IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 20900/08

In the matter between:

ROSSO SPORT AUTO CC **Applicant**

and

VIGLIETTI MOTORS (PTY) LTD **Respondent**

JUDGMENT DELIVERED ON 26 AUGUST 2009

ALLIE, J

[1] The application for leave to appeal the judgment of this court delivered on 15 July 2009 is based on the following grounds; *inter alia*:

> *1.1. The court erred in finding that clause 4.2 of appendix "A" to the dealership agreement between the parties is unambiguous and imposes an obligation upon the applicant to make payment for the purchase price of vehicles prior to delivery of such vehicles to it.*
>
> *1.2. The court should have found that the provisions regarding payment are ambiguous and are capable of being interpreted in at least three ways, namely: payment be made "ex-works"; payment shall be made upon delivery to the dealer or payment shall be made upon delivery to the dealer's customer.*

1.3. The court should have found that it might not be possible to interpret clause 4.2 of appendix "A" at all and that the clause might in the circumstances be void for vagueness.

1.4. The court should have found that the meaning of clause 4.2 could not be established without hearing oral evidence.

1.5. The court should have found that the way in which the parties performed the agreement, namely by the respondents stipulating for payment and the applicant making payment only after delivery, provided acceptable and admissible evidence of the meaning of clause 4.2.

1.6. The court should have found that in view of the unexplained discrepancies in prices charged by the respondent for identical vehicles and identical optional extras, the applicant was entitled to be satisfied that it was paying the correct price for each vehicle prior to being obliged to make payment therefor.

1.7. The court erred in holding that the applicant was obliged to pay on pro forma invoices and should have found that the obligation to pay only arise once final invoices were delivered, alternatively should have found that as the agreement was silent on the form of invoice to be rendered for payment, oral evidence should be heard.

Prospects of Success:

[2] Although the court found that clause 4.2 was clear and unambiguous, the court examined the conduct of the parties subsequent to the signing of the agreement and came to the conclusion in paragraph 26 of the judgment, that such conduct did not lend support for the applicant's argument that it was obliged to pay only after delivery of the motor vehicles to it. In so doing the court indulged the applicant's exhortation to look at the subsequent conduct of the parties.

[3] The court concluded in paragraph 19 of the judgment that prior to the respondent cancelling the agreement on 26 January 2009, the applicant's legal representive confirmed that the established practice between the parties with regard to terms of payment was on an *ad hoc* basis and re-affirmed that the parties were bound by the terms of payment set out in clause 4.2. On this aspect the parties were *ad idem* at the time. There is accordingly no dispute of fact that ought to have been determined by reference to oral evidence.

[4] In paragraph 17 of the judgment, the court had regard to a primary rule of interpretation, namely the plain meaning of the clause. The court also looked at the entire clause 4.2 including the second sentence in the clause which supports the interpretation that "prior to such date of delivery" refers to delivery by the respondent to the applicant.

[5] The words “prior to such date of delivery” was interpreted in the context of the whole of clause 4.2 and in the context of the agreement as a whole as set out in paragraph 27 of the judgement.

[6] The obligation to pay “prior to such date of delivery” means that once delivery was tendered and an invoice generated, the payment became due. The second sentence of clause 4.2 stipulates that delivery must occur within 7 days of payment. Conversely, payment must be made 7 days before delivery.

[7] In the absence of a real and *bona fide* dispute concerning payment upon receipt of a pro forma invoice, there was no basis for a reference to oral evidence on that aspect.

[8] The alleged unexplained discrepancies in prices charged was explained in the papers by the respondent who attributed the discrepancies to a change in currency exchange rates. More importantly, the applicant failed to establish on the papers, that it was entitled to withhold payment because of the alleged discrepancies. This was the finding in paragraphs 29 and 30 of the judgment.

[9] In the circumstances, I am not persuaded that there is a reasonable that another court may arrive at a different decision.

Appeal will afford no substantial consequences:

[10] I was invited to dismiss the application in terms of Section 21A of the Supreme Court Act 59 of 1959. It is common cause that the respondent has once again terminated the contract on 180 days' notice on 30 July 2009.

[11] On 26 January 2010 the contract would effectively end. The respondent gave notice in anticipation of the applicant's contention that the agreement will be revived on appeal. It is further common cause that if leave to appeal is granted, an appeal would not be heard before 26 January 2010.

[12] Section 21A reads as follows:

> *"21A Powers of court of appeal in certain civil proceedings*
>
> *1. When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.*
>
> *(2)(a) If at any time prior to the hearing of an appeal the Chief Justice or the Judge President, as the case may be, is prima facie of the view that it would be appropriate to dismiss the appeal on the grounds set out in subsection (1), he*

or she shall call for written representations from the respective parties as to why the appeal should not be so dismissed.

(b) Upon receipt of the written representations or, failing which, at the expiry of the time determined for their lodging, the matter shall be referred by the Chief Justice or by the Judge President, as the case may be, to three judges of the Division concerned for their consideration.

(c) The judges considering the matter may order that the question whether the appeal should be dismissed on the grounds set out in subsection (1) be argued before them at a place and time appointed, and may, whether or not they have so ordered-

(i) order that the appeal be dismissed, with or without an order as to the costs incurred in any of the courts below or in respect of the costs of appeal, including the cost in respect of the preparation and lodging of the written representations; or

(ii) order that the appeal proceed in the ordinary course.

(3) Save under exceptional circumstances, the question whether the judgment order would have no practical effect or result, is to be determined without reference to consideration of costs.

(4) The provisions of subsections (2) and (3) shall apply with the necessary changes if a petition referred to in section 21 (3) is considered.

[13] The relief sought on appeal would have no practical value and would be purely academic, save for the determination of the issue of costs.

[14] Although Section 21A(1) and (2) of the Supreme Court Act refer to the court dealing with an appeal, Section 21A(4) extends the section to courts considering a petition for leave to appeal.

[15] Provincial or Local Divisions of the High Court who hear applications for leave to appeal are in an analogous position to the courts contemplated in Section 21A(4).

[16] **The cases that dealt with the application of Section 21(A) are: Logistic Technologies (Pty) Ltd v Coetzee & Others 1998 (3) SA 1071 (W)** at 1075 I to J; **Police and Prisons Civil Rights Uniorn & Others v Minister of Correctional Services & Others (No. 2) 2008 (30 SA 129 (E)** at 132 para 8 and **Rand Water Board v Rotek Industries (Pty) Ltd 2003 (4) SA 58 (SCA) Premier Provinsie Mpumalanga en ’n Ander v Groblersdalse Stadsraad 1998 (2**) SA 1136 (SCA) at 1141 D – E where the court held as follows:

> *Die artikel is, myns insiens, daarop gerig om die drukkende werklas op Howe van appèl, insluitende en miskien veral hierdie Hof, te verlig. Dit breek weg van die destydse vae begrippe soos ‘abstrak’, ‘akademies’ of ‘hipoteties’, as maatstawwe vir die uitoefening van ’n Hof van appèl se bevoegdheid om ’n appèl nie aan te hoor nie. Dit stel nou ’n direkte en positiewe toets: sal die uitspraak of*

bevel 'n praktiese uitwerking of gevolg hê? Gesien die doel en die duidelike betekenis van hierdie formulering, is die vraag of die uitspraak in die geding voor die Hof 'n praktiese uitwerking of gevolg het en nie of dit vir 'n hipotetiese toekomstige geding van belang mag wees nie.

[17] Section 21A is framed in discretionary terms and the courts accordingly retain the discretion to consider an appeal that has no substantial merit value for the litigants where the appeal raises issues that have value for public interest whether they stem from public or private law questions.

[18] In *casu*, the applicant did not seek to make out a case that exceptional circumstances exist as envisaged by Section 21A(3). The applicant instead contended that it should not be penalised due to a tardy justice system.

[19] The rationale of the legislature was clearly to afford the courts a discretion to dismiss an appeal or an application for leave to appeal where its adjudication on the merits would provide no substantial relief.

Rule 49 (11) Application:

[20] The respondent (in the leave to appeal) simultaneously with this application for leave to appeal, argued the application in terms of Rule 49 (11) of the Uniform Rules of this court. It submitted that the judgment delivered on 15 July 2009 should be of full force and effect even if the application for leave to

appeal is launched and even if an application for leave to appeal is made to the Supreme Court of Appeal in terms of Section 20(4)(b) of the Supreme Court Act 59 of 1959.

[21] The respondent alleged that it would be severely prejudiced as a Ferrari importer and dealer in parts of South Africa excluding those parts of South Africa in which the applicant (in the application for leave to appeal) had the exclusive right to operate as a Ferrari dealer. On behalf of the respondent it was submitted that the respondent is obliged to continue to supply the applicant with Ferrari motor vehicles, spare parts and accessories even though the applicant has not honoured its obligation to pay prior to delivery for the goods supplied.

[22] It was argued that in the context of the purchase price of Ferrari motor vehicles and the ancillary duties and taxes payable, such potential prejudice hold dire financial consequences for the respondent.

[23] It was argued further, on behalf of the respondent that the judgment of 15 July 2009, is a declaration that the respondent was entitled to cancel the dealership agreement on 26 January 2009. The respondent has accordingly lost the actual and prospective sales and concomitant profits that it would have generated, had it not been prevented from entering the disputed territories as a Ferrari dealer on 26 January 2009. It was argued that it would be a grave injustice to perpetuate such loss when the applicant's appeal enjoys no prospect

of success and it will be hit by Section 21A of the Supreme Court Act if it were to successfully "petition" the Supreme Court of Appeal for leave to appeal.

[24] On behalf of the applicant it was contended that the court order obtained on 26 January 2009 by agreement, provided in paragraph 5.2, for the terms of the dealership agreement to be observed by both parties regardless of the final outcome of the proceedings and not withstanding respondent's contention that the contract has been validly cancelled. Paragraph 5.2.1 of the agreement is framed in terms substantially different to other paragraphs in the order which provide that: "the parties are in agreement that" or "the parties record their agreement that." Paragraph 5.2.1 stipulates that "the parties are directed to…."

[25] The order, contains agreed provisions. It also has mandatory provisions such as: "Respondent is interdicted and restrained from…." The salient part for this application is paragraph 5.2.1 which reads as follows:

> *"5.2.1 The parties <u>are directed</u> to continue to observe and perform the rights and obligations provided for in FA2, which shall on an interim basis and pending finalisation of these proceedings continue to bind the parties." (my emphasis)*

[26] The language in paragraph 5.2.1 is that of a court sanctioned directive to the parties. The court was however able to so direct the parties because they had agreed to subject themselves to that directive without dispute. Since

paragraph 5.2.1 applies “regardless of the final outcome of these proceedings,” the applicant’s right to seek an appeal have been retained in the Order by Agreement. A matter is by no means finally determined unless all appeal procedures have been exhausted and until the courts have finally pronounced on it.

It is ordered that:

1. Leave to appeal is refused and the applicant shall pay the costs of that application

2. The application in terms of Rule 49 (11) is dismissed with costs.

ALLIE, J