



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: YES/NO
(2) OF INTEREST OF OTHER JUDGES: YES/NO
(3) REVISED
2023/07/05

DATE

SIGNATURE

Case No: 16427/22

In the matter between:

**WANGA ENGINEERING AND CONSTRUCTION
SERVICES CC**

Applicant

and

AZWINDINI ZELDA MALANGE

Respondent

JUDGMENT

FRIEDMAN AJ:

- 1 In this application, the applicant seeks payment of R307 044.50, interest, and costs in terms of an agreement which it concluded with the respondent on 1 May 2020. I shall describe this agreement as “the building contract” below. The applicant also seeks a punitive costs order, which I discuss more fully below.
- 2 The building contract contains various terms, many of which are not relevant to the issues arising in this application, aimed at facilitating the construction by the applicant of a house for the respondent. The total contract price was R1 050 000.00. In essence, the building contract imposed obligations on the respondent to purchase the land on which the house was to be built and to procure a mortgage to fund the construction of the house. The building contract required the respondent to pay a deposit of R600 000.00 within 14 days of acquisition by her of the bank loan. The remaining component of the contract price would be funded by the mortgage. As is common in agreements of this nature, the contract price was to be paid in progress payments, with the balance to be paid on completion.
- 3 Despite the requirements of the building contract, the respondent did not pay the R600 000.00 deposit. Rather, between the period 1 June 2021 and 26 October 2021, she made four payments to the applicant. The respondent first paid an initial deposit of

R50 000.00. Three progress payments were then made of R215 707.21, R177 248.25 and R300 000.00 on 8 July 2021, 27 August 2021, and 26 October 2021 respectively.

- 4 The applicant says that the construction of the house was completed on 6 December 2021. It says that the respondent took occupation on the same day. Two clauses of the building contract became relevant at that stage:

4.1 Clause 2.1.6 provides that:

“Upon completion of the construction of the House, the Purchaser specifically undertakes to attend the final inspection of the house and signing of the Happy Letter and the final building progress payment forms to authorize the bank or other financial institutions to pay the full proceeds of the mortgage loan and/or guarantee to the Developer”.

4.2 Clause 2.1.7 provides that:

“It is a specific term of this Agreement that the Purchaser shall not after having signed the Happy Letter and/or having taken occupation of the property, instruct the bank to hold back and not pay the Developer any outstanding amounts, and any attempt to do so, shall immediately entitle the Developer to claim the full outstanding amount directly from the Purchaser”.

- 5 It presumably goes without saying that the “Developer” is defined in the agreement (in clause 1.4) as the applicant and the “Purchaser” is defined (in clause 1.3 read with page 1 of the agreement) as the respondent. The term “Happy Letter” is defined as “[t]he Purchaser signing and accepting the House and confirming that the House has been completed in accordance with this Building Contract”. That is a verbatim quote from the building contract.

- 6 The applicant says that, after the respondent took possession of the house, she did not authorise the payment by the bank of the final instalment to the applicant. Instead, she withdrew the funds from the bank and refused to pay the balance then owing, of R307 044.50, to the applicant. Based on the allegations described above, and in reliance on clause 2.1.7 (to which I return below), the applicant seeks payment of this sum in these proceedings.

THE RESPONDENT'S DEFENCE

- 7 Before addressing the merits in her answering affidavit, the respondent took the point that the deponent to the founding affidavit, Ms Rapalalane, did not establish her authority to represent the applicant in the founding papers. Reference was made to a rule 7 notice sent by email by the respondent's attorney to the applicant's attorney in which the authority of Ms Rapalalane and Dube Lesley Attorneys, the applicant's attorneys of record, is disputed. To its replying affidavit, the applicant attached a resolution dated 7 June 2022 which authorised Ms Rapalalane to "sign all documents, depose to all affidavits and do all things necessary on behalf of the Company in pursuance of the aforesaid application" and confirming that "Dube Lesley Attorneys are the appointed Legal Representatives in the matter". The email attaching the rule 7(1) notice was sent by the respondent's attorney to the applicant on 31 May 2022 and the resolution is dated 7 June 2022. The answering affidavit was filed on 20 June 2022, which is after the resolution was apparently taken by the applicant. The applicant says in its replying affidavit that the resolution was sent to the respondent's attorneys, but does not say when this happened – in particular, whether it was sent before or after the filing of the answering affidavit. In the answering affidavit, the respondent says that the rule 7(1) notice "remains unanswered by the Applicant", which suggests that at that

stage the applicant's attorney had not yet sent the resolution to the respondent. In any event, the response of the applicant to the rule 7(1) notice adequately addresses the issue of authority and the point was not pressed on behalf of the respondent in argument. It is not necessary for me to address that issue further.

- 8 As to the merits, the respondent in her answering affidavit did not deny that she had failed to pay the outstanding sum of R307 044.50. Rather, she said the following:

8.1 First, she denied having been presented with, or having signed, a Happy Letter.

8.2 Secondly, she referred to various respects in which she said that the applicant had breached the building contract. These allegations of breach relate to issues which I would broadly describe as "workmanship complaints". The respondent put up evidence, in the form of an extract from a WhatsApp chat, to show that she had raised her dissatisfaction with the applicant's work with the applicant; although the precise nature of the dissatisfaction is difficult to discern from the extract from the WhatsApp text annexed to the answering affidavit.

8.3 Thirdly, she denied having taken occupation on 6 December 2021. She said that she only took occupation in February 2022 and that, at the time she took occupation, "the cupboards, electrical work, bathroom tiles and accessories fittings [sic] as well as the double garage door were not even done and I had to spend R141 000.00 to install them".

8.4 Lastly, the respondent took the position that there were irresolvable disputes of fact on the papers which precluded the applicant from obtaining the relief

sought in motion court. I do not discuss the details of this stance here and prefer to deal with that argument separately below.

- 9 *Mr Zwane*, an attorney with right of appearance, filed heads of argument on behalf of the respondent. In them, he repeated the points summarised above (except, as already noted, the authority point). He framed the dispute-of-fact point as a “preliminary objection”.

THE MERITS

- 10 In my view the merits of this matter are straightforward. The applicant is entitled, for the reasons given below, to the relief which it seeks. I proceed to explain why, and then conclude by addressing two matters: the supposed disputes of fact and – something which I have not mentioned above – the fact that the building contract has an arbitration clause.

The contractual cause of action

- 11 The applicant admitted in its replying affidavit that no Happy Letter was signed by the respondent, blaming this on its allegation that communication with the respondent had become difficult by that stage. (I pause to note that the replying affidavit appears to have been filed four days late. Condonation for its late filing is sought in the body of the affidavit, but no formal condonation application was brought. The respondent has not sought to take issue with the late filing of the replying affidavit, and it is my view that it would be in the interests of justice for me to have regard to it. Since no formal

condonation application was brought, I do not see the need to make a formal order to this effect.)

- 12 So, it is common cause that no Happy Letter was signed by the respondent. In this regard, the text of clause 2.1.7 of the agreement is important. I have reproduced it in paragraph 4.2 above, but repeat it for convenience here. It provides that:

“It is a specific term of this Agreement that the Purchaser shall not after having signed the Happy Letter and/or having taken occupation of the property, instruct the bank to hold back and not pay the Developer any outstanding amounts, and any attempt to do so, shall immediately entitle the Developer to claim the full outstanding amount directly from the Purchaser”.

- 13 The building contract provides, in clause 2.1.4, that progress payments will be made from time to time and that the “full amount including the ‘initiation fees’ will be paid upon completion of the house”. The plain text of clause 2.1.7 suggests that if one of two events takes place the Purchaser (ie the respondent) becomes precluded from instructing the bank to withhold the final payment; which carries the corollary that the final payment must be made at that point. One of these events is the signing of the Happy Letter and the second of these events is the taking of occupation of the property by the Purchaser. So, in other words, this clause seems to be clear that, if the Purchaser takes occupation of the property, she cannot interfere with the requirement that the bank makes the final payment; and, if she does, the Developer (ie, the applicant) may claim the final payment directly from her.

- 14 The applicant says that the respondent took occupation of the property on 6 December 2021. The respondent denies this and says that she only took occupation in February 2022. In its replying affidavit, the applicant says that the respondent is misleading the

court when she says she only moved into the house in February 2022. To support this contention, a WhatsApp exchange from 20 November 2021 in which the respondent appears to say that she would “start moving tomorrow” and an electrical compliance certificate, which is dated 4 November 2021, are provided.

15 I cannot say, on the evidence before me, precisely when the respondent took occupation. I say this, in particular, while keeping an eye on the test applicable to disputes of fact in motion court, a topic to which I return below. Yes, on the one hand, the WhatsApp exchange does suggest that, in November 2021, the respondent was about to move in (the electrical certificate is entirely inconclusive on the issue of occupation). But anything could have happened between the time when the respondent sent that text and when she ultimately moved in. I simply do not have sufficient evidence on this issue to make a definitive finding.

16 But nothing turns on that for present purposes. This is because, as shown above, it is common cause that in February 2022, before this application was launched, the respondent took occupation. So, for my purposes, I must proceed on the basis that two key facts are common cause:

16.1 First, that, as of February 2022, the respondent was in occupation of the property.

16.2 Secondly, despite taking occupation, the respondent did not pay the final payment of R307 044.50, reflecting the sum needed to discharge the total contract price by that time.

- 17 On the plain text of clause 2.1.7 of the building contract, this would seem to suggest that the respondent has no defence to this application. Having taken occupation, she was obliged to facilitate payment of the final instalment of the contract price to the applicant. And, having failed to do so, the applicant became entitled to claim that sum.
- 18 The respondent's defence to this application – leaving aside the claim that disputes of fact prevent the applicant from obtaining the relief which it seeks – is that there were defects in the applicant's performance. As framed in the answering affidavit, the respondent takes the view that the applicant's breach of the building contract means that the respondent is not obliged to pay the balance of the contract price. In fairness to the respondent, and reading her papers generously, her stance seems to be slightly more nuanced than that. She appears to contend (although the point was not framed in this way) that she is entitled to some sort of set-off arising from the poor workmanship, and that the quantum of the applicant's claim cannot be determined in motion proceedings.
- 19 Having regard to the fact that courts are now enjoined to interpret agreements in a unitary exercise in which language, context and purpose assume equal importance,¹ the question is whether the agreement can be interpreted to support the respondent's defence. Put differently, does the building contract, properly interpreted, permit the respondent to withhold the final payment on the basis that the applicant allegedly breached the agreement by not providing the quality of workmanship required by the contract?

¹ University of Johannesburg v Auckland Park Theological Seminary 2021 (6) SA 1 (CC) at para 65

20 I have already intimated that the plain text of clause 2.1.7 does not support the respondent's defence. But clause 2.1.7 must also be read in the context of the agreement as a whole. In my view, the building contract, read as a whole, does not envisage a defence along the lines of the defence which the respondent wishes to raise. In particular, the building contract envisages specific remedies for the respondent in circumstances where she was not satisfied with the applicant's workmanship.

20.1 Clause 5 of the building contract is headed "Warranties and Defects Liability". Clause 5.1 provides that, on completion of the house, the Purchaser "shall take possession of, and inspect, the house" and provide the applicant with a "final written list within 14 days of any work still to be completed and/or defects to be remedied". It then provides that the "defects liability period shall commence from the date of completion".

20.2 Clause 5.2 provides that as soon as any remedial work identified on the list has been completed and accepted by the Purchaser, the house will be deemed to be complete.

20.3 Clause 5.3 then provides that:

"Any payment defects, shrinkage or other faults which may appear within 3 months after completion of the house due to material or workmanship not in accordance with this Agreement, or faults occurring before completion of the house, shall within a reasonable time after receipt of the Purchaser's written instructions be made good by the Developer at his own cost".

20.4 Clause 5.5 is also relevant to the interpretive exercise. It provides that:

"Any repair of a leakage in the roof or any damage to the house caused thereby, arising from the faulty materials or workmanship, occurring within a period of 12 months after completion of the house

shall be undertaken within 30 days after receipt of the Purchaser's written notification of such leakage and/or damage".

20.5 Clause 5.9 then provides that:

"The Developer shall be relieved of the above undertakings if the Purchaser fails to give the Developer written notice on/before the expiry of the said period, to the effect that the Developer is required to fulfil the relevant undertakings. A certificate by the appointed inspector stating that any defect for which the Developer is liable, and which is rectified, shall be final and shall relieve the Developer from any further obligations".

20.6 In addition to these provisions of clause 5, the clause dealing with breach has relevance to the interpretive exercise. It envisages the resolution of disputes by arbitration, a topic to which I return below. But it also contains the following relevant clauses:

20.6.1 First, clause 8.1 provides:

"Should a party to this agreement fail timeously or fully to perform any obligation resting upon it in terms of this agreement or arising out of the agreement ("the defaulting party") then the other party having the right to have the obligation in question performed (the "aggrieved party") shall call upon the defaulting party to remedy the failure within 14 (fourteen) days after the date on which the defaulting party has been called upon to remedy such failure".

20.6.2 Secondly, clause 8.2 provides:

"Should the defaulting party fail to remedy its failure within the period stipulated in the notice, the aggrieved party shall be entitled to terminate this agreement forthwith by notice in writing, and without prejudice to any rights which it may have in law, to take action against the defaulting party for damages it may have suffered as a result. Alternatively, the aggrieved party may, should it so wish, proceed against the defaulting party for specific performance in terms of this agreement."

21 It seems to me that, in the light of these clauses of the building contract (including, of course, clauses 2.1.6 and 2.1.7), the position under the agreement is the following:

21.1 The agreement envisages that, on completion of the construction of the house, there will be a final inspection which will enable the purchaser to identify any problems. If no problems are identified, then the purchaser will sign the Happy Letter with the consequences which flow from that.

21.2 If the purchaser is dissatisfied with the workmanship in any respect, her first and primary remedy is not to take occupation and not to sign the Happy Letter. But, of course, defects in workmanship might appear after a purchaser takes occupation and a purchaser cannot be expected to notice, and highlight, every defect before taking occupation. This is why the agreement also gives the purchaser the right to identify defects in workmanship which might come to her attention within the first three months after the completion of the house. This right is to be exercised by giving the developer written instructions to remedy the defect; and, on receiving such instructions, the developer is obliged to remedy the defect at its own cost.

21.3 There is also the self-standing right, not confined to a particular time limit, on either party effectively to place the other party in breach of an obligation in the building contract by giving the other party 14 days to remedy the breach. This carries the concomitant right of the innocent party, if the breach is not cured within the period stipulated in the notice, either to cancel the agreement and claim damages or claim specific performance.

- 21.4 Therefore, if the respondent was aggrieved by the standard of workmanship even before taking occupation, she could have elected not to take occupation and then place the applicant on terms to remedy the defects in terms of the provisions discussed above. Or, if the respondent became aware of problems after moving in, she could have used her rights in the agreement to oblige the applicant to address the problems – including on pain of cancellation, if necessary. But what the respondent could not do is take occupation of the premises, fail to avail herself of any of the rights described above, and simply refuse to pay the balance of the contract price. The provisions discussed above demonstrate that this conduct is categorically precluded.
- 22 There is an indication in the papers that, in fact, the respondent *did* avail herself of some of the rights mentioned above. As I noted above when explaining the respondent's stance in the answering affidavit (see paragraph 8.3 above), the respondent explains that, when she took occupation, she had to spend R141 000.00 taking care of aspects of the building work which were not done. The applicant accepts that this is the case, and says (with a proof of payment attached in support) that it reimbursed the respondent for this payment which was "inclusive of all complaints that were raised by the Respondent".
- 23 Both parties filed relatively terse affidavits and many of the factual allegations made by both sides raise more questions than answers. This applies to the dispute about the R141 000.00, amongst others. It is not necessary for me to become engaged with those factual disputes, including the one about the R141 000.00. I mention it to illustrate a fundamental point about the clear intention of the parties as reflected in the proper

interpretation of the agreement. The building contract envisages a series of mechanisms which assist the purchaser to compel the developer to ensure that proper workmanship was provided in all cases. The idea clearly being to preserve the agreement and ensure that it was properly fulfilled by both sides, rather than to make it easy for either party to walk away. While providing the purchaser with various protections, it also protects the developer by preventing the purchaser from doing precisely what the respondent has attempted to do in this case.

- 24 It follows that, on a proper interpretation of the building contract, the respondent's answering affidavit discloses no defence. On the key common cause fact – that the respondent took occupation of the property – nothing alleged by the respondent in her answering affidavit exonerated her from the obligation to ensure payment of the final instalment of the purchase price.

Disputes of fact?

- 25 Rule 6(5)(g) provides that, “where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision.” The respondent has not relied on rule 6(5)(g) expressly in her answering affidavit or heads of argument but has used its terminology to explain why she says that the application should be dismissed.

26 In *Lombaard*,² an application was brought in the High Court by Mr Lombaard to transfer certain immovable property to him. His application failed and he appealed to the Supreme Court of Appeal. There was no application in the High Court for the matter to be referred for the hearing of oral evidence or to trial. The High Court simply determined the matter on the papers. But, in the SCA, a debate arose as to whether the matter ought to have been, and therefore should now be, referred to oral evidence. The majority of the SCA held that a proper factual basis for a defence had been set out in the answering affidavit and had not been addressed by the applicant (now appellant) in his replying affidavit. In holding that it would not be appropriate to refer the matter to oral evidence – and that, instead, it was appropriate for the SCA to confirm that the application was rightly dismissed by the High Court – the SCA said the following:

“An order to refer a matter to oral evidence presupposes a genuine dispute of fact (*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163; *Ripoll-Dausa v Middleton NO and others* 2005 (3) SA 141 (C) at 151F ff [also reported at [2005] 2 All SA 83 (C) – Ed]). The appellant chose not to respond to the factual allegations concerning rectification. He did so at his peril . . .”³

27 There are several ways in which the *Lombaard* matter is distinguishable from the present case. But, I have referred to *Lombaard* because it is helpful in the following respect: when there are genuine disputes of fact, the court will normally dismiss an application in circumstances where the applicant ought reasonably to have anticipated them.⁴ However, before a court even enters into an enquiry as to whether the applicant ought to have anticipated that there would be genuine disputes of fact on the papers, it has to be convinced that there are genuine disputes of fact on the papers in the first

² *Lombaard v Droprop CC* [2010] 4 All 229 (SCA)

³ *Lombaard* (supra) at para 26

place. If there are not, no purpose would be served in referring the matter for the hearing of oral evidence or trial under rule 6(5)(g). Rather, the result of the application will be determined largely by the question of which party has failed to raise a genuine dispute of fact: if it is the respondent, then the application would normally be granted on the basis of the principles expressed in *Plascon-Evans*.⁵ If it is the applicant – which would arise in circumstances such as in *Lombaard* when the applicant fails to, or cannot, address a genuine factual defence put up in the answering affidavit – then the application would simply be dismissed.

28 To determine that there is a genuine dispute of facts, it is necessary to consider the allegations in the affidavits of each side and ask: if the allegations made in the papers of each side turn out, with the leading of oral evidence, to be true, would they disclose a cause of action or defence? To give an easy example (and let us leave aside that an applicant would be most unlikely to bring a claim of this nature on application): a particular applicant sues a respondent for R500 000 in delict for intentional damage to property. In her founding affidavit, she gives a detailed narrative of how the respondent caused extensive damage to the applicant's car. In the respondent's answering affidavit, he gives a detailed narrative of how he had nothing to do with the damage and was out of the country at the time. If the applicant's version is true, she must win. If the respondent's version is true, he must win. This is a genuine dispute of fact.

29 On the other hand, a genuine dispute of fact will not even be triggered if the respondent puts up a version saying something along the lines of: the applicant is wrong when she

⁴ See *Economic Freedom Fights v Manual* 2021 (3) SA 425 (SCA) at para 114

says that I destroyed her car with a hammer, I actually did it with explosives. Yes, the parties may have different factual versions as to what actually happened. But, on either of their versions, the applicant must win.

30 Therefore, it seems to me that a court faced with a decision of how to apply the provisions of rule 6(5)(g) should ask the following questions:

30.1 Is there a genuine dispute of facts on the papers?

30.2 If there is, then the next question is: ought the applicant to have anticipated these disputes of fact when launching the application? If the answer to that is yes, then ordinarily the court would dismiss the application.

30.3 If the applicant cannot have anticipated that disputes of fact would arise, or there is some other compelling consideration, the court would then ask whether it is in the interests of justice for the matter to be referred to trial or for a referral to oral evidence in respect of a discrete topic to be made. This will depend on the facts of each case.

31 In her answering affidavit, the respondent in essence flagged the following factual disputes:

31.1 Whether the applicant completed the building and construction in compliance with the building contract.

⁵ Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-5

- 31.2 Whether there were structural defects that ought to have been remedied by the applicant, and which it failed to remedy despite them being brought to its attention.
- 31.3 The quantum of what the respondent owes the applicant, if anything. The respondent says that the quantum is not readily ascertainable from the papers.
- 32 In her heads of argument, the respondent says that it is clear from the papers that there is a material dispute about whether the applicant completed the building and construction in compliance with the building contract.
- 33 It should by now be apparent that none of these supposed disputes of fact can assist the respondent in resisting the applicant's claim. On the proper approach to disputes of fact, which I have set out above, one has to place each party's version side by side (assuming, for the sake of conducting this exercise, that the respondent's factual version triggers a genuine dispute as to what the true facts are) and ask: does the respondent's version of the facts constitute a defence to the applicant's case? For all of the reasons given above, even if the respondent is correct that the applicant did not comply with its obligations under the agreement, and even if the respondent is correct that there were structural defects, these facts do not disclose a defence to the applicant's claim for payment.
- 34 Once one accepts that the existence of defects in the workmanship of the applicant does not constitute a valid defence to the claim as framed by the applicant, it also becomes apparent that there is no dispute of fact on the question of the respondent's

indebtedness. The only way for there to be such a dispute, on the facts as alleged by the respondent, would be if the respondent were entitled to withhold payment of some or all of the outstanding amount as a result of the allegedly shoddy workmanship. Once one finds, as I must, that the respondent does not have this entitlement, the quantification of the amount that she owes become a straightforward exercise. It is common cause that the contract price was R1 050 000.00. It is also common cause that the respondent paid R742 955.46, which is the sum of the payments made as itemised in paragraph 3 above. The applicant is clearly entitled to the balance, which is R307 044.54. (The astute reader will notice that this sum differs, in the amount of 4c, from the sum claimed in the notice of motion. I address that below.)

The arbitration clause

35 The last issue which I must address is the fact that the agreement contains an arbitration clause. Neither party referred to this issue at all and I raised it with them during the hearing. The applicant acknowledged that there was such a clause, but pointed out that the respondent did not object to the jurisdiction of this Court by relying on it in her answering affidavit (or, indeed, in argument). The applicant submitted that, in the absence of an objection by the respondent, that was the end of the matter and this Court has jurisdiction to grant the relief sought.

36 The applicant is clearly correct. In the answering affidavit, the respondent did not take the point that her right to have the dispute arbitrated precluded the applicant from obtaining the relief which it seeks from this Court. It appears now to be settled that, even where an agreement has an arbitration clause, an applicant or plaintiff is entitled to

proceed via litigation in court. If the respondent/defendant wishes to assert its right to arbitrate, it must do so – in other words, it must elect whether to challenge the step taken by the applicant/plaintiff to proceed via litigation or to submit to it. If it fails to assert that right by objecting to the jurisdiction of the court, and instead submits to the jurisdiction of the court, it must be taken to have waived its right to arbitrate.⁶

- 37 It follows that the applicant was entitled to take its chances by bringing court proceedings. The failure of the respondent to object means that this Court has jurisdiction to grant the relief sought.

THE NATURE OF THE COSTS ORDER

- 38 The building contract does not deal with the issue of costs. I mention this because both parties asked, in the event of success, for a costs order on the attorney-client scale. Neither party substantiated this request in the heads of argument which were filed. It was clarified in argument that both parties sought a punitive costs order, in the event of success, on the basis of their view that the other party had litigated unreasonably.

- 39 As Todd AJ recently put it in *Beer*,⁷ relying on the decision of the SCA in *Claase*⁸ and quoting from the decision of the Constitutional Court in *Swartbooi*:⁹

“Our courts will grant costs on a punitive scale where a party has been put to unnecessary expense in consequence of conduct by a litigant that can reasonably

⁶ See *BDE Construction v Basfour 3581 (Pty) Ltd* 2013 (5) SA 160 (KZP) at paras 9-10

⁷ *Beer v South African Institute of Chartered Accountants* 2022 JDR 3058 (GJ) at para 45

⁸ *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA) at para 11

⁹ *Swartbooi v Brink* 2006 (1) SA 203 (CC) at para 27

be characterized as unreasonable or obdurate. An award of this kind requires *‘special considerations arising either from the circumstances which gave rise to the action or from the conduct of the losing party’.*” (Emphasis in the original.)

40 I have explained above that the applicant’s claim in this Court must succeed and that the respondent’s defences to the application have no merit. However, I can find no basis to conclude that the respondent’s conduct – either through the conduct in the litigation or from the circumstances leading to the present dispute – rises to the level of being characterised as unreasonable. She clearly felt aggrieved by the workmanship of the applicant. Whether her grievances were objectively justified is unclear to me; and, as demonstrated above, this issue is irrelevant to the decision which I must make on the merits. What does seem clear is that her response to this application was not so palpably indefensible as to rise to the level of being unreasonable – at least in the sense understood by our courts in the context of punitive costs orders.

41 It follows that the applicant has not made out a case for a punitive costs order.

CONCLUSION AND ORDER

42 As appears from everything which I have said above, the applicant’s claim must succeed.

43 I have explained above (see paragraph 34) that the outstanding balance of the contract price is R307 044.54. In the notice of motion, the applicant claims R307 044.50. Either the applicant voluntarily and deliberately abandoned 4c of its claim (perhaps in a rounding-down exercise similar to that conducted by some of our major retailers at points of sale), or the sum claimed in the papers was derived as a result of an oversight.

While I doubt that either of the parties would grumble over 4c, I intend to stick with what is claimed in the notice of motion because I did not have the opportunity to ask the parties about this.

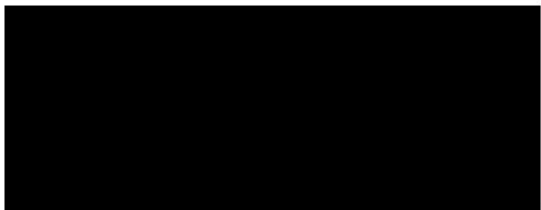
44 In the notice of motion, the applicants simply seeks “interest at the prescribed rate”. Interestingly, clause 2.1.8 of the building contract provides that interest “is payable on all amounts which is [sic] due and payable by the Purchaser under this Agreement and which remains [sic] unpaid for a period of 7 days from date of receipt of demand, at the prime interest rate plus 3% as charged by ABSA from time to time and shall be calculated and compounded monthly in arrears.” It is unclear to me why the applicant did not seek to rely on this clause in these proceedings. But, since it did not do so, I say nothing more about this provision of the building contract.

45 The reason why I raise the issue of interest is that there could be a reasonable debate about whether the building contract fixes a date for performance by the respondent of its obligation to pay the final instalment of the contract price.¹⁰ For instance, had it been common cause that the respondent signed a Happy Letter on a particular date, or if it had been common cause that the respondent took occupation on a particular date, then it might have been possible to identify a term of the agreement, properly interpreted, which fixed the date of performance. However, not only is there insufficient evidence before me as to when precisely the respondent was in breach, the applicant has not attempted to argue that the building contract envisaged a specific date for performance of the obligation on which it sues, which was earlier than when it demanded payment.

46 The applicant's claim clearly constituted a claim for a liquidated amount. As a consequence, the default position is that interest began to run when the respondent received the applicant's letter of demand.¹¹ On the evidence before me, this was no later than 22 February 2022 – this is the date on which the respondent said that she received the letter of demand, in an email which she sent on 1 March 2022. To avoid any lack of clarity on this issue, I intend to spell this out in my order.

47 I accordingly make the following order:

- 1. The respondent is ordered to pay to the applicant the sum of R307 044.50.**
- 2. The respondent is ordered to pay interest on the sum described in paragraph 1 above at the prescribed rate, calculated from 22 February 2022 to date of payment.**
- 3. The respondent is ordered to pay the costs of this application.**


ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal

¹⁰ See *Scoin Trading (Pty) Ltd v Bernstein* NO 2011 (2) SA 118 (SCA) at para 13; *Dunn v Road Accident Fund* 2019 (1) SA 237 (KZD) at para 19

¹¹ See *Da Cruz v Bernado* 2022 (2) SA 185 (GJ) at para 45; *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at para 86

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 5 July 2023.

APPEARANCES:

Attorney for the applicant: Dube Lesley Attorneys

Counsel for the applicant: L Dube (Attorney with right of appearance)

Attorney for respondent: Peter Zwane Attorneys

Counsel for the respondent: P Zwane (Attorney with right of appearance)

Date of hearing: 15 March 2023

Date of judgment: 5 July 2023