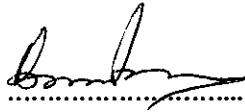




**IN THE HIGH COURT OF SOUTH AFRICA**  
**(NORTH GAUTENG, PRETORIA)**

18/7/2014

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: ✓
18.07.2014	
DATE	SIGNATURE

CASE NO: 9267/09

DATE: 18 JULY 2014

In the matter between:

**ERCON ELECTRICAL AND EARTHING CONTRACTORS (PTY) LTD**

**PLAINTIFF**

and

**OLYMPUS COUNTRY ESTATE AND HOME OWNERS ASSOCIATION**

**FIRST DEFENDANT**

**SERISO 505 (PTY) LTD**

**THIRD PARTY/SECOND DEFENDANT**

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**JUDGMENT**

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**RAULINGA J,**

1. Plaintiff's claim against the First Defendant is based on an oral agreement in terms whereof the Plaintiff rectified and repaired the electrical reticulation network at a property known as Boardwalk Extension 3. First Respondent is an association registered in terms of section 21 of the Companies Act, 1973 and responsible for the management of the property. The Plaintiff claims an amount of R831 839.79
2. Plaintiff's action against the First Defendant is based on an oral agreement which was allegedly concluded during June 2008. The quantum of the Plaintiff's claim is not in dispute. It was also agreed that Plaintiff would become entitled to payment 30 (thirty) days after delivery of invoices to First Defendant.
3. It is common cause that the Plaintiff was appointed following the granting of an Order on 1 July 2008 by Phatudi J. Paragraph 1 of the Court Order reads as follows:

"1. [First Defendant] will appoint an accredited installation electrician or an accredited master installation electrician as stipulated in the Electrical Installation Regulations to rectify and repair the electrical reticulation network at Boardwalk Extension 3 in order to comply with electrical reticulation network plan".
4. The only dispute between the Plaintiff and the First Defendant, concerns the question who was responsible for the payment of the Plaintiff's account. The Plaintiff alleges that in terms of the agreement, the First Defendant was liable for the payment of its account. The First Defendant on the other hand, alleges that the parties agreed that the Third Party (Seriso 505 (Pty)Ltd ("Seriso") the developer, would be liable for the payment of the costs of repairs and the Plaintiff would invoice Seriso for all costs pertaining to the works.
5. On 19 August 2008 Seriso paid the First Defendant an amount of R215, 805.68 whereupon the First Defendant paid Plaintiff on 28 August 2008 an amount of R187, 692.12. The First Defendant did not make any further payments and Plaintiff on 18 February 2009 issued summons against First Defendant wherein Plaintiff claimed payment of the total amounts reflected in its invoices, namely R1,019,531.91 less the amount of R187,692.12 (i.e an amount of R831,839.79)
6. First Defendant denied that it owed Plaintiff any money and pleaded that the parties agreed

- that the developer (Seriso) would be liable for all costs pertaining to the works and that Plaintiff will issue invoices to Seriso.
7. The First Defendant served a Third Party Notice on Seriso wherein the First Defendant claimed an indemnification from Seriso based on the terms of the Court Order. The Third Party maintains that not all of the work that had been done in terms of paragraph 3 of the Court Order. It follows that, if Plaintiff did work that fell outside the scope of the Court Order, the First Defendant would not be entitled to claim payment for such work from Seriso.
  8. The matter was enrolled for trial on 14 April 2011. By agreement between the parties, the matter was postponed whereafter Plaintiff joined Seriso as Second Defendant in the action on the basis that, if Plaintiff was unable to obtain payment from the First Defendant in terms of the agreement concluded between the parties, Plaintiff would be entitled to obtain payment for such work from Seriso.
  9. Prior the trial, Plaintiff and Seriso settled the dispute between them in confidence, and as a result Plaintiff now seeks judgment against First Defendant in the amount of R481, 839.79 (i.e R839,839.79 less the settlement amount of R350,000.00) together with interest and costs. That is in terms of Plaintiff's notice of amendment filed during the trial.
  10. As a consequence, the dispute has since crystalized to the following:
    - 1.1 As between the Plaintiff and the First Defendant, whether it was a term of the contract between those two parties;
      - 1.1.1 that the Plaintiff will be paid for its electrical work by the First Defendant; alternatively
      - 1.1.2 that the Plaintiff will be paid by for that electrical work directly by the Third Party and not by the First Defendant; so that in essence the Court must simply choose between those two versions; and
    - 1.2 As between the First Defendant and the Third Party, but only in the event of the First Defendant being ordered to pay the Plaintiff any amount under its contract with the Plaintiff in respect of the material and labour claimed by the Plaintiff in respect of the electrical work done in Boardwalk Extension 3, whether the First Defendant can claim such payment from the Third Party under a previous Court Order as electrical work(including material and labour) falling within the scope and

ambit of the Court Order.

11. There is no need to regurgitate the evidence of Mr van Wyk who testified on behalf of the Plaintiff. A synopsis of his testimony will suffice.
12. On the 1 July 2008 Mr Van Wyk was visited by Mr Eric Daniel who introduced himself as the Chairperson of the First Defendant. Daniel requested Mr Van Wyk to repair the electrical reticulation at Boardwalk Extension 3. Van Wyk attended to the property and inspected it on the same day. Daniel mentioned to Van Wyk that the First Defendant had obtained a Court Order compelling the developer to pay the costs in respect of repairs.
13. Van Wyk ascertained that there were substantial defects to the electrical reticulation network and indicated that Plaintiff could not provide the First Defendant with a quotation but only with unit prices; the total cost would depend on the actual quotations measured as the work progressed. Van Wyk indicated that the costs may be in the region of R500 000.00. Daniel answered that these costs may be substantially higher, though. Daniel then instructed the Plaintiff to commence with the repairs. Up to that point in time, Van Wyk was unaware of the existence of Seriso or its sole director Mr Delport.
14. Although it was Plaintiff's standard practice to demand a payment guarantee from its customers, in this instance it didn't, because the First Defendant indicated that it would pay the Plaintiff whereafter the First Defendant would recover this amount from Seriso.
15. On the 15 June 2008, First Defendant's attorney, Loubser van der Walt Inc, provided Plaintiff with a letter confirming Plaintiff's appointment, whereafter Plaintiff commenced with the repair and rectification of the electrical reticulation network. Plaintiff proceeded to execute the works in the absence of any of the plans referred to in paragraph 3 of the Court Order.
16. When Plaintiff forwarded its first invoice to the First Defendant, Daniel contacted Mr Van Wyk and requested him to change the invoice and reflect Seriso as the client. Van Wyk made the requested changes and forwarded Plaintiff's invoice to the First Defendant's attorneys. As the work progressed, Plaintiff forwarded similar invoices to the First Defendant's attorneys. Van der Walt confirmed that by that time, the Plaintiff did not make use of the services of attorneys. He also confirmed that Plaintiff had never made use of First Defendant's attorneys.

17. On 29 July 2008 the First Defendant's attorneys demanded payment of the amount indicated in Plaintiff's first invoice from Seriso. In the said letter, First Defendant also indicated that further invoices rendered would be forwarded to Seriso's offices for payment. On 30 July 2008, Seriso's attorneys responded and pointed out that the amount claimed by the First Defendant was unrecoverable.
18. The First Defendant's attorneys in a letter dated 4 August 2008, insisted that Seriso should pay the First Defendant the amount reflected on Plaintiff's invoices on or before 5 August 2008, otherwise Seriso would be in breach of the Court Order.
19. Seriso thereafter paid an amount of R215, 085.66 to the First Defendant who in turn paid an amount of R187,692.12 to Plaintiff. The balance of R28,113.54 the First Defendant paid to an entity known as Greycon Projects CC(in respect of Venter's professional fees and the fees of an expert, Mr Greyling who was appointed by Venter).
20. On 10 September 2008 Plaintiff provided the First Defendant's attorneys with the Plaintiff's fourth payment certificate in the amount of R 258,974.53 and the First Defendant's attorneys in turn demanded payment of this amount from Seriso. No payments were forthcoming from Seriso and on 29 August 2008 the First Defendant caused a writ of execution to be issued against Seriso. Seriso thereafter applied for setting aside the warrant of execution.
21. Seriso's payment default culminated in First Defendant's attorneys notifying Seriso's attorneys that in terms of the Court Order, the money was not owed to the Third Party (Seriso) and must be paid directly to Loubser van der Walt Inc's Trust account.
22. On 10 November 2008 Venter approached the High Court under Case No 31146/2008 for an order compelling Seriso to provide the First Defendant with the approved electrical reticulation plans and secondly, to compel Seriso to make payment of (amongst others) the amount of R894,326.24.
23. Under cross-examination Van Wyk confirmed that Plaintiff executed the contract without the plans referred to in paragraph 3 of the Court Order. According to him the Plaintiff rectified and repaired as they uncovered defects. Plaintiff only had sight of the plan contained in exhibit "E1" and not Exhibits "E2" and "E3".

24. Mr Eric Daniel testified on behalf of the First Defendant. His evidence is that the parties had agreed that Seriso would be liable towards Plaintiff and that Plaintiff would invoice Seriso directly.
25. Daniel conceded that the Plaintiff was obliged to execute the contract without the plans referred to in the Court Order. He emphasised that the Plaintiff nevertheless complied with the terms of the agreement and that the repairs and rectifications were done in a highly professional manner. This is a conflicting version from the original one.
26. The First Defendant's expert Venter confirmed that Plaintiff performed all the work referred to in Plaintiffs Contractor's Payment Certificate Summary. Venter also made it clear that some of the work done by Plaintiff reflected in its payment Certificate summary was not covered by the terms of the Court Order.
27. Based on the agreement between the parties, the Court Order of the 1 July 2008 and the evidence of all the witnesses in this matter, I have come to the conclusion that the First Defendant's version must be rejected.
28. In the premises, I start first with the agreement between the parties, in particular, the agreement between the Plaintiff and the First Defendant.
29. In *Coopers & Lybrand v Bryant 1995(3) SA 761 (A) at 768 (A-D)* the principles applicable in interpreting the terms of a contract were summarised as follows by Joubert JA:
- " The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:
- (1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract as stated by Rumpff CJ *supra*;
  - (2) to the background circumstances which explain the genesis and purpose of the contract i.e to matters probably present to the minds of the parties when they contracted.....
  - (3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document save direct evidence of their own intentions.

30. The parties' common intention and the terms of contract can be discerned from their conduct in executing their obligations – *Rame Investments Trust v Commissioner, South African Revenue Service 2003(6) SA 332 (SCA) at 346 D*. This can be deduced meaningfully from the parties' evidence. My interpretation of the agreement is in favour of the Plaintiff.
31. To the extent that there are conflicting versions in the First Defendant's evidence, and differing versions as between the parties, the court must depend on probabilities.
32. Although there are instances in which a client may not be bound by mistakes of own attorney, in this regard the attorney must have known the distinction between claiming payment as an agent on behalf of the Plaintiff and claiming payment on behalf of the First Defendant. An agent cannot claim payment in its own name for monies due to its principal. – *SWA Amalgameerde Aflaars (Edms)Bpk V Louw 1956 (1)SA 346 (A)*. The First Defendant was neither obliged nor entitled to claim payment to itself of the monies owing by Seriso; and Seriso did not owe the First Defendant any monies in respect of the repair work done by the Plaintiff.
33. In Exhibit F, the First Defendant's attorney deposed to an affidavit in support of the writ of attainment to enforce a debt that was due to the Plaintiff – this would have exposed the attorney to perjury.
34. In letters dated 29 July 2008, 4 August 2008 and 20 August 2008, it is apparent that the First Defendant's attorneys were under the impression that the First Defendant was liable towards Plaintiff for the payment of the latter's amount. This is an indication that Daniel must have instructed the First Defendant's attorney that the First Defendant had undertaken to pay the Plaintiff's account. Further to that, there is no agreement in terms whereof the First Defendant was not liable towards the Plaintiff and that Plaintiff had to claim directly from Seriso.
35. The version of the First Defendant does not support the defence that was raised originally. This therefore supports the version of the Plaintiff.
36. It is Daniels' evidence that the First Defendant tries to assist Plaintiff to obtain payment from Seriso. There is no such an agreement between the Plaintiff and the First Defendant. On the contrary, the agreement was that the First Defendant would pay the Plaintiff. This is clear from the meeting between Van Wyk and Daniel on the 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 No 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 the First Defendant and the scope of works included a deviation from the terms of the Court Order. Venter confirmed that Plaintiff did work that fell outside the ambit of the Court Order. The Contractors Payment Certificate Summary makes it clear that Plaintiff has to "supply and install new kiosk to Article 21 spec". Venter made concessions that some of the work fell outside the Court Order.
38. It was not the agreement between the parties that Plaintiff would only be entitled to payment for work done in accordance with the plans. This can be deduced from an estimation of R500 000.00 by Van Wyk, because there were no exact calculations. Hence the Plaintiff took the risk to repair and rectify irrespective of whether such work fell inside or outside the plan.
39. My reading of the Court Order is that Plaintiff had no business dealing with Seriso and was not a party to the Court Order. The Court Order has to do with the First Defendant and Seriso.
40. In the circumstances, judgment is granted against the First Defendant:
  - (a) Payment of R481 839.79;
  - (b) Interest on R831, 839.79 at 15.5% per annum a *tempore morae* until 24 July 2012.
  - (c) Interest on R481, 839.79 at 15.5% per annum from 25 July 2012 to date of payment;
  - (d) Costs of suit.
41. Having granted judgment in favour of the Plaintiff in the matter between the Plaintiff and the First Defendant, the next step is to consider the dispute between the First Defendant and the Third Party (i.e Seriso). What begs the answer is whether the First Defendant can claim such payment from the Third Party under a previous Court Order as electrical work (including material and labour) falling within the scope and the ambit of the Court Order. To

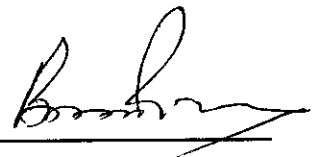


the extent that I have already granted judgment against the First Defendant, there is no need for me to deal in detail with the matter between the First Defendant and the Third Party.

42. At the outset one agrees that whatever Seriso as the developer of Boardwalk Extension 3 has to pay under the Court Order, is on a proper interpretation of the Court Order only due and payable to the Plaintiff and creates no legal obligation to indemnify or pay the First Defendant any amount whatsoever. The Court Order creates a legal relationship or obligation only as between the Plaintiff and the Third Party.
43. It is indeed true that in the main action the cause of action is a contract or an oral agreement, whereas in the Third Party proceedings, the cause of action is the Court Order. I have already dismissed the contention that the First Defendant elected to follow on the basis that it advances two mutually destructive propositions.
44. I have intimated above that the evidence of the First Defendant does not support the defence raised. Based on its pleadings and the evidence which was adduced during the trial, the First Defendant did not discharge the onus proving its contractual liability toward the Plaintiff for the relevant portion of the electrical work done by the Plaintiff at Boardwalk Extension 3 within the scope and ambit of the Court Order – See *Schmidt & Rademeyer Bewysreg (2000) 24 and 31-32*, with specific reference to:  
  
(i) the rule that is normally the Plaintiff who has the burden and not the Defendant (Where in the proceedings, the First Defendant is effectively in the position of a Plaintiff whilst the Third Party is in the position of a Defendant). I agree with this scenario.
45. It can be accepted that the First Defendant has not proven that there is any work falling inside the scope and ambit of the Court Order. This can be seen from the amounts already paid and received by the Plaintiff – this is according to the final Bill of Quantities. That being the case, then the Third Party cannot be held liable at all.
46. It can be confirmed that there is no credible or reliable evidence whatsoever before the Court to show that there is any item of work on the final Bill of Quantities that indeed falls within the scope and ambit of the Court Order.
47. The only expert witness for the First Defendant in this regard, Venter, was evasive in his answers , he contradicted himself on the witness stand, he changed his version numeral

times ect Venter did not attempt to lay any factual foundation and did not attempt to put his reasoning before the court.

48. I have already dealt with the issue concerning the fact that the project started without plans and that Van Wyk for the Plaintiff only had insight in the layout plan. Whatever was found to be defective was repaired or rectified.
49. I have deliberately omitted to deal with the cable sizes, the street lights, kiosk and other related items, for the simple reason that most of these aspects relate to Venter's evidence and the contradictions already referred to above.
50. In the premises I make the following order:
- (a) The case against the Third Party is dismissed with the First Defendant to pay the costs of the Third Party.
  - (b) Such costs are to include the costs of two Counsel.
  - (c) The costs include qualifying costs and fees of the expert witness Mr Nico Van Wyk for the Third Party.



**T J RAULINGA**  
**JUDGE OF THE NORTH GAUTENG HIGH COURT**

**FOR THE PLAINTIFF** : Adv BC Stoop  
**INSTRUCTED BY** : Pennells Attorneys  
**FOR FIRST DEFENDANT** : Adv MMW Van Zyl SC  
**INSTRUCTED BY** : Loubser van der Walt Inc  
**FOR SECOND DEFENDANT** : Adv MM Oosthuizen SC  
**INSTRUCTED BY** : Snyman de Jager Ing  
**HEARD ON** : 12 -16.08. 2013  
**DATE OF JUDGMENT** : 18 July 2014