Drifters Adventure Tours CC v Hircock [2006] SCA 130 (RSA)

Interpretation of an exemption clause

1 Introduction

This case is concerned with the interpretation of an exemption clause (see on exemption or exception clauses in general, Van Dorsten "The nature of a contract and exemption clauses" 1986 *THRHR* 189–207; Van der Merwe, Van Huysteen, Reinecke and Lubbe *Contract – General Principles* (2003) 274–276; Christie *The Law of Contract in South Africa* (2006) 188 *et seq*; Kerr *Principles of the Law of Contract* (2002) 427–435).

In casu the appellant was a tour operator conducting business under the name Drifters (par 2 of the judgment). In August 1999, while the respondent was a passenger on an adventure tour in Namibia operated by the

appellant, the appellant's driver, who was acting in the course and scope of his employment, negligently drove the appellant's Mercedes Benz bus on a public road, thereby causing an accident in which the respondent sustained injuries (par 3). The appellant admitted the negligence of the driver but denied that he acted recklessly or with gross negligence. As a result, the respondent instituted action against the appellant for damages. The appellant defended the action relying on an "indemnity form" signed by the respondent prior to the commencement of the tour. The terms of the indemnity were as follows (par 6):

> "I have read and fully understand and accept the conditions and general information as set out by Drifters in their brochure and on the reverse side of this booking form. I acknowledge that it is entirely my responsibility to ensure that I am adequately insured for the above venture. I further absolve Drifters, their staff and management and affiliates of any liability whatsoever, and realise that I undertake the above venture entirely at my own risk."

The "conditions and general information" referred to in the first sentence are contained in a document which is on the reverse side of the form headed "Booking conditions and general information". The latter document deals with some 19 subjects including insurance. Of direct relevance is the last subject, which is headed "Conditions" and then continues:

> "Due to the nature of hiking, camping, touring, driving and the general third-world conditions on our tour/ventures, DRIFTERS, their employees, guides and affiliates, do not accept responsibility for any client or dependant thereof in respect of any loss, injury, illness, damage, accident, fatality, delay or inconvenience experienced from time of departure to time of return, or subsequent to date of return, such loss, injury etc arising out of any such tour/venture organised by DRIFTERS. Should a tour/venture be cancelled by DRIFTERS due to weather conditions or other reasons, it shall either refund full payment or offer a substitute tour/venture. Should DRIFTERS have to curtail a tour/venture for any reason due to weather conditions or other factors after the time of departure, DRIFTERS will not be liable for any form of refund whatsoever, although everything will be done to complete a tour/venture or to utilize an alternative arrangement or venue. All tours are subject to a minimum of 6 pax travelling, although a tour may still run with fewer, at the discretion of DRIFTERS. Should a client decide to curtail a tour for any reason whatsoever DRIFTERS will not be liable for any refund whatsoever."

At the outset of the hearing, the court *a quo* gave effect to an agreement between the parties in terms of which the enforceability of the indemnity would be decided prior to any other issues in the case (par 4). Thus, the only matters that were considered by that court were whether the indemnity is enforceable to exempt the appellant from liability for its employees' negligence and, if so whether it is enforceable to exempt the appellant from liability arising out of its employee's recklessness or gross negligence in relation to the accident. The court *a quo* held that, as a matter of interpretation, the indemnity clause did not protect the appellant from its employee's negligence. Accordingly, it was unnecessary to consider the argument that the indemnity clause was illegal and hence a nullity or unenforceable (par 5).

The Supreme Court of Appeal (*per* Zulman, Farlam, Conradie, Mlambo and Maya JJA) was now called upon to hear an appeal regarding the failed

defence based on the indemnity clause. One does not know, of course, how the appellant was advised, but it should have been advised that its chances of success could not be significant since our courts generally construe exemption clauses restrictively (see par 9 of the judgment and par 2 *infra*), and in particular subject – vague or generally formulated exemption clauses – as would *prima facie* appear to be the case *in casu* – to restrictive interpretation (see generally *Weinberg v Olivier* 1943 AD 181; *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 4 SA (D); *Ornelas v Andrew's Café* 1980 1 SA 378 (W); *First National Bank of SA Ltd v Rosenblum* 2001 4 SA 189 (SCA); *Minister of Education and Culture (House of Delegates) v Azel* 1995 1 SA 30 (A)).

2 The Court's Approach and Judgment

In the joint judgment of Zulman and Conradie JJA on behalf of a unanimous bench, it is stated at the outset that the party attempting to invoke an indemnity clause (or perhaps more accurately, an exemption clause), bears an onus of proof to be discharged on a balance of probabilities that the clause is enforceable against the plaintiff (par 9). The court also accepts that indemnity provisions in general should be construed restrictively – thus not limiting this approach merely to vague or unclear provisions (relying on *Essa v Divaris* 1947 1 SA 753(A); *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA); *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA); *First National Bank of SA Ltd v Rosenblum* 2001 4 SA 189 (SCA) and *Johannesburg Country Club v Stott* 2004 5 SA 511 (SCA)).

The court endorses the following *dictum* in *Durban's Water Wonderland (Pty) Ltd v Botha* (989) dealing specifically with the difference between ambiguous and unambiguous provisions:

> "The correct approach is well established. If the language of the disclaimer or exemption clause is such that it exempts the *proferens* from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity the language must be construed against the *proferens*. (See *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) at 804C.) But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be 'fanciful' or 'remote'(cf *Canada Steamship Lines Ltd v Regem* [1952] 1 All ER 305 (PC) at 310C–D . . ."

The court then carefully analyses the exemption provisions *in casu* as follows (par 10): It notes that the indemnity form signed by the respondent is one document consisting of a front portion and a reverse side. The indemnity clause relied upon by the appellant appears on the front portion of the document. It is couched in wide terms – for example, using the phrase "any liability whatsoever". While something more general could hardly be imagined, the court argues that it must be read in the context of the contract as a whole (including its reverse side). This portion of the document unequivocally states that the other contracting party has read and fully understands and accepts the conditions and general information set out by the appellant in their brochure and on the reverse side of the "booking form". This, according to the court, is clearly a reference to the heading "Indemnity Form" appearing at the top of the document. The

indemnity appears on the front of the form just above the signature of the respondent. Despite the fact that the latter part of the indemnity clause, read on its own, is, in the opinion of the court, wide enough to exclude liability for negligence ("any liability whatsoever"), one is nevertheless compelled to have regard to the other conditions appearing on the reverse side of the document in order to interpret the indemnity clause correctly. The court points out that a close examination of the conditions clause on the reverse reveals that it makes no mention whatsoever of negligent driving by employees of the appellant. Instead it exempts the appellant from responsibility "in respect of loss, injury, illness, damage, accident, fatality, delay or inconvenience experienced from time of departure to time of return, or subsequent to date of return, such loss, injury, etc. arising out of any such tour/venture organised by the appellant". The court also draws attention to the fact that this portion of the conditions is prefaced with the following: "Due to the nature of hiking, camping, touring, driving and general third-world conditions on our tour/ventures, Drifters, their employees, guides and affiliates, do not accept responsibility for any client or dependant thereof."

The court finds it unnecessary to decide, on the facts before it whether there would in the absence of the exemption clause be absolute liability under the contract (par 11) and adds that it is also unnecessary to decide whether the clause exempts the appellant from liability for damage caused by all negligence regardless of the activity (par 12). Zulman and Conradie JJA proceed as follows (pars 12–13):

> "What does arise for decision in this case is whether liability for damages arising from negligent driving on a public road has been excluded under the contract. It is that question to which we now turn. In case of doubt, an exemption clause reasonably capable of bearing more than one meaning is given the interpretation least favourable to the *proferens*. The concept of 'driving' in the conditions part of the contract is to be interpreted with a bias against the *proferens*. The appellant's refusal to accept responsibility for 'driving' is predicated upon the 'nature' of the driving. What, a reasonably astute customer would wonder, is meant by the 'nature of driving'? She would soon discover that the expression occur among other 'adventure' activities, those that she hopes to enjoy on the tour. If she reads it in the context of driving over unmade roads or slippery, steep or otherwise exciting terrain the expression 'nature of the driving' might well make perfectly good sense. If it is read in the context of passenger transportation on a public road, it makes only imperfect sense. So, although it is possible to interpret the expression 'driving' as referring to any kind of driving anywhere in the country and on any terrain, it is probably not the interpretation that a reasonable reader would give to it and is, in the light of established canons of interpretation, not one we should favour. At best for the appellant the reference to driving is ambiguous. If it is, it is helpful to have regard to evidence in aid of a correct interpretation."

The court found its conclusion strengthened by evidence on behalf of the appellant to the effect that the risks the appellant wished to exclude were not those inherent in ordinary road transportation but risks associated with, for example, rough conditions and "third world sort of anomalies" (par 15). (It is refreshing to note that this witness was honest in the sense that he was evidently not "briefed" or "advised" beforehand to testify to a

wider intention behind the exemption provision.) The court finally referred to the consideration that it would have been "perverse" for the appellant to have attempted to contract out of its obligations in terms of the Cross-Border Road Transportation Act 4 of 1998. The appeal was thus dismissed and the exemption held not to bar the damages claim.

3 Evaluation

The court's statement of the law and its application to the facts, appears to be plausible and correct. The court's considering of the contract as a whole, including every clause regarded as relevant in qualifying the exemption – and thus establishing its true ambit – is convincing and has obviously been employed before (see, eg, *Galoon v Modern Burglar Alarms (Pty) Ltd* 1973 3 SA 647 (C) 654–655; *Minister of Education and Culture (House of Delegates) v Azel*).

While this judgment probably does not create new law on the important question of the interpretation of exemption clauses, it strongly confirms principles already in existence and demonstrates how they are to be applied in a given situation. On reflection, it appears that although the *contra proferentem* rule often finds application in this context, more is at stake. Even in the absence of factors warranting a *contra proferentem* approach, our courts treat exemption clauses with a healthy measure of circumspection and care (see generally *Yeats Hoofwegmotors* 1990 4 SA 289 (NC) 293; *First National Bank of SA Ltd v Rosenblum* 390–391), as well as obvious scepticism and even hostility – without expressly conceding such an attitude (see for references on "hostile" construction in English law, Furmston *Cheshire, Fifoot and Furmston's Law of Contract* (1986) 158). The courts are thus not in the habit of over-interpreting such provisions. That this is justifiable from a public policy perspective, should be self-evident. The exclusion of a damages award where it would normally be available to compensate the victim of a delict or breach of contract, is a drastic measure that should not be based merely on a few words formalistically inserted into a contractual document – like "any liability whatsoever" as found *in casu*.

One may further conclude that it is a substantive rule of law (and not merely a question of interpretation) that exemption clauses should be expressed clearly and without ambiguity, or they will be ineffective (see *Chitty on Contracts* (1999) ch 14 where reference is made, *inter alia,* to the connection between the exemption clause and the contract as a whole and the so-called "four corners" rule; see further generally Treitel *The Law of Contract* (2003) 221 *et seq*). Strict judicial scrutiny of exemption clauses is to be expected and welcomed to protect, *inter alia,* the rights of clients of businesses who should not be at the mercy of those with the *de facto* power to dictate contractual terms and even hide terms with huge significance in a document containing many other contractual provisions and information (see also *Chitty on Contracts* par 14-001). This is clearly not to say that exemption provisions should not be tolerated in general (see the warnings about inappropriately hostile construction in, eg, *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* 1983 1 All ER 101 where it is remarked that one must not strive to create ambiguities by strained

construction – this is also evident in *Durban's Water Wonderland (Pty) Ltd v Botha* 989). However, the judgment *in casu* is another reminder to those intending to invoke exemption clauses to devise and formulate them with considerable care and attention to detail. The existing principles of construction applied by our courts are perhaps an indication of an overriding concept of fairness in striking down or limiting unreasonable or unconscionable contractual provisions, which may one day be clearly described as such and not merely as a rule of interpretation.

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