**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, PRETORIA**

16/1/2017
Case No. 18545/2012

In the matter between:

**SATARA ONTWIKKELAARS (EDMS) BPK** APPLICANT

and

**PIERRE KRYNAUW** RESPONDENT

**Heard on: 19 December 2016**
**Judgment on: 16 January 2017**

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**JUDGMENT**

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**CANCA AJ**

[1] This is an application for leave to appeal the whole of my judgment and order handed down by Justice Khumalo on 29 June 2016.
The applicant also seeks condonation for the late filing of the application for leave to appeal. The reasons for the late filing are dealt with hereunder.
The respondent opposes both the application for condonation and the one for leave to appeal.

[2] It is convenient to first consider the condonation application.

Condonation Application.

[3] On or about 31 October 2016, a Judge's Registrar of this Court forwarded me the aforementioned application for leave to appeal. As same was not accompanied by an application seeking condonation for the late filing of same, I requested the Registrar to enquire from the applicant's attorneys of record, if they intended to apply for condonation.

The condonation application was then filed on or about 21 November 2016 and the matter set down for hearing on 19 December 2016.

[4] According to the applicant's attorney, the reason for the late filing, in summary, is the following: Senior Counsel, who had been on brief for the trial, came across the judgment on the SAFLII website per chance sometime in September 2016. The applicant's attorney further avers that:

> "3.4. It appears from the website that the judgment had been delivered on 29 June 2016, without any indication to the plaintiff's attorneys of the judgment being handed down on that date. It is not known whether the defendant's attorneys had any knowledge of the judgment being handed down - as they never communicated with my firm about the judgment....."

[5] Upon receipt of the condonation application, I enquired from the Registrar, who had assisted me whilst acting in this Court during the relevant period, as to whether or not she had informed the parties when judgment would be handed down. She replied in the affirmative and pointed out that the respondent's representatives were in Court to note the judgment. She would never have just informed one party and not the other, she stated further. I have no reason to question the Registrar's version, particularly, given that one of the parties was represented when the judgment was handed down. The probabilities are that someone in the applicant's attorney's office forgot to note the date when judgment was to be handed down. It is also not clear to me why the applicant's attorney did not enquire from the Registrar as to when the judgment would be handed down given that the trial ended on 21 April 2016. It took over 5 months for the applicant's attorney to know that judgment had been handed down and even then, not through his own efforts but rather, through his senior counsel. I am, however, given that he has sworn on oath that he was not aware of the date of judgment, unable to question his *bona fides*.

[6] It is generally known that the Chief Justice has directed that judgments should not be outstanding for longer than 3 months. The impugned judgment was handed down well within that period and I would have expected the applicant's attorney to have started

making enquiries closer to the three months cut-off date and certainly thereafter. However, be that as it may, Mr Griessel for the respondent, did not object too strongly to the application for condonation as he was confident that the application did not have any prospects of success on appeal. Condonation was duly granted.

The application for leave to appeal.

[7] The application is based on 7 grounds and these are that I erred in:

1. dismissing the plaintiff's claim with costs;
2. not finding that the plaintiff had proved its damages;
3. dismissing the plaintiff's claim for R1 129 970.78 ("the addendum claim");
4. in finding that the plaintiff did not prove the quantum of the addendum claim;
5. in finding that the plaintiff had ceded and waived all or part of the addendum claim to Excalibur;
6. in finding that there was no evidence of negligence on the part of the Vermaark; and
7. in finding that the plaintiff failed to prove that sufficient evidence existed which could reasonably have been obtained and adduced by the defendant had he performed his mandate and on which evidence the plaintiff would have been successful with the addendum claim.

[8] Mr Rip, for the applicant, did not persist with the 6th ground of appeal and limited his attack to two main thrusts. These are that: (1) the plaintiff had proved its damages and (2) the evidentiary burden on the plaintiff was lower in this particular case. Reliance for this contention was placed on *Dhooma v Metha* **1957 (1) SA 676 (D) 678 E-F**. It was also argued on behalf of the applicant that the waiver or cession to Excalibur the respondent relied on had to have been in writing. There was no evidence that a valid cession or waiver took place particularly as the sale agreement contained a non-variation clause, so the argument continued.

[9] Mr Grissel countered these submissions by arguing, firstly, that the only evidence adduced to show what amounts were still due was the introduction of Annexure C which was compiled by Crouse on the evidence of Vermaak, both of whom did not testify. The testimony of Dr Theron on this aspect of the matter was consequently inadmissible hearsay evidence. Secondly, Mr Grissel persisted with the contention that the applicant had failed to prove that it suffered damages as a result of a breach of the mandate by the respondent. Finally, Mr Grissel contended that the variation clause

relied on by the applicant was in respect of the sale agreement and not the construction agreement. There was no proof that construction agreements were concluded or what their terms were, so the contention continued.

[10] These aspects of the matter are dealt with in detail in paragraphs 21 to 42 of my judgment and need not be repeated here.

[11] Having considered the applicant's grounds for leave to appeal to a Superior Court and the arguments in support thereof, I am not convinced that any of the grounds are such that another Court will come to a conclusion which will differ from mine. This application therefore stands to be dismissed. It lacks merit and contains no basis which will convince a Court of appeal to overturn my judgment.

[12] In the result, I order as follows:

The application for leave to appeal is dismissed with costs.

**CANCA AJ**