IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

20/7.02.24
DATE

[redacted]
SIGNATURE

CASE NUMBER: A839/14

DATE: 24 February 2017

OLYMPUS COUNTRY ESTATE & HOME OWNERS ASSOCIATION Appellant

V

ERCON ELECTRICAL & EARTHING CONTRACTORS (PTY) LTD First Respondent

SERISO 505 (PTY) LTD Second Respondent

JUDGMENT

MABUSE J:

[1] This is an appeal against the whole of the judgment and order of Raulinga J ("the court *a quo*") of 18 July 2014. The appeal is opposed.

[2] The appellant in this matter is the Home Owners Association of the Olympus Country Home Owners Association with legal standing. It can sue and be sued in its own right. The appellant was the first defendant in the court *a quo* ("Olympus"). The first respondent is a company with limited liability duly registered as such in terms of the company laws of this country having its principal place of business at the Remaining Extent 2, a Portion of Portion 3, Plot 83 Acqilles Road, Olympus, Pretoria. The first respondent was the plaintiff in the court a quo. The second respondent is also a company with limited liability duly registered as such in accordance with the company statutes of this country. It has its principal place of business at 444 Rodericks Street, Lynnwood, Pretoria. The second respondent was the second defendant in the court *a quo*.

[3] For purposes of convenience the parties herein will be referred to by the names they chose to call themselves in the court *a quo*, the appellant as Olympus, the first respondent as Ercon and the second respondent as Seriso.

[4] On or about July 2008, and at or near Pretoria, Ercon, duly represented by one Francois van Wyk ("Van Wyk"), and Olympus, duly represented by Eric Daniels ("Daniels"), concluded an oral agreement whose relevant express, alternatively tacit, further alternatively implied terms were as follows:

4.1 Olympus mandated and instructed Ercon to rectify and repair electrical reticulation network at Boardwalk Extension 3;

4.2 Olympus would pay Ercon for the rectification and repairs referred to in paragraph 4.1 supra;

4.3 Ercon would be entitled from time to time to submit invoices to Olympus for payment;

4.4 Olympus would be obliged to pay Ercon the amounts referred to in the Ercon invoices within 30 days after delivery of the invoices to Olympus.

[5] After the conclusion of the said agreement, Ercon complied with its obligations arising from the said agreement in that it completed the required rectification and repair of the electrical reticulation network at the aforementioned premises and delivered on certain days the invoices to Olympus.

[6] Olympus was in breach of the said oral agreement inasmuch as of the total amount, it only paid R187,692.15 on 28 August 2008. Olympus was therefore in default with the payment of the balance of R831,839.79. Notwithstanding demand for payment of the said amount Olympus failed to pay Ercon the said balance.

[7] Ercon put up a conditional claim against Seriso as follows. The second claim was conditional upon the court *a quo* finding that Ercon was not legally entitled to claim payment from Olympus in respect of the rectification and repair of the electrical reticulation work as set out in paragraphs 5 and 6 of Ercon's particulars of claim.

[8] On or about 1 July 2008 in terms of the order by Phatudi J under case number 31146/2008 Olympus was authorised to appoint an accredited installation electrician, alternatively an accredited master installation electrician as stipulated in the electrical installation regulation to rectify and repair the electrical reticulation network at Boardwalk Extension 3 in order to comply with the electrical reticulation network plan. In terms of the said court order, Mr. Venter (inspector of Electrical Safe Circuit) was appointed as an inspector of the works with the following rights:

8.1 the right to be present on the site at all times;

8.2 the right to oversee the works;

8.3 the right to stop the work at any time should proper compliance with this order not occur and to report back to the court for any further directions or relief;

8.4 Seriso was ordered to pay all the costs pertaining to the rectification and repair of electrical reticulation network at Boardwalk Extension 3 as far as the physical installation deviated from the plan as prepared by Watson Mattheus Consulting and Electrical Engineers (Pty) Ltd and did not comply with the accepted standards as indicated by the inspector in his reports, including the costs of the inspector at a market related fee, within 7 days of the receipt of an account, which account would be hand-delivered at Seriso's address at 444 Rodericks Street, Lynnwood, Pretoria.

[9] Ercon duly rectified and repaired the electrical reticulation network at Boardwalk Extension 3 in order to comply with the electrical network in the presence of an inspector under the supervision of an inspector and under circumstances where the inspector did not stop the works on the basis that proper compliance with the court order did not occur. Having done so Ercon delivered, on the following dates, invoices for the following amounts to Olympus in respect of the works:

9.1 invoice 789 dated 22 July 2008 for the amount of R125,718.97, which included VAT;

9.2 invoice 800 dated 31 July 2008 for the amount of R324,717.86, which included VAT;

9.3 invoice 808 dated 20 August 2008 for the amount of R310,120.55 which included VAT; and

9.4 invoice 822 dated 9 September 2008 in the amount of R258,974.53 which included VAT.

The total of all the above mentioned four invoices was R1,019,531.91. Ercon contends that in the premises and in terms of paragraph 3 of the court order Olympus became liable to pay Ercon within 7 days of the date as set out in the abovementioned paragraphs. In its plea Olympus denied the agreement as pleaded by Ercon and pleaded furthermore that Ercon was

appointed in terms of the court order under case number 31146/2008 and that according to the said agreement it was agreed that the developer, Seriso, would be liable for all the costs pertaining to the works and that Ercon would issue invoices to Seriso. Olympus then joined Seriso as a third party by means of a third party notice. In the said third party notice, it was alleged that in terms of the court order referred to above, Seriso was obliged to pay for the rectification and repair of the electrical works at the development and in the event of the court *a quo* finding that Olympus was liable to Ercon, Seriso was obliged to pay Olympus any amount that the latter was ordered to pay to Ercon.

[10] Seriso pleaded to the third party notice. It denied all the material allegations made in the third party notice. In the alternative Seriso pleaded that in the event of the court *a quo* finding that Olympus duly appointed Ercon as contemplated in paragraph 1 of the said Court order and that the amount claimed from Olympus by Ercon was in respect of the work undertaken by Ercon consequent to its appointment in terms of the Court order then in that event Seriso denied that the work undertaken by Ercon fell within the scope and ambit of the work contemplated in paragraph 3 of the court order, namely, the rectification and repair of the electrical reticulation network at Boardwalk Extension 3 as far as the physical installation deviated from the plan as prepared by Watson Mattheus Consulting Electrical Engineer (Pty) Ltd and furthermore the Court ordering Olympus to pay any amount to Ercon in respect of the work undertaken by Ercon consequent to its appointment in terms of the Court order and pertaining to the work undertaken that it did not comply with the accepted standards as indicated in the report of one, Mr. GE Venter. Seriso furthermore denied that the fees for Ercon were market related. Seriso pleaded furthermore, in the alternative, that in the event of the court *a quo* ordering Olympus to pay any amount to Ercon in respect of the work undertaken by Ercon, consequent to its appointment in terms of the said court order and pertaining to the work undertaken by Ercon falling within the scope and ambit of the work contemplated in paragraph 3 of the said court order at a market related fee then in such event

Seriso denied that in terms of the said court order it was in any event obliged to pay the said amount to Olympus.

[11] Upon this Ercon thereafter made an application to join Seriso as the second defendant. The application was successful. Ercon then amended its particulars of claim and, based on the terms of the aforementioned court order, amended its particulars of claim and incorporated therein an alternative claim against Seriso. Seriso settled Olympus's claim against it. A consent order between Olympus and Seriso was granted by Phatudi J, on 1 July 2008. Subsequent to the settlement agreement between Olympus and Seriso, the only remaining issues to be decided then were:

11.1 firstly, whether an oral agreement existed between Ercon and Olympus in terms of which Olympus was liable to pay Ercon; and

11.2 secondly, in the event of the court *a quo* finding that Olympus was liable to pay Ercon, whether Seriso, as a third party, was obliged to make payment to Olympus in the amount which Olympus had to pay to Ercon.

[12] Before dealing with the appeal, the appeal court had to deal firstly with certain preliminary issues. The appellant had brought two substantive applications for condonation. The first of these two applications related to the appellant's failure to comply with the time period prescribed by Rule 49(2)(6) and (7) of the Uniform Rules of Court, in other words the appellant's failure to file its notice of appeal within the prescribed time, while the second application related to the late filing of the record of appeal. Although the respondents had not filed any opposing papers, counsel for each respondent had indicated in both their practice notes and heads of argument that they would oppose both applications for condonation. Moreover they have conceded that no prejudice arose from the delay in filing the notice of appeal in time.

[13] Mr. Van Zyl, counsel for the appellant, conceded that the notice of appeal was delivered late. It was late by 8 days when it was delivered to the registrar and 9 days late when it was served on the respondents. An affidavit by Mr. Van der Walt, the appellant's attorney was used in support of both applications. With regard to the late filing of a notice of appeal, he testified that it was basically a mistake by a clerk in his office that the notice of appeal was filed late. According to his testimony, the notice of appeal was received in time. Because of his commitment somewhere he handed it to a clerk in his office to go and file. His mistake was that he did not warn the clerk that there was a deadline before which a notice of appeal had to be filed. The clerk dragged his feet and the deadline came and passed.

[14] It only dawned upon him that the notice of appeal had not been delivered in time when he received a letter from Ercon's attorneys on 4 November 2014. In the said letter the said attorneys expressed a view that the appellants were not proceeding with the appeal. Van der Walt then conducted an investigation into the matter and discovered that through the fault of the relevant clerk, the notice of appeal had not been delivered. He quickly made arrangements that it should be delivered. It was for the aforesaid reason that the notice of appeal was delivered late as indicated above.

[15] With regard to the late filing of the record of appeal Mr. Van Zyl stated that the delay was due to the process of having to obtain a copy of the transcript from the transcribers. In his affidavit in support of the application for condonation for the late filing of the record of appeal, Van der Walt explained the steps that the appellant's attorneys took to obtain a transcript. Such steps included, among others, emails to Digital Audio Transcriptions ("Digital"), one of the entities contracted to do transcription of Court records, commencing on 22 October 2014 and continuing on 31 October 2014, 7 November 2014, 17 November 2014, 26 November 2014, 28 November 2014, 8 December 2014, 16 January 2015 and 28 January 2015. The appellant's attorney, after a dogged attempt to obtain a quotation from the service providers,

finally received one from i-Africa, another transcription service provider, on 11 February 2015. The amount in the quotation was paid on 18 January 2015. In one of the letters that the appellant's attorneys wrote to Digital they threatened that if Digital was unable to render service they would enlist the services of another service provider. While the appellant's attorneys were struggling to obtain a copy of the transcript, they kept the respondents' attorneys abreast of developments. Eventually the appellant's attorneys only received a copy of the transcript on 4 March 2015 and sent it for binding on 6 March 2015. They were only able to file a bound record on 11 June 2015 and to deliver it to both respondents.

[16] The appellant's attorneys explained that they could only apply for a date of hearing of the appeal after obtaining a copy of the transcript. They pointed out in the same affidavit by Van der Walt that the practice of the registrar of this Court with regards to the allocation of appeal dates in terms of Rule 49(6) is that no appeal dates are allocated to parties unless such parties are able to file appeal records pronto. This is despite the provisions of Rule 49(7)(a) which makes provisions for the acceptance of an application for a date for hearing of an appeal without the necessity of having to file copies of the transcript.

[17] In the end Mr. Van Zyl submitted that despite the appellant's failures to file its notice of appeal and a transcript of the proceedings in time, neither of the respondents has suffered any prejudice.

[18] Mr. Stoop, counsel for the respondent, complained strenuously about numerous breaches of the rules of this Court by the appellant over a considerable length of time. In an effort to hi-light the lackadaisical way in which the appellant had treated the appeal, he referred to three other applications for condonation the appellant had had to launch before the current ones. He pointed out to the Court that even at the stage of the appeal, the appellant had not filed

the entire record of the appeal and that certain parts on the basis of which the claim against the second respondent were founded were not before the court. He concluded by submitting that even if the appellant's appeal on the merits is strong, the application for condonation should be refused.

[19] Mr. Oosthuizen, counsel for Seriso argued that the notice of appeal filed by the appellant did not comply with the appeal court rules brought about by the Superior Court Act 10 of 2013. Rule 49(4) of the new rules provides categorically that every notice of appeal shall state the respects in which variation of the judgment or order is sought. This, the appellant has not complied with. The second point he raised was in respect of the record. He argued strenuously that the record was incomplete in material respects. He complained that although the issue of the incomplete record was among the issues raised in his heads of argument, the appellant has failed to address the problem. Mr. Oosthuizen did not ask the court to refuse the application for condonation.

[20] We are satisfied that the application for condonation for the late filing of the transcript complies with the requirements set out in **Unitrans Fuel and Chemical (Pty) Ltd and Dove-Co Carriers CC 2010(5) SA 340 GSG at page 349** wherein at paragraph 31 the Full Court stated as follows:

"In future applicants for condonation in matters such as the present will have to show their attempts at compelling the transcribers to provide the record, including, but not limited to the bringing of an application to Court to compel compliance, as part of the explanation for the delay and to show that they are not at fault."

[21] The power of the Court to grant the applications for condonation have been set out in numerous cases and in particular in a decision of **Shaik and Others vs Pillay and Others ALL SA 465** and **A Hardrodt (SA) (Pty) Ltd v Behardien and others (2002) 23 ILJ 1229 (LAC)** at

1231-3. The power of the Court to grant condonation ordinarily is a discretionary one. That discretion is unfettered. The Court will consider all the circumstances of each case. See in this regard **Liquidators Myburgh, Krone & Co Ltd v Standard Bank of SA Ltd and another 1924 AD p. 231** where the Court stated:

"In the words of Cotton LJ quoted in that case an application must show "something which entitles him to ask for the indulgence of the Court. What amounts to sufficient cause in each case; what constitutes a ground for the exercise of indulgence must depend upon the circumstances. The cause of the delay and the excuse for it, though necessarily factors to be considered, are not decisive. The merits of the appeal may in some cases be very important; but they have not been relied upon here by either side, and I do not propose therefore to consider them."

[22] In Shaik and Others v Pillay and Others supra the Court stated at paragraph 5:

"Generally, however, the Court will consider among the facts usually relevant the degrees of lateness, the explanation therefor, the passwords of success on appeal on the merits and the importance of the case. These facts are interrelated." See in this regard **Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (a)**, see also **Federated Employers Fire & General Insurance Co Ltd and another v McKenzie 1969 (3) SA 360 (A) at 362G**. Finally the onus is on the appellant to satisfy the Court that condonation should be granted. In this regard see **Meintjies v HD Combrinck (Edms) Bpk 1961 (1) SA 262 (A) at 263H-264A** and **Glazer v Glazer NO 1963 (4) SA 694 (A) at 702H**.

[23] Furthermore we are unanimous in our view that the appellant's attorneys have furnished a reasonable explanation for the late filing of the notice of appeal and the record of appeal. Moreover we have considered that no prejudice arose from the delay in filing both the notice of appeal and a copy of the transcript.

THE MERITS OF THE APPEAL

[24] It is not in dispute that during July 2008 Olympus and Ercon entered into an oral agreement in terms of which Ercon, repaired the electrical reticulation network at Boardwalk Extension 3. It is also not in dispute that between Ercon and Olympus, that Ercon did the work in a professional manner and in accordance with the applicable technical requirements. The amount that Ercon claimed from Olympus, and as evidenced by the invoices that Ercon had delivered to Olympus, was not in dispute. The battlefield between Olympus, the first defendant, and Ercon, the plaintiff, revolved around the question of who was responsible for payment of Ercon's account. By relying on the oral agreement of July 2008, Ercon, contended that Olympus was liable for the payment of its account. In clause 4.2 of the particulars of claim Ercon had pleaded that Olympus should pay it for the rectification and repairs. On the other hand, Olympus had insisted that Seriso, was liable for the payment of Ercon's account. In dealing with this aspect the court *a quo* stated as follows in its judgment:

"36. It is Daniel's evidence that the first defendant tried to assist the plaintiff to obtain payment from Seriso. There is no such agreement between the plaintiff and the first defendant. On the contrary, the argument was that the first defendant would pay the plaintiff. This is clear from the meeting between Van Wyk and Daniel on 1 July 2008. One must also be aware of the fact that Van der Walt wrote a letter of demand dated 29 July 2008 on Daniel's instructions and not on behalf of the plaintiff. It was confirmed by Daniel under oath that application under case number 52360/2008 was an initiative of the first defendant's claim for payment by Seriso of the amount of R894,326.24. It was the first defendant who funded all legal costs.

37. If regard is had to the discussion between Van Wyk and Daniel and the court order, it is clear that the plaintiff executed the work in terms of the agreement it concluded with Olympus and the scope of works included a deviation from the terms of the court order. Venter confirmed that the plaintiff did work that fell outside the ambit of the court order.

The Contractors Payment Certificate Summary makes it clear that the plaintiff had to "supply and install new kiosk to Article 21 spec". Venter made concession that some of the work fell outside the Court Order.

38. My reading of the Court Order is that the plaintiff had no business dealing with Seriso and was not a party to the Court Order. The Court Order has to do with Olympus and Seriso.

40. In the circumstances judgment is granted against Olympus:

(a) payment of R481,839.79;

(b) interest on R831,839.79 at 15.5% per annum temporae *until 24 July 2012;*

*(c) interest on R481,839.76** at 15.5% per annum from 25 July 2012 to date of payment;*

(d) costs of suit."

Accordingly the issue that this Court has to decide in this appeal is whether or not the court *a quo* was correct in the aforegoing finding.

[25] The findings of the court a quo must be seen against the following background. On 1 July 2008, one Mr. Eric Daniel ("Daniel"), then the chairperson of Olympus, visited the offices of Ercon. He introduced himself to a certain Mr. Francois van Wyk ("Van Wyk"), a director of Ercon in that capacity and asked if Ercon would be in a position to rectify certain electrical reticulation at Boardwalk Extension 3. On the very same day, Van Wyk inspected the property and on inspection found substantial defects in the electrical reticulation network. He came to a finding that Ercon would be able to do the rectification and repair work but that it would not be possible to provide Olympus with a quotation since the total cost depended on the actual quantities that would have to be measured as they progressed. Nonetheless Van

Wyk gave an indication that the costs might be in the region of R500,000.00. On the other hand Daniel answered that the costs may be substantially higher. Daniel, acting in his aforementioned capacity, then instructed Ercon to commence with the repairs. At this stage Van Wyk was not aware of the existence of Seriso or of its sole director. Ercon's standard practice was, with regard to new customers, to demand a payment guarantee. Because Olympus was in possession of an order of Court that had been granted on 1 July 2008, and on Van Wyk's version Daniel had indicated that Olympus would pay Ercon for the work Ercon had to do, Van Wyk did not request a payment guarantee. Instead he insisted that Olympus should provide Ercon with a letter of intent to confirm Ercon's appointment. Following the agreement that Olympus should provide Ercon with a letter of intent to confirm Ercon's appointment, on 15 June 2008 Ercon's attorneys, Loubser Van der Walt Inc, notified Ercon as follows:

"RE: OLYMPUS ESTATE HOMEOWNERS ASSOCIATION / SERISO 505 (PTY) LTD ADSL OLYMPUS COUNTRY ESTATE SUPPLY PROJECT

We refer to the above matter and attach hereto for your kind attention the court order obtained on 1 July 2008 under case number 31146/2008 before the honourable Mr. Justice Phatudi.

We herewith confirm that Ercon Electrical represented by Francois van Wyk is herewith appointed as an accredited installation electrician or an accredited master installation electrician as stipulated in the Electrical Installation Regulations to rectify and to repair the electrical reticulation network at Boardwalk Extension 3 in order to comply with the electrical reticulation network plan as stipulated in the court order attached hereto.

We trust you find the above in order and if there is any queries kindly contact the writer hereof."

[26] On the strength of the aforementioned letter Ercon then commenced with the repairs and rectification of electrical reticulation network. As it continued with the rectification repairs of the electrical reticulation network it uncovered certain defects in the network and attempted to repair them without the benefit of the plan referred to in paragraph 3 of the Court Order. On 22 July 2008 Ercon forwarded its first invoice to Olympus. This invoice, which was invoice number 789 of the same date, was for an amount of R125,718.97. This invoice showed that Olympus was the client. Daniel then requested Van Wyk to change the invoice to reflect Seriso as the client. Van Wyk acted accordingly and forwarded the amended invoice to Olympus attorneys. As the work continued Ercon forwarded its invoices to Olympus's attorneys. Instead of obtaining payment from Ercon and settling Ercon's invoices, Olympus's attorneys demanded payment from Seriso. This is clear from the following correspondence:

26.1 a letter from Olympus's attorneys to Seriso's attorneys dated 29 July 2008;

26.2 a letter from Olympus's attorneys to Seriso's attorneys dated 4 August 2008;

26.3 a letter from Olympus's attorneys to Seriso's attorneys dated 18 August 2008;

26.4 a letter from Olympus's attorneys to Seriso's attorneys dated 20 August 2008;

It is clear that in these letters that Olympus's attorneys threatened Seriso with litigation if Ercon's outstanding invoices were not paid;

26.5 a letter from Olympus's attorneys to Seriso's attorneys dated 10 September 2008; and

26.6 a letter from Olympus's attorneys to Seriso's attorneys dated 1 October 2008.

[27] Seriso failed to pay Olympus. That resulted in Olympus issuing a writ of execution against Seriso. This writ of execution was issued on the strength of an affidavit by one Jan Adriaan van der Walt ("Van der Walt"), a practising attorney and a director at Loubser van der Walt Incorporated. The thrust of the said affidavit was that Seriso was responsible for the payment of the repairs that had been done and for the amount that was owing by Olympus. Subsequently Seriso thereafter applied, on an urgent basis, for an order setting aside the

relevant warrant of execution. Olympus's attorneys then wrote a letter on 1 October 2008 to Seriso's attorneys. The said letter read, among others, as follows:

"Ons wys u daarop dat alle gelde, in terme van die hofbevel, nie verskuldig is aan 'n derde party nie, maar moet alle fakture, soos gelewer aan u kliënt direk betaal word aan Loubser van der Walt Ingelyf se trust rekening soos duidelik blyk op iedere en elke skrywe versend aan u kantore en u kliënt waarby die fakture en sertifikate aangeheg is.

...

Ons bevestig verder dat die kontrakteurs tans weier om op site te wees en dreig die kontrakteurs tans met 'n dagvaarding teen ons kliënt vir betaling, welke u kantore deeglik bewus van is dat ons kliënt oor geen bona fide verweer oor beskik nie."

[28] Olympus then caused inspector Venter to apply to this court on an urgent basis, under case number 31146/2008, for an order in terms whereof Seriso would be compelled to provide it with the approved electrical reticulation plans and secondly to compel Seriso to pay it, among others, an amount of R894,326.24. Olympus then indemnified the said Venter in respect of the costs of that application.

[29] The question now is considering the first claim that Ercon instituted against Seriso, was it a term of the contract between the parties that Ercon would be paid for its electrical work done in Boardwalk Extension 3 by Olympus or considering the second claim which Ercon had instituted in the alternative against Seriso, whether the said plaintiff would be paid for its electrical work done in Boardwalk Extension 3 by Seriso? Thirdly, if Olympus was ordered to pay directly to Ercon any amount under its contract with Ercon in respect of the material and labour claimed by Ercon in respect of electrical work done in Boardwalk Extension 3, whether in the context of the claim between Seriso and Olympus, Olympus can claim such payment from Seriso under a previous court order as payment in respect of electrical work falling within the scope and ambit of that court order? In brief the basic issue will be what did Olympus and

Ercon agree upon as far as payment was concerned? If they agreed that Olympus should make payment to Ercon to what extent can that payment be recovered by Olympus against Seriso as payment for work that falls within the scope and ambit of electrical work contemplated by a previous Court Order?

[30] The issues involved in the first claim against Olympus do not in any way involve Seriso. If the court finds for the applicant on this issue in the sense of finding that Ercon and Olympus had contracted on the basis that Olympus would not be liable to pay Ercon, then that will be the end of the whole matter except for the issue regarding costs in the action against Seriso and in that event Seriso may seek costs against Olympus, alternatively against Ercon. If the court finds against Olympus on the previous issue, in the sense of finding that Ercon and Olympus contracted on the basis that Olympus would be liable to pay Ercon then the question arising in the third party proceedings is to what extent, if any, a previous Court indemnifies Olympus or to put it differently, to what extent the four conditions of liability on the part of Seriso under that previous court order have been met.

[31] It is of paramount importance to point out the differences in the causes of actions between the action that Ercon had instituted against Olympus and the action that Ercon had instituted against Seriso. The cause of action in the first claim was based on a contract. Olympus and Ercon had in fact agreed that Ercon would be paid by Olympus for all general and all electrical work in Boardwalk Extension 3 against payment. With regard to the second claim which was indeed a claim against Seriso, the cause of action was a previous Court Order. That previous court order contemplated the liability of Seriso for specific electrical repair work in Boardwalk Extension 3 once a number of conditions had been met. In other words Olympus was held to be contractually liable to Ercon for the electrical work done by Ercon.

[32] By relying on the authority of **Rane Investments Trusts vs Commissioner, South African Revenue Services 2003 (6) SA 332 (SCA) 346 D** where Lewis J stated that:

"There is ample authority for the proposition that in seeking to establish the parties' intentions, when a third person is questioning the meaning of the conduct, regard may be had to the parties' conduct in executing their obligations." Mr. Stoop submitted that the subsequent conduct of the parties supported Ercon's version of the terms of agreement between them and furthermore demonstrates that Olympus's version was clearly inherently improbable. Support for this submission can be found in the following circumstances. Olympus's conduct in claiming payment from Seriso could only be explained or understood in the context of the contracting party who knew fully well that it was liable to pay the account of the contractor who did the work; Olympus was, throughout represented by a legal representative. If Daniel had informed Olympus's attorneys that it was expressly agreed that Ercon would not be entitled to claim payment from Olympus but that Ercon had to claim payment directly from Seriso, there would have been no doubt in the attorney's mind that, firstly, Olympus was not entitled to payment of the monies owing by Seriso, and secondly, that Seriso did not owe Olympus any monies in respect of the repair work done by Ercon. If Olympus and Ercon had agreed that Ercon must look towards Seriso for payment, there was, in our view, no reason whatsoever why Olympus would have incurred substantial legal costs that it did just to obtain payment of Ercon's account by Seriso. If Daniel's word was anything to go by and that it had been agreed between Olympus and Ercon that Ercon would be responsible to claim payment directly from Seriso, there would not have been any reason at all for Olympus to involve attorneys for the sole purpose of enforcing payment from Seriso. It is highly unlikely that Olympus's attorneys would have insisted that the debt owing by Seriso was a debt owed to Olympus if Ercon and Olympus had agreed to the terms that were directly the opposite; furthermore, advised Olympus to attach assets belonging to Seriso to enforce a debt that was due to Ercon; and deposed to an affidavit stating that Olympus was entitled to payment if that would have exposed him to a charge of perjury.

[33] If Ercon and Seriso had agreed that Olympus would not be liable towards Ercon it was simply unthinkable that Olympus's attorneys would not in a letter of appointment have stated that Olympus disputed that it was liable towards Ercon for the payment of Ercon's costs; Olympus's attorneys would not have disclosed this defence; Olympus's attorneys would have emphasised in the letter dated 1 October 2008 that Olympus had no defence to Ercon's claim for payment. At the same time Daniel would not have disclosed this defence in the affidavit filed in opposition to Seriso's application to set aside the writ of attachment. Finally, Ercon would have agreed to perform work clearly not covered by the court order.

[34] Paragraph 1 of the court order of 1 July 2008 dealt with the power of the appellant to appoint Seriso and the purpose of such appointment. It states in paragraph 1 that:

"1. The applicant will appoint an accredited installation electrician or an accredited master installation electrician as stipulated in the electrical installation regulation to rectify and repair the electrical reticulation network at Boardwalk Extension 3 in order to comply with the electrical reticulation network plan."

Paragraph 2 thereof deals with the appointment of Mr. Venter of Electrical Safe Circuit as an inspector of works and stipulates his rights as follows:

"2. Mr. Venter of Electrical Safe Circuit, is appointed as an inspector of the works, with the following rights:

2.1 the right to be present on the site at all times;

2.2 the right to oversee the works;

2.3 the right to stop the works at any time should proper compliance with this court order not occur and to report back to court for any further directions or relief."

Finally, paragraph 3 of the said order deals with the circumstances under which Seriso would be liable and it provides as follows:

"3. The respondent is ordered to pay all costs pertaining to the rectification and repair, all electrical reticulation network at Boardwalk Extension 3, as far as the physical installation deviates from the plan as prepared by Watson Mattheus Consulting Electrical Engineers (Pty) Ltd and does not comply with the accepted standard as indicated by Mr. Venter in his report, including the costs of the inspector, Mr. Venter, at a market related fee, within 7 days of receipt of an account/s which account/s will be hand-delivered at the respondent's business address at 444 Rodericks Street, Lynnwood, Pretoria."

Paragraph 3 of this order is, in our view, relevant. It qualifies the potential liability of Seriso in the following four important respects. To put it otherwise the following four conditions that must be present before Seriso could be held liable for any payment under the court order. In the first place the costs must refer to a rectification and repair of the electrical reticulation network at Boardwalk Extension 3; secondly, the liability would only arise insofar as existing physical installation on 1 July 2008 deviated from the electrical network plan as prepared by Watson Mattheus Consulting Electrical Engineers (Pty) Ltd. The network was a set of plans identified and submitted into evidence as exhibits 'E1', 'E2' and 'E3'; thirdly, that liability only arose insofar as the existing physical installation on 1 July 2008 did not comply with the accepted standards as indicated by Mr. Venter in his report; fourthly and finally, the costs so claimed must be a market related fee. It was submitted by Mr. Oorshuizen that Olympus failed to satisfy all the four conditions.

[35] The explanation given by Daniel that Olympus tried out of sheer desperation to assist Ercon in order to enable Ercon to obtain payment from Seriso could, in our view, not be maintained. There is no denying the fact that Olympus's attorneys, who were acting at all material times on instructions of Daniel, were clearly under the impression that Olympus was liable for the payment of Ercon's account. That being the case such a liability could only have emanated

from the oral agreement concluded between Ercon and Olympus. The probabilities are overwhelming that Daniel must have instructed the attorneys of Olympus after an agreement had been concluded that Olympus would be liable to pay Ercon's account. One merely has to have regard to the defendant's subsequent conduct after the conclusion of an agreement. That conduct made it clear that Olympus knew that it was obliged to pay Ercon's account. It was submitted by Mr. Stoop that this conclusion was fortified by the fact that nowhere in the correspondence between the parties or in the affidavits filed of Olympus was any mention made of an agreement in terms of which the defendant was not liable towards Ercon and that Ercon had to claim directly from Seriso. This defence was, for the first time, raised in Olympus's plea. On the other hand Ercon's version of the terms of the agreement enjoys the support of the correspondence and documentation that originated from Olympus's attorneys. In particular Olympus's attorney's letters dated 20 August 2004 and 1 October 2008 are of crucial importance inasmuch as they confirm Ercon's version that it was never agreed that Ercon would only be entitled to claim payment from Seriso.

[36] It is highly unlikely that Olympus only facilitated payment of Ercon's account. Olympus's attorneys could only have done so on the strength of an agreement concluded between Olympus and Ercon or in terms of an agreement between Ercon and Olympus's attorneys. It was never Olympus's case that such an agreement existed, nor was there any evidence given of the existence of such an agreement. This view would contradict Daniel's concession that Olympus's attorney did not act on behalf of Ercon when they wrote the letter of demand dated 29 July 2008. Finally on this point, nowhere in the correspondence between the parties or in the affidavits filed on behalf of Olympus was there any mention made of such an agreement. At any rate this crucial point was conceded by Daniel.

[37] On the probabilities Ercon would not have agreed to do work of the magnitude envisaged by Van Wyk when he inspected the premises for an entity completely unknown to it without

insisting of some form of guarantee. Furthermore Ercon would not have agreed to do work under circumstances where it had no previous business dealings with Seriso. Ercon did not possess Seriso's physical address, nor did it have any details of its directors and could not therefore assess Seriso's credit worthiness. In addition Ercon did not obtain any benefits in terms of the Court Order. Ercon could not rely on the terms thereof to obtain payment from either Olympus or Seriso.

[38] When one further looks at the probabilities it is highly unlikely that Ercon would have commenced with the execution of the works if it did not have the plans and if the parties had agreed that Ercon would only be entitled to payment for work done in accordance with the approved plans. The parties would not have consulted on the basis that Ercon was obliged to rectify and to repair and that Ercon would then assume the risk that it would not be entitled to payment from Seriso for work which was done outside the scope of the approved plans. The probabilities existed that the reason Ercon executed the contract in absence of the plans was because Ercon did the work on the instructions of Olympus and under circumstances where Olympus had agreed to pay Ercon for all the costs in respect of the repair and rectification work. According to Olympus, Ercon agreed to repair and rectify the entire electrical reticulation network but to restrict its claim for payment only in respect of work contemplated in paragraph 3 of the Court Order. This, in our view, is highly improbable. It was pointed out by Mr. Stoop that Olympus was faced with an emergency situation as residents had no electricity and the repairs had to be done very urgently.

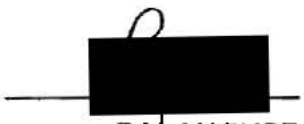
[39] We are unanimous, in our view, that the court *a quo* correctly found that the reason why the first defendant's attorneys were under the impression that Olympus was liable towards Ercon for payment was because Daniel must have instructed them that Olympus had undertaken to pay Ercon's account. The order appealed against was correctly made. There is therefore no merit in the appeal.

In the premises, we make the following order:

(1) The application for condonation for the late filing of the notice of appeal is granted and the appeal is accordingly reinstated.

(2) the application for the late filing of a transcript of the appeal record is hereby granted.

(3) the appeal is dismissed with costs which costs shall include the costs of the applications for condonation as set out in paragraphs 1 and 2 of the order.

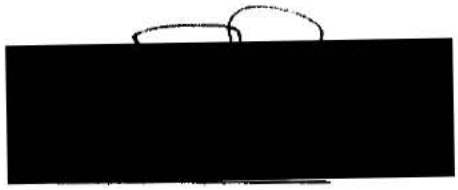


P.M. MABUSE
JUDGE OF THE HIGH COURT

I agree

L.M. MOLOPA-SETHOSA
JUDGE OF THE HIGH COURT

I agree, and it is so ordered



C.P. RABIE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the appellant:	*Adv. MMW van Zyl (SC)*
Instructed by:	*Loubser van der Walt Inc.*
Counsel for the first respondent:	*Adv. BC Stoop (SC)*
Instructed by:	*Pennells Attorneys*
Counsel for the second respondent:	*Adv. MM Oosthuizen (SC)*
Instructed by:	*Snyman de Jager Inc.*
Date Heard:	*25 May 2016*
Date of Judgment:	*24 February 2017*