IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

4/5/16

CASE NO: 9834/2003

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

04/05/16
DATE

SIGNATURE

In the matter between:

THUSHANANG CONSTRUCTION CC Plaintiff

and

GREATER TUBATSE MUNICIPALITY Defendant

J U D G M E N T

TEFFO, J:

INTRODUCTION

[1] The plaintiff sued the defendant for payment of an outstanding balance in the sum of R614 637,91 due and payable to it for services rendered during

the period February 2002 to July 2002 at the defendant's special instance and request together with interest and costs.

[2] At the end of the trial the plaintiff brought an application to amend the amount claimed to read R643 869,17. The application was opposed but was ultimately granted.

[3] The plaintiff alleged in its particulars of claim that during March 2000 it duly represented by Mr Pieter Daniel De Nysschen ("*Mr De Nysschen*") submitted a tender for the construction of a sports and recreation facility for Tubatse Township ("*the project*") which was to be completed in two phases. The tender was for the amount of R1 913 902,40. The amount was based on quantities provided by Tsebo Development Consultants CC ("*Tsebo*") who were the defendant's consulting engineers at the time. The tender was not accepted but the defendant requested the plaintiff to keep it open. The plaintiff agreed to this arrangement subject to an escalation of the amount tendered.

[4] The following facts are common cause between the parties: During February 2002 and at Tubatse, a duly authorised employee of the defendant, accepted the tender on behalf of the defendant on the basis that the defendant would pay the plaintiff an amount of R907 229,11, that the scope of the project was to be reduced, that the plaintiff would only have to complete phase 1 which included the construction of an athletics and a soccer field. It was further agreed that the following work was to be omitted from the reduced

project: septic tank and associate pipe works, Bill 17 – soil drainage – all items; irrigation system for the football grounds – Bill 17 – irrigation system – all items, fencing – Bill 17 – fencing – all items; storm water channels around the athletics track – Bill 17 – storm water channels – all items; spectator seating – Bill 18 – spectator seating – all items.

[5] The plaintiff duly proceeded with the project and it was agreed that payments would become due and payable during the course of the construction upon the submission by the plaintiff to the defendant of the invoices for the work done up to the date of the invoice.

[6] Further allegations were made, which were disputed by the defendant in its plea, to the effect that it was an express, alternatively tacit, alternatively an implied term of the agreement that the contract price would increase or decrease in the event that quantities provided by the defendant or its duly authorised representatives were found to be incorrect, depending on whether more or less work had to be performed as a consequence of such incorrect quantities.

[7] The following further allegations were made in the plaintiff's particulars of claim:

> "*Para 10 During the construction process of phase I, it became clear that Tsebo incorrectly surveyed the quantities as follows:*
>
> *10.1 instead of 19 trees to be removed, there were 340 trees to be removed;*

10.2 the total area for excavation and filling was underestimated as follows:

10.2.1 Excavation volumes as provided by Tsebo: 9 405 m^3. Actual excavation volumes: 11 833 m^3 plus 18 868 m^3.

10.2.1.1 Excavation volume of rock as provided by Tsebo: 470 m^3.

Actual excavation volume of rock: 1 800 m^3.

10.2.2 Filling volumes as provided by Tsebo: 11 828 m^3.

Actual filling volumes: 11833 m^3 and 18 868 m^3.

11. The additional excavation and filling work increased the contract price, details of which are contained in para 14 below."

[8] The defendant pleaded as follows to paras 10 and 11 of the plaintiff's particulars of claim:

"*The contents of these paragraphs are denied and plaintiff is put to the proof thereof. The defendant pleads that the contract amount was R907 229,11 inclusive of VAT. As the plaintiff progressed with work the following payments were made to it:*

R171 974,47 on 7 May 2002;

R 58 390,80 on 20 June 2002;

R243 423,02 on 2 August 2002;

R245 801,00 on 29 August 2002;

R143 487,61 on 13 November 2002.

The total payments made to the plaintiff amount to R863 076,90. The balance of R44 152,21 was retained for incomplete and/or defective workmanship as well as penalties payable by the plaintiff to the defendant. The stated completed date was 30 June 2002 and the plaintiff only vacated the site on or about 30 August 2002. The penalty payable by the plaintiff to

the defendant was R500,00 per calendar day for everyday beyond the stated completion date."

[9] The plaintiff also averred that during or about June 2002 and at Tubatse, the parties further orally agreed to amend the agreement to the effect that it was to proceed with phase 2 of the project and that it eventually proceeded with the construction of phase 2. It is alleged that the plaintiff eventually issued the following invoices to the defendant:

4 April 2002	R 188 568,50
1 May 2002	R 384 354,50
10 July 2002	R 712 924,41
2 August 2002	R1 321 906,70
Total	R2 607 754,11

Accordingly so it was alleged, that various payments were made to the plaintiff leaving the balance of the amount claimed. These allegations have been disputed in the defendant's plea.

[10] The issue for determination is whether the plaintiff is entitled to the relief sought and whether it indeed did the work on phase 2 and whether it was authorised to do the work on phase 2 of the project.

THE EVIDENCE

[11] Mr De Nysschen was the only witness who testified in support of the plaintiff's case while the defendant called two witnesses, namely, Mr Collins Sipho Dlamini (" Mr Dlamini") and Mr Ramatshidiso Mpho Matje (" Mr Matje").

[12] The evidence of Mr De Nysschen was briefly as follows: He is the managing member of the plaintiff. He practises as a civil engineer with a B.Sc in Civil Engineering degree he obtained in 1965. He is registered with the Engineering Council of South Africa ("*ECSA*"). He does consulting and construction work and all the disciplines in civil engineering. He submitted a tender for phases 1 and 2 on behalf of the plaintiff. The tender was not accepted. Mr Dlamini engaged him and requested that he should keep the tender valid as they were busy trying to raise the capital amount. The tender became a negotiated tender. On 13 December 2001 he was called to a Council meeting at Burgersfort Municipality which is part of the defendant. Mr Janse van Rensburg who was the Acting Municipal Engineer for the defendant informed him that the defendant wished to pursue the construction of the complex. He asked him what his conditions would be in case the full tender amount was not awarded. Heads of departments, community leaders, Mr Dlamini, Mr Van Rensburg and Mr Andries Ngwenya were also present at the meeting. They agreed that the escalation should be paid to the tender rates which were two years old and that the full tender amount should be made available to the plaintiff when the funds were raised. The tender was valid for 45 days. After the expiry of the 45 days, it was kept valid at the request of Mr Dlamini. The sum of R910 000,00 was available for the construction and the total amount that the defendant had for professional fees

and construction was R1,1 million. He was not told when to start with the project at that meeting. Mr Dlamini said he would revert to him.

[13] In March 2002 Mr Dlamini requested him to avail himself on a specific day at the site where he orally informed him to start with the project immediately. On that day he met with Mr Dlamini, the late Mr Simon Bhembani and his co-member, Mr Andries Ngwenya. He asked Mr Dlamini to furnish him with a letter of appointment. Mr Dlamini told him that he would get the letter. He urged him to start with the project immediately and that he would cancel the contract if he did not start with the project as requested. He immediately hired people and started looking for the survey pegs. He started working long before he received the letter of appointment. It was brought to him more than three weeks later. He proceeded with the work on phase 1 and submitted invoices. Phase 1 was completed and two weeks before it was completed, he informed Mr Dlamini that the work was going to be completed and that the machines should be removed. He also informed him that should the machines be removed from the site, it would cost him R50 000,00 to bring them back to the site to complete the contract. Mr Dlamini told him that the letter of appointment for phase 2 was in the Municipal Manager's office. He said he could not access it because there was a municipal strike at the time and the municipal offices were closed.

[14] He kept on reminding him to furnish him with the letter of appointment every time he saw him. They brought more machines to the site and completed the work on phase 2 in two weeks. Phase 2 entailed the

excavation of soil, filling the layers of soil to perform platforms 2 and 3. They completed phases 1 and 2. He always asked Mr Van Rensburg to go with him to the site to show him the extent of the work done and indicated to him that quantities made by the consultants were not correct. Everyday people stopped at the site and asked questions. Mr Dlamini was at the site everyday. Nobody told them to stop working while they were busy with the work on phases 1 and 2 but at a meeting with Mr Van Rensburg and the consultants where they discussed quantities, Mr Van Rensburg told them to stop working until the finance issue was resolved.

[15] He was referred to page 165 of the bundle of documents and explained that the document on that page was the minutes of a meeting of all stakeholders held on 22 August 2002 at Praktiseer satellite office to discuss circumstances surrounding the contract. He explained who was present at the meeting. Mr Dlamini appeared as the chairperson on the minutes, officials from the defendant which included Mr Van Rensburg, were present according to the minutes, Mr Matje from Tsebo, himself together with his co-member, Mr Ngwenya and Ms Ledwaba who was a representative for the department of sports and culture. The following paragraphs of the above minutes were read into the record:

"*5 PHASE 1 OF THE PROJECT*

The following items are put forward for discussion by Ms Lerato Ledwaba:

- *Bill of Quantities,*
- *Contract amount,*
- *Professional fees,*

- *Donation,*
- *Job creation,*
- *Expenditure to date,*
- *Why is there no activity by the contractor?*
- *Who is in charge of the project?*
- *From the Municipality.*

6. *The chairperson asked Mr Rama Matje to respond to the items raised by Ms Lerato Ledwaba and inform the meeting why payments to Thushanang Construction have been delayed.*

7. *Mr Rama Matje of Tsebo replied as follows:*

He said he is not an Engineer, but has asked a friend to do the work for him. His friend made a mistake with the design and plans as well as a mistake with the quantities in the Bill of Quantities. He said he will consult his lawyer to deal with his friend. He stated further that a tender was issued during 2001 by the Northern District Council for Phase I. The value of the tender submitted by Thushanang Construction amounted to R1,9 million. Only R1,1 million was available, including professional fees. Thushanang Construction was awarded an amount of R910 000,00 to build Platform I, Toilet Block, Fencing, Athletic Track, Sewage and Storm Water, as a reduced tender for a reduced Phase I. The Civil Engineers underestimated the quantities for Earthworks in the Bill of Quantities for this work. Expenditure to date amounts to R660 000,00 and the additional value of work to complete the additional Earthworks must still be paid. The number of trees removed was also far more than allowed for in the Bill of Quantities. More details will be included in a report. He will also hold discussions with the contractor. He will rectify the mistakes made in the Bill of Quantities.

8. *Thushanang Construction replied as follows:*

The reason for the increase in the contract amount is because the actual quantities exceed the estimated quantities for the earthworks in the bill of Quantities.

The tender is subject to re-measurements, in other words, the contractor must be paid for the actual work completed (not a lump sum tender). An outside consultant was employed by Thushanang to check the quantities and they produced the

revised quantities which exceeded the quantities in the Bill of Quantities.

The Earthworks for Phase II was completed on 19 July 2002.

Work was stopped because of non-payment of their certificate and because Mr J van Rensburg, Acting Municipal Engineer, advised Thushanang Construction not to undertake further work until the financial issues are resolved.

9. *Ms Lerato Ledwaba replied as follows:*

Thushanang Construction agreed to undertake certain work to the value of their tender. Ms Lerato Ledwaba asked Thushanang Construction who gave them instruction to proceed with the Earthworks for Phase II. Thushanang Construction replied that Councillor Collins Dlamini gave them the instruction.

Councillor Collins Dlamini admitted that he gave Thushanang Construction an instruction to proceed with the Earthworks for Phase II.

10. *Mr Collins Dlamini stated that the Engineer had underestimated the amount of Earthworks to be constructed. There were also more trees removed. The Councillor must state his side. The Council had made a mistake to appoint a person who is not an engineer.*

11. *Mr J Van Rensburg asked Tsebo to check their quantities and then to liaise with the Contractor.*

15. *Mr J Van Rensburg, Acting Municipal Engineer, asked Mr Matje when he will pay Thushanang Construction.*

16. *Mr Rama Matje promised that he will authorise payment as soon as possible.*

17. *Mr J Van Rensburg promised Thushanang Construction that they will be paid.*

18. *Ms Lerato Ledwaba from the Department of Sport and Culture, said that an amount of R1,0 million will be transferred to Tubatse Municipality to pay for the completion of Phases I and II by Thushanang Construction. Tsebo Development Consultants must submit a revised report for the project and give Thushanang Construction an instruction to proceed with the contract.*

19. *Mr Rama Matje agreed that he will submit a revised report and instruct Thushanang Construction to proceed with the contract."*

[16] He indicated the bills that were submitted to the defendant as per the documents filed of record, which ones were approved and paid, and which were not. The actual amount for the work done excluding VAT according to his evidence was the sum of R1 321 906,20. The amount of VAT that had to be included in the aforesaid amount of R1 321 906,20 was R185 066,86 and the amount due and payable to the plaintiff was the sum of R1 506 973,06 from which an amount of R863 076,90 should be deducted. The outstanding amount due and payable to the plaintiff is the sum of R643 896,16.

[17] At the meeting held on 22 August 2002 when it was recorded that the earthworks for phase 2 was completed on 19 July 2002 nobody said the work was incomplete and that the plaintiff was not authorised to proceed with phase 2. The plaintiff never received a revised report from Tsebo as Mr Matje was requested to hand it to it at the meeting held on 22 August 2002. The plaintiff was also not instructed to proceed with the contract as Mr Matje had agreed to do so at the meeting held on 22 August 2002.

[18] Para 22 of the minutes of the meeting held on 22 August 2002 reads:

"*IDENTIFIED ACTIVITIES FOR PHASE 1*

- *Storm water or drainage*
- *2 x Multipurpose tennis courts*
- *Fencing*
- *Irrigation Sytems*
- *Grass of the soccer Pitch*
- *Electricity*"

[19] He explained that the above paragraph related to additional items to be constructed on the earthwork platforms completed by the plaintiff on the new phase 1. The work was not yet done and no claim had been made in respect of it. He further stated that the plaintiff was not given any instruction to proceed with the activities in relation to it. Instead the plaintiff was invited to submit a tender for the work. The plaintiff did submit a tender in respect of the work on para 22 on page 169 of the bundle of documents but the tender was not awarded to them. It was awarded to Mohtrans Transport.

[20] He was also referred to page 169(a) of the bundle of documents. He testified that the document on that page was an approval of the minutes appearing on pages 165 to 169. The document had a list of names of the people who attended the meeting, approved the minutes and a space at which each one of them signed and/or were to sign. Ms Ledwaba who was also present at the meeting had passed on and Mr Dlamini became uncooperative and refused to append his signature on the document. At the time the document was made available for the people who attended the meeting to sign it, they were not able to get hold of Mr Matje as he was based in Johannesburg.

[21] The majority of the councillors and officials from the Municipality signed the minutes. He stated that he never received any objection from any person that the minutes were not correctly recorded. As regards invoices from the plaintiff that appeared on pages 139 to 155 he stated that the plaintiff was

paid an amount less than what it claimed and that what it claimed was less than what it could have claimed.

[22] Under cross-examination he testified that the amount of R50 000,00 included in the total contract price of R1 913 902,43 was for contingencies. The amount was according to the statement (invoice) on page 97 of the bundle of documents to be deducted in whole or in part, if not required from the total amount of the contract price. He explained that at the tender stage the aforesaid amount of R50 000,00 should be added to the subtotal of R1 678 861,78 on the final summary of the tender on page 97 of the bundle to make provision for events that could be needed. At the completion of the work if there are no contingencies the amount will be deducted from the contract price. He stated that the amount of R50 000,00 was eventually added to the contract price. It was not supposed to be deducted because there were extras. The plaintiff calculated the quantities and realised that they were far much higher than what was provided for in the tender.

[23] He further testified that Annexure "A" included on pages 16 to 18 of the bundle was compiled by Tsebo on behalf of the defendant, tender rates were recorded on the document and submitted as a tender by the plaintiff. After being referred to page 42 of the bundle, he explained that the handwritten rates and amounts appearing on that page, were written by him. When asked whether that meant that the plaintiff was bound by them, he stated that he cannot answer with a yes or no because those were interpreted rates which were fixed. He further explained that the plaintiff did not sign a formal contract

document. The letter of appointment stated that the plaintiff's tender was a negotiated tender. According to him to infer that the quantities were fixed was devoid of the truth and misleading. He testified that he informed Tsebo that their quantities were wrong and they did not respond. He further stated that Mr Van Rensburg was also informed about the incorrectness of the quantities and in response thereto Mr Van Rensburg said Tsebo could not penalise the plaintiff for the mistakes they made. He then referred to the minutes of the meeting of 22 August 2002.

[24] He conceded that the contract price for phase 1 was the sum of R907 229,11 as stated in the letter of appointment from Tsebo. When asked why did the plaintiff go for a higher amount than what is stated in the letter of appointment, he explained that the letter of appointment was only received three weeks after the plaintiff had started with the work. As a result, he approached Mr Van Rensburg regarding the quantities. Mr Van Rensburg conducted an investigation and neither him nor Mr Matje instructed the plaintiff to stop working at the aforesaid amount of R907 229,11. The plaintiff could not leave the project unfinished.

[25] He stated that there was a large amount of money not paid to the plaintiff and the plaintiff realised that the stopping of the work would jeopardise the project.

[26] It was put to him that he submitted the tender for an amount of R1,9m before he received a letter of appointment stating that the contract price for

the work to be done was an amount of R907 229,11, he continued with the work despite later on receiving the letter of appointment for an amount less than what he tendered for. He testified that at the meeting of 13 December 2001 at the council chambers where municipal officials, councillors and community leaders, were present, Mr Dlamini offered the plaintiff the money that was put together and Mr Van Rensburg requested the plaintiff to put conditions when accepting the appointment. As a result the plaintiff said the payment of the escalation was one of the conditions. They eventually agreed about the date when the balance of the tender amount would be payable and that the plaintiff would then be awarded the amount.

[27] He was referred to numerous figures, viz, the amounts of R1 913 902,43, R907 229,11, R1 321 906,20, R614 637,91 and asked what was actually claimed as all these amounts appeared in the bundle of documents and the pleadings. He explained that the amount of R907 229,11 was the amount included in the letter of appointment from Tsebo as testified above, the amount of R1 913 902,43 that appeared on page 98 of the bundle was from the original tender document and R1 321 906,20 as reflected on page 155 of the bundle (Certificate 6) represented the amount for the work completed on the property.

[28] When asked who called the meeting on 22 August 2002 he testified that as the plaintiff they were requested to attend the meeting and he could not tell who called it but said it was an official meeting and the plaintiff was invited to attend. He was also asked who took down the minutes at the

meeting. He testified that he was requested to take down the minutes by Mr Van Rensburg and the minutes were approved by the people who attended the meeting and who signed the approval of the minutes document contained on page 169(a) of the bundle. Further to this, he testified that the reason why the other people did not sign the approval of the minutes document was because they could not locate them. He stated that it was never their intention that the document would be used in court as its intention was just to record the facts as they were. It was put to him after he was referred to pages 169(a), 101 and 108 of the bundle that the signatures of Mr Van Rensburg on those pages were different. He testified that he also has different signatures and that he was not present when Mr Van Rensburg appended his signatures on pages 101 and 108. He further testified that the different signatures do not make the document invalid. He was asked if he was saying Mr Van Rensburg had two signatures. He said it could be or someone else could have signed on his behalf.

[29] He conceded that when the plaintiff started with the construction the amount that was available for the construction and consultation fees was R1,1m. He also conceded that the amount the plaintiff was contracted for in relation to a full negotiated tender was R907 229,11. The work commenced at the beginning of March 2002.

[30] When asked why did the plaintiff continue with the project even after Mr Van Rensburg told them not to continue, he testified that the plaintiff stopped with the project on 19 July 2002 and the meeting was held on 22 August

2002. He explained that he met with Mr Van Rensburg prior to the meeting of 22 August 2002 where they discussed the quantities and the discussion culminated into a meeting that was held on 22 August 2002. At his meeting with Mr Van Rensburg, they also spoke about the funding for phase 2. He disputed that he never agreed with Mr Dlamini about the project on phase 2.

[31] He disputed that in terms of the tender awarded to the plaintiff, the plaintiff should not have gone beyond phase 1 and that by so doing, they acted recklessly. He also disputed that the plaintiff was not supposed to do the work in excess of the amount of R907 229,11 they tendered for. He disputed that all monies due and payable to the plaintiff were paid save for the retention amount as agreed.

[32] Mr Dlamini testified as follows: He is currently employed by the defendant. He was a ward councillor from 2000 to 2006 and from 2006 he became an official who has been a social facilitator. As a social facilitator he has been involved in the establishment of project steering committees, the establishment and the overseeing of ward committees, and performing functions of the protocol institution. He knows Mr De Nysschen as a person who was a service provider who worked on a sports facility project at Praktiseer where he used to be a ward councillor. He was referred to the minutes of a meeting held on 22 August 2002 on pages 165 to 169 of the bundle. He confirmed that his name appeared in the minutes and that the minutes stated that he was chairing the meeting. When asked whether the meeting took place, he said he was not sure about the date as he used to

attend a lot of meetings. He explained that meetings are called by them as officials and that the minutes of those meetings are taken by officials of the municipality who should be secretaries attached to the various departments in the municipality. He stated that he was familiar with all the names of the people listed in the minutes.

[33] He disputed that he was the chairperson of the LED Committee as stated in the minutes and contended that Mr Mohlala was the chairperson of the committee. He stated that he used to be a chairperson of a ward committee by virtue of his position as a ward councillor. He explained the procedure of taking the minutes in a meeting at the municipality. According to him there will be a person at the meeting who will be taking down the minutes and after the meeting that person will type the minutes and the roll call that circulated at the meeting which all the people present signed, will be attached to the minutes. Eventually the chairperson will sign all the pages of the typed minutes.

[34] He testified that the attendance register has not been attached to the minutes. He disputed the contents of the minutes as read out on record, in particular paragraphs 6, 7, 8, 9, 10 and 14. He testified that the project awarded to the plaintiff was an allocation from the Northern District Council as their municipality was not yet functional. The project was delayed until their council was elected. In 2000 the District Council transferred all the projects to the different municipalities. In 2001 their council decided that Tsebo should

continue with the project. The plaintiff through Mr De Nysschen, was appointed to do the developments on the sports field.

[35] At the beginning the project was big but when the defendant looked at the amount that was allocated for the project, it realised that it was too little to complete the project. It asked an Engineer from Tsebo to downgrade the amount of work which was initially there for the project. Tsebo requested the plaintiff to outline the job as per the downgrading. Phase 1 was eventually awarded to the plaintiff. He disputed ever giving the plaintiff the instruction to proceed with the earthworks for phase 2. He further testified that he does not know any person by the name of Lerato Ledwaba and the name Lerato Ledwaba did not appear on the list of the people who were allegedly present at the meeting. He testified that he only knew the name Ledwaba MP which appeared on the list and that it belonged to a lady who was attached to the Department of Sports and Culture at the time.

[36] He contended that the code of conduct that should have been followed at the meeting, was not followed and that he did not know who drafted the minutes.

[37] He disputed that he visited the site everyday and maintained that the municipality had appointed officers to do so because he also had other work to do. He also disputed that he told Mr De Nysschen to commence with the earthworks on phase 1 and that when he asked him for the letter of

appointment, he threatened that should he not start with the work, the tender will be taken away from him.

[38] When referred to page 169(a), the approval of minutes, he confirmed that his signature did not appear on the document and also contested Mr Van Rensburg's signature on the document. He maintained that the minutes on pages 165 to 169(a) were not the minutes taken at a meeting of the defendant in that they were not on the letterhead of the defendant, no roll call was attached to them and they did not indicate who was the secretary at the end. He testified that he only saw the minutes a day prior to the trial.

[39] He disputed that Mr De Nysschen informed him two weeks before the completion of phase 1 that if he was to remove the machines from the site, he would incur costs to return them to the site. He also disputed that he stopped him from removing the machines on the site and instructed him to continue with phase 2. Further to this, he disputed that Mr De Nysschen requested him to furnish him with a letter of appointment for phase 2 and that when he made such a request, he told him that he could not access it because it was in the Municipal Manager's office and at that time there was a strike at the municipality. He was adamant that the plaintiff was only awarded work on phase 1 and that if there was money for phase 2, the project would have gone on tender to also give other people a chance to bid.

[40] He was asked under cross-examination whether he denies that the meeting on 22 August 2002 took place and that the people whose names

appear on the list attached to the minutes, attended the meeting. In reply thereto he testified that he used to attend a lot of meetings and he does not recall that particular meeting. When asked whether there was a possibility that such a meeting could have taken place on that day and that those people could have been present at that meeting but he could not just recall it, he testified that he found it strange to see such a document with his name on it without his signature to indicate that he indeed attended the meeting. He conceded that in a number of meetings he attended, which included those where the plaintiff, Tsebo and council officials were present, the sports complex and its development were discussed. He was asked where were the minutes of such meetings they held in relation to the project that was awarded to the plaintiff and he responded that he did not know that they would be required as they were lying in the archives. He further testified that he did not tell his legal representatives that meetings were held where the project awarded to the plaintiff was discussed because he was only called to testify whether he knew Mr De Nysschen and the plaintiff, their project and what he knew about the project awarded to them.

[41] He was asked whether he consulted with his counsel regarding the matter. He testified that two days prior to the trial, he consulted with his counsel and he showed him a copy of the minutes of the meeting of 22 August 2002. He testified that he told his counsel that the minutes were irregular and that the defendant kept its own minutes. He testified that despite all this, he did not know why the minutes of the meetings held in relation to this matter were not before court. He disputed that Mr De Nysschen could

have been requested by a representative of the defendant to draft the minutes of the meeting of 22 April 2002. He was asked if he recalled a meeting with these people present and he testified that he did not and that the people whose names were mentioned were his colleagues. He further stated that a signed roll call would have assisted him because the events happened a long time ago.

[42] He testified that he recalls a meeting where Mr Matje was present together with Mr De Nysschen and Mrs Ledwaba because Ms Ledwaba was tasked by the Department of Sports, Arts and Culture to attend the meeting as the project awarded to the plaintiff was funded by the department. He was referred to paragraph 7 of the minutes and asked why could he remember what he said and did not say at the meeting while he did not remember when was the meeting held and who attended it. He testified that in terms of running the projects, they call two sets of meetings which include a stakeholder's meeting and a technical meeting. He explained the difference between those meetings and contended that that was the reason he could respond to the allegations made in the minutes. It was put to him that the issue of two sets of meetings as he testified was not put to Mr De Nysschen when he testified and he was asked whether he knew why that evidence was not put to him. He testified that he did not know why the evidence was not put to Mr De Nysschen when he testified but stated that Mr De Nysschen knew about the two sets of meetings. After being referred to page 165 again and referred to the names of the people who were allegedly present at the meeting, he conceded that such a meeting could have taken place but

contended that he does not recognise the minutes of the meeting after it was put to him that pages 165 to 169 was a correct record of a meeting that took place on 22 August 2002.

[43] He was further asked about his challenge to Mr Van Rensburg's signature on page 129 of the bundle and whether Mr Van Rensburg still had dealings with the defendant. He testified that Mr Van Rensburg was no longer working for the defendant but was still in Burgersfort and running projects for the District Municipality.

[44] He was referred to pages 16 to 98 of the bundle of documents. According to the plaintiff's evidence which was not contested these pages record the tender for phases 1 and 2. He was asked if he knew what phase 2 entailed and he testified that he did not have all the details of phase 2 as that was handled by the District Municipality but conceded that the development was done in Praktiseer which was his ward at the time and that the project was for the improvement that would benefit the community of his ward. When asked how involved was the Council and the community in the project that had started, he testified that the Council had appointed a project manager who also appointed an inhouse project manager who should have been on site on day-to-day basis to see what was happening on site. He was asked who these managers were in relation to the project awarded to the plaintiff and he testified that he only remembered that Mr Matje was the project manager and did not remember who the inhouse manager was.

[45] He also testified that he recalled that the soil turning was done on the project. When told that Mr De Nysschen testified that he started work on phase 1 three weeks before he was given a letter of appointment and that it was never put to him that this evidence was going to be disputed by the defendant's witnesses, he testified that the project only started after Mr De Nysschen was furnished with a letter of appointment.

[46] He disputed that the plaintiff did work on phase 2 although he could not recall what phase 2 was all about. According to his evidence the project that was awarded to the plaintiff was divided into two because of the shortfall of the amount allocated to it. Excavations were done where the plaintiff was to put the soccer field. The plaintiff also levelled the area where the tennis courts were to be put. It also installed storm water drain pipes and applied for an electricity line from Eskom. The line was constructed. It also installed athletic tracks and opened drains for storm water. He was not sure about the other things as he testified that they could have been done by other people who have also been working there at the time he was giving evidence. He testified that the work he stated was done by the plaintiff, he saw it because as and when they held monthly meetings they used to go on site and see what was happening there. He was asked as to why did he not stop the plaintiff from continuing with the excavation of the tennis court as he could see that that work formed part of phase 2. He testified that even if what the plaintiff did fitted under phase 2, the plaintiff worked according to an instruction and what was allocated to the project. All what the plaintiff did fell under phase 1. When told that it was the first time the court was told that the levelling of the

tennis court was part of phase 1 despite Mr De Nysschen's evidence that it fell under phase 2, he testified that the plaintiff was paid in terms of what it was instructed to do in respect of phase 1. He was referred to paragraphs 8.2 and 8.3 of the plaintiff's declaration and told that these paragraphs were not disputed in the defendant's plea. He testified that he knew nothing about that and that all what he knew was that all the work done by the plaintiff fell under phase 1. He was also asked as to how did he know that the job done by the plaintiff fell under phase 1 if he had earlier testified that he did not know what phase 2 entailed. His response was that he knew that because after their engineers, Mr Matje and Mr De Nysschen had agreed on what the plaintiff was to do, the Council of the defendant took a resolution that the work should be limited to the reduced work that fell under phase 1.

[47] He conceded that the tender for phase 1 was only awarded to the plaintiff a year or more after he had submitted the tenders for phases 1and 2. He also conceded that over a period of a year, costs for material and fuel increased. He disputed that he ever had a conversation with Mr De Nysschen where he requested him to keep the tender open and invited him to put conditions for keeping the tender open. He also disputed Mr De Nysschen's evidence that he agreed to keep the tender on phase 1 open on condition that the tender would be subject to an escalation and that he would be awarded phase 2 of the project. When asked if he knew why it was never put to Mr De Nysschen that conditions were attached to keeping the tender on phase 1 open, he testified that Mr De Nysschen had the letter of appointment which clearly stated that he was only awarded phase 1 and phase 2 was put to the

public for tender. He was asked why was the tender for phase 2 not before court and his response was that the Northern District Municipality Council handled the tenders for the two phases but the one for phase 1 was eventually given to them to handle. He also testified that Mr De Nysschen knew that the tender for phase 2 was handled by the District Municipality but failed to attend the briefing sessions.

[48] Mr Matje also testified. His evidence was briefly as follows: The Close Corporation, Tsebo, was dissolved in 2007. He is a qualified electrical engineer. He has a Master's degree in Electrical Engineering which he obtained in 1991. He is also a professional registered engineer with the ECSA. He was registered as a Professional Engineer in 1996. As a professional engineer he is allowed to constitute and lead teams, and to oversee the construction on behalf of the client. Sometime in 2002 he was requested by the defendant to assist them with a project. His practice number is 960444. He was referred to the letter of appointment given to the plaintiff and he explained that it was aimed at formally instructing the plaintiff to commence work at the Sports Recreation Centre in Praktiseer for phase 1. The appointment was for the total sum of R907 229,11. The letter is not dated. He could not say with certainty when was the letter sent to the plaintiff but thought it could have been in the second week of February 2002 because he was invited to attend a meeting on 22 February 2002.

[49] He authorised five payments to the plaintiff. He confirmed a payment of the sum of R171 974,47 as reflected on page 101 of the bundle of documents.

[50] He was referred to the minutes of the meeting of 22 August 2002 and their approval. He contended that he knew nothing about the documents. His name appeared on the minutes but his signature did not. He first saw the minutes on the first day of the trial and he has got nothing to do with them. He did not recall a meeting allegedly held on 22 August 2002. He could recall that they had a meeting with the Department of Arts and Culture and the members of the community at the defendant's offices in Praktiseer. He disputed the contents of paragraph 7 of the minutes and maintained that at that time he was already a professional engineer. He explained that his role on the project was that of a project manager and that they had a designated team of three other professionals which consisted of a professional civil engineer, Mr Sam Selatile, a professional Quantity Surveyor, Mr Mohapi Makosho and an architect, Mr Makgweba Tlale. Although he did not agree with the first paragraph of paragraph 7 on page 166, he agreed with the first, second and third paragraphs of paragraph 7 on page 167. He testified that there was an underestimation of the earthworks that were necessary and when that was realised, they had discussions with the contractor and additional earthworks were compensated under phase 1.

[51] In all the meetings he attended when he ran the projects, an attendance register was circulated for all delegates to sign. He did not sign page 169(a) and the reason could be that he never had sight of the minutes.

[52] Under cross-examination he conceded that there was an underestimation regarding the calculation of earthworks on phase 1 and the underestimation was discussed in a number of meetings after the work had started. He could not recall at what stage the issue was raised for the first time but said it could have been after the letter of appointment was issued. He conceded that the underestimation implied that there was additional work to be done on the earthworks and that would increase the original contract price if the rest of the work was to be done as per the appointment letter. He testified that he only studied electrical engineering and never took any subject relating to civil construction which entailed earthworks. He confirmed Mr Dlamini's evidence that he was the project manager but was not on site on a daily basis. He did not have anybody else representing him on site on a daily basis. When asked how would Tsebo know whether the actual work was done on site if none of them was on site on a daily basis, he said they had agreed with the defendant that they would visit the site only once a week.

[53] He conceded that the excavation and the levelling of the tennis court form part of phase 2. He was asked whether he agrees that the plaintiff worked on the excavation and levelling of the tennis court and his response was "*this is a difficult question for me in the sense that I cannot answer it in my role as a project manager simply because I did not have a mandate for phase II from the client but I can confirm that I observed the plaintiff's equipments working on the tennis court platform*". When asked why did he not stop the plaintiff when he saw them working on the tennis court and tell them that he did not have a mandate for Phase 2, he testified that he did

discuss the matter with Mr De Nysschen verbally and Mr De Nysschen told him that he was appointed by the community to proceed with the work. When asked why was that evidence not put to Mr De Nysshen when he testified, he referred to a letter on page 186 of the bundle from Tsebo's attorneys to the plaintiff's attorneys. The letter is dated 30 October 2002 and is addressed to Mr Rob Dick per telefax. It reads as follows:

"*Dear Sir*

RE: SPORTS AND RECREATION FACILITIES FOR TUBATSE TOWNSHIP CONTRACT NO. TS 0121/2000

1. *We represent Tsebo Development Consultants CC who have handed us your letter of the 25th instant for our attention and reply.*

2. *From our instructions, we advise that our client is not authorised to endorse your client's certificate numbers and as such its failure to do so can neither be unjustifiable nor unlawful.*

3. *Whether your client has completed the work referred to in the certificate or not, cannot be determined by our client for the reasons set out above.*

4. *It appears that your client engaged in certain works in anticipation of our alleged respective clients being appointed in terms of the contract.*

5. *In the circumstances our client has instructed us to inform you, as we hereby do, that it will not and cannot comply with your client's demand and any action which your client may deem fit to institute, will be vigorously defended.*

Yours faithfully,

MARGOLIS AND ASSOCIATES INCORPORATED
per: Mr. A.H. Margolis

cc: TSEBO DEVELOPMENT CONSULTANTS CC
Ref: Mr Rama Matji"

[54] He testified that in the above letter his attorneys informed the plaintiff's attorneys that Tsebo did not have any mandate for phase 2. Counsel for the plaintiff put it to him that he understood the correspondence to be after the fact. He asked him why was that fact not put to Mr De Nysschen when he testified. His response was he could have missed that evidence in his consultation with the defendant's attorneys. When asked whether he told the defendant that the plaintiff was working on phase 2, he testified that he cannot recall that but he could have discussed the matter with Mr Van Rensburg who was the defendant's acting Engineer at the time.

[55] When he was told that Mr De Nysschen testified that he actually started working on the project three weeks before he received the letter of appointment he testified that he cannot recall that but in terms of actual physical work on site, Mr De Nysschen started all the work after he was given the letter of appointment. He further said he can agree because if he had done some other work before like, for an example, the surveying of pegs, he could have commenced the work on phase 1 before he received the letter of appointment. He would not have known who would have instructed him to start working before he received the letter of appointment.

[56] He conceded that a meeting where there was a discussion about the incorrect calculation of quantities as referred to in paragraph 7 on page 165 could have taken place.

ANALYSIS

PHASE 1

[57] It is common cause between the parties that the plaintiff worked on the construction of the sports field on phase 1 at the defendant's special instance and request, and that the work was for a reduced tender for the total sum of R907 229,11. The total amount that was available for professional fees and construction was R1,1 million. It is also common cause that the agreement between the parties with regard to the construction of the sports field at Tubatse was only entered into more than a year after the plaintiff had submitted a tender for both phases 1 and 2 which was not accepted. According to Mr De Nysschen's evidence the agreement was reached after negotiations took place. These negotiations included a request by Mr Dlamini of the defendant to him to keep the tender open and discussions regarding the reduction of the work on phase 1 because of the amount that was available at the time. Mr De Nysschen also testified that at some stage Mr Van Rensburg asked him if he was prepared to work at a reduced fee and what his terms would be. He indicated in his evidence that because of the fact that it was more than a year he had submitted the tender, he put a condition that the price was subject to an escalation. He also explained the issue of contingencies and how they were going to work.

[58] His evidence was clear that he commenced working on phase 1 three weeks prior to receiving the letter of appointment from Tsebo after Mr Dlamini instructed him to do so. Mr Dlamini disputed instructing the plaintiff to

commence with the construction on phase 1 prior to the issue of the letter of appointment.

[59] Mr Dlamini also disputed that the plaintiff commenced with the project prior to the issue of the letter of appointment but Mr Matje conceded under cross-examination that the plaintiff could have started with the project on phase 1 before it was issued with the letter of appointment. It is important to note that Mr De Nysschen was not told during cross-examination that any of the defendant's witnesses was going to dispute that he commenced with the project on phase 1 prior to being issued with the letter of appointment.

[60] Mr De Nysschen's further evidence was to the effect that after he had received the letter of appointment from Tsebo, he realised that there were incorrect calculations on the work to be done on phase 1. He discussed the matter with Mr Van Rensburg and Mr Van Rensburg conducted some investigations. Neither Mr Matje and Mr Van Rensburg stopped the project even though they were aware of what was happening. Mr Matje conceded under cross-examination that there was an underestimation regarding the calculation of earthworks on phase 1 and that this underestimation was discussed in a number of meetings after the work had started. He could not recall when was the issue raised for the first time but conceded that it could have been after the letter of appointment was issued.

[61] The evidence of the plaintiff through Mr De Nysschen in relation to the work done on phase 1 was basically that although there was an agreement as

to what work was to be done and the amount for the work to be done, because of the underestimation of the quantities of the earthworks to be done, the fact that prices increase due to inflation and the period of time that lapsed from the submission of the tender and the conclusion of the agreement, there had to be an escalation on the agreed contract price and the amount of contingencies thereof to cater for such situations. Although it is in dispute that Mr Dlamini instructed him to proceed with the project prior to the issuing of the letter of appointment, no evidence was adduced by the defendant as to who could have instructed him to proceed with the work. Mr Matje who was the project manager testified that there was an agreement between him and the defendant to visit the site once a week. I find that improbable taking into account the nature of the work that was done on site. It is also strange that Mr Matje who saw that the plaintiff had commenced with the project on phase 1, e.g. the surveying of the pegs, etc, according to his evidence, did nothing to stop him or rather instruct Mr Van Rensburg or his inhouse manager, who was a civil engineer, to stop the plaintiff from continuing with the project prior to issuing him with the letter of appointment. What I also find strange in Mr Matje's evidence is that according to him the plaintiff was paid for the extra work that he did on phase 1. No evidence was adduced as to what was the amount for the additional work paid. Mr Matje conceded that the underestimation implied that additional work had to be done on the earthworks and that would have increased the original contract price if the work was to be done in terms of what was stated in the letter of appointment. The parties are agreed about what was paid to the plaintiff. The dispute revolves around the fact that the plaintiff alleges that it did extra work due to

the underestimation of the quantities of the earthworks on phase 1 by Tsebo and that it submitted invoices but the defendant only paid some and did not pay others.

[62] The evidence of Mr De Nysschen was very comprehensive, logical and clear as to what actually transpired between the parties and how the events unfolded. Despite the fact that he kept on mentioning the name of Mr Van Rensburg, in his evidence, who acted as the defendant's engineer at the time, the defendant did not call him as a witness to contest the allegations by Mr De Nysschen. Further to the above it was clear from the evidence of Mr Matje that although he was a project manager at the time, he was not a civil engineer like Mr De Nysschen. He had appointed an in house manager, who according to his evidence, was a civil engineer who could have been involved in construction like Mr De Nysschen. The in house manager was not called to support the defendant's case in challenging Mr De Nysschen's evidence. Mr Matje testified that although he could constitute, lead teams and manage projects, he only studied electrical engineering, he never took any subject relating to civil construction which entailed earthworks.

[63] Mr Matje did not dispute the fact that because of the underestimation of the quantities of the earthworks that had to be done on phase 1, additional work had to be done. He also did not dispute the fact that after a year prices increase due to inflation. It was also not disputed that the additional work was done. I concur that given the evidence the contract price had to increase. From this evidence it is clear that the amount of R 907 229,11 stated in the

letter of appointment would not have been enough to complete the earthworks on phase 1. The court can safely accept this evidence as it tallies with Mr De Nysschen's evidence which the court finds probable.

[64] Mr Dlamini did not make a good impression to the court. He was evasive when he was asked simple questions and he gave detailed responses to questions which did not require much. He kept on referring to how things are done at the municipality but failed to produce evidence in support thereof. He was just disputing everything that Mr De Nysschen said in his evidence.

[65] Surely I do not find any reason why Mr De Nysschen would just implicate Mr Dlamini if he was never involved in the project. I also do not find any reason why Mr De Nysschen would have started with the project on phase 1 if he was not instructed to do so. I will deal with the issue of the minutes of 22 August 2002 later in the judgment. I also find it strange that there was no one between Mr Dlamini, Mr Matje and his team who according to them visited the site on a daily basis to see what was happening. I therefore under the circumstances find that the evidence of Mr De Nysschen is probable. I find that Mr Dlamini could have visited the site on a daily basis as testified by Mr De Nysschen. One should also not loose sight of the fact that Mr De Nysschen testified that he always invited Mr Van Rensburg to the site to show him what was happening. This evidence was not contested. Mr De Nysschen was never shaken during cross-examination. He stuck to his version which tallies with the pleadings and the minutes of 22 August 2002. I

therefore accept from the totality of the evidence that indeed Mr Dlamini instructed Mr De Nysschen to commence with the earthworks on phase 1 prior to him being issued with a letter of appointment. No evidence was adduced that Mr Dlamini did not have the authority to instruct Mr De Nysschen to commence with the construction of the earthworks on phase 1. Mr Dlamini only denied that he instructed him to do the work.

PHASE 2

[66] Mr Dlamini disputed that he instructed the plaintiff to continue with the work on phase 2. He testified that he did not know what phase 2 entailed but conceded that although the tender was handled by the District Municipality, the development was done in Praktiseer and that the project was for the improvement that would benefit the community of his ward. It is improbable that while Mr Dlamini testified that he did not know what work formed part of phase 2, he would have known if the plaintiff did work that formed part of phase 2.

[67] He conceded that excavations were done where the plaintiff was to put the soccer field and that the plaintiff also levelled the area where the tennis courts were to be installed. His evidence was also to the effect that the work that he testified was done by the plaintiff he witnessed it because when they held monthly meetings they would go on site and see what was happening. I find this evidence strange because Mr Dlamini initially distanced himself from visiting the site when it was put to him that Mr De Nysschen testified that he

visited the site on a daily basis. He even went to the extent of testifying that there were people who were designated to visit the scene as he had other work to do. I still maintain that Mr De Nysschen would have no reason to involve him if he was not part of the project. I found Mr De Nysschen to have been candid and honest in his evidence.

[68] When Mr Dlamini was asked why did he not stop Mr De Nysschen from continuing with the excavation of the tennis court as he could see that that formed part of phase 2, he testified that even if what the plaintiff did fell under phase 2, the plaintiff worked under an instruction and his project was only limited to phase 1. His evidence became so muddled in that while he mentioned that the excavation of the tennis court fell under phase 2, at the same time he mentioned that because of the instruction that was given to Mr De Nysschen in terms of the letter of appointment, the work fell under phase 1. This evidence is improbable if one also takes into account that paragraphs 8.2 and 8.3 of the plaintiff's declaration as discussed above were not disputed in the defendant's plea.

[69] What I also found strange and improbable in Mr Dlamini and Mr Matje's evidence was that when they were asked as to why while they observed the plaintiff working on phase 2, they did nothing to stop it as they knew what it was supposed to do, they testified that phase 2 was not under them. It was a tender that was handled by the district. Mr Matje was managing the project awarded to the plaintiff for phase 1. He knew that what the plaintiff was doing was going to have consequences. Initially when he

testified it was like the continuation of work by the plaintiff on phase 2 did not bother him because according to him the plaintiff had to work according to the letter of appointment that was issued to it. Upon extensive cross-examination he testified that he confronted Mr De Nysschen about working on phase 2 and Mr De Nysschen told him that he was appointed by the community. He still did nothing although he knew the consequences. He knew for a fact that the plaintiff was only on site because of the work that he assigned it to do in terms of the letter of appointment but he left it to continue with what it was not supposed to do.

[70] I also found it strange that Mr Matje only mentioned that he confronted Mr De Nysschen about working on phase 2 after Mr De Nysschen had finished testifying. Mr De Nysschen was not told while he was testifying that Mr Matje confronted him and he told that he was instructed by the community to continue to work on phase 2.

[71] A lot was said about the minutes of the meeting allegedly held on 22 August 2002 and the fact that they did not reflect what happened at the meeting, they were not on the defendant's letterhead, they were not taken by the officials of the defendant and were not signed, etc. The evidence of Mr De Nysschen was clear that when the minutes were taken, they were not intended to be used in court. Mr De Nysschen brought the minutes to court in order to prove the plaintiff's case against the defendant. The defendant's witnesses went a long way to dispute each and every statement made in the minutes but failed to produce any minutes to support their case. The minutes

of 22 August 2002 were discovered and parties exchanged documents. Surely if the defendant was candid in its evidence, it should have also discovered its own minutes which supported its case. To come to court and say the minutes were in the archives and could be available on request is untenable. The approach taken by the defendant in defending this case was so wanting and lacking. The minutes of the meeting of 22 August 2002 were the only minutes available at the trial. Most of what was recorded in the minutes, was common cause, it tallied with the plaintiff's cause. I do not have any reason not to accept them and conclude that they correctly recorded what was discussed at that meeting. I further accept that given the totality of the evidence, Mr Dlamini is the person who instructed Mr De Nysschen to continue to do work on phase 2 and did not furnish him with the letter of appointment.

[72] Issues were raised that summons was issued in 2003, was abandoned and eventually a declaration was issued in 2013. This also included the issue of the different amounts allegedly claimed in the summons and the declaration and also the amendment of the amount claimed. I find the issues irrelevant as they were never raised in the pleadings. Further to the above Mr De Nysschen was asked to explain the different amounts during cross-examination. I have dealt with his evidence regarding this aspect. His evidence was clear as to how the amounts were arrived at. He referred to the bundle of documents. His evidence tallied with the documents filed of record.

[73] The plaintiff did work on phases 1 and 2 at the defendant's special instance and request. It submitted invoices as per certificate number 6 as contained in the bundle of documents. The certificate was not contested and there has not been any evidence to disprove that the plaintiff did in fact work as it testified. No evidence was adduced that the work as done by the plaintiff was defective or incomplete and/or that the plaintiff was fully paid for the work done. The plaintiff testified that it completed phase 2 on 19 July 2002. No other evidence was led to the contrary. It is therefore my view that the plaintiff should be paid in full for the work done on phases 1 and 2. I am therefore satisfied that the plaintiff has established its case on a balance of probabilities. It is therefore entitled to the relief sought.

[74] In the result I make the following order:

74.1 The plaintiff's claim succeeds with costs.

74.2 The defendant is ordered to pay the amount of R643 869,17 to the plaintiff with interest on the aforesaid amount of R 643 869,17 at 15,5% per annum *a tempore morae* from the date of the issue of summons.

M J TEFFO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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M J TEFFO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

FOR THE PLAINTIFF	J L ENGELBRECHT
INSTRUCTED BY	SMITH VAN DER WALT ATTORNEYS
FOR THE DEFENDANT	E I MOOSA
INSTRUCTED BY	ASGER GANI ATTORNEYS
HEARD ON	12 JUNE 2015
HANDED DOWN ON	4 MAY 2016