IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A368/2013

In the matter between:

GEORGE MUNICIPALITY Appellant

And

PHILLIP RUDOLPH GREYVENSTEIN Respondent

Before: BAARTMAN et BOQWANA JJ

JUDGMENT DELIVERED ON 10 FEBRUARY 2015

BOQWANA, J

Introduction

[1] The appellant brought an application before the George Magistrates' Court for an order compelling the respondent to remove illegal garage doors installed onto the storeroom and washroom built on his property and to align the structure to the building plans approved by the appellant. The magistrate dismissed the application with costs in a short judgment he gave, dated 10 October 2012. In brief, the magistrate found that the double garage door was on the approved plan which was attached to the respondent's answering affidavit and referred to as 'PRG1'. He found in favour of the respondent because no other plans were placed before the court. The appellant appeals against that judgment.

[2] The appeal was preceded by an application for condonation brought by the appellant for its non-compliance with the Rules of Court in noting and prosecuting the appeal. The application is opposed by the respondent. I first deal with the condonation application.

Condonation application

[3] It is the appellant's case that the delay in noting and prosecuting the appeal was caused by the appellant's attorney, Frances Schröter ('Schröter'), who deposed to an affidavit in support of the application for condonation.

[4] In the first instance, the appellant admittedly failed to comply with Rules 51(3) and 51 (4) of the Magistrates' Courts Rules[1] which stipulate as follows:

> '(3) An appeal may be noted within 20 days after the date of a judgment appealed against or within 20 days after the registrar or clerk of the court has supplied a copy of the judgment in writing to the party applying thereof, whichever period shall be longer.
>
> (4) An appeal shall be noted by delivery of notice, and, unless the court of appeal otherwise order, by giving security for the respondent's costs of appeal to the amount of R1000: Provided that no security shall be required from the State or, unless the court of appeal otherwise order, from a person to whom legal aid is rendered by a statutorily established legal aid board.' (Own emphasis)

[5] In the present matter the notice of appeal was delivered on 14 December 2012 and security paid on 19 December 2012. The notice of appeal and payment of security were not done simultaneously. The noting of the appeal was effectively done on 19 December 2012 if one has regard to the requirements of Rule 51(4).

[6] The judgment of the magistrate is dated 10 October 2012. Schröter allegedly received it on 25 October 2012. It is common cause that the judgment was not handed down in open court. It appears from the reading of the transcribed record of the proceedings that judgment was reserved after the hearing of the matter on 09 October 2012. The court informed the parties that they would be notified as soon

[1] Rules Regulating the Conduct of the Proceedings of the Magistrates' Court of South Africa, Published under GN R740 in GG 33487 of 23 August 2010 [with effect from 15 October 2010]

as possible of the finding of the court. Schröter alleges that she was not aware of the existence of the written judgment dated 10 October 2012 and found out about it by chance from the respondent's attorney who furnished her with a copy of the judgment *via* email on 25 October 2012.

[7] According to Schröter the magistrate usually gives written judgments which are deposited in the pigeonholes of different attorneys concerned, situated at the office of the clerk of the court. Both she and the respondent's attorneys have such pigeonholes. Her contention is that she was and is still of the opinion that a proper judgment had not been given because it was not done in open court. Based on that view she was not sure how to handle the judgment, having regard to the prescribed 20 day period by which the notice of appeal had to be filed. She eventually decided to rather take the safe option and continue with the filing of the appeal instead of engaging the magistrate about delivering the judgment in open court. She then considered the judgment, and after receiving instructions from her client, she briefed an advocate, Mr Schmidt, on 22 November 2012, to prepare a notice of appeal which was served on the respondent's attorneys and the magistrate on 14 December 2012.

[8] It can be construed from Schröter's conduct that she accepted the judgment as valid on the appellant's behalf as she failed to do anything to challenge its status. She continued to note and prosecute the appeal instead of insisting that the judgment be delivered in open court. Whilst that is so, Mr Schmidt has invited this Court to give a view on the practise of placing judgments in pigeonholes instead of delivering those in open court. He submitted that in his view, Schröter's view was correct that a judgment did not exist as it was not delivered in open court.

[9] In my view, although the judgment was not given in open court or Schröter supplied with a copy of the written judgment by the clerk of the court, she became aware of the written judgment after she received it from her colleague, the respondent's attorney. If she was unsure of the status of the judgment, she should have enquired from the clerk of the court or the magistrate immediately, which she

failed to do. She also failed to obtain an opinion from counsel about the validity of the judgment, at least early on. Doubts remained in her mind.

[10] The only authority Mr Schmidt could rely on to as authority for his proposition on this issue was that of **Snyman v Crouse en 'n Ander**[2] where it was held that 'judgment' only takes place when delivered in open court. It should be noted that the **Snyman** matter dealt with action proceedings. Another key distinguishable factor is that in the **Snyman** matter, the magistrate 'orally' conveyed the decision to the clerk of the court with an instruction to convey the decision to the parties. In the present instance a written judgment existed.

[11] In the decision of **Main Street 421 (Pty) Ltd v Goldfields Development (Pty) Ltd**[3]**,** the Court set out general legal principles applicable in our courts relating to recordal of judgments. Key to the principles extrapolated by that court, albeit *obiter*, was a principle that a judgment must be delivered in open court although not necessarily by the judge or magistrate who prepared it. In support of its view the Court referred to section 16 of the Supreme Court Act, 59 of 1959 and section 5 of the Magistrates' Courts Act and LAWSA, vol 3, part 1, paragraph 323. It also made reference to the fact that the orders of the Supreme Court of Appeal and Constitutional Court are handed down in open court and only after the legal representatives of the parties have been notified of the date and time to allow them to note judgment. The court held a view that judgments and orders are meant to create certainty.

[12] Section 16 of the Supreme Court Act, 59 of 1959, reads as follows:

> ***'16 Proceedings to be carried on in open court***
>
> Save as is otherwise provided in any law, all proceedings in any court of a division shall, except in so far as any such court may in special cases otherwise direct, be carried on in open court.'

[2] 1980 (4) SA 42 (0) at 49B

[3] Orange Free State Division of the High Court, Appeal No A187/2013, delivered on 27 February 2014) at paragraph [24] thereof.

[13] An equivalent provision (sec 32) in the new Superior Courts Act[4] reads as follows:

> 'Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except in so far as any court may in special cases otherwise direct, be carried on in open court.'

[14] Section 5 (1) of the Magistrates' Courts' Act[5] reads as follows:

> '5 Courts to be open to the public, with exceptions
>
> (1) Except where otherwise provided by law, the proceedings in every court in all criminal cases and the trial of all defended civil actions shall be carried on in open court, and recorded by the presiding officer or other officer appointed to record such proceedings.' (Own emphasis)

[15] It must be noted that section 5 (1) of the Magistrates' Courts Act deals with defended civil actions. Despite the above, there is seemingly no rule that the delivery of a judgment must take place in open court, with regards to application proceedings in the magistrates' court. Having said that, one must take note of the Civil Practice Directive for the Regional Courts of South Africa[6], in which it is stated, at clause 8.2, that judgment delivery should be done in open court. That clause reads as follows:

> **'8 Reserved judgements**
>
> 8.1 Judgments may not be reserved sine die and the presiding officer shall indicate the date on which judgment will be delivered or handed down which should be within a reasonable time from date of hearing the matter.
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> 8.2 Judgment delivery should be done in open court.'

[16] Although the word 'should' has been used, indicating that the requirement is not peremptory, the practise noted from the above civil practice directive should be encouraged.

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[4]No.10 of 2013.
[5]No. 32 of 1944
[6](Adopted by resolution of the Regional Court Presidents' Forum on 28 May 2013 Effective from 1 August 2013)

[17] The fact that there is a written judgment in this present matter, which recorded the outcome of the application proceedings, distinguished this matter from the **Snyman** and **Main Street 421** decisions (which found that oral conveyance of the result to the registrar or a clerk or failure to record the judgment respectively, meant that there was no judgment to be acted upon). Therefore, the fact that the magistrate did not deliver his judgment in open court did not invalidate the status or existence of his written judgment as there is no rule with respect to magistrate courts requiring delivery of judgment in open court, in applications.

[18] Whilst that is so, the practice of placing reserved judgments in pigeonholes should not be condoned. The civil practice directive (coupled with the rule applicable in trials I have referred to above) should be followed in applications in the magistrates' court as well. This would avoid uncertainties such as the one alleged by Schröter in this matter.

[19] Reverting to the appellant's failure to note the appeal timeously. Apart from being uncertain about the validity of the judgment, there is no explanation from Schröter as to why she only briefed counsel on 22 November 2012, when she received a copy of the written judgment on 25 October 2012 from her colleague. In addition to that, it took a further 16 days to finally note the appeal as security was only paid on 19 December 2012. Furthermore, no explanation is proffered as to why the security was not paid simultaneously with the delivery of the notice of appeal as prescribed by Rule 51(4) of the Magistrates' Courts Rules.

[20] Having said all that, if one has regard to all other factors such as the degree of lateness, which is not excessive on this aspect, and lack of prejudice to the respondent, I see no reason why the late noting of the appeal should not be condoned.

[21] Turning to the prosecution of the appeal. The appellant failed to prosecute the appeal within 60 days after noting it and to make an application to the registrar,

within 40 days of noting the appeal, for the hearing of the appeal as required in Rules 50(1) and 50(4) of the Uniform Rules of Court.

[22] The reason given for this failure is that Schröter misunderstood Rule 51(8) of the Magistrates' Courts by thinking that she had to wait for a statement from the magistrate before proceeding any further with the appeal. She accordingly held the continuation of the matter in abeyance whilst waiting for the Magistrate's statement. She professes to have done this because she was hurried and under stress. She states that her interpretation of Rule 51(8) was incorrect. Mr Schmidt was however not convinced that Schröter was wrong. Rule 51(8) stipulates that:

> '8(a) Upon delivery of a notice of appeal the relevant judicial officer shall within 15 days thereafter hand to the registrar or clerk of the court a statement in writing showing (so far as may be necessary having regard to any judgment in writing already handed by him or her)-
>
> (i) the facts he or she found to be proved;
>
> (ii) the grounds upon which he or she arrived at any finding of fact specified in the notice of appeal as appealed against;
>
> *(iii)* his or her reasons for any ruling of law or for the admission or rejection of any evidence so specified as appealed against.'(Own emphasis)

[23] In terms of this rule the magistrate is not absolutely compelled to give further reasons when he or she has delivered a judgment which he or she considers sufficient. However, a practice has developed where a magistrate when served with a notice of appeal would issue a statement that he or she abides by his or her judgment and has nothing further to add. The remarks of Hoexter JA in **R v Bezuidenhout**[7] are pertinent to this case where he said the following:

> 'The magistrate is not bound to give reasons when he pronounces verdict. He may do so, but that will not relieve him of the duty of giving written reasons when an appeal has been noted. If he has given adequate written reasons when pronouncing verdict it would no doubt be a sufficient compliance with the Rule to state in writing that he adopts those reasons and has nothing to add to them. But the fact that the magistrate has

[7] 1954 (3) SA 188 (A) at page 222D-E.

given reasons when pronouncing verdict cannot debar him from adding to those reasons whatever may be necessary when he complies with the Rule after an appeal has been noted.' (Own emphasis)

[24] In the case of **S v M** [8] where the magistrate had stated that he did not wish to add anything to his *ex tempore* judgment. Whilst finding the *ex tempore* judgment to be '*quite adequate for the purpose of indicating broadly what his approach to evidence was*,'[9] the appeal court criticised the magistrate for not providing further reasons pertinent to the grounds for appeal raised.[10]

[25] If one has regard to the case law as well as the practice that has developed, Schröter's expectation of a statement or further reasons was reasonable in my view. I am however of the view that nothing in that Rule compels a magistrate to file such statement if he or she regards his or her written judgment to be sufficient.

[26] In my view, if a party does not receive a statement as prescribed by that rule after 15 days, it is incumbent upon them to either enquire timeously from the magistrate or from the clerk of the court, or, if in doubt, to continue with the process by complying with the provisions of Rules 50 (1) and 50(4) of the Uniform Rules of Court[11] timeously. Rule 50(1) states that:

' (1) An appeal to the court against the decision of a magistrate in a civil matter shall be prosecuted within 60 days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed.'

[27] Whilst Rule 50(4) further provides as follows:

'(4) (a) The appellant shall, within 40 days of noting the appeal, apply to the registrar in writing and with notice to all other parties for the assignment of a date for the hearing of the appeal and shall at the same time make available to the registrar in writing his full residential and postal addresses and the address of his attorney if he is represented.

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[8] 1978(1) SA 571 (N)

[9] S v M supra at 572 A

[10] See S v M supra at 572 C - E

[11] Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the Supreme Court of South Africa as promulgated in Government Notice R48 of 12 January 1965 and as amended by various Government Notices. Supreme Court must be construed as reference to the High Court – see section 16(5) (b) to (c) of Schedule 6 of the Constitution of the Republic of South Africa.

(b) In the absence of such an application by the appellant, the respondent may at any time before the expiry of the period of 60 days referred to in subrule (1) apply for a date of hearing in like manner.

(c) Upon receipt of such an application from appellant or respondent, the appeal shall be deemed to have been duly prosecuted.' (Own emphasis)

[28] It was only in early August 2013 that Schröter enquired from the clerk of the court and that is when she realised that she made a mistake by waiting for a statement from the magistrate. There is no explanation as to why she waited for more than seven months to make enquiries from the clerk of the court.[12] This conduct is, in my view, unacceptable and tardy.

[29] Having discovered in August 2013 about her alleged mistake, Schröter and/or her firm of attorneys waited for another month before they sent the record of appeal to the respondent's attorneys on 5 September 2013, to prosecute the appeal. Whilst Schröter's interpretation of the rule is excusable, her failure to make enquiries for months cannot be. She has acknowledged that her conduct amounted to negligence. She however submits that such conduct should not be imputed to the appellant. It is trite law that negligence on the part of the attorney will not necessarily exonerate the litigant.[13] In **Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others**[14] the Court held that there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or insufficiency of the explanation tendered. The litigant is at least required to explain that none of the ineptitude or remissness of his attorney is imputed to himself if reliance is placed on that in seeking condonation.[15] There is no explanation given by the appellant itself regarding the actions it took to avoid the delays in this matter.

[12] In Van Wyk v Unitas Hospital 2008 (2) SA 472 (CC) at paragraph 22, the court said: 'An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And what is more, the explanation given must be reasonable.'

[13] In this regard see Ferreira v Ntshingila1990 (4) SA 271 (AD) at 281(E)and Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A) at 141.

[14] 1985 (4) SA 773 (A) at 787 G-H

[15] Salojee and Another, NNO v Minister of Community Development at page 141

[30] The submissions made by Mr Schmidt that the appellant has one legal advisor, that it is a big public organ that deals with a lot of matters is a supposition made from the bar with no supporting evidence.

[31] Regard must also be had to the respondent's interest in the finality of the judgment. In **Cairns' Executors v Gaarn**[16] the Court remarked that:

> 'when a party has obtained a judgment in his favour and the time allowed by law for appealing has lapsed, he is in a very strong position, and he should not be disturbed except under very special circumstances.'

[32] I have already found that the explanation given by Schröter about her understanding of the Rule was reasonable. What is not satisfactory is her conduct in waiting for more than seven months to enquire from the clerk of the court about the statement that she was expecting. The enquiry however does not stop there; regard must also be had of other factors such as prospects of success, the importance of the matter, and the balance of convenience, before a decision is made on whether or not condonation should be granted.

[33] Mr Whitehead SC has referred to case law that suggests that in cases where non-observance of the Rules has been so flagrant and gross, condonation should not be granted, whatever the prospects of success might be.[17] I am not convinced that this case falls within the category of those cases, and therefore would proceed to deal with the merits of this case.

Merits

Appellant's case

[34] The appellant's case is that during 2010 it received building plans for approval from the respondent. These plans were accompanied by an application for deviation from the appellant's normal board policy with regard to garage space on a property zoned for single residential use. The board policy makes provision for a maximum of four garages on a property with a residential home. The policy details

[16] 1912 AD 181 at page 193

[17] See Ferreira v Ntshingila 1990 (4) SA 271 (AD) at 281J to 282A

that if an owner of such property wants to erect more garages, he must apply for a special concession by the board.

[35] The respondent thus applied for such special concession, as he wanted to erect garage space on the property for 20 vehicles. The reason for this was based on the fact that the respondent is a collector of veteran vehicles. He wanted to store his collection of vehicles in the garage space.

[36] The house on the premises is designed in such a way that vehicles could be stored underneath the building with the residence being on the top level of the building. The building plan has a second building ('an outbuilding') indicated as a garden store and laundry (also referred to as a store room and washroom in the papers). The board of the appellant approved the application for a special concession on 19 October 2011 with the following conditions:

a) That the garage facility is limited to the ground floor of the proposed dwelling;

b) That the garage facility may only accommodate or store a maximum of 20 vehicles;

c) That no vehicle may be serviced or repaired on site and no dangerous chemicals or fuels may be stored on site inclusive of equipment, spare parts, fixtures or tools related thereto;

d) That in the event the garaging facility is no longer used for that purpose, a new application must be submitted to Council for consideration.' (Own emphasis)

[37] The dispute between the parties concerns the outbuilding, indicated as the laundry/garden store on the plan PRG1. During inspection on the respondent's premises by the appellant's officials it was found that the outbuilding was significantly bigger than on the original approved plans. It was also noticed by the appellant's officials that the structure of the outbuildings had a garage door. Given the number of garage facilities and the involved application of the respondent for concession, it was clearly put to the respondent that the outbuilding structure could not be equipped with further garage facilities. The respondent was requested to submit 'as built' plans depicting the enlarged outbuilding being built for which he had no authorisation. He however submitted new plans with the outbuilding equipped with a garage door notwithstanding the fact that it was clearly stated to

him that further garage facilities would not be considered. These plans were modified during the approval process after the appellant's officials contacted the respondent's architect, Da Silva. On the insistence of the appellant's officials, Da Silva amended the plans to enclose the double garage door and replacing it with a normal entrance door. The amended plan was approved.

[38] Despite this, the respondent proceeded to build a storeroom with garage doors infront contrary to the 'approved' plans ('amended plans'). He was given notice to adhere to the approved plan and the respondent confirmed in an email dated 21 September 2011, addressed to Mr S Carstens of the appellant, that he had complied with the instruction as follows:

> 'Dear Mr Carstens
>
> As per our telephonic conversation we are in the process of bricking up both openings of the small outbuilding and building in single door.
>
> The contractors will be finished by end Thursday 22nd September.
>
> As we have complied with all requests from Town Planning Department could you please now issue the occupation certificate so we can move in.
>
> I ve (sic) gone to considerable lengths, not to mention cost, to comply with these requests, and sincerely hope that we can reach a speedy resolution.
>
> Should you so wish you can contact me on 0824773305 or Sharon on 0836611163.
>
> Kind regards,
>
> Rudolph Greyvensteyn...'

[39] The building became ready for occupation whilst the board was considering the concession regarding the garages. The respondent was issued with an interim occupation certificate whilst the approval for deviation was still in process, having been given the condition to remove the garage doors and close the space. The respondent complied with the condition placed on him.

[40] After the entire building was completed and a final occupation certificate issued, the respondent once again, contrary to the approvals, broke the enclosed

door spaces down and installed the garage doors again. Since October 2011 the respondent has been served with various notices. The last being on 17 November 2011. Subsequent to these notices, the respondent submitted a further application for approval of the amended plans with the garage doors currently built on the outbuilding. He was advised in a final notice dated 7 December 2011 that the plans could not be approved and to once again correct the illegal structure built on his premises by 22 December 2011. He failed to comply with that notice and the garage doors built 'illegally' are still in place.

[41] According to the appellant, this is contrary to the special consent which states that there may only be 20 vehicles in the main building on the premises. The appellant further submits that the respondent is in violation of the sections 4(1) and 4(4) of the National Building Regulations and Building Standards Act 103 of 1977 and section 39(2) of the Ordinance on Land Use Planning, Cape Ordinance 15/1985, which prohibit building without prior written approval of the local management using land for a purpose not provided for in the approved plan.

The respondent's case

[42] The respondent denies that he is in breach of the approved plans and the law. He attached to his answering affidavit a building plan dated 20 January 2011 which depicted a double garage door as well as an extra entrance as 'PRG 1'. He admits that he was informed by the appellant that he may not use the laundry as a garage. He however submits that when the appellant was considering the special consent, it only had the PRG1 plans with it. According to him the provision allowing him to store 20 vehicles on the ground floor of his residence includes the outbuilding, as it forms part of the residence. He alleges that for as long as he does not store more than 20 vehicles at any given stage, he does not violate any provision. He further denies that he uses the outbuilding as a garage. He maintains that he uses the building to perform crafts for which he requires a larger entrance to let light in. In addition to that he uses the facility to store his garden tools and as a laundry.

[43] He alleges that after the dispute about the entrance to the outbuilding he looked at the 'as built' plans and noticed that there was an undated amendment on the plan which indicated that the garage door would be closed and that a normal door would be built on the north side. He contacted Da Silva, his architect, who informed him that he had amended the plan without the respondent's approval, upon the appellant's insistence. Da Silva confirmed this. He denies that he proceeded to build garage doors contrary to the approved plans as the building was already erected when the amendment was made.

[44] He concedes that he complied with the instruction to close the garage and the walls but contends that he was blackmailed by the appellant's officials who unlawfully withheld the occupation certificate, 'forcing him to close the garage doors. He contends that, that instruction was unlawful. He thus, in accordance with the original plan, erected the double garage door again and is refusing to close it. He denies that he is in violation of the special consent awarded to him for as long as he does not store 20 vehicles in the premises.

Discussion on the merits

[45] The respondent raises what may, on the face of it, look like a dispute of fact regarding which plans are legitimate. The key issue however revolves around the amended plans wherein the garage doors under consideration were removed. Close scrutiny of the allegations contained in the answering affidavit reveal that the respondent does not dispute that the amended plan, enclosing the garage door existed and that it was approved. What he contends is that Da Silva amended the plans without his approval, upon the appellant's insistence. The issue of Da Silva's authority to amend the plans is a separate issue in my view, which appears to be a collateral defence raised as a reason why the respondent would not comply with what he terms an 'unlawful instruction' by the appellant. The respondent does not recognise the amended plans, first because of Da Silva's lack of authority and secondly because he discovered the plans after he had built the garage doors, according to him, in compliance with the original, PRG1 plans.

[46] Accepting that the respondent had no knowledge of the existence of the amended plan, until the dispute arose, and/or that the amendment was made by Da Silva after the special consent was given, as he suggests, the question is why would he not challenge the appellant's officials' instruction on the basis of its legality instead of going through an expensive exercise of removing the garage doors installed and bricking the openings. The explanation he offers, that he went through this expense and effort because he was 'blackmailed' and he wanted the occupancy certificate to be granted, is untenable in my view. In fact his actions coupled with an email he wrote on 21 September 2011 support a view that he had knowledge of the 'new plan' and agreed with it. Otherwise on what basis would he build an unapproved structure and not formally challenge the 'unlawful requirements' of the appellant's officials? It also appears in the final notice dated 7 December 2011 that the respondent was notified in a letter of 23 September 2011 that the garage doors fitted to the outbuilding during construction must be converted back in line with the approved building plans.

[47] The respondent's action of re-building the garage doors after he had agreed to close them is tantamount to bad faith. It does not help him to say that he built those doors according to the original plans as it is clear that a lot of changes to the building took place between the time of the original plan and when he rebuilt the garage doors. He concedes that further amendments were made with regard to the size and the placement of the storeroom and laundry as the outbuilding was separated from the original residence and had become 1.28 square metres larger. He however did not annex the amendments which he alleges were made by hand on 7 February 2011 to his answering affidavit. To only refer to PRG1 as the only plan that existed creates an incorrect impression, even on the respondent's own version.

[48] Clearly the building, as borne out by the papers from both sides, looked nothing like the original plan, PRG1, at the time he re-built the garage doors and when the matter was brought before the magistrates' court.

[49] This fact is important because PRG1 formed the basis of the magistrate's judgment. From this, it would appear that the magistrate erred by simply focusing on PRG1 and not paying due regard to the other facts contained in the affidavits.

[50] To the extent that the respondent disputes the amended plans as not being the correct or legitimate ones, he did not challenge them even when he allegedly became aware of its existence. The approved amended plans exist. Even if the amendment which Da Silva made, was done after the garage doors were rebuilt or after the 'as built' plans were prepared, the crucial point is that that amendment was approved and ought to have been complied with or challenged *via* the necessary legal channels available if the respondent was unhappy about how those plans came about. I therefore agree with Mr Schmidt's submission that the principle raised in the **Oudekraal Estates (Pty) Ltd v City of Cape Town and others**[18] matter, to the effect that, 'Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked'[19], is relevant in this matter. The Court in **Oudekraal** went on further to say:

> '[35] It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question. A collateral challenge to the validity of the administrative act will be available, in other words, only "if the right remedy is sought by the right person in the right proceedings". Whether or not it is the right remedy in any particular proceedings will be determined by the proper construction of the relevant statutory instrument in the context of principles of the rule of law.' (Own emphasis)

[18][2004] 3 All SA 1 (SCA)

[19] See Oudekraal Estates (Pty) Ltd at para 26. See also Laurence Baxter in Administrative Law at page 355-356 where the principle is stated as follows:'[27] 'There exists an evidential presumption of validity expressed by the *maxim omnia praesumuntur rite esseacta*; and until the act in question is found to be unlawful by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are ''voidable'' because they have to be annulled.'

[51] It is common cause that the respondent has to date not sought to have the 'unlawful' amendment set aside on review. The amended plans which were approved by the appellant exist as a matter of fact. The respondent did nothing to challenge the lawfulness of such plans by first following the internal remedies and thereafter challenging the matter on review. Instead he complied with 'the instructions' of the appellant, which in my view showed that he was in agreement with the amendment of the plans.

[52] In conclusion, if one follows the Plascon- Evans rule[20], the respondent's version supports that of the appellant insofar as the existence of the amended plans is concerned and therefore the court is capable of granting the order sought by the appellant.

[53] In light of the reasons set out above, the magistrate erred by making a finding solely based on the PRG1 plan attached to the respondent's answering affidavit and not taking into account the common cause facts alleged in the papers, in the process. For that reason his judgment ought to be set aside.

[54] Reverting back to the condonation application. Despite the delay of over seven months to prosecute the appeal and the tardiness of the appellant's attorney in prosecuting the appeal, the merits of the case and its importance to the public weigh in favour of the granting of condonation. It is in the public interest that decisions of organs of state are observed and respected by members of the community. It would be amiss of this Court to overlook the actions of the respondent in this case, which were *mala fide*. In *Oudekraal Estates (Pty) Ltd v City of Cape Town*[21] the following was said:

> 'The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing

[20]Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623(A) at 634G – 635C.
[21] Oudekraal Estates (Pty) Ltd v City of Cape Town supra at paragraph 26

legally valid consequences for so long as the unlawful act is not set aside.' (Own emphasis)

[55] Having regard to the cumulative effect of the degree of non-compliance in the noting and prosecution of the appeal, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the matter and the prospects of success, which the court usually weighs in considering an application for condonation, the appellant's application for condonation should succeed.

[56] I would therefore propose an order in the following terms:

1. Condonation application is granted;
2. The appeal is upheld and the magistrate's judgment is set aside and the following order is made:

   2.1 The respondent is ordered to remove the garage doors installed on the laundry/garden store of his property and repair those in line with the amended building plans approved by the applicant and the respondent is ordered to pay the costs of the application.
3. The respondent is ordered to pay the appellant's costs of the appeal.

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N P BOQWANA

Judge of the High Court

I agree, and it is so ordered

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E BAARTMAN

Judge of the High Court

APPEARANCES

FORTHE APPELLANT: Advocate A Schmidt

Instructed by: Shcröter & Associates, George C/O Harmse Kriel, Cape Town

FOR THE FIRST RESPONDENT: Advocate J Whitehead SC

Instructed by: Cilliers Odendaal Attorneys C/O Vanderspuy, Cape Town