Case No 47393

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

EU CIVILS (PTY) LIMITED Applicant

and

CLIFFORD HARRIS (PTY) LIMITED Respondent

CORAM : HEFER, STEYN, F H GROSSKOPF, VAN

DEN HEEVER JJA et NICHOLAS AJA

HEARD : 20 FEBRUARY 1995

DELIVERED : 10 MARCH 1995

J U D G M E N T

HEFER JA/

HEFER JA :

The applicant in this application for condonation was the unsuccessful plaintiff in the Cape of Good Hope Provincial Division where its claim for damages against the respondent was dismissed with costs. After obtaining the necessary leave from the trial judge the applicant filed a notice of appeal but failed to serve it on the respondent's attorneys in terms of the Rules of Court; hence the present application which is opposed by the respondent on the ground that there are no prospects of a successful appeal.

The claim arose from a collision which occurred between two motorised scrapers in the course of certain earthmoving operations in Khayelitsha. Both scrapers were damaged, one beyond repair and the applicant who bore the risk of that damage in terms of an instalment sale

agreement is seeking to recover its value from the respondent. It is alleged in the particulars of claim (but denied in the plea) (1) that the collision was caused by the negligence of Mr Hentile, the driver of the other scraper and (2) that Hentile drove that scraper in the course of his employment with the respondent, alternatively, under the respondent's control and supervision. On the first issue the trial court ruled in the applicant's favour; but on the second issue the court found that Hentile was not employed by the respondent nor did the latter have the right of control over the way in which he performed his duties. The outcome of the appeal - and thus of the present application - depends upon the correctness of this finding and it is accordingly not necessary to mention other matters which were in issue at the trial but are not presently

relevant.

How the controversy about Hentile's employment and the respondent's control came about, appears from what follows.

A consortium of five companies including the applicant successfully tendered to perform certain bushclearing and earthmoving operations for the Cape Provincial Administration in Khayelitsha. In its tender the consortium indicated that it would provide a general foreman and five other foremen to supervise the work. It was contemplated that each member would contribute a foreman and a number of machines and operators but, in view of the consortium's commitments elsewhere, its members apprehended that their resources would be over-extended. On behalf of the consortium the applicant accordingly entered into an agreement with the respondent in terms of which the latter

would supply additional machines and operators. According to Mr Marsh, the applicant's managing director who testified at the trial, it was a term of the agreement that the respondent would also supply a foreman. Respondent's witnessess maintained that it was only when the machines and operators arrived on the site that Mr Smit, the consortium's general foreman, insisted that a foreman be supplied by the respondent. Be that as it may it is common cause that the respondent called in Mr Visser to act as a foreman. Smit took instructions from the consulting engineers and in turn allocated specific tasks to specific teams under the supervision of specific foremen. He thus exercised general control over all the foremen, each of whom was in turn in direct control of the team to which he was assigned.

On the day of the collision applicant's

driver and Hentile were both members of Visser's team. Hentile operated a scraper provided by the respondent but owned by the latter's holding company, Basil Read (Pty) Ltd ("Basil Read"). Smit had charged the team with the task of levelling a dune and dumping the sand in a low-lying area in the vicinity. The collision occurred on a haul road between the loading area and the dumping area when (so the trial court found) Hentile deviated from the pre-determined course and crossed the path of the other scraper.

As mentioned earlier the applicant alleges in its particulars of claim that Hentile drove the scraper in the course of his employment with the respondent. It is common cause however that he was employed, not by the respondent, but by Basil Read. Vicarious liability can accordingly only be imputed to the respondent if the

alternative allegation that Hentile acted under the respondent's control and supervision has been established. The applicant's case (as appears from particulars supplied for purposes of the trial) is

that

> "Defendant's employees, and in particular its Mr Visser, were responsible for the supervision of the team of machines used in the operation during which the collision occurred."

It is common cause that Visser was also employed by Basil Read. Faced with this difficulty applicant's counsel submitted that control over the exercise by Visser of his functions was transferred to the respondent and no longer remained with Basil Read. He conceded that there was no evidence of an express agreement to that effect but submitted that facts had been proved from which it might be inferred that control over the way in which Visser

exercised his duties was transferred to the respondent. In this regard he relied upon the "close relationship" between a holding company and its subsidiary, the fact that Visser was provided by the respondent in order to fulfill its obligations under its agreement with the consortium and the existence of an agreement between the respondent and Basil Read in terms of which the risk of loss or damage to the scrapers provided by Basil Read rested with respondent.

It may be mentioned that, for the purposes of a counterclaim which was dismissed, the respondent adopted the attitude that control over Visser had passed to the consortium and that this is indeed what the trial court found. Such an inference might well be drawn. Even if Basil Read did relinquish control over its employees pro hac vice I do not think that it can be inferred that

control passed to the respondent. In all the circumstances of the case I am prepared to accept that the facts relied on may reasonably support the inference contended for. I also accept that the inference sought to be drawn need not in a civil case be the only reasonable one. But, precisely by reason of the close relationship between a holding company and its subsidiary it is in my view more natural, suitable or acceptable to conclude that it was the respondent and not its holding company who exercised control over Visser (Govan v Skidmore 1952(1) SA 732 (N) at 734C-D; A A Onderlinge Assuransie-Assosiasie Bpk v De Beer 1982(2) SA 603 (A) at 614H-615B). It might at least equally well be that the question of the transfer of control was never considered or that it was considered but found to be unnecessary. What was required to be transferred to render the respondent vicariously

liable was control in respect of the way in which Visser had to perform his duties (Penrith v Stuttaford 1925 CPD 154 at 159; McMillan v Hubert Davies & Co Ltd 1940 WLD 256 at 262; R v AMCA Services Ltd and Another 1959(4) SA 207 (A) at 212H; Colonial Mutual Life Assurance Society Ltd v McDonald 1931 AD 412 at 434-435) and, in view of the relationship between the two companies, there seems to be no reason for the delegation to the subsidiary of control which the holding company was in any event entitled to exercise.

Applicant's counsel rightly accepted the onus of proving that the required degree of control had passed to the respondent (Stadsraad van Pretoria v Pretoria Pools 1990(1) SA 1005 (T) at 1007 H-J). Three of the respondent's directors testified at the trial; not one of them was asked a single question in an attempt to ascertain what

had passed between the respondent and Basil Read. In my judgment the onus has not been discharged on the meagre circumstantial evidence available.

It follows that the appeal cannot succeed and that the present application falls to be dismissed. The appeal was enrolled for the same day on which the application was heard. A suitable order will accordingly be made to dispose of the appeal as well.

It is ordered that

1. the application for condonation be dismissed with costs including the costs of two counsel;

2. the appeal be struck from the roll with costs including the costs of two counsel.

J J F HEFER JA

STEYN JA )
F H GROSSKOPF JA ) CONCUR VAN
DEN HEEVER JA) NICHOLAS AJA )