Case No 2/95

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

KIMBERLEY JEANNE KETT Appellant

and

AFRO VENTURES (PROPRIETARY) First Respondent LIMITED

CHRISTOPHER LEIGH KEMP Second Respondent

CORAM: CORBETT CJ, EKSTEEN, NIENABER,
MARAIS et ZULMAN JJA

HEARD: 30 AUGUST 1996

DELIVERED: 20 SEPTEMBER 1996

JUDGMENT

/NIENABER JA

NIENABER JA:

The appellant, a Swiss resident, was injured in Botswana when the Land Rover truck in which she was a passenger overturned. I shall refer to her as the plaintiff, to the second respondent, who drove the truck, as the second defendant and to his employer at the time, the first respondent, as the first defendant. The first defendant is a tour operator from Randburg which organizes and conducts safaris from Johannesburg to the Okavango swamps. The contract in terms of which the plaintiff was conveyed when the accident occurred, was entered into by her husband purporting to act in his personal capacity as well as on her behalf. It contained a comprehensive waiver of rights and exemption from liability clause. The plaintiff sued the two defendants jointly and severally for damages in delict, alleging that the accident was due to the second defendant's negligence. The defendants filed a special plea in which they relied on the waiver and exemption clause, the second defendant alleging in addition that he had accepted the benefit "conferred upon him in terms of the said contract". In the plea over both defendants deny negligence. Both also joined in what is in effect a conditional third party notice in which "a

contribution or indemnification" is sought from the plaintiffs husband. Since the third party is not a party to the appeal, no more need be said about it. The plaintiff thereupon excepted to the special plea as lacking averments necessary to sustain the proposed defence

> "in that ex facie the terms of the contract, the alleged waiver and/or abandonment of rights and/or indemnification made or granted by the Plaintiff do not embrace or extend to actions for damages brought by the Plaintiff against the Defendants on the grounds of negligent driving".

The order sought was that the special plea be set aside with costs.

The exception came before Eloff JP in the Witwatersrand Local Division who, judging the exemption clause to be unambiguous and to the point, dismissed it. The following order was made:

> "The exception is dismissed with costs, including the costs involved in the retention of two counsel."

The plaintiff subsequently applied for and was granted leave to appeal to this court. The spectre of appealability was not raised before the court a quo and neither counsel mentioned it in the heads

of argument filed on appeal. Some three weeks prior to the hearing of the appeal the parties were requested, by notice emanating from the registrar of this court,

> "to be prepared to argue the issue whether the order made by the Court a quo is an appealable 'judgment or order' for purposes of s 20 of the Supreme Court Act, 59 of 1959".

When the matter was called in this court it was conceded by counsel for the plaintiff and contended by counsel for the defendants, on the authority of cases such as Blaauwbosch Diamonds Ltd v Union Government(Minister of Finance) 1915 AD 599 and Wellington Court Shareblock v Johannesburg City Council 1995 (3) SA 827 (A), that the order made was not appealable. The concession was properly made. Being the dismissal of an exception based on that court's interpretation of a term in an agreement, the order made was capable of being reconsidered by the trial court and as such was not "the final word in the suit on that point" (Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance), supra, at 601). This court, lacking jurisdiction, was precluded from expressing a view on the merits (Nxaba v Nxaba

1926 AD 392 at 394). The appeal was accordingly struck off the roll. Judgment was, however, reserved on this one issue on which there was some debate, the question of costs.

Having won the jurisdictional battle, counsel for the defendants, relying on "the usual order", claimed the spoils of wasted costs (cf Stevenson v MacIver 1922 AD 413 at 414; Western

1948 (3) SA 353 (A) at 355-6; Charugo Development Co (Pty)Ltd v Maree No 1973 (3) SA 759 (A) at 764G-H; South Africa Motor

1980 (3) SA 91 (A) at 98G-H; Levco Investments(Pty) Ltd v Standard Bank of SA Ltd 1983 (4) SA 921 (A) at 929A). The

plaintiffs response was that there was no battle. At the first intimation that the order might not be ripe for appeal, she capitulated. By then the costs of the appeal, including its hearing, had already been incurred. The sooner she had been alerted, ideally when she applied for leave to appeal, the more costs would have been averted. Consequently, so it was submitted, since both parties were jointly responsible for the abortive proceedings, costs should

be costs in the cause.

I disagree. Even if that approach were to be accepted, the plaintiff should in any event be held liable for the costs of the application for leave to appeal. Moreover, should the matter run its course and the plaintiff happen to succeed, it would mean that in the result the defendants will be saddled with all the costs relating to the abortive proceedings, whereas the plaintiff was the one, being dominus litis,who was primarily responsible for the wastage of the costs. Klerksdorp & District Muslim Merchants Association v Mahomed and Another 1948 (4) SA 731 (T) on which plaintiffs counsel sought to rely and in which costs were ordered to be costs in the cause, is clearly distinguishable. At 741 it is said:

> "Having agreed to that [incorrect] procedure plaintiff cannot with any justification contend that the costs incurred thereby should be regarded otherwise than as costs in the cause".

A similar agreement is absent in this case.

There are cases where this court, in comparable circumstances, made no order as to costs (cf Union Government (Minister of the Interior)and Registrar of Asiatics v Nadoo 1916

AD 50 at 52; Nxaba v Nxaba supra at 394; Tropical (Commercial and Industrial) v Plywood Products 1956 (1) SA 339 (A) at 345A-346C). But those were cases where both parties, to a greater or lesser extent, co-operated or acquiesced in pursuing an incorrect procedure. The plaintiff in this case did not require or ask for the co-operation or consent of the defendants to apply for leave to appeal. In any event, as was stated in Tropical(Commercial and Industrial) Ltd v Plywood Products Ltd,supra, at 346A:

> "None of the cases purport to lay down a hard and fast rule in a matter such as this nor can they be said to deprive the Court of its inherent discretion to make such an order as to costs as may be just in the circumstances of any particular case."

In exercising that discretion three factors in particular must be taken into account. The first, mentioned earlier, is that the plaintiff initiated and prosecuted the appeal. She was dominus litis (Charugo Development Co (Pty) Ltd v Maree NO, supra, 764H). On the other hand - and this is the second factor - she did not persist in her appeal once its propriety was placed in issue. In that respect this case differs from cases such as Sekretaris van Binnlandse Sake en

'n Ander v Olieslagetr en n Ander 1966 (4) SA 641 (A), Desai v Engar and Engar 1966 (4) SA 647 (A) at 655A-B and Wellington Court Shareblock v Johannesburg City Council supra, at 835F-H, in all of which the appellants concerned did not concede the non-appealability of the orders appealed against. The third factor is that the defendants cannot in my view be absolved from all blame. The appealability point should also have occurred to their legal advisers. What was said in 1922 in Stevenson v Maclver, supra, apropos of an appellant who had purported to appeal as of right as no application for leave to appeal was then necessary, is equally applicable nowadays to a respondent, where such an application is a requirement:

> "The case is entirely covered by the decisions in Blaauwbosch Diamonds v Union Goverment (supra). We have no jurisdiction. Practitioners do not seem to make themselves acquainted with important decisions of this court."

The defendants, through counsel, opposed the application for leave to appeal on the merits. I am prepared to accept that there is no duty on a respondent to alert an aspiring appellant to the unappealability of the order under attack. But where leave to appeal

is required from the court a quo, as in this case, it is, I believe, incumbent on counsel for both sides to advise the court whenever there is reason to doubt its power or competence to issue the order sought. Counsel on both sides were remiss in not appreciating, and in not bringing it to the attention of the court a quo, that it would be futile for the court to make an order granting the plaintiff leave to appeal. Had they done so the court a quo would doubtless not have made the order and the wasted costs would have been saved. To the extent that the defendants are also to blame it seems to me to be only fair that they should bear a portion of their own wasted costs. I would assess that portion to be one third.

The appeal having been struck off the roll, the following supplementary orders are made:

(1) The order of the court a quo, granting the appellant leave to appeal, and its order as to costs, are set aside;

(2) The appellant is ordered to pay the costs of the application for leave to appeal;

(3) The appellant is ordered to pay two thirds of the respondents' wasted costs of appeal, including the costs of two

counsel.

P M Nienaber Judge of Appeal Concur: Corbett CJ Eksteen JA Marais JA Zulman JA