



**THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION**

Reportable: YES/NO

Case No: 5476/2019

In the matter between:

ROUTE MANAGEMENT (PTY) LTD t/a BUSAF BAUER

Applicant/Defendant

and

**MISTY SEA TRADING 296 (PTY) LTD t/a
PROJECT LOGISTICS MANAGEMENT**

Respondent/Plaintiff

Coram: Opperman, J

Heard: 20 October 2023

Delivered: 23 October 2023. This judgment was handed down in court and electronically by circulation to the parties' legal representatives *via* email and release to SAFLII on 23 October 2023. The date and time of hand-down is deemed to be 15h00 on 23 October 2023

Judgment: Opperman, J

Summary: Application for leave to appeal

JUDGMENT

- [1] The application for leave to appeal that lies before court relates to a matter that served on trial before Pohl, AJ. His term as acting judge lapsed and the matter is entertained in terms of section 17(2)(a) of the *Superior Courts Act* 10 of 2013 read with Rule 49(1)(c) of the *Uniform Rules of Court* in that leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same Court or Division.
- [2] The application for leave to appeal was filed on 4 July 2023 but the matter could not be set down for hearing due to the fact that the judge to whom the matter was allocated, went on sick leave and the matter was transferred to myself on 17 August 2023. Dates were immediately suggested to the parties and the first suitable date for both parties was 20 October 2023. The matter was finalised on virtual platform at 08h00 on 20 October 2023.
- [3] The background of the case is the following according to the court *a quo*:
INTRODUCTION:
- [1] The Plaintiff in this matter is in the logistics and transport business. The Defendant in this matter inter alia designs and manufactures truck trailers for use in different transport applications.
- [2] During September 2017, the Plaintiff approached the Defendant to design and manufacture a so-called tri-axle step deck trailer for use in Plaintiff's transport business. The Defendant then duly designed and manufactured the said trailer and supplied same to the Plaintiff during March 2018.
- [3] The Plaintiff's case is that the said trailer suffers from latent defects. The Plaintiff consequently returned the trailer to the Defendant and instituted action against the Defendant for repayment of the purchase price based on the *actio redhibitoria* and argued further that it is entitled in the alternative, to damages based on breach of contract if the Court does not find in its favour on the *actio redhibitoria*.
- [4] The Plaintiff in this matter was represented by Adv S. Hoar and the Defendant was represented by Adv W.J. Groenewald.
- [4] A further issue that came to the fore is the position of an entity called Reichmans Capital, that might be a party to the litigation.

[5] This is the order *a quo*:

ORDER:

[57] In the premises I make the following order:

- 1 The lawful cancellation of the of the sale agreement is confirmed.
2. The Defendant is ordered to pay the Plaintiff the amount of R564 300.00.
3. The Defendant is ordered to pay the Plaintiff interest *a tempore morae* on the aforesaid amount.
4. The Defendant is ordered to pay the Plaintiff's costs of suit, which costs will include the costs pertaining to the application for absolution from the instance which was brought at the conclusion of the Plaintiff's case.

[6] The atmosphere of this case cautioned and directed this court to the words of the Constitutional Court in *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and others* 2007 (2) SACR 28 (CC) that defined the judicial character of the task conferred upon a presiding officer in determining whether to grant leave to appeal. It should be approached on the footing of intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor over-anxiously referring decisions that are indubitably correct to an Appellate Court.

[7] The Supreme Court of Appeal in *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA) in March 2021 ruled that:

[10] ... If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.

[8] The applicant maintains that the agreement of sale was concluded between the applicant and the respondent. Reichmans Capital merely financed the sale of the trailer on behalf of the respondent. Further:

46 The Court therefore respectfully erred in finding that Reichmans:

46.1 purchased the trailer from the applicant, and

46.2 ceded to the respondent all of its rights, title, and interest as purchaser in and to the sale agreement.

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47.1 The exemption clause contained in clause 8.1 of the conditions of sale is applicable to the sale agreement concluded between the applicant and the respondent.

47.2 Because the trailer be supplied by the applicant to 'the client' (the respondent) in accordance with the instructions and/or specifications and/or dimensions as specified by the respondent, as envisaged in clause 8.1 of the conditions of sale, the respondent cannot claim against the applicant.

47.3 According to the respondent Reichmans purchased the trailer from the applicant in terms of the sale agreement. Reichmans is therefore "the client" as envisaged in clause 8.1 of the conditions of sale. The conditions of sale are therefore applicable, even if the sale agreement was in fact concluded between the applicant and Reichmans, on the respondent's version.

48 The applicant duly manufactured and supplied the trailer to the respondent and the Honourable Court respectfully erred in finding that the applicant breached and repudiated the sale agreement in any manner.

49 It is humbly submitted that the Honourable Court erred in granting judgment in favour of the respondent against the applicant.

50 It is further submitted that the Honourable Court erred by not dismissing the respondent's claim against the applicant with costs.

CONCLUSION:

51 It is humbly submitted that the applicant has made out a proper case for the relief that it seeks.

52 It is therefore humbly submitted that the following order should be granted:

52.1 That leave be granted to the applicant to appeal to the Full Bench of the Free State High Court, Bloemfontein against the whole of the order and judgment granted by this Court on 20 June 2023;

52.2 That the costs of this application for leave to appeal be costs in the appeal.

[9] The respondent opposes the above and maintains that:

INTRODUCTION

1. The applicant was the defendant and the respondent the plaintiff in the principal action. The parties shall hereinafter be referred to (sic) plaintiff and defendant.
2. During September 2017, the plaintiff approached the defendant, an expert in designing, manufacturing and supplying of truck trailers to the transport industry, to design and manufacture a specific trailer for use in the plaintiff's logistics and transport business.
3. The defendant designed and manufactured the trailer (chassis number AAH123296LR30050) and supplied (sic) it to the plaintiff during March 2018 ("the trailer").
4. The plaintiff immediately encountered numerous problems with the trailer, which included that the deck of the trailer "ran uphill" (i.e. did not sit level) when the trailer was coupled to the plaintiff's truck tractors, the trailing arms of the suspension on the trailer were snagging (dragging on the ground) when the trailer was reversed, or towed over speed bumps, rail crossings and gate rails and the combination length of the trailer, when coupled to the plaintiff's truck tractors, exceeded the legal length of 18,5 meters.
5. The plaintiff complained about the defects in the trailer and the defendant acknowledged that there were "problems" and put forward "proposed solutions". These were not acceptable to the plaintiff.
6. At no stage prior to the defendant's attorney becoming involved in the matter did the defendant seek to:
 - 6.1 exonerate itself from liability for the defects in the trailer;
 - 6.2 contend that there was nothing wrong with the trailer; or
 - 6.3 contend that it had supplied the trailer according to the plaintiff's specifications and that it was not responsible for any problems/defects in the trailer.
7. Ultimately, the defendant never rectified the situation, resulting in the plaintiff cancelling the sale agreement returning the trailer to the defendant and claiming repayment of the purchase price.
8. The defendant refused to reimburse the purchase price to the plaintiff and the plaintiff instituted action against the defendant, ultimately succeeding at trial.
9. This was always a simple matter, rendered unnecessarily complicated by the defendant's attempts to evade liability to the plaintiff for the obvious defects in the trailer. That the defendant, a self-proclaimed trailer manufacturing specialist, continues to contend that a trailer, the suspension of which drags on the ground, rips out gate rails and catches on speedbumps, is fit for the purposes for which it was sold, is somewhat astounding. *Res ipsa loquitur*.

[10] Reading of the evidence, having heard the arguments of counsel for the parties and with due regard to the complexity of the issues in dispute and the evidence tendered; it is concluded that there is a real and reasonable prospect of success on appeal and that a court of appeal could reasonably arrive at a conclusion different to that of the trial court.

[11] ORDER

1. Leave is granted to the applicant to appeal to the Full Bench of the Free State High Court, Bloemfontein against the whole of the order and judgment granted by this court on 20 June 2023.
2. The costs of this application for leave to appeal be costs in the appeal.



M OPPERMAN, J
APPEARANCES

On behalf of the applicant

N SNELLENBURG SC
W.J. GROENEWALD
 Bloemfontein
Symington De Kok Inc.
 Bloemfontein

On behalf of the respondent

S HOAR
 Durban
Lott Attorneys
 Kloof
 c/o Lovius Block Attorneys/Honey Attorneys
 Bloemfontein