FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ no:

PARTIES: PETER JOHN FRANCE N.O. AND HILARY BARRAS N.O. v OMNI TECHNOLOGIES (PTY) LTD t/a GESTETNER

REFERENCE NUMBERS –

- Registrar: **CA 341/05**
- Magistrate:
- Supreme Court of appeal/Constitutional Court: **EASTERN CAPE DIVISION**

DATE HEARD: 28 AUGUST 2006
DATE DELIVERED: 20 OCTOBER 2006

JUDGE(S): JONES J; JANSEN J AND GOOSEN AJ

LEGAL REPRESENTATIVES –
Appearances:

- for the State/Applicant(s)Appellant(s): **ADV B HARTLE**
- for the accused/respondent(s): **ADV P SCOTT**

Instructing attorneys:

- Applicant(s)/Appellant(s): **NN DULLABH & CO**
- Respondent(s): **WHEELDON RUSHMERE & COLE ATTORNEY'S**

CASE INFORMATION –

- *Nature of proceedings:* **FULL BENCH CIVIL APPEAL**

- *Topic:* **Appeal – whether the onus was discharged of proof of an oral agreement, breach of the terms of which gave rise to the claim for damages – whether the loss and the quantum of the damages were properly proved – no basis on appeal for departing from the trial court's findings of fact.**
- *Keywords:*

Not reportable

In the High Court of South Africa
(Eastern Cape Division) Case No: CA 341/05
Delivered: **20/10/06**

In the matter between

PETER JOHN FRANCE N.O. 1st Appellant
HILARY BARRAS N.O. 2nd Apellant

and

OMNI TECHNOLOGIES (PTY) LTD t/a GESTETNER Respondent

SUMMARY: Appeal – whether the onus was discharged of proof of an oral agreement, breach of the term of which gave rise to the claim for damages – whether the loss and the quantum of the damages were properly proved – no basis on appeal for departing from the trial court's findings of fact.

JUDGMENT

JONES J:

This is an appeal, with the leave of the court a quo (Ludorf J), against an order for payment of damages in the sum of the R108 495-62 for breach of contract. I have had the benefit of reading the judgment of Jansen J which concludes that the learned judge of quo erred in holding that the respondent (plaintiff a quo discharged the onus of proving the terms of the contract upon which it relied for its claim, and which consequently allows the appeal and orders absolution from the instance with costs. For the reasons which follow I am unable to agree with Jansen J's conclusion.

Jansen J gives comprehensive summary of the facts. I do not consider it necessary for me to repeat the exercise in this judgment. This is, however, essentially an appeal of the facts, and it is therefore necessary to deal with the facts as I see them in the course of the judgment and to give something of the background information required for a proper understanding of the dispute.

One Forbes and his financial director Marx controlled the activities of a group of companies and trusts which provided office equipment manufactured by Gestetner to business firms. Up until 1998 the group's activities were carried on mainly in the East London area and Transkei. In 1998 it took over a concern which sold Gestetner equipment in the Port Elizabeth area. The respondent company was formed in 1998 for purposes of the take over and to run the Gestetner business in Port Elizabeth. Its activities were also controlled by Forbes.

The appellants are trustees of a trust which carries on the business of a broker and financer of rented office equipment in Port Elizabeth. The trust was referred to by its nickname 'Rental' (short for The Rental Company) in the proceedings a quo, and I shall for convenience call it Rental in this judgment. The first appellant, France, conducted the business of Rental on behalf of the trust. Before 1998 Rental had done business with the East Lodon business run by Forbes, but their relationship had soured. Rental had also done considerable business with the respondent's predecessor in Port Elizabeth before the take over. But that business declined because of the soured relationship between France and Forbes in East London. France wanted to revive it and he took active steps in that direction. The upshot was that the respondent and Rental began do business together in Port Elizabeth and Rental once again became one of the organizations which would be requested to provide finance for the rental of office machines and equipment provided by the respondent to its customers, particularly in Port Elizabeth.

This appeal concerns one such transaction. In December 1999 the respondent arranged for the supply of a Gestetner photocopy machine to the Commercial High School in Port Elizabeth. The deal was for the rental of the photocopier to the school for a period of 60 months at a monthly rental of R2536-50, which included 50 000 copies per month at a rate 4.45 cents per copy. Rental was approach to provide the finance for portion of the deal. It agreed. The result was that the respondent invoiced Rental in the amount of R66 028-27 for the photocopier (which it paid), and Rental and the school entered into a rental agreement in terms of which Rental rented the

photocopier to the school and collected the monthly rental of R2536.50. Of that amount R1150-00 was for its own account and R1000-00 was collected for the respondent and paid over to it each month. The balance was VAT. This agreement continued for 12 months. Thereafter the school's photocopying requirements changed. It arranged with Rental for the early termination of the rental agreement, and for the provision of a new photocopier from another supplier. The new supplier settled the rental agreement for the Gestetner photocopier by paying out the settlement figure to the Rental and building that figure into the rental agreement for the new photocopier. By this time the relationship between Rental and the respondent had again broken down.

The termination of the rental agreement with Commercial High gave rise to the present litigation between the parties. The respondent's case is that the early termination was done in breach of an umbrella agreement with Rental for the conduct and termination of these transactions, and that it suffered damages in consequence. In order to establish this case it alleged and sought to prove an oral agreement entered into at the respondent's premises on 21 November 2000 between Forbes and Marx representing the respondent, and France acting on behalf of Rental. Though apparently elaborate, the terms of the alleged agreement were standard for the kind of business conducted by parties to the financing of rental agreements such as this. The evidence is that the respondent had agreements on the same terms with all of the other firms which financed its transactions. I shall return to the terms of the agreement in due course.

France denied entering into the alleged agreement. His evidence was that Rental entered into an agreement of sale with the respondent in terms of which it purchased the photocopier from the respondent, and that it then entered into agreement with the school in terms of which it rented the photocopier to the school. He denies that this transaction, or any other transaction between Rental and the respondent, was governed by an agreement with the terms alleged by the respondent. I am in respectful agreement with the conclusion of the learned trial judge that the

probabilities are preponderantly against Rental's version as testified to by France'. Instead he preferred the respondent's version, given in evidence by Forbes and Marx.

Ludorf J's judgment is a finding of fact based upon his evaluation of the oral evidence given before him. This involved a consideration of the probabilities of the version of the witness, their demeanour and credibility, and the inferences to be drawn from the facts he found to have been proved. As the trier of fact who saw and heard the witnesses, Ludorf J was better able than we are on appeal to come to a proper conclusion of where the truth lay. In this case the issue of credibility, probability, the relationship between the parties and the nature of their respective businesses are interwoven. This is one of those cases where, to quote *Rex* v *Dhlumayo and another* 1948 (2) SA 677 (A) 705/06,

> '[t]he trial Judge has advantages – which the appellate court cannot have – in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should be overlooked.
>
> Consequently the appellate court is very reluctant to upset the findings of the trial Judge.
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> The mere fact that the trial Judge has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as he was.
>
> Even in drawing inferences the trial Judge may be in a better position than the appellate court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial.
>
> Sometimes, however, the appellate court may be in as good a position as the trial Judge to draw inference, where they are either drawn from admitted facts or from the facts as found by him.
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> Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.
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> In such a case, if the appellate court is merely left in doubt as to the correctness of the conclusion, then it will uphold it'.

Counsel for the appellant, Ms *Hartle,* argued that the court a quo had committed a large number of misdirections. There is no substance in this argument. While there

may in some cases be room for argument about the detail of some of the factual findings made by the court a quo, I can find no material misdirection which influenced the learned judge's decision. In my view there is not justification for departing from Ludorf J's acceptance of the evidence of Forbes and Marx or from the inferences he drew from their evidence.

While a court of appeal may in some cases be in as good a position as the trial court to draw the proper inferences (see further *Union Spinning Mills (Pty) Ltd* v *Dye House (Pty) Ltd and another* 2002 (4) SA 408 (SCA) 416 G – H), one possible inference may be convincingly more probable in a given case and another decidedly less probable, not when viewed in a vacuum, but when regarded within the particular framework of the case. This may be discernible only in the light of the personalities and demeanour of the witnesses and the aura and the atmosphere of the cases as a whole. I believe that this is such a case.

I therefore dot not agree with Jansen J where he bases his conclusion on issues of credibility generally or on features of the evidence or Marx which he regards as unsatisfactory or less preferable than the evidence of France, in so far as they are at odds with the findings a quo.

The evidence showed that France was anxious to restore the business relationship between the parties after the respondent took over the Gestetner business in Port Elizabeth. It was indeed common cause that France offered the respondent a 2% allowance on future transactions, which on the facts was a considerable inducement. To this end France had a meeting with Forbes and Marx on 21 November 1998 at which, according to their evidence, the parties reached agreement on the future conduct of their business. In summary, their future business would be in accordance with the following terms:

- that the respondent would make offers to Rental to finance the rental of its equipment to its customers;
- ownership in the equipment would be transferred to Rental to give Rental security for the finance it provided, but would revert to the

respondent on termination of the agreement, whether by effluxion of time or on early settlement;

- Rental would give the respondent a 2% rebate on the initial payment of the discounted portion of the rental agreement;
- Rental would collect all rentals due in terms of the agreement which included amounts payable by the customer to both Rental and the respondent, the latter to be collect by Rental for the respondent free of charge;
- early settlement of rental agreements would be in accordance with an agreed as between Rental and the respondent, and the amount would not be quoted by Rental to the customer but would be given to the respondent to enable the respondent to use it to negotiate a further rental agreement with the client. The agreed formula for the amount to be paid to Rental by the respondent was the net present value of the equipment, plus either 30 or 90 days' penalty interest, depending on whether the customer entered into an 'upgrade' agreement for another item of equipment.

It is common cause that in this case Rental did not give a settlement figure to the respondent to enable it to use it as part of its negotiations with the school for an upgrade. Instead it deprived the respondent of this advantage by quoting the settlement figure direst to the school. This was the breach relied on by the respondent. It would entitle the respondent to recover any loss it caused, provided of course that the agreement in those terms is established.

I can find no fault with the learned trial judge's finding that France's change of ground on the issue of the agreement is of significance. Initially France took the stance that there was no meeting at all between the parties at which agreement have been reached. Then he accepted not only the meeting, but an agreement on the 2% rebate. If there was agreement on the 2% rebate there must have been an agreement about transactions to which the rebate applied. As the trial proceeded it became clear that there must also have been agreement on other terms alleged by the respondent,

such as the collection by Rental free of charge of the respondent's portion of the monthly rental. This evidence showed that France's denial was unsubstantiated in material respects. Then there are the inherent probabilities. These are, in my judgment, strongly in the respondent's favour. It is almost unthinkable that parties who do this kind of business with each other would not enter into an agreement along the lines alleged by the respondent. The evidence is that the terms which is alleged in its pleadings was also the basis upon which the respondent did business with all other finance houses which provided finance for its transactions. Why should it have been different in the case of Rental? Why would the respondent have offered business to Rental if it did not have the same or a similar basis for their transactions? It is to me inconceivable that they would not have agreed upon the reversion of ownership of the equipment. This is because a finance provided has no interest in ownership except insofar as it gives him security. Once the need for security falls away because he has been paid, he has no interest in the article concerned. It is also inconceivable that they would not have agreed on how they were to proceed in cases of early termination. This happens quite frequently and must always be in the forefront of the minds of parties to rental arrangements such as the present. Can it be accepted that these businessmen would be so unbusinesslike as to leave an important issue like this completely in the dark? As against this, however, Forbes and Marx were not businesslike in another respect – they did not see fit to confirm these terms in writing.

Ludorf J attached considerable importance to evidence that other cases of early termination of agreements were settled on the terms alleged by the respondent. The evidence was that all settlements of agreements entered after the meeting on 20 November 1998 until the second download turn of the relationship between the parties in about March 2000 were dealt in terms of the agreed formula for settlement, i.e net present value plus penalty interest, the figure being given to the respondent not the client, which was in all respects in consonance with the oral agreement alleged by the respondent. In the course of argument Mr *Scott* for the respondent referred us to 6 such settlements. Ms *Hartle* conceded that these cases were indeed the only settlements during the period November 1998 to March 2000, but she referred to settlements outside of this period were settled on a basis consistent with France's

version. I think that Ludorf J was correct in concluding that the settlements referred to by Mr *Scott* generate a strong probability in the respondent's favour: the most probable inference is that the respondent and Rental settled those cases with the customer on that basis because they had a binding agreement to that effect. France was obliged to accept that that was how these transactions were settled. But he denied that it was in terms of any agreement. His explanation was that this was done at his sole discretion because it happened to suit him in those particular cases. I think that that is hollow and unconvincing. Can he really have been a party to termination, in every one of the six instances of early settlement, in the precise terms alleged by respondent purely because it co-incidentally happened to suite him? I think that it is overwhelmingly more probable that he did so because he was bound by agreement to do so.

Each party regarded the right to quote the settlement figure to the customer as a valuable and effective tool for securing future business and each party sought to use this fact as a probability in its favour. It is so that this is the kind of advantage that each party would want to preserve. But on the facts of this case it is difficult to understand how this can be thought to favour Rental. Rental's argument would make sense where the customer was properly Rental's customer; i.e. where Rental canvases the business with the customer, negotiates with him about the kind of he requires and the amount he must pay for it, supplies it to him, arranges for its maintenance, and then collect the rental from him. In those circumstances it would have a relationship with the customer which it would want to preserve. But that is not what happened here. The respondent canvassed the business with the school, advised the school on the kind of equipment which would meet its requirements, negotiated the amount which the school would have to pay, arranged for the finance, and, after delivering the photocopier, did whatever maintenance was necessary to ensure that the school got 50 000 copies a months at 4.45 cents a copy. In invited Rental to provide finance for a portion of the deal. Rental agreed without ever having any direct contact with the school. It then collected the rental by monthly stop order and paid the respondent's share over to the respondent. Marais, the headmaster of the school, could not even remember who had financed the deal. In these circumstances Rental can hardly claim

an entitlement to preserve its relationship with the school because the school was its customer. The school was the respondent's customer, not Rental's. whatever the position may be in another kind of case, in this set of circumstances France's evidence that he would not have agreed to give up the right quote to quote to this customer is unconvincing, especially in the light of his having foregone that very right in all of the other similar cases of early settlement.

Furthermore, the transaction with the school must be understood for what it really was. As I understand the evidence, this was a standard agreement for the provision of finance for equipment where the customer did not which to lay out the capital which would be required to purchase the equipment. It is indeed possible to analyse it in the way that Rental has done in the pleadings, i.e. simply as a sale of the equipment from the respondent to Rental, and then a rental agreement between Rental and the school. But on the facts of this case that would be an oversimplification. There can be no doubt that what happened here was a transaction between the respondent and the school with the Rental being brought in as the finance provided.

Rental's version of the facts is that it was entitled to settle the rental agreement with the school without reference to the respondent because there was a simple purchase of the photo-copier followed by an agreement to rent it to the school. This version does not account for Rental's obligation to pay R1000 of the rental to the respondent for the rest of the contract period. Indeed, this part of the agreement was not settled. France suggested that the R1000 per month was for maintenance of the photo-copier, and the obligation to maintain and to pay for maintenance fell away when the agreement was terminated. It is indeed so that the respondent maintained the photo-copier to enable it to produce 50 000 copies a months. But France's suggestion is not borne out by the terms of the written rental agreement or the other evidence. The terms of the agreement between Rental and the respondent – providing as it does for 60 payments of R2250 per months for the photocopier plus VAT in an amount of R311-50 – is for rental and not for maintenance. Maintenance is specifically excluded by paragraph 7.1 which makes the school solely responsible at its own cost for keeping the photo-copier in good working order and for maintaining and servicing it

in accordance with the manufacturer's recommendations. As I understand the evidence of Marais of Commercial High School, maintenance of the photo-copier was an incident of the agreement to provide 50 000 copies per month and was done by the respondent free of charge. The school paid the amount of R2250 per month, but it was not a party to the split of R1225 for Rental and R1000 for the respondent. That was a matter between Rental and the respondent. This split was referred to in a document, numbered B1. This document was not explained in evidence because its author, Vlok, was not called as a witness by either party. It breaks the amount of R2250 down into R1220 which its calls the capital portion and R1000 which it calls the service portion. This to an extent may support both the notion of a service obligation and the evidence of Forbes that Rental provided finance for only a portion of the deal. But it does not change the character of the rental agreement by converting it into a maintenance agreement, and it does not give Rental the right to take a unilateral to dispense with the respondent's right to R1000 per month as its part of the deal. Ludorf J also set store on France's failure in correspondence to deny the oral agreement when a denial would have been expected. Instead he called for written proof of the agreement, which in the view of Ludorf J was consistent with a concession of the existence of an unwritten agreement, albeit with different terms.

In all the circumstances I am of the view that Ludorf J's conclusion is correct. I agree with him that the probabilities are preponderantly against France's version, and that the evidence of Forbes and Marx should be accepted.

A second ground of appeal is that the respondent did not discharge the onus of proving its loss or the quantum thereof. In this regard the respondent relied on the evidence of Marx and certain calculations done by him. France offered no alternative calculations. He said merely that Marx hade made wrong assumptions about Rental's rate of return and that the true return depended on his subjective and arbitrary assessment of the net present value of the equipment in each particular transaction. Ludorf J considered, correctly in my opinion, that France's evidence of an arbitrary value did not make commercial sense. He applies the dicta in *Hersman* v *Shapiro and Co 1926* TPD 367 at 379-80 and *Venter* v *Bophuthatswana Transport Holding*

(Edms) Bpk 1997 (3) SA 374 (SCA) 389J and held that in the absence of helpful input from France, the evidence of Marx, which was carefully considered and motivated, was the best evidence available of the quantum of the respondent's loss, and that it represented a fair and just assessment thereof. Once again, I am not persuaded that this conclusion was wrong.

In the result, while I consider that the appellant's argument on the merits justifies granting condonation, I am of the view that the appeal should be dismissed with costs.

There will be the following order:

1. The application for condonation is granted, with no order for costs.
2. The appeal is dismissed with costs.

RJW JONES
Judge of the High Court
10 October 2006

GOOSEN AJ: I agree.

G GOOSEN
Judge of the High Court (Acting)