

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: **1216/2004**

In the matter between:

PETZETAKIS AFRICA (PTY) LIMITED

Plaintiff

and

CHIANTI CIVILS (PTY) LIMITED

Defendant

JUDGMENT DELIVERED ON MONDAY, 27 FEBRUARY 2006

NTSEBEZA, AJ:

INTRODUCTION

[1] On 17 February 2006, I heard argument from both Counsel, to whom I am indebted, on application for leave to appeal brought by the Defendant against the whole of my judgment delivered on 24 November 2005. The Defendant, in its notice, stated that another court could reasonably come to a different conclusion for the reasons stated in the notice. For the sake of

completeness I quote herein the reasons indicated by the Defendant in its notice of application.

- " 1.1 *The learned Judge erred in not finding that it was inherently improbable that the Defendant would have contracted with the Plaintiff on the basis that if the Plaintiff delivered pipes for installation underground and such pipes had latent defects which could result in it leaking and having to be replaced, the liability of the Plaintiff for the costs of the replacement of such pipes would be excluded; another Court may come to the conclusion that where such an exclusion was contained in the standard terms and conditions upon which a seller sells goods, and could have the effect of leaving the purchaser without an effective remedy where the goods delivered did not comply with the specifications stated by the seller, or whether the goods were in other respects materially defective, it was improbable that it had been within the contemplation of the purchaser at the time of the conclusion of the contract of sale that the liability of the seller relied upon such an exclusionary clause in the standard terms and conditions upon which the goods were supplied, it was incumbent upon a Court to determine the precise extent to which the purchaser had agreed to the exclusion of the seller's liability; and*
- 1.2 *The precise ambit of an exclusionary clause contained in standard terms and conditions for the sale of goods or services that could potentially leave the purchaser without any remedy for a complete lack of performance on the part of a seller, should as a matter of policy be determined on the evidence."*

The Plaintiff opposed the application. Counsel, on the hearing of the application, were the same as had been in the trial itself, namely Mr Brown for the Plaintiff, and Mr Oliver for the Defendant.

- [2] Mr Oliver, in effect, said no more than what he had submitted in argument before my judgment. Once again, the gravamen of his argument is in fact

contained in his notice. Stripped of all its detail, Mr Oliver's argument amounts to the following:

- 2.1 Another court could have taken into account what a purchaser would reasonably have had in mind in agreeing to the exclusionary clauses that constituted the subject matter of debate in the case whose judgment is now being appealed against;
- 2.2 In the alternative, and when one has regard, to the notice of application for leave to appeal, another court would have come to a view that ordinary people sometimes sign things without thinking about all the possible consequences;
- 2.3 There is a constitutional court authority – *Jaftha v Schoeman & Others; Van Rooyen v Stoltz and Others*,¹ which Mr Oliver purported to rely upon in support of the propositions he made, which, if I understood him, is authority for the proposition that even in commercial transactions, an inquiry needs to be made into the circumstances under which a particular commercial transaction was made.

[3] I took time to go and read and study the *Jaftha* (*supra*) case. It is a case that dealt with whether Section 67 of the Magistrate's Court Act 32 of 1944 was constitutional or not to the extent that it does not, provide for blanket prohibition against sales in execution for homes below a certain value, regard being had to the provisions of Section 26 of the Constitution. It is true that in the

¹ 2005 (2) SA 140 (CC)

judgment, the Court did hold that in dealing with the question of determining the constitutionality or otherwise of this section but more in particularly in dealing with the question of whether a blanket prohibition against sales in execution below a particular value was appropriate or not, the court might consider certain factors amongst which, but not limited to, circumstances in which the debt was incurred, any attempts made by the debtor to pay off the debt, the financial situation of the parties, the amount of the debt, whether the debtor is employed or has a source of income to pay off the debt, and any other factor relevant to the particular facts of the case before a court.²

[4] Not only is this case distinguishable on facts because of the subject matter that it dealt with, but I also cannot find its applicability to the circumstances of this case, other than that it merely restates a broad principle, trite in our law, that a court should take into account all relevant circumstances before it comes to a conclusion, particularly in the context of a case where a decision of the court might well affect the entrenched constitutional rights of an individual.

[5] In the context of the *Jaftha (supra)* case, the Court spoke as it did because the decision of the court might well deprive an individual of his or her right to housing, a right entrenched in Section 26 of the Constitution. I therefore, in distinguishing the *Jaftha* case, find, for the reasons that follow, that the case is inapplicable and does not assist Mr Oliver. I decline his invitation to me to apply it to the facts – and indeed the well established law – in this case.

² Para [60] at 163 E-P

LEGAL PRINCIPLES

[6] The test in an application for leave to appeal is whether a court is satisfied that there are prospects of success on appeal. Stated differently, the test is whether there are reasonable prospects that another court might reverse or materially alter the judgment of the court that heard the matter now sought to be appealed against.

See: *Zweni v Minister of Law & Order*.³

[7] Where the matter concerns difficult and complex issues of law, particularly in an area of law that is developing, a court may well be inclined to grant leave to appeal.

See: *Rail Commuter Action Group & Others v Transnet Ltd t/a Metrorail & Others (2)*.⁴

As Mr Brown submitted in his short principal submissions opposing leave to appeal, where the matter concerns a settled area of law – and the law of contract is pretty much that sort of area in our law, - and where the judgment is not assailable on any reasonable grounds given the law as it exists, leave to appeal ought not to be granted. This is particularly so where the facts are not complex or disputed and the law is clear. I am in respectful agreement with this submission made by Mr Brown.

³ 1993 (1) SA 523 (A)

⁴ 2003 (5) SA 593 (C)

See: *Debbie Lewis & Another v Chairman Amnesty Committee of the Truth and Reconciliation Commission & Others*.⁵

[8] In the judgment now appealed against, reference to which was not even made by Mr Oliver in his argument before me, ⁶ I stated fully what the facts were, and how the law applied to the facts. I am not persuaded that in an area where the law is settled, by the Provincial Divisions and the Supreme Court of Appeal, there would be any point in granting leave just to test whether the law is still what it looks like it is on all the authorities. ⁷

[9] I need not repeat my findings that the facts upon which the matter was determined by me, on the pleadings, were not disputed. I found, and in my respectful view no other court could find otherwise, that each and every allegation made in the Plaintiff's Particulars of Claim was admitted, and that the Defendant had accordingly admitted that it owed the Plaintiff the sum of R554 395,74. I found that the Defendant's defence to the action, accordingly, lay only in its counterclaim. Accordingly, all I had to decide was the limited legal argument as to whether the exclusionary clause, of the admitted contract, excluded the Defendant's counterclaim or not. I cannot see on what basis any other court would find that there is any room for the Defendant to dispute facts that it unqualifiedly admitted, which it never sought to withdraw during argument, and which it would now seek to dispute and/or withdraw and/or qualify at the stage of its application for leave to appeal.

⁵ 2002 (3) SA 485 (C) at 488 F

⁶ Mr Oliver had not filed any written submissions

⁷ *The Rail Commuter Action Group* is a case in point where this court has made the point that granting leave to appeal would not only be inappropriate but would also be prejudicial to one of the parties that is inconvenienced by a delay in its reception of justice.

See: *Afrox Healthcare Bpk v Strydom*,⁸ *First National Bank of SA Ltd v Rosenblum and Another*,⁹ and *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd*.¹⁰

[10] No other court, in the face of admissions made by the Defendant, could find it possible to venture into the realm of probabilities contended for by Mr Oliver, when the facts, and the application of the law, are clear, uncontentious and unambiguous. In the circumstances, granting leave would not only be a waste of time. It would amount to declining the Plaintiff its entitlement to execute on its judgment. Consequently, the application for leave to appeal is dismissed with costs.

D B NTSEBEZA

Acting Judge of the High Court of South Africa

Date of Hearing: 17 FEBRUARY 2006

Date of Judgment: 27 FEBRUARY 2006

For the Plaintiff: **AD BROWN**

Instructed by: MINDE SCHAPIRO & SMITH

CAPE TOWN

⁸ 2002 (6) SA 21 (SCA)

⁹ 2001 (4) SA 189 (SCA)

¹⁰ 1978 (2) SA 794 (A)

For the Defendant:

G OLIVER

Instructed by: ALAN G JONES INC.

CAPE TOWN