IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MAKHANDA

NOT REPORTABLE

Case No.: 5477/2016

Date Heard: 31 August 2023

Date Delivered: 12 September 2023

In the matter between:

CITY SQUARE TRADING 204 (PTY) LIMITED Plaintiff

and

INXUBA YETHEMBA LOCAL MUNICIPALITY First Defendant

CHRIS HANI DISTRICT MUNICIPALITY Second Defendant

JUDGMENT

EKSTEEN J:

[1] The issues for decision in this matter are whether a contract concluded between the first defendant, Inxuba Yethemba[1] Local Municipality (Inxuba Yethemba) and the plaintiff, City Square Trading 204 (Pty) Limited, trading as Hlumisa Engineering Services (City Square), was lawfully delegated (assigned) to the second defendant, the Chris

[1] Previously known as Cradock

Hani District Municipality (CHDM), so that CHDM became liable to City Square for the obligations of Inxuba Yethemba and, if so, the interpretation of the contract.

[2] CHDM was at all material times the Water Services Authority in terms of the Water Services Act[2] (the Act) which imposed on it an obligation to provide access to water[3] for its entire district. It is entitled to perform the functions of a water services provider[4] itself, or it may contract in writing with a different entity to perform the functions of a water services provider.[5] Inxuba Yethemba is a local authority situated wholly within the district of CHDM and CHDM had entered into a written agreement (the water agreement) with Inxuba Yethemba to perform the functions of the water services provider[6] within its own area of jurisdiction on their behalf. In order to discharge its obligations to CHDM under the water agreement Inxuba Yethemba entered into an agreement (the maintenance agreement) with City Square, a company engaged in mechanical and electrical construction and the design of electrical panels and pump stations for water and waste water. In terms of the maintenance agreement City Square undertook the performance of certain operations, maintenance of pumps, boreholes and electrical panels and the provision of support to water services. The maintenance agreement was concluded in February 2014 for a period of two years in accordance with a legitimate tender process and the validity of the agreement is not in dispute.

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[2] The Water Services Act 108 of 1997
[3] Section 11 of the Act
[4] Section 11 of the Act
[5] Section 19 and 22 of the Act
[6] As circumscribed in s 4 of the Act

[3] City Square was required to maintain a permanent presence in Inxuba Yethemba in order to respond to emergency maintenance requirements from time to time. However, the water agreement expired on 30 June 2014, while the maintenance agreement was still in force. In anticipation of the expiry the CHDM resolved, during March 2014, that it would assume the functions of the water services provider for Inxuba Yethemba itself with effect from 1 July 2014. By July 2014 Inxuba Yethemba had defaulted on numerous payment obligations to City Square and when City Square enquired from Inxuba Yethemba about their overdue invoices they were referred to CHDM for payment.

[4] In these proceedings City Square contended that the maintenance agreement had been delegated, or assigned, to CHDM and that CHDM had taken over all the rights and obligations of Inxuba Yethemba under the contract. They said, accordingly, that they looked to CHDM for payment of their invoices. On 12 December 2014 representatives of City Square met with Mr Dungu of CHDM and they agreed that the maintenance agreement would be suspended to enable CHDM to appoint an independent engineer to investigate and verify what services had been rendered and what goods or equipment had been supplied by City Square and to consider their complaints of non-payment. During March 2015 City Square became aware that CHDM had engaged another contractor to render services and to supply the goods and equipment which they had tendered to do. They considered the conduct to be a repudiation of the maintenance agreement which they accepted, and they cancelled the contract. In consequence thereof City Square issued summons in which they claimed payment in

terms of the contract for invoices rendered and damages for loss of profits as a result of the repudiation. Initially they cited Inxuba Yethemba as the first defendant and CHDM as the second. The claim against Inxuba Yethemba was subsequently withdrawn and they did not participate in the litigation. CHDM on the other hand, resisted the claim and denied that they had any contractual liability to City Square.

[5] As I have said, the essence of the first dispute in this matter is whether the maintenance agreement concluded between City Square and Inxuba Yethemba had been delegated, or assigned, to CHDM so as to render CHDM liable for the obligations arising from the contract.

[6] Mr Jordaan, who had been employed by City Square for approximately seven years, testified on their behalf. He said that City Square had not been advised in June or July 2014 of the takeover of the water services provider functions by CHDM and they had continued to discharge their obligations to Inxuba Yethemba in terms of the maintenance agreement. During or about July or August 2014 Mr Jordaan and Mr Wardle, also of City Square, met with Mr Saleni, the technical manager for Inxuba Yethemba Municipality, in respect of their outstanding and overdue invoices. He said that Mr Saleni advised them that Inxuba Yethemba were experiencing financial challenges and that the water provider functions would be taken over by CHDM. He explained that all payments due under the maintenance agreement would henceforth be made by CHDM. Mr Saleni had requested them, accordingly, to be patient.

[7] After the lapse of some time, and as no further payments were being received, Mr Jordaan returned to Inxuba Yethemba only to be advised that Mr Saleni had now left the employ of the municipality. However, he was advised by employees of the municipality whose identity he was unable to recall that CHDM was now responsible for all outstanding payments. In view of this communication he set up a meeting with Mr Dungu, who was the technical director of CHDM. Mr Dungu, he said, informed him that the CHDM had taken over the running of the water services for Inxuba Yethemba and said that they wanted to "cede" the maintenance contract to CHDM and to take it over. Accordingly, he requested them to continue with the maintenance contract and to reissue the unpaid invoices to reflect CHDM as the debtor because they would be liable for outstanding debts. City Square accepted this proposal as evidenced by the reissue of invoices to CHDM and, as I have said, some payments were made by CHDM. City Square continued to maintain a full-time presence in Inxuba Yethemba in terms of the maintenance agreement and Mr Jordaan understood that their contract with Inxuba Yethemba had been taken over by CHDM, but no further work was allocated to them. Flowing from these interactions City Square contended that the parties had expressly, alternatively tacitly, agreed that CHDM would be substituted as the contracting party in place of Inxuba Yethemba in respect of the maintenance agreement.

[8] It was argued on behalf of CHDM that Mr Jordaan had conceded in cross-examination that the intended "cession" of the maintenance agreement never in fact occurred and that City Square had never concluded any "contract" with CHDM. Mr Jordaan made a favourable impression on me in the witness box and I certainly never

formed the impression that he had attempted to mislead me. It clearly emerged from his evidence that he was a technically qualified man and the concessions made in respect of legal conclusions to be drawn from his interactions with Mr Dungu cannot be decisive of the issue. His difficulty was compounded by the inaccurate use of legal terms, in particular the use of the terms “cession” and “cede”. The legal concepts were not explained to him and I consider that the high-water mark of these concessions was that he sought to convey that no express “cession” or “contract” had been concluded. In the view that I take of the matter there is no evidence of an express cession and assignment and, for purposes of this judgment, I shall approach the matter on the basis of a tacit agreement to cede and assign the maintenance agreement to CHDM, as pleaded in the alternative.

[9] As adumbrated earlier, City Square were not advised of the expiry of the water agreement at the end of June 2014 or of the performance of the water services during that time. However, subsequently, in preparation for the current litigation, the minutes of two council meetings of the CHDM were discovered. The first related to a meeting of the council which had occurred on 26 March 2014. An extract of the minutes of this meeting related to a report prepared by Mr Dungu to advise the council on the recommended model of the water services provider function in the light of the anticipated expiry of contracts, including that with Inxuba Yethemba. It recorded:

> “It had … been analysed … to what extent and (*sic)* risks would expose the District Municipality should a decision to be taken *(sic)* by Council at the end of the current financial year to take over the service.
> The risks can be listed as follows:

- Maintenance and Operational risk – this is a risk associated with collapse of the service.
- …
- Risk associated with contingent liabilities – this relates to any unknown … debts associated with water services and commitments that are owed by Local Municipalities to third parties."

[10] After consideration of the report the council's resolution recorded, *inter alia*, that:

> "Council, as the Water Services Authority, take full responsibility of the function for Lukhanji and Inxuba Yethemba Municipalities with effect from the 01st of July 2014."

[11] The extract from the minutes serve to emphasise that it was within the contemplation of the CHDM that existing contractual debts owed by the local municipalities of Lukhanji and Inxuba Yethemba and associated with the water services would constitute a risk to CHDM. It further suggested that the CHDM had been alerted to a risk associated with the possible collapse of the water services which had to be averted.

[12] The second minute related to a meeting of the CHDM council on 30 June 2014. The material extract from the minutes relates to the taking over of existing contracts by the CHDM to ensure effective service delivery. The debate had again been facilitated by a report prepared by Mr Dungu in order to request approval for the taking over of existing contracts held by local municipalities to ensure service delivery is not disrupted during the transfer process of the function from local municipalities to the CHDM. Accordingly, the presentation recorded:

> "The taking over of the function means that CHDM will have the direct responsibility for the performance of all Water Services Provider functions and as such will require the necessary service delivery mechanisms to perform this function effectively."

[13] Mr Dungu had therefore proposed that "existing contracts and mechanisms for service provision" be "ceded" to the CHDM to ensure continuity and efficient service delivery.

[14] Later in his presentation, dealing specifically with Inxuba Yethemba, he had recorded:

> "There are several term contracts … issued through a competitive bidding process by LMs[7] in ensuring that relevant resources and materials is available for the operation and maintenance of water service schemes and the provision of technical support where required. The assumption of the water services provider function by CHDM will require that such mechanisms are viable for the CHDM to perform the water service provider function effectively.
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> - It is proposed that the term contracts for Water services provision at Inxuba Yethemba Local Municipality are explored. They are detailed as follows:
>
> …

Company	Service	Contract value	Commencement	End date

[7] Local Municipalities

…				
Hlumisa	Pumps	Term Tender	2014	2014[8]
…				

"

The resolution taken by the CHDM council at the conclusion of this presentation was that the term contracts from Inxuba Yethemba "be approved".

[15] As I have said, after the meetings referred to earlier certain payments were forthcoming from CHDM in respect of outstanding invoices which has previously been delivered to Inxuba Yethemba. However, later, disputes arose as to whether work which had previously been invoiced had in fact been performed and CHDM appointed Mr Gibson, the independent engineer referred to earlier, to verify that the work had in fact been done by City Square. Mr Jordaan understood that once it had been verified payment would be forthcoming. This, however, did not happen.

[16] At the conclusion of the plaintiff's evidence CHDM applied for absolution from the instance. I dismissed the application and provided written reasons for the conclusion to which I had come. When the trial resumed Mr Dungu was the only witness to testify on behalf of CHDM. He was a most evasive witness and did not make a favourable impression in the witness box. Mr Ford**,** on behalf of City Square, submitted, with some justification, that he had been "prone to rambling and extended responses to questions

[8] As explained earlier "Hlumisa Engineering" is the trading name of City Square and the parties were agreed at the presentation of evidence that the end date of the contract reflected as 2014 was erroneous and that it was intended to refer to 2016.

which did not address the substance of the questions posed." Mr Beyleveld, for CHDM, acknowledged that he had in fact made a complete *volte face* in cross-examination.

[17] In his evidence in chief Mr Dungu suggested that he had at all times told Mr Jordaan expressly, from the start, that CHDM had no contract with City Square and no liability to pay the debts of Inxuba Yethemba. He contended that CHDM had merely offered to pay certain debts of Inxuba Yethemba as an advance to them. Mr Dungu insisted that the reference to the "term contract" of Inxuba Yethemba with City Square in the council meeting on 30 June had related to a different contract which had no bearing on the litigation presently before court. When taxed on the specific wording of his presentation recorded in the minutes he was constrained to concede that it was an express reference to the contract in issue in the litigation. The concession is undeniably correct, but it does give rise to serious concern about the integrity of his evidence in chief. Mr Ford's submission that he had deliberately attempted to mislead the court has considerable force. Moreover, it is readily apparent from the minutes of the meeting of 30 June that CHDM had every intention to take over the rights and obligations of Inxuba Yethemba in respect of the maintenance agreement. Mr Dungu was constrained to acknowledge that he had understood the resolution "to approve" the maintenance agreement to mean that CHDM would assume all rights and obligations of Inxuba Yethemba under the agreement. The concession accords with and lends credence to Mr Jordaan's version of what Mr Dungu had conveyed to him at the meeting in July or August 2014. Mr Dungu's evidence must, I think, be rejected wherever it conflicts with that of Mr Jordaan.

[18] As I have explained, what the plaintiff contended for is a delegation of the contract which occurs when a debtor under a contract is replaced by a third party whilst the creditor remains the same. It is a form of novation.[9] For a delegation to occur an intention between all the relevant parties to novate the original obligation must be established and the onus to do so rests on the party alleging the delegation.[10] In *Securicor*[11] this court explained the concept thus:

> "The word 'assignment' in our law is usually used to denote a transfer of both rights and obligations. Christie *The Law of Contract in South Africa,* in my view, aptly describes it as 'a combined cession and delegation':
>
> 'Stepping into another's shoes involves acquiring his rights, which can be done by cession without the debtor's consent, and undertaking his obligations, which can be done by delegation *with the creditor's consent*. *Since the lesser is included in the greater it follows that the whole process of substitution cannot take place without the consent of the other party to the contract*.'"

[19] It has been held that where the delegation, or novation, does not arise from an express agreement, proof of novation or delegation must be clear and unequivocal.[12] In order to establish a tacit assignment of the contract City Square was required to prove unequivocal conduct that establishes, on a balance of probability, that the parties in fact intended to, and did, agree on terms contended for. In deciding whether a tacit contract

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[9] *AJ Kerr: The Principles of Contract* (6th ed) p. 544; *Christie: The Law of Contract in South Africa* (8th ed) p. 559; *Wille's Principles of South African Law* (9th ed)(General Editor Francois de Bois) p. 837.
[10] *Christie* at p. 560 and *Amler's Precedent of Pleadings* (9th ed) p. 277.
[11] *Securicor (SA)(Pty) Ltd and Others v Lotter and Others* 2005 (5) SA 540 (E) at 547D
[12] *Dowling v Registrar of Deeds* 2012 AD 28 at 35; *Electric Process Engraving and Stereo Co. v Irwin 1940 AD 220 at 226*; *French v Sterling Finance Corporation (Pty) Ltd* 1961 (4) SA 732 (A) at 736E-H; *Barclays National Bank Ltd v Smith* 1975 (4) SA 675 (D) at 683D.

was concluded, the law considers the conduct of all parties objectively and the circumstances of the case generally.[13]

[20] The extract from the minutes of the council meetings of CHDM on 26 March and 30 June 2014 reveal conclusively that the CHDM appreciated the potential of the collapse of the water services upon takeover and understood the need to put in place the necessary service delivery mechanisms in order for them to perform the function effectively. The proposal to adopt the existing contracts and mechanisms for service delivery, and in particular the maintenance agreement, was expressly approved. The resolutions taken at these meetings give the lie to Mr Dungu's version of his discussions with Mr Jordaan at their meeting in July or August 2014. Mr Dungu said that regular monthly meetings were held with Inxuba Yethemba after 26 March 2014 in order to facilitate the hand back of the water services provider functions. He acknowledged that the takeover was discussed extensively and that Inxuba Yethemba accepted the arrangement, which included taking over the rights and obligations under the maintenance agreement. The presentation to council by Mr Dungu on 26 March made it plain that the existence of unknown pre-existing debts arising from contracts concluded by Inxuba Yethemba was a risk that CHDM was willing to accept. Mr Saleni's communication to Mr Jordaan and Mr Wardle reinforces Inxuba Yethemba's acceptance of the arrangement for CHDM to take over the maintenance agreement. The subsequent confirmation thereof by other officials of Inxuba Yethemba and by Mr Dungu confirmed the consensus between the municipalities. Mr Dungu's concessions,

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[13] *Roberts Construction Co. Ltd v Dominion Earthworks (Pty) Ltd and Another* 1968 (3) SA 255 (A); *Standard Bank of South Africa Ltd v Oceans Commodity Inc* [1983] 1 All SA 145 (A); 1983 (1) SA 276 (A) at 292; *NBS Bank Ltd v Cape Produce Co. (Pty) Ltd* [2002] 2 All SA 262 (A); 2002 (1) SA 396 (SCA).

under cross-examination, lent further credence to the version advanced by Mr Jordaan of their discussions and in my view established, on a balance of probabilities, that all three parties intended for CHDM to take over all the rights and obligations of Inxuba Yethemba under the maintenance agreement, including the liability for invoices previously rendered, and that they were in fact agreed on those terms.

[21] Mr Dungu sought repeatedly to suggest that payment of outstanding invoices was subject to various documents being completed and verification being provided that the work had in fact been performed. These formal requirements relate to the internal regulations of the CHDM and have no bearing on the liability of CHDM to meet the obligations assumed in the maintenance agreement by Inxuba Yethemba.

[22] I turn to the quantum of the outstanding invoices. At the commencement of the hearing City Square abandoned certain of the claims set out in its particulars of claim and the parties agreed that in the event that I should find that CHDM was liable to City Square for payment of outstanding invoices in terms of the maintenance agreement then City Square is entitled to payment of a number of agreed invoices. It is not necessary herein to traverse each invoice but, suffice it to say that only one invoice in respect of work to an aerator remained in dispute. CHDM questioned whether in fact the services relevant to the aerator in issue had been rendered at all. The basis for the challenge appears to have arisen from the fact that the invoice was initially not rendered in respect of the services, but was belatedly rendered on 31 March 2016, some two years after the event. Mr Jordaan testified that the work in respect of the aerator in

issue was performed during 2014, but that an invoice was not generated at the time. He said that the work had been signed off and that the independent engineer appointed by the CHDM to verify work carried out had subsequently confirmed the performance of the work. He explained that when difficulties had arisen in extracting payment from CHDM in 2014, and in the course of negotiation with the municipal manager at CHDM, they had reached an agreement in respect of certain payments. The agreement included an undertaking by City Square not to render an invoice in respect of this work, as a gesture of goodwill. But, when CHDM later reneged on the agreement, City Square rendered an invoice in respect of the work. No other version was advanced and at the conclusion of the trial Mr Beyleveld did not advance any argument in respect of this invoice.

[23] Thus, at the conclusion of the trial the parties were in agreement, subject to my finding of liability arising from the assignment of the maintenance agreement, that the total sum of the invoices due to City Square[14] amounts to R5 434 111,58.

[24] That left the plaintiff's claim for loss of profits, which requires a consideration of the nature and the interpretation of the maintenance agreement. As I have said, the contract was for a period of two years, and it was the product of a legitimate, transparent tender process. As adumbrated earlier, City Square was engaged to perform the operations and maintenance of major electrical and mechanical pumps under the control of Inxuba Yethemba as water services provider. The scope of the works was described to include:

[14] As a result of the finding earlier.

- Attendance to all major breakdowns of pumps as well as maintenance.
- The service provider was expected to be available 24 hours 7 days a week.
- The service provider was expected to be on site within 6 hours after being notified.
- The installation of new electrical panels and the update of the existing panels.
- The installation and equipping of the pumps.
- The supervision and management of the works.
- The technical support and training of the internal staff.
- The routine maintenance and servicing of the pumps and associated equipment.
- Proper monitoring, recordkeeping and analysis is expected to be done all the time.
- Submission of reports on all work done on a monthly basis.

[25] The contract provided further that the services required would be determined from time to time by agreement between the parties, but subject to the conditions of service which may be imposed by the council from time to time. Mr Jordaan accepted, accordingly, that City Square would only be entitled to perform work, and render invoices for work, that they were instructed to perform from time to time by Inxuba Yethemba.

[26] In its tender City Square submitted a Bill of Quantities setting out the rates at which it would be prepared to perform various functions which were anticipated to be necessary during the contract period, in accordance with the tender. The Bill of

Quantities included an amount of R3 100 000,00 in respect of general and preliminary items made up as follows:

1.	Time related obligations	month	24	R30 000	R720 000
2.	Value related obligations	lump sum	1	R650 000	R650 000
3.	Fixed related obligations	lump sum	1	R650 000	R650 000
4.	Establishment of office	sum		R1 080 000	R1 080 000

[27] The contract permitted City Square to raise a 20% profit and the estimated work set out in the Bill of Quantities amounted to R12 797 888,20. Hence, City Square initially claimed that they would have been entitled to perform work to this value and to calculate its loss of profits flowing from the repudiation of the contract on this sum. However, recognizing that they were only entitled to work allocated by the municipality from time to time, within their financial means and discretion, they did not pursue this method of calculation. Thus, during the course of the litigation City Square delivered a further notice in terms of Rule 35(3) of the rules of court demanding further discovery in respect of documentation relating to services in fact rendered at Inxuba Yethemba by other contractors during the contract period. City Square contended that it had been entitled to be engaged for all work required by the water services provider of the kind set out in the scope of works adumbrated earlier, and thus calculated their loss of profit as 20% of the value of work in fact awarded to and performed in breach of the agreement by other contractors.

[28] CHDM disputed their entitlement to any loss of profits because it contended that, on a proper interpretation of the maintenance contract, City Square was not entitled to

any work, nor were they exclusively entitled to all maintenance work commissioned by Inxuba Yethemba. Their entitlement, so CHDM argued, was always subject to Inxuba Yethemba requesting work to be done, in which event the rates set out in the Bill of Quantities would apply to such work.

[29] This brings me to the proper construction of the maintenance agreement. Generally, when a tender is in the form of a standing offer to supply services of a specified type, as and when required, at a price agreed upon, the acceptance of the offer results in a *pactum de contrahendo*. Corbett JA said in *Hirschowitz*[15] that a *pactum de contrahendo* is 'simply an agreement to make a contract in the future …. It was a class of contract "very well-known in Civil Law" (see *McIlrath's v Pretoria Municipality* 2012 TPD 1027 at 1037 where Wessels J, Bristowe J concurring)'.[16]

[30] Provided that the agreement results from a firm offer and it is not too vague such an agreement will be enforceable.[17] The resulting obligation may oblige the tenderer to supply the specified services whenever ordered, with or without the reciprocal obligation to order exclusively from the tenderer.[18] This is such a case.

[31] Notwithstanding the constitutional and legislative provisions which now bind organs of state in procurement of goods and services it is not impermissible for a successful tenderer to commit itself to supply goods as and when required and for an

[15] *Hirschowitz v Moolman and Others* 1985 (3) SA 739 (A)
[16] See also *Wessel's Law of Contract in South Africa (*2nd ed) volume 2, para 4436
[17] *Christie* p. 51
[18] *Christie* p. 60*; Beka (Pty) Ltd v Nelson Mandela Bay Metropolitan Municipality and Another*, an unreported judgment of the High Court, Port Elizabeth, delivered on 30 August 2011 (case number 768/2011); and *Amathole District Municipality and Others v Wesley Pretorius and Associates Incorporated and Others*, an unreported judgment of the Full Court, Makhanda delivered on 13 September 2022 (case number CA75/2021).

organ of state to, in turn, commit itself to order all the goods exclusively from the contractor as and when needed.[19]

[32] Whether or not the contract contains an exclusive supply provision depends on the interpretation of the contract but, generally, in the absence of sufficient indications to the contrary it will not be implied that any work will be given to a contractor or that none will be given to anyone else.[20] The contract in this instance has no express exclusivity clause. However, it was held in *Soeker*[21] that:

> "Where the act to be done by the party binding himself can only be done upon something of a corresponding character being done by the opposite party, you would there imply a corresponding obligation to do the things necessary for the completion of the contract. So if a man engages to work and render services which necessitate great outlay of money, time, and trouble, and he is only to be paid by the measure of the work he has performed, the contract necessarily pre-supposes and implies on the part of the person who engages him an obligation to supply the work."

[33] The facts of this matter reveal that City Square, a company based in East London, contracted with Inxuba Yethemba on the basis that it was required to establish a base in Inxuba Yethemba, at considerable expense, in order to maintain a staff presence at all times during the contract period. City Square honoured this obligation and, as set out earlier, the expense incurred in respect thereof appears from the preliminary and general expenses set out in the Bill of Quantities. It required a substantial outlay in order to meet the demands of the contract and I consider that it

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[19] *The Law of Government Procurement in South Africa* (2007) LexisNexis p. 26 at para 3.2.2.2; *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA)
[20] *Christie* p. 51
[21] *Soeker v Colonial Government* (1906-1909) 3 Buch AC 207 p. 220

constitutes a strong indication that Inxuba Yethemba intended to commit itself to award all the work covered by the scope of works exclusively to City Square during the contract period. To hold otherwise would lead to an insensible and unbusinesslike result.[22] That was the obligation that CHDM assumed under the assignment of the contract. Accordingly, I consider that the work falling within the scope of work adumbrated earlier and performed by other contractors within the municipal area of Inxuba Yethemba, at the instance of CHDM, during the contract period constitutes a reliable measure for the calculation of the loss of profit suffered by City Square. The parties have prepared a schedule of contracts awarded by CHDM to other contractors during the period and agreed on the quantum of payments made to such contractors during the period. By calculating the profit at 20% thereof City Square's loss amounts to R828 241,20. City Square is entitled to payment thereof as damages.

[34] I accordingly make the following order:

The second defendant, the Chris Hani District Municipality, is ordered to pay to the plaintiff:

1. The amount of R5 434 111,58 in respect of work done and services rendered, together with interest on the aforesaid sum calculated at the prevailing prescribed legal rate of interest *a tempore morae* to the date of payment.

[22] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18]

2. The amount of R828 241,20 as and for damages, together with interest on the aforesaid sum calculated at the prevailing prescribed legal rate of interest from the date of summons to the date of payment.

3. The plaintiff's costs of suit, such costs to include:

3.1 The costs of two counsel where so employed; and

3.2 The qualifying expenses, if any, of Mr Ian Wardle.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv EAS Ford SC and Adv K Watt instructed by Bax Kaplin Russell Inc c/o Owen Huxtable Attorneys, Makhanda

For 2nd Defendant: Adv A Beyleveld SC instructed by McWilliams & Elliot c/o Whitesides Attorneys, Makhanda