 July 2015, and enrolled for hearing on the unopposed roll on 18 September 2015. On this date, an appearance was made by the legal representative of the COT, and the rule 30A application was postponed sine die with costs reserved. What was initially termed a "preliminary answering affidavit" was served by the COT on 5 October 2015, with the replying affidavit being served on 29 October 2015. The answering affidavit was served after the expiry of the dies, but I have exercised my discretion to condone the late service of same.
5. Both the main application and the interlocutory application were enrolled for hearing before me on 28 April 2016. Shortly before then, on 18 April 2016, the COT brought an application for an order to compel Themba to comply

with the discovery notice, and to grant the COT leave to file a supplementary affidavit within 20 days of compliance with such order, if granted.

6. In addition, the COT brought an application to amend the title of the affidavit served by it in answer to Themba's founding affidavit, to read "answering affidavit" instead of "preliminary affidavit". No objection was preferred by Themba to the late delivery of these documents.
7. At inception of the hearing, the amendment was granted. This left the issue of the efficacy of the COT's discovery notice, coupled with Themba's rule 30A application and the COT's counter-application.
8. The discovery notice contains a preamble which mentions that Themba had been appointed to render, and claimed payment for, professional engineering management services, as contemplated in the Engineering Profession Act 46 of 2000 ("the Engineering Act"). In the result, the COT called for documents which it separated into five categories covering Operation Reclaim Phase 1, such categories being for: the inception stage, the concept and viability stage, the design development stage, the procurement stage and finally, the contract administration and inspection stage.
9. These five stages are essentially the same as the five stages mentioned in clauses 3.2.1 to 3.2.5 of the "Guidelines on Scope of Services and Tariff of Fees for Registered Professional Engineers" as stipulated in Government Gazette no 34875 dated 20 December 2011, which identifies the nature of typical documents which it recommends to be prepared by a professional engineer when contractually engaged. These guidelines are referred to below as "the December 2011 guidelines", and are of material importance to this case.
10. It merits mention that a subsequent Government Gazette published similar guidelines on 4 December 2013, under Gazette number 37102, and that

Themba relied on these guidelines in this case. For the purpose of this judgment, however, it is the December 2011 guidelines which apply to the facts in casu.

11. Under every one of the five headings contained in the guidelines, mention is made of typical "deliverables" which it describes as information or documents. So, for example, under the inception stage, it states:

*"Deliverables will typically include*

- *Agreed services and scope of work*
- *Signed agreement*
- *Report on project, site and functional requirements*
- *Schedule of required surveys, tests, analyses, sites and other investigations*
- *Schedule of consents and approvals."*

12. Since the question of further discovery by Themba was at issue, I am constrained to quote from paragraphs A to E of the COT's discovery notice, to demonstrate the manner in which the documents were described:

*"A All documentation on the deliverables on the **Inception Stage** for Operation Reclaim Phase 1, by the following:*

1. *Normal Services (civil engineering)*
2. *Urban Design/Architect*
3. *Electrical Engineering*
4. *Traffic engineering*

*"B All documentation on the deliverables on the **Concept and Viability Stage** for Operation Reclaim Phase 1, by the following:*

1. *Normal Services (civil engineering)*
2. *Urban Design/Architect*
3. *Electrical Engineering*
4. *Traffic engineering*

*"C All documentation on the deliverables on the **Design Development** for Operation Reclaim Phase 1, by the following:*

1. Normal Services (civil engineering)
2. Urban Design/Architect
3. Electrical Engineering
4. Traffic engineering

"D All documentation on the deliverables on the **Procurement** for Operation Reclaim Phase 1, by the following:

1. Normal Services (civil engineering)
2. Urban Design/Architect
3. Electrical Engineering
4. Traffic engineering

"E All documentation on the deliverables on the **Contract Administration and Inspection** for Operation Reclaim Phase 1, by the following:

1. Normal Services (civil engineering)
2. Urban Design/Architect .
3. Electrical Engineering
4. Traffic engineering"

13. In its formal reply, Themba asserts that the discovery notice falls foul of rule 35(12) on the basis, simpliciter, that no mention is made in the founding affidavit to the documents sought by the COT.
14. It avers that the documents sought are not sufficiently identified, with the result that the notice is vague and nonspecific. Moreover, in its view, all documents of relevance to any reasonably anticipated issue are either annexed to the founding affidavit, or form the subject-matter of its Close Out Report. The Close Out Report is attached to the application but the annexures are excluded to obviate prolixity. But it is an undisputed fact that the Close Out Report, in its entirety, was duly delivered to the COT on 14 May 2015, in both electronic format and hard copy. The entire Close Out Report was contained in fourteen lever arch files.
15. In argument before Court, the attorney for the COT conceded that the COT's discovery notice in the terms framed was not enforceable. He accepted that the provisions of rule 35(12) were inapplicable, no reference having been

made by Themba in its founding affidavit to the documents sought. It was further conceded that the documents were also not identified with sufficient specificity for the purposes of rule 35(14), and that no suggestion had been made by the COT that the documents which were called for were not contained in the Close Out Report.

16. I agreed with these concessions. Accordingly, the rule 30A application was granted, striking out the discovery notice, and the COT's application to compel discovery refused, and, in both instances, with costs in favour of Themba. The consequence of these concessions is that the COT was left with no basis for granting it leave to supplement its answering affidavit, and it could not level any claims of prejudice against Themba for Themba's refusal to comply with the COT's discovery notice. Moreover, the COT's notice to amend the answering affidavit to describe same as the answering affidavit and not a preliminary affidavit made its position plain. In the result, the COT had to accept the inherent risk attached to the contents of the answering affidavit as it stood.

17. I turn to the merits of the main application. Themba's case, as outlined in the founding affidavit, is as follows. Themba is a private company with three directors, all of whom are professional engineers registered as such with the Engineering Council of South Africa. On 8 July 2011, the COT called for tenders for professional civil engineering services to be provided to its Transport and Roads Development Panel, on an ad hoc basis. Themba submitted a tender.

18. On 2 April 2012, the COT issued its first letter of appointment to Themba, in which its subject heading reads:

**"CONTRACT CB117/2011: PROFESSIONAL CIVIL ENGINEERING SERVICES FOR VARIOUS PROJECTS IN TSHWANE (AS AND WHEN REQUIRED): 3 YEAR TERM: OPERATION RECLAIM WITHIN THE INNER CITY OF TSHWANE"**

19. I will briefly summarise the terms of this first letter of appointment. The scope of services is stated to cover phase 1, which is described as: status quo survey of existing infrastructure per block, design principles and services enquiries. The letter goes on to say: "*A form of agreement (SAICE) must be issued immediately to the CoT for signing.*" I interpose to mention that it is an undisputed fact that the SAICE form was never executed by the parties. Nothing turns on this fact, as it was not an issue which called for adjudication. The official representatives of the COT were designated as Deon Viljoen ("Viljoen"), as project manager, and Nicholas Ngwetjana as engineer representative. (The latter person was subsequently substituted.)
20. The appointment was subject to submission by Themba of an acceptable programme of works, with the requirement that the project would be carried out in accordance with "*the Transport Division's and the Council's policy, standards, financial by-laws, procedures and directives*". Reporting of progress and expenditure was to occur on a monthly basis, while co-ordinating and status review meetings were to occur regularly.
21. Under the payments section, the letter confirms a fee estimate for the ad hoc work required, in the sum of R50 000,00. The amount included Vat and 10% for contingencies, subject to the conditions of contract, the discount offered and availability of funds. There was a qualification that the COT was not obliged to pay for services in excess of such estimate without the prior written instruction of the designated COT officer.
22. Invoices were to be accompanied by supporting documents reflecting details of all expenses and costs. The following also appears under the "Payments" heading:
- "The fees will be calculated in accordance with Government Gazette 34875, Notice 206 of 2011: Guideline Scope of Services and Tariff of Fees for Persons Registered in terms of the Engineering Profession Act, 2000 (Act No 46 of 2000)."*

23. Between April 2012 and December 2013, the COT issued seven letters of appointment to Themba. One of such letters is a revision of its predecessor. (Themba asserts that eight letters were issued, but in fact, the last two letters are both dated 6 December 2013, and are identical.) The letters were issued on 2 April 2012, 13 April 2012, 29 June 2012, 18 July 2012, 28 August 2012, 20 November 2012 and 6 December 2013.
24. Themba contends that the contract with the COT was partly oral and partly written. It supplies the seven letters of appointment as evidence of the "partly written" portion of the contract. But, while quoting in general those terms which were material to the contract, it omits to specify the precise terms of the "partly oral" portion of the contract. The issues in casu were such that this omission was of no moment, which was fortunate for Themba.
25. Themba avers that it performed all of its services in a threefold capacity. It performed as a professional civil engineer, as an engineering management agent, and as a principal agent, and, through such appointment, other subconsultants' services, all in terms of the alleged "partly oral partly written" contract. It avers that the contract period was for three years, from 1 March 2012 to 28 February 2015. (The contract period was not in dispute).
26. In asserting its claim to payment, Themba relies extensively on the contents of its Close Out Report served on the COT on 14 May 2015. Themba's opinion, the Close Out Report contains details which substantiate the work done for the COT and motivate the complexity of the project, and the disjointed manner in which it developed. It alleges that the Close Out Report also takes note of the fact that, in terms of overall scope, the work remains incomplete, but it contains a brief for handover to any successor who may be appointed by the COT.
27. Themba points out that it clarified the functions of the various parties involved in the project in a "Report on Terms of Professional Appointment" dated 16 June 2014, which document was incorporated in turn in another



report of the same name, dated 18 June 2014. This report was given to the COT.

28. It appears that there was a fairly thorough disclosure by Themba of the pre-litigation correspondence which preceded the application. The COT does not deny that all relevant correspondence was provided by Themba. Indeed, no other correspondence is attached to the COT's answering affidavit. A consideration of pre-litigation communications is a useful mechanism for determining the genuineness of any disputes subsequently raised in litigation.
29. The correspondence shows that, during the course of the relationship, issues with Themba's performance were indeed raised by the COT. What is significant, however, is that the first intimation of dissatisfaction came two and one half years after inception, and about six months before the expiry of the contract. This occurred on 1 August 2014, when the COT wrote a letter to Themba which takes the form of a written warning. The author of the letter being Lorato Kegakilwe-Piki, ("Kegakilwe-Piki"), executive director: Transport Infrastructure Design, Construction and Maintenance division.
30. The gist of the complaint related to unanticipated costs which had been caused by delays in performance. Five contractors had made claims arising from delays. (The contractors in question were Primat Construction CC ("Primat"), Mologadi Construction, ("Mologadi"), HBC Construction ("HBC"), Just Right and Kufa Trading ("Kufa")). It was noted that Primat had submitted a total of seven claims arising from delays in the contract, starting on 23 October 2013, and ending on 11 June 2014. Themba had failed to draw these claims to the attention of the COT.
31. Themba was accused of submitting its first variation orders in March 2014. These were returned to it for correction but the orders were never formally submitted. Themba had indicated in response that variation orders were not required where the contract was "remeasurable", but the COT did not agree.

Certain documents which were required to sanction payment for extensions of time had been sent to Themba but not submitted. Repeated requests for the relevant documents had been ignored by Themba.

32. The COT's letter notes that an undertaking had been given by Themba to *"complete the adjudication by 8 August 2014."* It quotes from clauses 2.3(e) and (f) General Conditions of Contract of 2004 in averring that Themba had failed to settle the claims submitted by the five contractors and had failed to grant extensions of time to them. Moreover, Themba had breached its duty to inform the COT of the claims and of any resolution thereof. The letter ends with a threat that, failing its improvement in performance, the COT may have to terminate the contract under clause 8.4.1(c) of the Standard Professional Services Contract guidelines.

33. Themba addressed two replies to the warning, on 10 August 2014, and again on 29 August 2014. A consideration of same reveals that the COT's concerns were traversed in terms, specific dates being given concerning the submission of variation orders, cost estimates and daily progress summaries. Poor performance issues with contractors HBC and Kufa were dealt with, and details of engineer's rulings on extension of time and standing time claims given.

34. In the latter communication, Themba speaks of the claims for extensions of time and standing time arising from three main factors, namely, the funeral procession in the Pretoria CBD for the late Nelson Mandela, (who had passed away on 5 December 2013), abnormal rainfall, and services relocation.

35. Further elaboration for the delays is given and quoted verbatim below, since it is germane to the matter:

*"Adjudication of the Madiba Funeral claims had initially proved challenging, due to the paucity of back-up information provided by the contractors. It was*

*consequently delayed whilst such information was gathered. It was further delayed due to the uncertainty of the funding source, which situation still persists.*

*Whilst the extension of time applicable to Madiba's funeral remained unchanged, the periods of time had continuously changed in respect of both the abnormal rainfall being experienced and the lengths of time taken to relocate the water pipelines and the electricity cables, the latter of which, at the time of writing this letter, still remains incomplete in respect of the Pretorius/Thabo Sehume Street intersection.*

*Notwithstanding this, negotiations took place, over a period of time, between ourselves and the various contractors, with a view to their respective claims being submitted in a format that permitted adjudication in accordance with the GCC. The contractors consequently submitted suitably prepared extension of time and standing time claims in respect of these issues."*

36. Without referring to Themba's reply of 10 August 2014, on 15 August 2014, the COT sent a terse email to Themba, this time from engineering consultant Viljoen, stating:

*"Can you please give reason why CoT must not cancel your appointment as PRINCIPAL AGENT OF THE CLIENT from 25 April 2014.*

*The reasons must be based on the "typical deliverables" as stayed (sic) in the Government Gazette and documented proof must be attach (sic).*

*Brake (sic) this up per month starting 25 April 2014 ending 15 Aug 14.*

*You have seven calendar days to reply."*

37. Themba sent its reply to this demand, in the form of its detailed 23-page report, on 21 August 2014.

38. This was followed by a written reply, some two months later, on 24 October 2014, from Viljoen. His email alleges that, "as suspected", Themba did not render any Principal Agent service from 25 April 2014 ending 15 August 2014. The COT proceeded to terminate Themba's appointment as such as of 25 April 2014, and instructed Themba to remove all fees from its payment

certificates after 25 April 2014. Regarding Themba's appointment as engineering management consultant, it was invited to provide reasons why its fees should not be reduced to 15% of the gazetted fee. It was asked to give its reasons, per category of eleven cited, (and these included categories such as streetlights, traffic signals, dustbins and various others). Themba was afforded seven days to motivate a non-reduction in fees.

39. Themba's response to Viljoen was given on 3 November 2014. It disputed that it had failed to render service as principal agent. It refused to accept what it termed the COT's repudiation of its appointment. It tendered performance until completion of the project, while stating that it expected to be paid for its services.

40. Regarding the suggested reduction in fees to 15% of the gazetted fee, it noted that it was not competent to limit principal consultant services to discrete elements, such as the technical design for pavement thickness. It stated that

*"...the Principal Consultant services are concerned with the management and integration of a range of professional services across the entire scope of the project..."*

41. Themba went on to mention that the COT had found Themba's services to be acceptable throughout the duration of the project, and had approved its invoices and paid same on presentation. It alleged that Viljoen, on behalf of the COT, had been fully involved in co-ordination meetings, the exchange of correspondence, and the provision of documents by Themba. The project had been completed to stage 5 and Themba was proceeding with stage 6.

42. On 6 November 2014, the COT, via Viljoen, addressed an array of questions to Themba, pertaining primarily to its alleged non-performance of obligations. There was no formal reply from Themba. There was also no subsequent correspondence insisting on a reply. Themba alleges in its

founding affidavit that answers to the questions had already been addressed and/or same were irrelevant.

43. On 17 November 2014, Viljoen asks for information, which he records had already been invoiced by Themba. He asks for this information to be loaded onto CDs in pdf format, by the following day. He states that such information is "as stipulated in Government Gazette no 34875 dated 20 December 2011 and Government Gazette no 34788 dated 2 December 2011." The information is the same as the documents identified in the COT's discovery notice, which followed the guidelines. The demand for information is coupled with an accusation that Themba had failed to attend meetings, and with a threat that a forensic audit would follow shortly.
44. This missive was taken seriously by Themba, who asserted, in reply, that the claims made by the COT were unsubstantiated, but that Themba had informed its professional indemnity insurers of a possible claim.
45. On 18 November 2014, Themba's attorneys addressed a letter of demand to the COT in terms of section 3 of the Institution of Legal Proceedings against Certain Organs of State Act ("the Legal Proceedings Act"). Coupled with a repeat of the prior tender by Themba to continue to perform its obligations, payment of the sum of R3 780 283,66 was claimed. On behalf of Themba, they contend that as at this date, the project was 98% complete with only one week to go for completion. There was never any direct reply to this demand.
46. On 19 November 2014, Kegakilwe-Piki writes a letter to Themba to declare that a dispute has arisen and inviting it to engage in negotiations to resolve *"the issue of non-performance on the various aspects of your appointment."* The letter notes that, although Themba had continuously insisted that it had performed well, it had still not given substantial evidence of this. He quotes from clause 12.1.1 of the Standard Professional Services Guidelines:

*"The parties shall negotiate in good faith with a view to settling any dispute or claim arising out of or relating to the contract and may not initiate any further proceedings until either party has, by written notice to the other, declared that such negotiations have failed."*

47. Themba's attitude, as evidenced by its attorneys' reply of 26 November 2014, was that it had never refused to attend any meeting, but that it would not attend a meeting whose sole purpose was to discount its fees. Concerning the standard professional services guidelines, it considered that these guidelines did not form part of its contract with the COT. Nevertheless, it would agree to meet subject to prior agreement on an agenda, subject to its being accompanied by its legal representatives and insurers, and subject to the attendance at the meeting of officials who were authorised by the COT to negotiate and conclude any settlement of the matter.

48. On 29 November 2014, the COT asserts that Themba had recorded on 10 November 2014 that it intended to cease all site supervision services from 1 December 2014. Themba is informed that its site personnel had to report to site to complete, inter alia, electrical works and the CCTV system. It is invited to engage in discussions to determine the extent of the claims raised and to quantify the amount available in the budget allocated under the seventh letter of appointment. The following statement is made:

*"Your reluctance to negotiate with us has had a bad impact on this Department because we do not know if there are sufficient funds available to pay for construction monitoring for the month of December 2014. Please be informed that all construction monitoring from 1 December 2014 to the completion of the project will be at your own financial risk. Had you engaged us earlier, we would have made contingency plans to mitigate such risks. May we remind you that you still have a contract with us and any dispute does not nullify our original agreement and you still have not completed the works according to your contractual obligations."*

49. Themba's answer to this is articulated in its founding affidavit. Based on progress achieved with phase 1a, it had assumed that site monitoring would

not be required beyond November 2014, but because the COT had failed to reach a decision on tying in works, site monitoring became necessary, so Themba provided site monitoring by two staff members. When Themba had quoted on site monitoring in the context of tying in, the COT had asked that this be omitted from the quotation. Themba had provided the COT with regular forecasts on request. All monthly invoices included a detailed analysis of the current claim and total projected costs.

50. The COT, on 22 January 2015, proposed dates and times, and an agenda, for meetings covering four days, on four consecutive dates. A counterproposal was made shortly after this by Themba for a meeting to occur for one day, commencing in the early morning. Two dates were proposed. The COT was asked to provide further clarity and detail on its agenda. There was no reply to this invitation.
51. On 23 January 2015, the COT raised a query regarding certain fees raised in the invoices received from Themba, and asked it to resubmit same or to permit the COT to "remove unnecessary attachments". In an email of the same date, written by Hosana Ndhlovu, engineering consultant: infrastructure, the COT reiterates that the revised contract amounts remain in dispute, and that no approval was given to Themba to increase the contract amount.
52. Themba tried to clarify matters on 29 January 2015. It stated its understanding of the COT's reference to "attachment" as meaning the detailed claim form on which its invoice was based. It maintained that it had informed the COT, in a meeting on 23 September 2014, attended by Messrs Retief and Viljoen, that the estimate in the seventh appointment letter would be exceeded, whereupon Viljoen had said he had made sufficient provision for this and had instructed Themba to continue to estimate and report on the fee. Themba had done so, on a monthly basis. Themba says the following about the increased contract price:

*"We have not increased the "contract amount" as appears to be suggested. The estimate has increased as an automatic consequence of the value of the project works increasing, as allowed for and as calculated in accordance with Letter of Appointment no 7."*

53. In the view of Themba, the COT came up with more excuses to avoid payment, and this appeared from its email of 6 February 2015. It was willing to pay for invoices which covered construction monitoring or site supervision, but queried two invoices. It disputed that Themba had reached 95,7% of the project. It demanded that fees be charged at the actual construction cost, with a potential saving of about R3 000 000,00 on the charges of Primat and HBC. Professional fees could not be based on what it termed "Ps and G's", meaning "Preliminary and General items". The fees for work done as principal agent and engineering manager still had to be resolved by negotiation. Regarding electrical engineering services, the COT had not constructed electrical works to the value of R8 688 584,72, electrical works having been part of civil construction works for which R2 000 000,00 was already paid. Electrical fees had to be recalculated. Since the Close Out Report had not been received, the claims for urban design and contract and admin could not be justified. The principle of claiming interest on certain invoices was also challenged.

54. A detailed reply was forthcoming on 10 February 2015. The COT was referred to clauses in the Government Gazette applicable to the calculation of fees: Clause 1 subsection 1, which provides that the percentage fees are based on the "cost of works", and clause 2.3 (vii) which defines cost of works as

*"cost of works" means the total final amount (or a fair estimate thereof), exclusive of value added tax, certified or which would normally be certifiable, for payment to contractors (irrespective of who actually carries out the work) in respect of the works designed, specified or administered by the consulting engineer before deduction of liquidated damages or penalties, including –*



*...a pro rata portion of all costs related to the contractor's general obligations and overhead (preliminary and general) items applicable to the works; (irrespective of who actually carries out the works) and...."*

55. The above sections are identical to the equivalent sections in the December 2011 Gazette.

56. Themba asserted that its claim indicated that stage 5 was 96% complete and stage 6 was 50% complete. Concerning construction cost, it was incorrect to state that current claims should be based on actual cost. The Government Gazette provided that the cost of works could be based on the total final amount or a fair estimate thereof. Interim claims could only be based on estimates with only the final claim being based on the final cost of works.

57. Themba goes on to state that, should it be demonstrated that the COT had suffered loss as a result of failure to discharge its contractual obligations, this would be subject to a professional indemnity claim. The letter concludes, in summary:

*"For the record, for the last three years, since inception of this project:*

- *The calculation of our fees has been based on the Government Gazette*
- *Our services have been provided in accordance with the guidelines of the Government Gazette*
- *Calculations of fees have been based on the "cost of the works" as defined in the Government Gazette*
- *The "cost of the works" so calculated has always included the value of "Preliminary and General" items*
- *Fees have been calculated on the interim estimates of the "cost of the works" and not, obviously, on the actual final value*
- *The fee for electrical consulting has always been based on the value of the electrical "cost of the works"*.

58. The answer to this letter, by email from the COT on 11 February 2015, confirmed that there was no dispute that the fees were based on the

Government Gazette, and suggested that all of these points should be discussed during negotiations.

59. The debate on the quantification of fees and completion of the works culminated finally in an email dated 16 February 2015, from Themba to the COT. This constituted a reply to correspondence from the COT sent on 26 January 2015, and 2, 11 and 12 February 2015. In summary, the issues were as follows.
60. The first complaint pertained to the snag list. The COT alleged that it had asked Themba to correct the snag list and that it had wasted three weeks in attending to this, despite repeated requests. Themba replied that snag lists were issued on 11 December 2014 and 21 January 2015. Reports from the various subcontractors, who were liable for dealing with snags, were given on 2 February 2015. It attached the latest status report to its email of 11 February 2015. Themba noted that the subcontractors had shown a level of reticence in continuing with their work after the COT had suspended phase 1B of the works. Primat and Mologadi had indicated that they would deal with snags when the step removal was authorised by the COT, but had to wait for the variation order to be issued for this.
61. In its letter of 2 February 2015, the COT complained that during the past three weeks Themba had provided only one person to monitor the site and to inspect the correction of defects, but the defects had still not been remedied, leading the COT to consider the reduction of fees for such services as this person had not done much in correcting defects. Themba's answer to this was that the COT had, on 8 January 2015, told it to continue with site monitoring on a part time basis, for a category D person, for the removal of the step and finishing the works. Themba had duly engaged a category D person, who had been on site since inception. Themba had complained that the engagement of only one site person was counter-productive. It mentioned that its site personnel had endured abuse at the hands of COT personnel. It confirmed that snag lists would be issued soon.

62. On 3 February 2015, Themba's attorneys addressed a further demand to the COT in terms of section 3 of the Legal Proceedings Act, demanding payment of the further amount of R1 109 715,79 for services rendered in December 2014 and January 2015, with Themba estimating an additional liability of R492 000,00 for work done in February 2015, with an allowance for interest of R43 000,00. There was never any direct reply to this letter.
63. On 11 February 2015, the COT had called for a certificate of practical completion and a progress report on the snag lists. It asked if the snag list would be completed by the end of February 2015.
64. In its answer, Themba referred the COT to the General Conditions of Contract, and in particular, clause 51.1, which provided that the contractor was entitled to receive a certificate of practical completion when the works had reached a stage which allowed their use for their intended purpose without danger or undue inconvenience. The issue of the certificate had been delayed by a variation in the contract, caused by the COT's instruction to remove the steps in Pretorius and Thabo Sehume Streets. At a meeting on 3 February 2015, the relevant contractors had expressed concern about non-payment for work done for the Mandela funeral, but had agreed to proceed with the work on the steps subject to the issue of variation orders authorised by the COT. The variation orders were signed by the engineer and contractors on the day of the meeting and handed to COT officials. The variation order for Primat was received by it on 12 February 2015, and the order for Mologadi had still not been received.
65. On 12 February 2015, the COT had demanded a detailed programme from Primat for the correction of the steps, an intervention plan to complete the snag lists, a cost estimate, and HBC's variation order signed by Themba and the contractor.
66. Themba recorded that the variation order for Primat was received from the COT on 12 February 2015. On 5 February 2015, the COT had been given

a timeline for completion of the variation. The final estimates of expenditure had been submitted for all contractors on 4 February 2015, with revised costing for Mologadi given on 11 February 2015. Themba pointed out that the order for Mologadi was delayed as the COT queried milling rates because the milling rates quoted by it were much higher than those quoted by Primat. Themba replied that Mologadi's rates were higher due to it milling out a higher volume, but Themba had negotiated a lesser rate. A mistake had been made by Themba for quoting a higher rate on the order. The COT was asked to confirm its agreement on the above to facilitate the issue of two revised variation orders. HBC's variation orders would be submitted to the COT on 16 February 2015. Primat's work would be completed by 27 February 2015, but no estimated date of completion by Mologadi could be given owing to the absence of a signed order. It was likely that HBC's work would be completed by 27 February 2015 subject to the road markings and sign off on the electrical work by a representative of the electricity department.

67. There was no further correspondence of relevance after this, and this is not disputed by the COT.

68. The statement of account attached to the founding affidavit reveals that payments were made in September and October 2014 for a balance brought forward on 30 September 2014, of R2 448 569,60. Hereafter, two further payments were made, on 31 October 2014 for R337 003,38 for an invoice dated 30 September 2014, and R474 692,39 on 9 March 2015, for invoices raised on 30 November 2014 and 12 January 2015 respectively. The rationale behind the payments which were made by the COT is not explained in the answering affidavit.

69. Arising from the amendment granted at the hearing, I may consider the answering affidavit as final, and not preliminary, as was initially indicated by the COT.

70. The papers run into 911 pages in toto. The answering affidavit of the COT consists of a total of 26 pages.

71. I refer to the averments in this affidavit which pertain to the discovery notice served on Themba, the COT having conceded the incompetence of same. No effort is made in the COT's answering affidavit to refer to the paragraphs in the founding affidavit which mention documents not annexed thereto, as required by rule 35(12). Nor is any attempt made to describe the documents with any further particularity, other than to assert, in vague terms, that they are "of a technical nature", and that they arise from the provisions of regulation 3 of the guidelines. Nor does the COT draw the necessary nexus between the documents sought and the reasonably anticipated issues, as contemplated by rule 35(14).

72. The deponent to the answering affidavit is Viljoen, who describes himself as an engineering consultant at the transport infrastructure construction project management department, and who states that the affidavit is deposed to "*in opposition to the main application.*"

73. For convenience, I have summarised the disputes raised in answer to the claims, in unison with the reply advanced in Themba's replying affidavit.

74. In limine, the COT avers that the application is premature owing to noncompliance with clause 12 of the General Conditions of Contract, which requires that there should be negotiation before recourse to litigation.

75. The COT asserts that the dispute relates primarily to two issues, namely, liability to pay, and determination of the amount payable. The COT professes to have no knowledge of the correct amount claimed because of Themba's unwillingness to meet with it, and it therefore denies liability to pay any of the amounts claimed and asks for the application to be dismissed.

76. Themba replies that it was more than willing to meet to avoid litigation, and that the COT knows full well how much it owes and how the amount is calculated.

77. Viljoen relies on the statute and the guidelines, (which he incorrectly refers to as "regulations"), which govern the engineering profession, as being applicable to the agreement between the parties. The statute being the Engineering Profession Act and the December 2011 guidelines. Themba's reply is that *"the contract and the various letters of appointment speak for themselves and to the extent that there is any governing legislation, the respondent is invited to refer to same."*

78. In the view of the COT, the only letter of appointment of relevance to the dispute is the one dated 6 December 2013. This is the seventh and last letter. The COT notes the essential terms of the contract evidenced by this letter as being as follows. Themba was appointed to render professional civil engineering services for Operation Reclaim phase 1. The services were to be rendered in accordance with the guidelines, and mention is made of the six stages to completion, as contemplated by the guidelines. The letter itself reads:

***"SCOPE OF CONSULTING ENGINEERING SERVICES***

*The professional civil engineering services required for the project in accordance with the Guidelines Scope of Services and Tariff of Fee for persons Registered in terms of the Engineering Profession Act, (Act 46 of 2000) are as follow (this scope can be reduced if the Executive Director: Infrastructure Design, Construction and Maintenance feel it is necessary):"*

79. Viljoen says that the appointment was for normal service, engineering management service and as principal agent, with provision for the appointment of subconsultants in the form of an electrical engineer, a heritage impact assessment practitioner, an urban designer and a traffic engineer.

80. The estimated fee was R8 290 400,00 including 10% for contingencies, excluding Vat, and subject to conditions of contract, the discount offered, and availability of funds. The estimate was based on the project value of R33 871 155,00.
81. In its replying affidavit, Themba avers that all letters of appointment are relevant and that the COT appears to challenge only certain services, the value of which amounts to R2 215 579,84, but does not challenge services for civil engineering, structural engineering, ground penetrating radar, construction monitoring, archaeology and travelling and printing disbursements, with an overall value of R2 978 337,70.
82. The COT asserts that the Engineering Act dictates that payment is dependant on fulfilment by Themba with the obligations imposed by regulations 3.2 and 3.3 of the guidelines. Themba asserts, on the other hand, that the Gazette serves only as guidance about services to be performed. It quotes from the preamble to section 3 of the December 2013 Gazette. (The preamble will be dealt with below.)
83. In the view of Themba, the typical deliverables identified in section 3.2 are merely guidelines and not minimum obligations imposed on the engineer. They serve as guidance as to the scope of work required to achieve a successfully complete project, and are neither prescriptive nor comprehensive in scope. With the works done to prepare for the Madiba funeral, the guidelines were not followed due to tight deadlines. Emails, discussions and site instructions took the place of formal reports.
84. It notes that the whole project was fragmented, with its scope, programme and approvals and budget being constantly varied by Viljoen whose "*chaotic management*" required the process to remain "*fluid and accommodating of the constant changes in scope, funding and programme.*" It mentions that until Viljoen realised he had erred in failing to provide adequately for increasing costs, he expressed no concerns about the project and had, by

email on 12 September 2012, commended Themba on its work, stating: *"Thanks for hard work to date."* It avers that it was only when his error in budgeting became apparent that he questioned the services provided and tried to renegotiate fees.

85. Viljoen alleges that the deliverables per the guidelines are spelt out in the final appointment letter, and these covered stages 1 to 6, stage 6 being the close out. Themba completed only 80% of stage 5, and did not attempt to perform any service for stage 6, and failed to sign the completion certificates. Themba denies these allegations. It alleges that stage 5 was completed in full, that the COT had taken possession of the works and that the facilities were being used by members of the public. It attaches photographs of Pretorius Street, Thabo Sehume Street, and Madiba Street. A consideration hereof reveals that there are no incomplete roadworks, or any other works, on these streets. Themba assesses the work for stage 6 as being 95% complete, as is demonstrated by the Close Out Report. The reason why final certificates of completion were issued to the COT but not signed by Themba was because the work was 95% complete by the date of termination of its appointment on 28 February 2015.

86. The COT avers that Themba was obliged to submit interim invoices on a monthly basis and, on every invoice, deliver the deliverables. While it was performing stage 5, it was already claiming money for stage 6. Themba replies that invoices were submitted generally on a monthly basis, and these included the degree of completeness, in a format prescribed by the COT. Stages 5 and 6 ran concurrently, it being normal for sections of a large project to be at different stages, in parallel with one another. Taking note of the imminent cessation of the contract, Themba started work on the Close Out Report while concluding construction. Themba alleges that Viljoen has not read the Close Out Report. If he had, he would have realised that the call for further documents was unwarranted. He would have realised that Themba performed services for stage 6.



87. The COT claims that the primary fee was wrongly calculated because stage 6 was not completed, and therefore the actual cost of the works could not be established. According to the December 2011 Gazette, the primary fee was based on the actual cost and did not include claims for standing time and suspension of works. The COT concedes that it had paid money for standing time and suspension of works when the water pipeline was relocated. Themba refers to the definition of "cost of the works" in the guidelines, the definition being the same in both Gazettes. The cost is defined as meaning *"the total final amount (or a fair estimate thereof), exclusive of Vat, certified or which would, normally, be certifiable for payment to contractors...."*
88. The COT elaborates on the two phases of Operation Reclaim, identified as phases 1A and 1B. The need to split the project was attributable to the discovery of underground services which had to be relocated so that road and pedestrian walkways could be built. The split meant a four lane roadway for phase 1A and one lane for phase 1B.
89. Themba had failed to inform the COT that the project was not ready for implementation, and thus "there was unavailability of funds to see the project through." Themba had been paid R4 357 567,00 for the financial year to 2014 and R2 859 882,00 for the year to 2015, for site supervision. Phase 1A had been completed and therefore the final fee had to be based on the final project cost. Themba avers that delays in implementation were attributable to Viljoen's failure to manage the involvement of the COT's services departments and that he was to blame for any lack of availability of funds.
90. The COT asserts that the production of deliverables for stages 1 to 6 would include those for an urban designer, whose duties are specified in the Architectural Profession Act, 44 of 2000. Approved design plans had not been provided by Themba, despite numerous requests. In the result, the COT was unable to determine whether Themba was entitled to fees for

architectural services, and it did not even know whether Themba had engaged anyone to perform this work.

91. Viljoen specifies documents which are deliverables but which were not provided by Themba. They include engineering management services approvals for stages 2, 3, and 5, approved heritage impact assessment reports, approved urban designs and approved electrical layout designs. As principal agent, Themba had also failed to deliver, for stage 3, the detail design and documents programme, for stage 4, contract documents, for stage 5, approved construction programme, progress reports. For stage 6, no work was done due to Themba allegedly abandoning the project after the tender period had expired.
92. Viljoen emphasises that a great deal of the disputes would disappear upon mere production of the deliverables for every stage, as prescribed in the guidelines and repeated in the appointment letter of December 2013.
93. To all of the above issues relating to delivery of deliverables in accordance with the guidelines, Themba avers that Viljoen had *"intimate engagements with the architects and with all the other consultants"* and that the roles of the consultants are spelt out in the Close Out Report.
94. Viljoen asserts finally that the quality of services rendered is directly connected to the right to claim payment, and that Themba rendered its services *"very poorly"*, and says that it was *"grossly negligent"*. He relies on two issues in this regard.
95. The first complaint relates to the engineering management services rendered by Themba. Themba was obliged to co-ordinate the electrical engineer and his duties. The design of street lights, pedestrian lights and poles at heights relative to adjacent buildings should have been included in design drawings, which should have been issued on or before 2 September

2013. The poles were due to be installed in November 2013. The buildings were surveyed to obtain accurate measurement of streetlights and poles. The streetlights and pedestrian poles which were initially delivered in September/October 2014 did not match the required size. Themba replies that the COT provided the survey, but its quality and accuracy were poor. Because of this, as installation started, clashes were identified and these were resolved by the electrical consultant and the principal consultants with no further implications to the project.

96. The second complaint relates to the services rendered as principal agent. On 15 August 2014, Themba was asked to give reasons why its services as principal agent should not be cancelled from 25 April 2014. One of the grounds for this invitation was because, after five months of claiming standing time, not one of the three civil contractors started work with the approved construction in April 2014. A report was submitted which allegedly proved that Themba had not provided service as a principal agent. This failure was directly related to the claim for payment of fees. Themba's answer to this is that its report proved that its services as principal agent were quite adequate. If Themba had failed to supply this service, the contract would have come to a halt.

97. This concludes the evidence advanced in the affidavits filed of record.

98. In determining whether the disputes raised in this matter are such that judgment may not be granted on motion, certain principles should be adopted. Cognisance has been taken of the **Plascon Evans** rule as explained by Corbett in **Plascon -Evans Paints (Tvl) Ltd v van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 SCA**:

*"It is correct that, where in proceedings on notice of motion, disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court*

*to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact."*

99. Where an allegation or denial is far-fetched or clearly untenable, the Court is justified in rejecting same merely on the papers. See **Associated South African Bakeries (Pty) Ltd & Vereinigte Backereien en Andere 1982 (3) SA 893 A at 923G.**

100. I refer to Erasmus Superior Court Practice, Service 40, at B1-43, in which, in referring to, inter alia, **Moosa v Knox 1949 (3) SA 327 N at 331,** it is stated:

*"If the respondent's affidavit in reply to the applicant's affidavit fails to admit or deny, confess and avoid, allegations in the applicant's affidavit, the court will, for the purposes of the application, accept the applicant's allegations as correct."*

101. I will address the disputes raised in the answering affidavit, ad seriatim, and under appropriate categories. The dispute relating to Themba's failure to comply with the discovery notice was no longer a live one, so it has been excluded from analysis.

102. Properly distilled, they amount to the following:

- a. Themba should have employed the dispute resolution procedure provided for in clause 12 of the General Conditions of Contract, it failed to do so, and therefore the application is premature;
- b. the guidelines in "Guidelines on Scope of Services and Tariff of Fees for Registered Professional Engineers", as stipulated in Government Gazette no 34875 dated 20 December 2011, applied at all times to the contract between the parties, in the sense that they were peremptory, with the result that any omission to strictly adhere to

same by producing "the deliverables" amounted to a breach of contract by Themba;

c. Themba breached the contract by delaying same through its failure to inform the COT in advance of commencement that the project was not ready for implementation, when it should have established that underground services had to be relocated before the works commenced, and thus there was an unavailability of funds to see it through;

d. Themba's performance under the contract was "poor" and "grossly negligent".

103. As a starting point, some general observations are warranted.

104. The founding affidavit of Themba traversed, in comprehensive detail, the sequence of events which culminated in the pending application. Themba's professionalism and transparency was more than adequately borne out by its detailed, direct and satisfactory replies to all issues raised in correspondence with the COT. I was given no cause to treat the evidence advanced by Themba with any measure of circumspection. It was within the province of the COT to contest the satisfactoriness of these replies, but it inexplicably failed to do so. I may therefore infer that these issues were addressed to the satisfaction of the COT.

105. The answering affidavit failed to traverse, in terms, and ad seriatim, the numerous material allegations made in the founding affidavit. There is not even a general denial of allegations made by Themba which the COT fails to specifically address. This would have had no probative value, in any event, since the COT was in a position to address all allegations, Viljoen having been intimately involved in the project from the outset to its conclusion. There are no confirmatory or supporting affidavits from any other officials at the COT. There is no independent expert's report to

corroborate any of the assertions made concerning the conduct of Themba in the performance of the contract, and the consequences thereof. No "forensic audit" appears to have been conducted, despite the threat by Viljoen to do so. There are no annexures to the affidavit other than an unsigned copy of the application to compel discovery.

106. The COT did not omit to address Themba's detailed allegations because they were irrelevant or immaterial. The facts in casu were of such a nature that the COT must have had knowledge of them, and would have been able to answer them directly, and without difficulty, and this inference is irresistible. The COT did not suggest otherwise.
107. The COT failed to traverse all material averments in the founding affidavit, in an answering affidavit which on its own version was final. It did so at its own peril, and with the risk of adverse inferences being drawn against it.
108. I am entitled to accept as admitted fact all allegations raised by Themba which were not specifically disputed by the COT in its answering affidavit. I am entitled to accept, by necessary inference, that, to the extent to which the COT did not persist, in its answering affidavit, in any of the complaints raised in the correspondence preceding the application, such complaints were resolved to its satisfaction, and do not qualify as disputes in this application.
109. It is an undisputed fact that the first intimation of any issue with Themba's services arose when the contract had progressed for two and one half years and only had another six months to go before expiry of the mandate. All invoices were paid by the COT for work performed until circa August 2014. Before then, I can safely infer that the COT was satisfied with Themba's services, with the format of its invoices, and with the methodology applied in its calculations of amounts owed.

110. It is an undisputed fact that Themba calculated its charges in accordance with the guidelines. Again, the COT accepts this in its email to Themba of 11 February 2015.
111. From the correspondence, it emerges that the first main issue related to unanticipated and unbudgeted claims made by Themba for standing time as a result of delays in performance by Themba and its subcontractors. Themba fully and satisfactorily explained the cause for the delays in the correspondence which the COT failed to challenge. It was not to blame for the delays.
112. The COT has not brought any counter-application for an order for a reduction in the amount claimed, nor has it made any attempt to quantify the amount which, on its version, should have been payable to Themba but for the alleged breaches made by it. The COT does not allege that the work was so glaringly incomplete or poorly done that it had to engage another engineer to complete and/or remedy same, at additional cost, which cost could have formed the subject-matter of a counter-application against Themba. It raises no dispute about the functionality of the works as delivered by Themba, albeit that same were not entirely complete at expiry of the contract. It never cancelled the contract during its three year period, despite the threat to do so.
113. There is no allegation that any official at the COT had read and properly considered the Close Out Report, a critically material document which, in hard copy, filled fourteen lever arch files. By the simple expedient of doing so, the COT would have been enlightened about the true extent, if any, to which Themba may have failed to deliver "the deliverables", a complaint raised with platitudinous monotony throughout the COT's answering affidavit.
114. The COT was embarrassingly unspecific in providing the detail to substantiate its complaint that "deliverables" under the guidelines were not

delivered, and, equally importantly, about the practical consequences on the project of the failure to do so.

115. The COT ignored the two letters of demand for payment of monies owed, and gave no explanation, satisfactory or otherwise, for its failure to address same. While I do not construe silence as acquiescence, I may take note of the absence of an explanation as a factor in my overall analysis of the veracity and genuineness of the disputes in casu.
116. I may take note of the fact that, on the papers before me, in the three-month period between the last letter of 16 February 2015, and 20 May 2015, being the date of service of the application, the COT did not address any further complaints to Themba, but chose instead to remain supine.
117. The COT raises the point in limine that Themba failed to employ the dispute resolution procedures prior to resorting to litigation. It relies on clause 12 of the General Conditions of Contract. It concedes that it has no knowledge of the correct amount claimed and denies that it is liable to pay any of the amounts claimed, because of Themba's unwillingness to meet with it.
118. Themba denies that it refused to negotiate with the COT. This allegation is corroborated by the plethora of correspondence on the issue. It also makes no sense for the COT to profess a lack of knowledge about how the amounts are motivated, when a perusal of this application and the Close Out Report in its entirety would have assisted in addressing the issue. The point is patently unsustainable.
119. Under the issue concerning the guidelines and the status of same vis a vis the duties of Themba, the COT has made several complaints. Summarised, they are that



- a. payment was dependant on fulfilment by Themba of every requirement outlined in section 3 of the guidelines, and this did not occur;
  - b. Themba breached the December 2013 letter of appointment by failing to complete the contract, and thereby, not delivering the deliverables required by the guidelines and specified in the letter;
  - c. Themba's interim invoices did not conform with the guidelines because they were not accompanied by the deliverables as required by the guidelines;
  - d. Themba omitted to produce several deliverables which left the COT in the dark as to the identities of all parties engaged by it; proper delivery would have helped the COT to assess the veracity of its claims.
  - e. Themba breached the guidelines by calculating its primary fee on an estimated cost as opposed to an actual cost, and the guidelines did not include claims for standing time and suspension of works;
120. Every letter of appointment mentions the guidelines both in respect of fees and in respect of scope of work. Fees are mentioned as follows, under the "payments" heading:
- "The fees will be calculated in accordance with Government Gazette 34875, Notice 206 of 2011: Guideline Scope of Services and Tariff of Fees for Persons Registered in terms of the Engineering Profession Act, 2000 (Act No 46 of 2000).*
121. Scope of work is mentioned under the heading "Scope of consulting engineering services:

*"The professional civil engineering services required for the project in accordance with the Guidelines Scope of Services and Tariff of Fees for persons registered in terms of the Engineering Profession Act, (Act no 46 of 2000) are as follow..."*

122. The Oxford English Dictionary defines *"guideline"* as *"a general rule, principle or piece of advice."*
123. I quote from the preamble to section 3 of the December 2011 Gazette no 34875, which is worded similarly to its counterpart in the December 2013 Gazette:

### **3. GUIDELINE SCOPE OF SERVICES**

*The following guideline scope of services are provided to indicate which services would normally be provided and for which the guideline's tariffs would typically represent reasonable compensation. In agreeing the scope of services and the scope of work to be carried out, the client and consulting engineer should review the scope of services and list the applicable normal and additional services and agree the related compensation."*

124. The use of the expressions *"normally"* and *"typically"* in the preamble is consistent with the meaning of *"guideline"* as a general rule, but immediately distinguishable from the meaning that the guidelines must *"always"* be applied. The use of the expression *"applicable"* contemplates that every contract would have an element of adaptability which may apply certain guidelines and exclude others depending on its nature. The language in the preamble is not peremptory. There is no use of the expressions *"must"* and *"shall"*.
125. The fact that the letters of appointment specifically stated that the scope of work and fees would be *"in accordance with"* the guidelines does not elevate the guidelines to a status other than that expressed in its own terminology.

126. If the COT intended that there should be strict adherence to every requirement in the guidelines, with no exception, it was incumbent on it to state so in the letter of appointment, in clear and unequivocal terms. This was not the case here. This being the case, the COT's interpretation of the guidelines as hard and fast rules from which no departure may be entertained at all is flawed and incorrect. All issues raised by the COT on the strength of its interpretation of the guidelines as peremptory and admitting of no departure, must be considered as legally untenable.

127. In addition, even if one assumed that the guidelines were peremptory, on the facts before me, the COT has failed to prove that the deliverables were not delivered by Themba. In this regard, one can only wonder what was contained in fourteen lever arch files of papers if they did not include the deliverables.

128. The COT has failed to prove that any such failure, if it occurred, materially impacted on the functionality of the works, thereby going to the root of the contract.

129. The issue pertaining to the calculation of the final fee hinges on an interpretation of "cost of works". Clause 1 subsection 1 of the guidelines provides that the percentage fees are based on the "cost of works", and clause 2.3 (vi) defines cost of works as

*"cost of works" means the total final amount (or a fair estimate thereof), exclusive of value added tax, certified or which would normally be certifiable, for payment to contractors (irrespective of who actually carries out the work) in respect of the works designed, specified or administered by the consulting engineer before deduction of liquidated damages or penalties, including –*

*...a pro rata portion of all costs related to the contractor's general obligations and overhead (preliminary and general) items applicable to the works; (irrespective of who actually carries out the works) and...."*

130. Plainly, Themba was entitled, on a proper construction of this definition, to calculate its claims based on a fair estimate of the value of the works. This point must fail.
131. The complaint about Themba's being at fault for delays in the contract is unduly scanty in its factual substantiation. In its letter of 29 August 2014, Themba addressed the causes for the delays as three-fold, namely: the interruption of works caused by the Madiba funeral in the streets which were part of the works, abnormal rainfall, and the need to relocate water pipelines and electricity cables. Themba consistently maintained that it was the COT which had failed to establish, in advance of the contract, that its underground infrastructure would obstruct the works. None of these allegations was ever seriously disputed. This much is also corroborated by the correspondence.
132. The complaints pertaining to poor workmanship are also lacking in substance. The issue about Themba being responsible for the incorrect lengths of the streetlights and pedestrian poles rings hollow in the face of its assertion that the survey required to measure their lengths was done by the COT, and incorrectly so, and because the problem was resolved. The COT produces no evidence to prove that it incurred extra cost to remedy the problem, and this is consistent with Themba's allegation that it was fixed. The averment that Themba did not render services as a principal agent is unsubstantiated. It was not seriously disputed in the pre-litigation correspondence after Themba had given its detailed report to the COT to motivate its services qua principal agent.
133. Based on the evidence which is either undisputed or not the subject of a real, genuine or bona fide dispute, I am satisfied that Themba has proved its claims against the COT, on a balance of probabilities. Themba is entitled to payment of interest from the dates of its respective letters of demand, and no dispute was raised about this. There is no reason why costs should not

be granted to Themba as the successful party in an application which was preceded by prior written demands.

134. The following order is granted:

- a. upholding the applicant's application in terms of rule 30A dated 20 July 2015 and striking out the respondent's discovery notice dated 30 June 2015, with costs against the respondent;
- b. dismissing the respondent's counter-application dated 18 April 2016, for an order to compel compliance with the above discovery notice, and ancillary relief, with costs against the respondent;
- c. directing the respondent to effect payment to the applicant of the sum of R3 782 283,66 plus interest thereon at the rate of 9% per annum from 19 November 2014 to date of final payment;
- d. directing the respondent to effect payment to the applicant of the sum of R1 109 715,79 plus interest thereon at the rate of 9% per annum from 4 February 2015 to date of final payment;
- e. directing the respondent to pay the applicant's costs of suit in the main application.

  
**T BRENNER**  
 ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
 GAUTENG DIVISION, PRETORIA  
 6 June 2016

Appearances

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