OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED:NO

(4) DATE OF JUDGMENT: 27 NOVEMBER 2024

[redacted]

SIGNATURE

CASE NUMBER:013552/2023

In the matter between:

UNIQON DEVELOPERS (PTY) LTD APPLICANT

and

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY RESPONDENT

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 27 November 2024.

JUDGMENT

COLLIS J

INTRODUCTION

[1] This is an opposed application wherein the Applicant seeks from the Respondent the following relief:

> "1. The reference to Annexure "D" in clause 9.1 of the agreement, annexed to the founding affidavit as Annexure "FA3", be rectified to Annexure "C".
>
> 2.Payment by the Respondent to the Applicant in the amount of R2,992,623.81 (two million nine hundred and ninety-two thousand six hundred and twenty-three Rand and eighty-one Cents) (inclusive of VAT);

3. Interest on the amount of R2,602,281.57(two million six hundred and two thousand two hundred and eighty-one Rand and fifty-seven Cents) at the prime overdraft rate of the Respondent's appointed banker from 23 February 2022 until date of final payment;

4. Costs on an attorney and client scale."

[2] The Applicant is a developer who concluded a written Agreement with the Respondent ("the Municipality") on or about 4 March 2021 ("the Agreement").[1]

[3] The Agreement provides, *inter alia*, that the Respondent will pay the Applicant an estimated contribution for associated costs pertaining to the development, as finally determined upon completion of the works.[2]

[4] Clause 9.1.5 of the Agreement which reads as follows:[3]

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[1] Paragraph 9 of the FA, CL: 002-10 to 002-14; Annexure "FA3" to the FA, CL: 002-25 to 002-47.

[2] Paragraphs 9.2.10 and 9.2.11 of the FA, CL: 002-13.

[3] CL: 002-36.

"9.1.5 The amount of money owed by the City to the Owner in terms of Annexure 'C'[4] of this Agreement will be budgeted for as follows:

9.1.5.1 If received before 28 February of any year the normal budget process will be followed and if approved, payment will be made within 30 days after 1 July of the same calendar year but falling in the following financial year;

9.1.5.2 If received after 28 February, funds will be budgeted for the second financial year after February and if approved, payment will be made within 30 days after 1 July of the next calendar year."

[5] It is common cause between the parties that the Applicant duly submitted its claim to the Respondent on or before 28 February 2022.[5]

[6] On 14 February 2023 almost a year later, the Applicant launched the present application in terms whereof payment in the amount of R2,992,623.81 (two million nine hundred and ninety- two thousand six hundred and twenty-

[4] It is common cause between the parties that the Agreement is to be rectified to refer to Annexure "C" instead of annexure "D".

[5] Paragraphs 11.1 to 11.11 of the FA, CL: 002-15 to 002-19; paragraph 52 of the AA, CL: 002-100.

three Rand and eighty-one Cents), together with interest at the Prime overdraft rate and costs is claimed from the Respondent.

[7] As per the Answering Affidavit, the Respondent adopted the position that the claim amount was not included in its budget for the 2022/2023 financial year.[6]

[8] The Respondent further alleges that there is a "suspensive condition" contained in the Agreement, which has not been met and, accordingly, it had no obligation to make payment to the Applicant until the alleged "suspensive condition" has been met.[7]

[9] Pursuant to the receipt of the Answering Affidavit, the Applicant delivered a Notice in terms of Rule 35(12).[8]

[10] On 11 May 2023, the Respondent replied to the request albeit insufficiently.[9]

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[6] Paragraphs 32, 36, 50, 55.1 and 55.2 of the AA, CL: 002-95, 002-96, 002-100, 002-101 and002-102.

[7] Paragraphs 12, 38, 39, 41, 42, 47, 49, 54, 55.1 and 56 of the AA, CL: 002-86, 002-96, 002-97, 002-99, 002-101 and 0025-102.

[8] Annexure "A" to the Application to Compel, CL: 004-12 to 004-13.

[9] Annexure "F" to the Application to Compel, CL: 004-20 to 004-22.

[11] The Applicant submits that its invoice was part of the approved budget, given the correspondence received from the Respondent's representatives stating that the payment "needs to be released by the end of June 2023"[10] and also confirmed in a telephonic conversation held with a representative of the Respondent.[11]

[12] On 10 July 2023, the Applicant launched an Application to Compel in terms of Rule 35(12).[12]

[13] Pursuant to the launch of the Application to Compel, the Respondent made payment to the Applicant on or about 6 October 2023 in the claimed amount of R2,992,623.81 (two million nine hundred and ninety-two thousand six hundred and twenty-three Rand and eighty-one Cents).[13]

[14] In light of the payment so made, the only remaining issue for determination before this Court remains the interest and costs to be awarded,[14] as the relief sought for payment has now become moot.

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[10] Paragraph 16 of the Application to Compel, CL: 004-8; Annexure "H" to the Application to Compel, CL: 004-155.

[11] Paragraph 11.10 of the Founding Affidavit, CL: 002-18.

[12] CL: 004-1.

[13] Paragraph 14 of the Replying Affidavit, CL: 002-185.

[14] Paragraph 15 of the Replying Affidavit, CL: 002-185.

[15] In this regard the Applicant places reliance on the service level agreement and more specifically clause 9.1.1 which states that interest will be calculated from the date on which the construction scheme was completed to the satisfaction of the Divisional Head: Transport Infrastructure Design and Construction.

[16] The Applicant further contends that the parties have agreed that completion means *inter alia* the proclamation of the township, completion of the construction scheme, the submission of all outstanding information i.e. as-built information, vendor registration, invoices and finalisation of the amount payable.

[17] On the Applicant's version the 23rd February 2022, is the date when the finalisation of the amount payable was determined and thus payable,[15] and as per their pleaded case, this is therefore the date from when this Court should order for interest to be paid at the prime rate (i.e. mora rate) until date of final payment.[16]

[15] Paragraph 11.9 Founding Affidavit CL 002 – 18.

[16] Paragraph 11.9 Founding Affidavit CL 001-17.

[18] In response to the above, the Respondent save for admitting that the Applicant completed the boundary work, submitted a pro-forma invoice and that a certificate of completion was issued by it, merely noted the remainder of the allegations so made.[17]

[19] On behalf of the Respondent it was argued that to enforce clause 9.1.1. in the calculation of interest, the Court must be furnished with the prime overdraft rate of the Respondent's appointed banker and the date on which the construction scheme was completed.

[20] Support for this argument is found in BNS Nominees (RF) (Proprietary) Limited and Another v Arrowhead Properties Limited and Another[18] Manoim J held the following:

> "[31] Thus, the applicants never made out the present case they contend for in the founding affidavit. They needed to do so. What constitutes a reasonable interest rate is not a question of law. It is a question of fact which must be pleaded. Use of particular pricing model whether it is CAPM or some other is matter for expert evidence requiring both motivation and calculation. This is so elementary a legal

[17] Paragraph 52 Answering Affidavit CL 002-100.
[18] In BNS Nominees (RF) (Proprietary) Limited and Another v Arrowhead Properties Limited and Another [2023] ZAGPJHC 37; 2023 (6) SA 441 (GJ) (24 January 2023).

proposition it does not require authority to establish but to the extent that it does, as counsel for Arrowhead point out, the case of Molusi and Others v Voges NO and Others does so. There, the Constitutional Court held;

"It is trite law that in application proceedings the notice of motion and affidavits define the issues between the parties and the affidavits embody evidence. As correctly stated by the Supreme Court of Appeal in Sunker:

'If an issue is not cognisable or derivable from these sources, there is little or no scope for reliance on it. It is a fundamental rule of fair civil proceedings that parties . . . should be apprised of the case which they are required to meet; one of the manifestations of the rule is that he who [asserts] . . . must . . . formulate his case sufficiently clearly so as to indicate what he is relying on.'

[32] To summarise. The applicants needed to make out in their founding papers what reasonable rate of interest they were contending for and the factual basis for doing so. They did this only in respect of the prescribed rate, not what they now contend for. This claim therefore cannot be sustained."

[21] Counsel for the Respondent further submitted that there are no facts before this Court on the applicable prime overdraft rate of the Respondent's appointed banker as at 23 February 2022, this albeit that the date of completion of the construction work is known. Absent the facts pleaded as to the applicable prime overdraft rate to be applied, this Court therefore cannot determine the exact figure for the interest that must be paid.

[22] The Applicant before Court, firstly made out a prayer for interest. In addition to the above, it also pleaded the rate upon which interest is to be calculated on and from when it is to be paid.

[23] As to the applicable rate that interest is to be calculated on, the Respondent bears exclusive knowledge of its bank’s prime overdraft rate at the time. This information is not within the knowledge of the Applicant but indeed within the knowledge of the Respondent.

[24] This Court is further not required to calculate the exact amount of interest to be paid but merely to determine whether interest is to be awarded to the Applicant or not and from which date.

[25] It is common cause between the parties, that the Respondent had paid the capital amount to the Applicant, this after the current proceedings has been launched.

[26] It having paid the capital only on 6 October 2023, it follows that the Applicant will be entitled to interest as from 23 February 2022, this being the date when the construction scheme was completed.

COSTS

[27] Clause 13.7 of the Agreement provides for costs on an attorney and client scale, should the Municipality institute legal proceedings against the Applicant.

[28] On behalf of the Applicant it was argued that it is also entitled to be awarded costs on an attorney and client scale when it had to institute legal proceedings against the Municipality. It would only be considered just and equitable to treat the two contracting parties the same.[19]

[19] Paragraph 13.2 of the FA, CL: 002-21.

[29] In its Answering Affidavit, on point, the Respondent took the view that its obligation to pay any amount is dependent on the fulfilment of a suspensive condition which has to be met. This stance so adopted by the Respondent has now been overtaken by events, in that the Respondent proceeded to pay the outstanding capital amount on 6 October 2023. The Answering Affidavit was however silent as to the scale of costs it ought to be ordered to pay by this Court.

[30] Before this Court, the Applicant remains the successful party and this Court could find no reason to deprive it of its costs. This Court further agrees that the Applicant is entitled to be awarded costs on an Attorney and Client scale.

RECTIFICATION

[31] As mentioned earlier, the Applicant also seeks rectification of the Agreement so concluded with specific reference to prayer 1 of its Notice of Motion.

[32] The Respondent is in agreement that this should be granted as it will correctly reflect the reference to the annexures. Consequently, this Court will order same.

ORDER

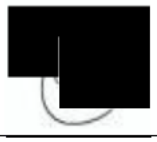
[33] For the above reasons the following order is made:

33.1 Respondent is to pay to the Applicant interest on the amount of R2,602,281.57 (two million six hundred and two thousand two hundred and eighty-one Rand and fifty-seven Cents) at the prime overdraft rate of the Respondent's banker calculated from 23 February 2022 until 6 October 2023.

33.2 Respondent is to pay the costs of the application on a scale as between Attorney and Client.

33.3 Prayer 1 of the Notice of Motion is granted, which reads as follows:

The reference to **Annexures "D"** in clause 9.1 of the agreement, annexed to the founding affidavit as **Annexure "FA3"**, is rectified to refer to **Annexure "C".**



C.COLLIS

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

APPEARANCES

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Counsel for the Respondent:	Adv. T.M MAKOLA
Instructed By:	Kutumela Sithole Inc
Date of Hearing:	21 May 2024
Date of Judgment:	27 November 2024