THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 147/2015

In the matter between:

LOCH LOGAN WATERFRONT (PTY) LIMITED **FIRST APPELLANT**

THE TRUSTEES OF THE N GEORGIOU TRUST **SECOND APPELLANT**

and

BENTEL ASSOCIATES INTERNATIONAL

(PTY) LIMITED **RESPONDENT**

Neutral Citation: *Loch Logan Waterfront v Bentel Associates International* (147/2015) [2017] ZASCA 135 (29 September 2017)

Coram: Lewis, Seriti and Petse JJA and Plasket and Schippers AJJA

Heard: 11 September 2017

Delivered: 29 September 2017

Summary: Condonation: application for condonation for late filing of appeal record not granted. Delay excessive and inexplicable.

Cross appeal: architect's contract with employer not varied in absence of written consent to delegation of employer's obligations; interest on amount awarded for fees and disbursements claimed is to be calculated in terms of the Prescribed Rate of Interest Act 55 of 1975; miscalculation of amount payable by trial court corrected.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Kruger J sitting as court of first instance).

1 The appellants' application for condonation in respect of the late filing of the record and for the reinstatement of their appeal is dismissed with the costs of two counsel.

2 The cross appeal is upheld with the costs of two counsel.

3 The order of the court a quo is set aside and is replaced with:

'(a) The N Georgiou Trust is ordered to pay the plaintiff the sum of R2 496 265.30 plus interest at the rate of 15.5% per annum from 19 May 2009 to date of payment.

(b) The N Georgiou Trust is ordered to pay the plaintiff's costs including those of two counsel.'

JUDGMENT

Lewis JA (Seriti and Petse JJA and Plasket and Schippers AJJA concurring)

[1] The appellants in this matter are Loch Logan Waterfront (Pty) Ltd (the company) and the Trustees of the N Georgiou Trust, to which I shall refer for convenience as 'the trust'. I shall refer to 'the appellants' collectively where appropriate. The respondent is Bentel Associates International (Pty) Ltd (Bentel), a firm of architects with a national practice, which has considerable experience in the design and construction of shopping centres.

[2] Some time in 2003, a representative of the trust, Mr T Koupis, met Mr P R Bray of Bentel, to discuss the design and construction of a shopping centre in Bloemfontein, on land owned by the trust – Loch Logan Waterfront. The name

conjures u visions of an attractive and alluring site. In fact, it is a small dam adjacent to which a number of restaurants and shops had been built some years previously.

[3] Bentel was awarded the mandate to design extensions to the existing buildings by the trust in 2006, and the building was largely completed in 2007. The dispute between the parties arose when Bentel claimed from the trust payment of outstanding fees and disbursements in the sum of R5 847 819, together with mora interest. It issued summons against both the trust and the company, which now owns the land and the shopping centre. The trust and the company defended the action, disputing the fees payable. They counterclaimed for various breaches of contract by Bentel in the provision of professional services.

[4] The trial proceeded before Kruger J in the Free State Division. In December 2014 he handed down judgment, finding in favour of Bentel and against the company only. But the learned trial judge awarded a very reduced amount as fees, as a result of a miscalculation – to which I shall return briefly as it is common cause that the learned judge erred in this regard; interest at the rate of only nine per cent per annum, and no costs in respect of its claims since Kruger J held that Bentel did not enjoy substantial success. The court granted absolution from the instance in respect of the counterclaim. The issues in the cross appeal are the award of the incorrect amount for fees and disbursements; the rate of interest payable; whether the company or the trust was bound by the contract (the locus standi issue); and the costs award.

[5] In February 2015, Kruger J gave leave to appeal to this court against that order to the appellants, and leave to cross appeal to Bentel. The appeal has, however, lapsed. The cross appeal was pursued and was argued independently of the appeal, as will appear below.

The application for condonation of late filing of the record, and for reinstatement of the appeal

[6] Before considering the merits of the cross appeal, it is necessary to decide whether we should condone the failure by the company and the trust to pursue the appeal timeously and properly. And if so, whether to reinstate the appeal. The history

of the proceedings between the noting of the appeal and cross-appeal and the date of the hearing of the cross appeal is significant.

[7] The notice of appeal was filed some six weeks after the cross appeal was noted, on 26 March 2015. The rules of this court required the record to be filed on 4 June 2015. However, in May 2015 Mr J Gautschi SC, who has had the unenviable task of dealing with this matter as the appellants' senior counsel, contacted Mr I Zidel SC, Bentel's senior counsel, to discuss the fact that the record was at that stage still incomplete. They agreed to ask the registrar of this court for an extension of time. The attorney for the appellants, Mr A J Barnard, of EG Cooper Majiedt (Coopers), confirmed that he would ask for an extension of three months ending in September 2015.

[8] Mr Barnard advised Mr S Perlman of Fluxman's attorneys (Fluxmans), representing Bentel, on 2 June 2015 that the transcription of the court record was incomplete and that recordings made by a Mr Badenhorst of Coopers were being used to reconstruct portions of the record. Mr Barnard advised that the reconstruction would take time, and that Coopers' 'Appeals division' would need a month in which to compile an index and do other work attendant on the preparation of the record. Mr Perlman responded on 30 March 2015, placing on record that Bentel had agreed to no more than a three-month extension.

[9] On 31 August 2015, Coopers wrote to Fluxmans reporting on progress in the preparation of the record and requested a further extension of three months, in which time the firm would 'in all likelihood be able to file the required record'. After consulting counsel, Fluxmans advised that Bentel agreed that the appellants would be given until 31 January 2016 to lodge a complete record. The transcript itself was required by the end of September 2015 and other documents by the end of October.

[10] On 12 October 2015 Fluxmans advised Coopers that the transcript was inaccurate and incomplete. Witnesses' names had been confused, and there were a number of other defects. By 2 November 2015, Coopers had not responded to this letter. Fluxmans reminded them of their failure and a response was sent by Coopers

on 17 November 2015. In their reply, sent on 7 December, Fluxmans advised that the appellants' 'supine attitude' to the compilation of the record made it impossible for them to assist with the record, and that Coopers should proceed itself to comply with the rules of this court.

[11] In the same letter Fluxmans advised that, should Coopers fail to comply with the rules of court, the appeal would lapse, but that Bentel would continue with the cross appeal. It also suggested that Coopers make use of a professional record compiler instead of relying on its own staff.

[12] On 21 January 2016, Fluxmans wrote to Coopers confirming that Mr Barnard and counsel had met Mr Perlman the previous day, and that Mr Perlman had provided Mr Barnard with comments on draft indices. Fluxmans also restated its position on the issues in the cross appeal.

[13] A year after leave to appeal was granted, on 1 February 2016, the appellants filed a record of appeal. Bentel regarded the record as defective, and the appellants were constrained to agree. It was not annotated and contained numerous duplicated documents. It had little practical value. Considerable correspondence passed between Coopers and Fluxmans, various different timelines were agreed, and eventually it was agreed that a proper record would be filed by 30 September 2016.

[14] Fluxmans reminded Coopers of the timeline on 11 August 2016. In the interim, Mr Gautschi had made valiant attempts to press Coopers into preparing the record properly. In his founding affidavit in an application for reinstatement of the appeal and condonation (filed only on 18 July 2017, as to which see below), Mr Oosthuizen of Coopers (who replaced Mr Barnard as the attorney involved with the appeal) referred to the many emails sent by Mr Gautschi chivying Coopers, explaining what was needed and suggesting ways in which Coopers should proceed. The September 2016 deadline was, nonetheless, not met.

[15] Fluxmans' correspondent attorneys in Bloemfontein, Matsepes, wrote to the registrar of this court on 11 October 2016 asking how to bring the matter to finality.

The office of the registrar advised Coopers the following day that the appeal had lapsed.

[16] Despite this, Coopers wrote to Fluxmans on 12 October 2016 recording an apology for the delay, and advising that Coopers had asked a Mr J Kumkaran to assist with the preparation of the appeal record. This was at the suggestion of Mr Gautschi. Coopers committed to filing the completed record by 9 November 2016 and asked for agreement on that date. Fluxmans responded that the appeal had lapsed and that it was not open to the parties to revive it by agreement. They repeated that Bentel was proceeding with the cross appeal.

[17] It was only when the heads of argument for the appellants in the cross appeal were received on 16 February 2016 that Bentel was given any indication that the appellants intended to apply for condonation and reinstatement of the appeal. The registrar of this court was advised the following day by Mr Oosthuizen that the appellants so intended. Coopers advised the registrar that the appeal and cross appeal should be heard together. It is not clear whether Coopers ever copied this letter to Fluxmans or whether they were advised of it. Since no application was in fact forthcoming the cross appeal was set down for hearing on 11 September 2017.

[18] When this court was seized with the record in the cross appeal, and the heads of argument of the parties, it made enquiries through the registrar on 4 July 2017 as to whether the appellants intended to pursue the appeal. The court asked that the appellants indicate their intention by no later than 18 July 2017. That request elicited an application for condonation and reinstatement, served at the last minute on 18 July, together with a new record of 18 volumes.

[19] The court, in early August 2017, then indicated to the appellants that the appeal could not be heard on the date of set down for the cross appeal, but gave leave to argue the application for condonation and reinstatement at the outset of the hearing of the cross appeal.

[20] In his founding affidavit to the application, Mr Oosthuizen said that after receiving the court's letter of 4 July 2017, 'final and very intensive work was done by

Mr Kumkaran to finalise the appeal record'. He continued: 'The appellants have at all times been resolute in pursuing this appeal and always believed (supported by the views of counsel acting for the Appellants) that they have good prospects of success in their appeal . . .' . No fault, he said, could be attributed to the appellants for the delay in finalizing the appeal record.

[21] It is trite that condonation is not there for the asking. A proper explanation for the delay must be furnished. The only explanation proffered by Coopers is that the transcribers let the appellants down and they had to hire Mr Kumkaran to assist in producing the record. This does not explain – least of all excuse – the failure on the part of Coopers to meet any deadline to which they had committed. Having failed to meet the September 2016 deadline, they appeared to go into hibernation. If there had been the slightest progress in the preparation of the record, then Coopers did not advise Fluxmans of this and did nothing to apply for condonation and reinstatement until asked by this court, in July 2017, to indicate the appellants' position. Between February and July 2017 nothing was done to indicate what the further delay was.

[22] Mr Kumkaran, who deposed to a supporting affidavit in the application, said no more than that it was a complex and time-consuming process and that he had spent 179 days working on it, but could not devote all his working time to the task as he is an attorney with other commitments. What is not explained is why Coopers asked a private practitioner to prepare the record, rather than an appeals record service. It is so that Mr Gautschi had suggested that Mr Kumkaran assist with the task, but that does not explain why the task was taken away from Coopers' appeal division or why a professional service was not used as well.

[23] Moreover, as Mr Perlman stated in his answering affidavit, the record that was eventually furnished on 18 July 2017 mirrored that which had been agreed to in September 2016. And it is significant too that Bentel was able to prepare the record in the cross appeal timeously.

[24] Mr Gautschi was placed in the invidious position of arguing that condonation should be granted and the appeal reinstated. The only argument that he could

advance was that the prospects of success in the appeal were good and that the extraordinary and inexplicable delay on the part of the appellants should be weighed against those good prospects. But that is not enough. Prospects of success are not the only factor that a court takes into account when considering a litigant's request for an indulgence. They must be considered in the context of an excessive and unexplained delay.

[25] The most recent judgment of this court dealing with the principles governing the grant of condonation is *Mtshali & others v Buffalo Conservation 97 (Pty) Ltd* (250/2017) [2017] ZASCA 127 (28September 2017) in which Plasket AJA discusses previous decisions of this court and the principles determined. These include *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) where Ponnan JA held that factors relevant to the discretion to grant or refuse condonation include 'the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice'.

[26] In *Darries v Sheriff, Magistrate's Court, Wynberg & another* 1998 (3) SA 34 (SCA) at 40I-41E Plewman JA pointed out that condonation is not a mere formality and will not necessarily be granted even where the failure to comply with the rules of court is entirely attributable to a party's attorney. He said:

'An appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. In applications of this sort the appellant's prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. But appellant's prospect of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be.'

[27] In *Tshivhase Royal Council & another v Tshivhase & another; Tshivhase & another v Tshivhase & another* 1992 (4) SA 852 (A) at 859E-F Nestadt JA pointed out that this court 'has often said that in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal are' and that this applies 'even where the blame lies solely with the attorney'. See also *Saloojee & another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141B-H.

[28] In my view, little more need be said. The failure on the part of the appellants to comply with the rules of this court has been flagrant and inexplicable. They did not bother to apply for condonation when they needed it. They sat back and allowed Bentel and this court to assume that they were not going to apply for condonation and that the appeal had lapsed. And the lack of any explanation for failing to comply with deadlines to which they had agreed is astonishing. Whatever prospects of success there might be fade into insignificance. Indeed, we might justifiably draw the inference from the silence between October 2016 and July 2017 that no one has much faith in the appeal that had been noted. No representative of the appellants has gone on oath to explain their determination to pursue the appeal and to explain why they have made no efforts to chase their attorneys.

[29] In the circumstances the application for condonation for the late filing of the appeal record and for reinstatement of the appeal must be dismissed with the costs of two counsel.

The cross appeal

[30] It will be recalled that the first issue in the cross appeal is the miscalculation by the trial court of the fees and disbursements owed to Bentel. The second is the rate of interest which the unsuccessful party should pay on the amounts outstanding, and the date from which it was payable. The third issue is whether the company had locus standi in the matter – whether only the trust was party to the contract with Bentel or whether the company had been substituted for it – and which entity was liable to Bentel. The award of costs is also in contention. I consider that the third issue, the company's locus standi, should be determined first. That entails a consideration of the documents constituting the contract between the parties.

The contract between the trust and Bentel

[31] On 23 June 2003, Mr P R Bray of Bentel wrote to Mr T Koupis representing the trust, thanking him for meeting to discuss the invitation to Bentel to undertake the architectural work for the proposed extension to Loch Logan. Mr Bray explained the nature of the contract that would be concluded, the fee that it would charge, and made various recommendations, including as to the appointment of a time management consultant. The letter was annexed to the particulars of claim as Annexure A.

[32] Mr Bray wrote to Mr Koupis again in February 2004 thanking him for Bentel's appointment as architects for the Loch Logan extension. He recorded that Bentel's services would be in accordance with the Institute of South African Architects' terms of appointment, subject to some variations. The standard terms (the architect's contract) were annexed as Annexure BA 1 to the letter, which constituted Annexure B to the particulars. It anticipated five work stages. The fifth work stage, to be performed by a Bloemfontein architect, entailed the contract administration and inspection. It is common cause that a locally based architect was appointed for this purpose.

[33] The terms of the agreement between the trust and Bentel were varied on 8 November 2005 and 19 April 2006, each variation by way of letter from Bentel to the trust, signed by the parties. The variations are annexed to the particulars as C and D. It is not disputed that the contract between Bentel and the trust was constituted by these letters, which incorporated the standard terms of the architect's contract.

[34] Significantly, clause 4.6 of the architect's contract, headed 'Change of status of the parties', read:

'Neither party shall assign, sublet or transfer its interest in this agreement without the written consent of the other, which consent shall not unreasonably be withheld.'

Clause 11.4, headed 'Whole agreement', read:

'This agreement, including any annexures hereto, is the whole of the contract between the parties and no variation hereof shall have any effect unless reduced to writing and signed by both parties. . . .'

The sale of Loch Logan Waterfront by the trust to the company

[35] Before the variation of the contract between the trust and Bentel on 19 April 2006 (Annexure D), on 20 October 2005, the trust sold to the first appellant, the company, the immovable property known as the Loch Logan Waterfront for the sum of R200m. The property was said to be sold as a 'going concern', which would be an 'income earning activity' and would remain operative as such until its transfer. The parties recorded that the company, as purchaser, should be enabled to 'continue the rental enterprise' from the property'. Kruger J held that the sale agreement, together with the conduct of the company and of Bentel had the effect of substituting the company for the trust in the architect's contract. Bentel argues on appeal that there was no change in parties.

Did the company, by virtue of the sale, become a party to the architect's contract?

[36] On 4 January 2006, a representative of the trust wrote to 'suppliers' advising that with effect from 1 December 2005, the Loch Logan Waterfront was transferred to a new company – the first appellant. Suppliers were requested to send all accounts to the company at a new address. This was followed by a letter from a Ms Georgiou of the company to a Mr L Vimercati, an employee of the project manager which was an agent of the trust, requesting that VAT invoices should be addressed in future to the company. Mr Vimercati forwarded the request to Mr R Leighton of Bentel, who in turn sent it to another employee of Bentel with a request to 'resolve'. The request was further confirmed by Mr Vimercati on 30 March 2006.

[37] From that time onwards, Bentel sent VAT invoices to the company. The significance of this, the company contends, is that by sending tax invoices to the company, Bentel agreed in writing to vary the architect's contract by making the company, rather than the trust, a party to the contract. And indeed, as I have said, Kruger J found that by its conduct, Bentel had agreed to a variation of the parties to the contract. He did not explain how the submission of tax invoices amounted to a written variation, signed by the parties.

[38] On appeal, Bentel argues that there are a number of indicia that there was no change in the agreement in writing, as required by its terms. I have already referred to one – the variation of the architect's contract on 19 April 2006 (Annexure D) took place after the sale of Loch Logan Waterfront by the trust to the company. Yet the variation agreement was between the trust and Bentel. It was clearly envisaged that Bentel's mandate continued to be with the trust.

[39] At site meetings after the sale and transfer of the property to the company, the trust continued to be the entity to which Bentel and other agents were obliged to meet their obligations. For example, the minutes of a meeting dated 25 April 2006 reflect that 'for contractual purposes the client is to remain the N Georgiou Trust'.

[40] The appellants argue, on the other hand, that the fact that tax invoices were sent, after the sale, to the company rather than the trust, reflects an intention on the part of Bentel that it accepted the company as the other contracting party. That seems to me to be not only contrary to the provisions of the architect's contract, which deals with the manner of variation, but also contrary to the other evidence. For the kind of variation for which the appellants contend to be effective, Bentel would have had to agree to the delegation of its obligations to the trust by the latter to the company. The mere invoicing of another entity does not amount to an agreement to delegate. It is, as Bentel argues, nothing more than a payment arrangement – Bentel agreeing to accept payment of its fees and disbursement by the company rather than the trust.

[41] G B Bradfield *Christie's Law of Contract in South Africa* 7 ed p 536, in dealing with delegation, points to a number of situations where a creditor requests a debtor to make payment to a third party, but which do not amount to a delegation. The mere rendering of an invoice to a third party cannot, in the absence of agreement on the part of a creditor, amount to a delegation.

[42] As against this, the appellants argue that a letter of demand in terms of s 345 of the Companies Act 61 of 1973, threatening liquidation, was sent by Bentel to the company on 16 September 2008. This was not followed through. In May 2009, Bentel issued summons against both appellants claiming some R6m and Bentel

proceeded to claim summary judgment against both. The appellants argue that the inability of a witness for Bentel to explain why summons was issued against both appellants, and why summary judgment was sought against both, shows that it regarded the company as a party to the architect's contract. In my view, the evidence is irrelevant. It goes not to agreement on delegation of the trust's obligations to Bentel, but to subsequent legal proceedings.

[43] In argument before us, Bentel asserted that it had claimed against both the trust and the company ex abundante cautela. But in any event, it argues, the pleadings did not make any case against the company, and in the plea the appellants did not assert that the company, rather than the trust, was party to the architect's contract.

[44] Bentel's particulars of claim relied on the contracts reflected in Annexures A to D. These all reflected the trust as the party to the architect's contract. In its plea, the appellants did not dispute that these were the written contracts on which Bentel relied, but pleaded that the company 'took over all the rights and obligations from' the trust, including 'the rights and obligations towards [Bentel]'. Bentel, in its request for further particulars for trial, asked when and how the 'taking over' had occurred and whether there was any written agreement in this regard. The response of the appellants was that 'it was not in dispute between the parties that the relevant parties to the claim are the plaintiff and [the company]'. This is hardly a proper response: there is no allegation that the trust ceded its rights and delegated its obligations to the company, with Bentel's consent, in writing. That was what was required in order to show that the trust's obligations to Bentel had been delegated to the company. Invoices sent by Bentel to the company, at the request of the company, hardly amount to a written agreement that the trust could delegate its obligations to the company.

[45] The pleadings thus do not bear out the contention of the appellants that the company had been substituted for the trust as the party to the architect's contract with Bentel. The party alleging a delegation must prove it. (*Van Achterberg v Walters* 1950 (3) SA 734 (T) at 745.) But in any event, the appellants did not plead a proper delegation.

[46] Kruger J in the trial court took into account the oral evidence of Mr Koupis, representing the appellants. He testified that it was common in developments of the kind embarked upon that the developer creates a separate entity to 'ring-fence' the risk. This was what had happened when the trust sold the property and business as 'a going concern'. The sale of the property was expressly stated to be that of a 'going concern'. The contract recorded that the property 'will remain active and operating as such until its transfer'. It also recorded that the company would be enabled by the trust, as seller, 'to continue the rental enterprise conducted from the property'. This, argued the appellants, meant that all the obligations of the trust were transferred to the company, and the company was not only entitled to receive rentals from tenants, but also obliged to pay professionals who had contracted with the trust, such as Bentel.

[47] However, the sale also recorded that:

'It is specifically agreed that, as far as it may be necessary, the Seller [the trust] shall enter into such Agreements as may be necessary to assign its rights and obligations (but does not warrant the other party will consent to the delegation) in terms of the contracts referred to above to the Purchaser [the company].'

Kruger J did not consider whether there had been any delegation by the trust of its obligations to Bentel, as envisaged in the sale, and to which Bentel had agreed. But he did take into account that there was no evidence that any representative of Bentel had ever objected to the 'taking over' by the company of the trust's business.

[48] Since there was no delegation pleaded, however, the evidence was inadmissible: *Société Commerciale de Moteurs v Ackermann* 1981 (3) SA 422 (A) at 435C-D. The difficulty was that Kruger J decided at the outset of the trial that he would allow all the evidence that the parties wished to lead, without objection, and would determine admissibility at a later stage. In the end, he made no rulings as to admissibility, and so took into account evidence that was irrelevant to the respective cases the parties had made out in their pleadings. As Bentel argued before this court, the practice of allowing all evidence that a party wishes to adduce and making a ruling as to admissibility later, is one that conduces to poor trial management. It prolongs the trial and results in irrelevant or hearsay evidence being taken into account. (See in this regard *Price Waterhouse Coopers Inc & others v National*

Potato Co-operative & another [2015] ZASCA 2; 2015 (2) All SA 403 (SCA) paras 80 and 81.)

[49] The final argument for Bentel that the company was not a party to the architect's agreement, and which I regard as conclusive, is that the entire contractual matrix in respect of the construction of the Loch Logan Waterfront's extensions would have failed if the trust were to have fallen away as a party. The principal contractor for the project was the construction firm, Murray and Roberts Construction (Pty) Ltd (M & R). The main contract was between the trust and M & R. The contracting 'and other parties' were the trust, D Nel as principal agent (the architect representing the Bloemfontein firm responsible for supervision and final work); Bentel as agent 1; the quantity surveyors appointed as agent 2; the structural engineers as agent 3; the consulting engineers as agent 4 and project consultants as agent 5. A project manager and fire consultant had yet to be appointed.

[50] All these professionals, including Bentel, were thus agents for the employer – the trust. All continued to be responsible to the trust until the termination of the project. The trust's contract with M & R remained unaffected by the sale of the property and the business of the shopping centre by the trust to the company. That was expressly agreed to be so. The appellants argue now that the M & R contract was exceptional. Various bank guarantees in favour of the trust would have had to be replaced if the company became the employer, and that would have been a costly exercise – so the trust remained in place as the employer in the principal contract.

[51] As Bentel argues on appeal, it would make absolutely no sense for M & R to be contractually liable to the trust, but its agents liable to the company. It follows that the company had no locus standi to sue for damages for breach of contract. And that Bentel's claims for fees and disbursements are against the trust only.

Bentel's claim for fees and disbursements

[52] As I have said, it is common cause that Kruger J erred in calculating the amount that he found was due to Bentel. He failed to take VAT into account and thus awarded the sum of R578 580, instead of R2 496 265. The difference is substantial.

Since the parties are agreed on the correct amount to be awarded, and as to the manner of its calculation, there is no need to deal with it and the cross appeal must succeed in this respect too.

Mora interest

[53] Bentel claimed interest a tempore morae at the prescribed rate of 15.5% per annum. Kruger J awarded interest only at the rate of nine per cent per annum, reasoning that the contract itself made no provision for mora interest, that it had been varied from time to time, and that the works had not yet been concluded. He thus also held that it was fair that interest be payable only from the date of judgment.

[54] The appellants argue that the amount claimed by Bentel was not liquidated and thus interest at the prescribed rate was not claimable. The argument loses sight of the fact that Bentel was not claiming damages. It is true that there were disputes as to whether certain fees were owing, but that does not mean that the claim for fees and disbursements was illiquid. It was determinable by calculation and required no exercise of judgement as to what should be paid. It is plain that the trust was in mora in so far as payment of fees to the company was concerned.

[55] The Prescribed Rate of Interest Act 55 of 1975 provides that interest shall run from the date on which payment is claimed by service on the debtor of a demand or summons. (See *David Trust v Aegis Insurance Co Ltd & another* 2000 (3) SA 289 (SCA) para 39.) The summons was served on the trust on 14 May 2009. Accordingly, the trust is liable to pay interest at the rate of 15.5% per annum on the sum of R2 496 265 from that date.

Costs

[56] Kruger J in the trial court considered that Bentel had not enjoyed substantial success in respect of its claim, and accordingly awarded it no costs. However, that was in large measure because he miscalculated the amount payable to Bentel and imposed interest at the wrong rate. It seems to me that Bentel was entitled to all its costs in respect of its claim, including those of two counsel. The trial court awarded Bentel only 50% of the costs in respect of the counterclaim on the basis that it had

pursued the wrong defendant – the trust. As I have already concluded, the trust was correctly cited as a defendant.

[57] In the result, the following orders are made:

1 The appellants' application for condonation in respect of the late filing of the record and for the reinstatement of their appeal is dismissed with the costs of two counsel.

2 The cross appeal is upheld with the costs of two counsel.

3 The order of the court a quo is set aside and is replaced with:

(a) The N Georgiou Trust is ordered to pay the plaintiff the sum of R2 496 265.30 plus interest at the rate of 15.5% per annum from 19 May 2009 to date of payment.

(b) The N Georgiou Trust is ordered to pay the plaintiff's costs including those of two counsel.'

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C H Lewis

Judge of Appeal

APPEARANCES

For the First and Second Appellants:	J Gautschi SC (Heads of Argument also prepared by A J R van Rhyn SC)
Instructed by:	E G Cooper Majiedt Inc, Bloemfontein
For the Respondent:	I J Zidel SC (with him D R van Zyl SC)
Instructed by:	Fluxmans Inc, Rosebank Matsepes Inc, Bloemfontein