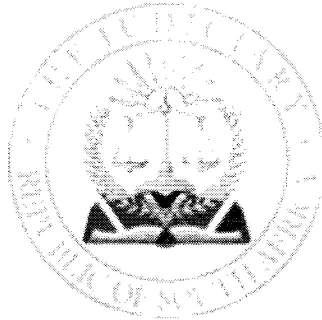

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED: NO
Signature: ______

CASE NO: 26417/20

In the matter between:

IGUANA PROJECTS (PTY) LTD Applicant

and

OAKTREE INVESTMENTS (PTY) LTD Respondent

Coram: Fourie AJ

Heard on: 6 August 2021

Delivered: 4 November 2021

Summary: Claim for payment in terms of construction contract. Condonation for late filing of answering affidavit sought. Condonation refused on application of normal principles. Judgment granted on capital amount.

JUDGMENT

Fourie AJ

Introduction

1. The applicant seeks payment from the respondent in the capital amount of R5 765 211.62, as outstanding in terms of payment certificates issued under a building contract. The initial claim was for payment of R12 765 211.62, but this was reduced following receipt of payment of R7 million from the respondent, the fact of which is common cause but the circumstances in which payment was made are in dispute.

2. The history of the matter is briefly as follows:

   2.1. During July 2019, the parties concluded a contract in terms of which the applicant was to perform certain construction works to a shopping centre complex known as the Mulbarton-Panorama Centre. The contract was embodied in the Principal Building Agreement (the standard construction contract, known as JBCC contracts) and related documents (collectively "the building contract"). The total contract sum was for some R39 million rand.

   2.2. The parties appointed a Principal Agent, and agreed that interim payment certificates issued by the Principal Agent would be binding and payable within 21 days of presentation thereof.

   2.3. Various interim payment certificates were issued during the course of the construction, some of which were paid. An arrears of some R12 million had accrued by the end of the project. During August 2020, the applicant

issued an application for payment of the arrears amounts. The respondent entered an appearance to oppose the application during November 2020.

2.4. On 4 December 2020, the parties met and engaged in settlement negotiations. The respondent paid R 7 million towards the amount owing to the applicant.

2.5. During January 2021, the respondent's bankers, Grindrod Bank, issued a guarantee in favour of the applicant, for payment of the outstanding amount, subject to the completion of certain property transactions involving the respondent, its shareholders, and related parties.

2.6. In April 2021, the applicant filed a supplementary affidavit, in which the further payment of R7 million was disclosed, and the notice of motion was amended to claim a reduced amount. The applicant's attorneys set the matter down for hearing on the unopposed motion roll of 26 July 2021. The respondent took no steps to oppose the application.

2.7. A few days prior to the hearing of the application, the respondent filed a notice to argue a point of law, where various issues were raised. The matter was postponed to my opposed roll, and was argued on 6 August 2021.

2.8. In the two-week period between the postponement from the opposed roll and the argument on the opposed roll, the respondent changed tack, by abandoning the notice to argue a point of law, and filing an answering affidavit on the merits, in which the respondent alleged that the matter had become settled in early December 2020, on the following terms:

2.8.1. The respondent would make immediate payment of R7 million;

2.8.2. The remainder of the total outstanding amount would be paid on completion of certain property transactions between the respondent and related parties;

2.8.3. It was envisaged that these transactions would be complete by mid-2021;

2.8.4. The respondent would issue a bank guarantee for the outstanding amount, as security for payment; and this guarantee was duly issued in January 2021;

2.8.5. For various reasons, the envisaged property transactions have been delayed, and a new guarantee has been obtained, which expires in early 2022;

2.8.6. As a result, the debt claimed, while not disputed, is not yet due for payment.

2.9. The applicant filed an answering affidavit, denying the compromise agreement as alleged.

3. The first issue for determination is whether to allow the respondent to enter the fray by way of an answering affidavit, filed some eleven months after the application was brought, an excessive delay by any standards, which can potentially be cured by a compelling explanation and excellent prospects of success on the merits.

4. The explanation provided is that it was only during a consultation with counsel, following the postponement of the matter in July 2021, that the respondent's representative mentioned the settlement agreement. This explanation stretches the bounds of credulity, at least for the following reasons:

   4.1. The respondent appointed attorneys to oppose the matter when the application was served on it, and an appearance to oppose was entered, which resulted in an agreement to remove the matter from the unopposed motion roll of 9 December 2020, with the respondent tendering the wasted costs. The respondent's attorneys would have been aware of the time periods for filing answering papers, but none were forthcoming.

   4.2. Settlement discussions were held on 4 December 2020, and shortly thereafter the respondent paid R 7 million towards the outstanding debt.

   4.3. Mr Prokas, a director of the respondent, and the deponent to the answering affidavit, explains that he met with the respondent's attorneys in early December and explained the facts giving rise to the content of the notice to argue a point of law, which was drawn up but not served at the time. The notice contains argument as to why the dispute should be referred to adjudication under the main building contract, and also contains factual assertions challenging the quantum of the claim.

   4.4. Mr Prokas alleges that on 4 December 2020, at a meeting between Jan Mostert (a director of the applicant) and Mr Andy Zissimides (a

representative of the respondent) concluded an oral settlement agreement, the terms of which are summarised above. For this reason, the respondent did not proceed to formally oppose the application. I pause to mention that this version constitutes hearsay evidence, as Mr Zissimides did not depose to a confirmatory affidavit, and on Mr Prokas' version, he (Prokas) was not present when the oral settlement agreement was not concluded. What is also strange to me is that the respondent did not see fit to record the terms of the oral settlement in writing, or to notify its attorneys of the settlement. This in circumstances where the applicant had already commenced with litigation to recover outstanding monies.

4.5. Mr Prokas then alleges that a guarantee was duly procured from Grindrod Bank in January 2021, as per the terms of the settlement agreement. When this expired, a "replacement extension" guarantee was obtained in July 2021.

4.6. The terms of both guarantees are essentially identical, except for the duration, and essentially amount to a guarantee provided by Spaghettino (Pty) Ltd (an entity presumably sharing common shareholders and directors with the respondent), for the full outstanding amount, which would be paid to the applicant once certain immovable property had been transferred from the respondent to Spaghettino, and a covering bond in the amount of R144 million had been registered over the property, in favour of Grindrod Bank. This seems to indicate that the respondent is owned and controlled by businesspeople of some means and ability, who would understand whether a settlement had actually been reached.

4.7. No mention is made of when this guarantee was communicated to the applicant or its attorneys, or why, when the applicant supplemented its papers in April 2021 (and made no mention of the settlement agreement or guarantee), the respondent did not enter the fray at that stage, and file an answering affidavit setting out the alleged settlement, or exchange correspondence about the alleged settlement agreement. This despite the fact that the supplementary affidavit and notice of set down was served on the respondent's attorneys.

4.8. The respondent seems to have done nothing until a few days prior to the hearing on 26 July 2021. It then obtained the second guarantee, and (presumably when this didn't convince the applicant to remove the matter from the roll), then filed the notice to argue a point of law, which, on the respondent's version (as pleaded in the subsequent answering affidavit) contained a version that materially contradicts the terms of the settlement agreement now alleged.

4.9. Having secured a last-minute postponement with this tactic, the respondent then sat down with its legal representatives and (for the very first time) mentioned the existence of a settlement agreement.

4.10. Unsurprisingly, Mr Mostert, deponent to the applicant's replying affidavit, and the only witness to the alleged oral settlement agreement, denies that any such agreement was concluded. He also asserts that, in any event, an oral settlement agreement would be unenforceable, as the principal construction agreement contains a non-variation clause, that

requires any amendments to be reduced to writing and signed by both parties (this rule is known in South Africa as the *Shifren*-rule, after the *SA Sentrale Ko-Op Graanmpy v Shifren* 1964 (1) SA 163 (O))

4.11. Counsel for the respondent argued that the *Shifren*-principle does not necessarily prevent an oral settlement agreement being concluded to settle a claim arising from a written agreement containing non-variation clauses. He referred to referred to *Absa Bank v van der Vyfer NO* 2002 (4) SA 397 (SCA) in support of this proposition, and argued that, should I agree with this legal proposition, the correct approach would be to refer the factual dispute on the papers as to whether such an agreement was in fact concluded, to oral evidence.

5. There is no need to address the legal validity of the defence of an oral settlement agreement arising from a claim based on a contract containing a non-variation clause. Even assuming in favour of the respondent that this is legally possible, the respondent has failed to provide a credible or satisfactory explanation for the excessive and wholly unreasonable delay in filing an answering affidavit. It is settled law that, absent such explanation, the prospects of success do not need to be considered. In any event, the factual version pleaded by the respondent on the conclusion of an oral settlement agreement, besides consisting entirely of inadmissible hearsay evidence, is so far-fetched and nonsensical (see the analysis above) that it can safely be rejected on the papers, and therefore the issue legal validity of the defence need not be decided.

6. For the reasons set out above, the application to condone the late filing of the answering affidavit is refused. The applicant is entitled to an order for payment of the outstanding capital amount owed by the respondent.

Interest

7. The applicant seeks interest on the capital at the rate of 160%. On the face of it, this is extortionate, and contravenes the *in duplum* rule. The founding affidavit relies on clause 31.11 of the principal construction contract, which deals with the calculation of interest on late payments on interim payment certificates, where payment is due within seven days of issuing of an interim payment certificate, where interest is to be calculated at 160% per annum, compounded monthly, and added to the recovery statement.

8. I am not satisfied that the applicant has made out a case on the papers for an order justifying this interest rate. However, I make no final findings in this regard, as the issue has not been properly ventilated on the papers. I intend ordering payment of interest at the default rate as prescribed by statute. The applicant is at liberty to bring a further claim for additional interest that it claims is due in terms of the contract, less the interest awarded in this judgment.

Costs

9. The applicant seeks costs on a punitive scale. Given that the respondent's conduct seems best explained as delay tactics, and that the factual version pleaded in the answering affidavit is far-fetched and nonsensical, and probably reflects the respondent's hopes of the applicant tolerating deferred payment, rather than any actual agreement to this effect, I am inclined to

award punitive costs against it. In the circumstances, I make the following order:

Order

1. The application for condonation for the late filing of the respondent's answering affidavit is refused.

2. The respondent is ordered to pay the applicant the amount of R5 765 211,62, together with interest thereon at the rate determined in section 1 of the Prescribed Rate of Interest Act, 55 of 1975.

3. The respondent is to pay the costs of this opposed application on the scale as between attorney and client.

Greg Fourie
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

HEARD ON:	6 August 2021
DATE OF JUDGMENT:	4 November 2021
FOR THE APPLICANT:	Adv K Mitchell
INSTRUCTED BY:	Frese Gurovich Attorneys
FOR THE RESPONDENT:	Adv GVR Fouche
INSTRUCTED BY:	David Bayliss Attorneys