



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
CASE NO 602/2005

In the matter between

DRIFTERS ADVENTURE TOURS CC

Appellant

and

B L HIRCOCK

Respondent

Coram: Zulman, Farlam, Conradie, Mlambo and Maya JJA
Heard: 4 September 2006
Delivered: 29 September 2006

Summary : Interpretation of an exemption clause read with conditions where the driver of a tour bus was negligent.

Neutral citation: This judgment may be referred to as *Drifters Adventure Tours v Hircock* [2006] SCA 130 (RSA)

JUDGMENT

ZULMAN JA and CONRADIE JA

[1] This appeal with the leave of this court is against a decision of Selikowitz J in the Cape High Court to the effect that an indemnity clause in a contract between the parties did not serve to exempt the appellant from liability to the respondent arising out of injuries sustained by her.

[2] The appellant is a tour operator conducting business under the name Drifters. The respondent currently resides in Maryland, United States of America. Gerhard Wildhelm (Wildhelm) was cited as the second defendant in the court *a quo*. He was employed by the appellant as a driver of a tour bus. He took no part in the proceedings and is believed to be resident in Switzerland.

[3] On 8 August 1999 while the respondent was a passenger on an adventure tour in Namibia operated by the appellant, Wildhelm, who was acting in the course and scope of his employment with the appellant, negligently drove appellant's Mercedes Benz Ecoliner tour bus thereby causing an accident in which the respondent sustained injuries. The appellant admitted that the accident was caused by the negligence of Wildhelm. It however 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 on 24 July 1999 prior to the commencement of the tour. The terms of the indemnity will be considered in more detail presently.

[4] At the outset of the hearing, the court *a quo*, made an order giving effect to an agreement between the parties in terms of which the enforceability of the indemnity would be decided prior to, and separately from, any other issues in the case. Accordingly, the only issues that were considered by the court *a quo* were:

- (a) Whether the indemnity admittedly signed by the respondent is enforceable to exempt the appellant from liability for its employees' negligence and, if so,
- (b) Whether the indemnity is enforceable to exempt the appellant from liability arising out of its employee's recklessness or gross negligence in relation to the accident.

[5] The court *a quo* decided that, as a matter of interpretation, the indemnity clause did not protect the appellant from its employee's negligence. Accordingly, it was unnecessary for the court to consider the argument that the indemnity clause was illegal and hence a nullity or unenforceable.

[6] The appellant's indemnity form contains the following three sentences on the front of it in bold capitals:

'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'. This latter document deals under appropriate headings with some 19 subjects including insurance. Of direct relevance to this matter is the last subject. It reads:

‘CONDITIONS

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.’

[7] In the court *a quo* the appellant contended that the indemnity clause exempted it from its employee’s negligence. The respondent in turn raised the following two arguments in reply:

- (a) As a matter of interpretation, the indemnity clause did not exclude liability based on the appellant’s fault; and
- (b) The indemnity was illegal and hence a nullity or unenforceable for two reasons:
 - (i) It was contrary to certain provisions of the Cross Border Road Transportation Act 4 of 1998; and
 - (ii) It was contrary to public interest (policy) for the appellant to include in its

contract an indemnity clause which excluded the appellant's liability for damages in circumstances where cross border tour operators, such as the appellant, take out public liability indemnity insurance as a matter of standard practice and such insurance is necessary to ensure that such tour operates in the public interest.

[8] The appellant contends that the court *a quo*'s decision that the indemnity clause does not exclude the respondent's claim based on the appellant's vicarious liability for its employee's fault is wrong and that the court *a quo* erred in its interpretation of the indemnity clause for the following reasons:

(a) As a matter of linguistic interpretation, the conditions clause does not cut down the indemnity clause in the manner contended for by the court *a quo*.

(b) In interpreting the clause by applying the *contra proferentem* rule in circumstances where the clause was not ambiguous; alternatively, if the clause is ambiguous, the court *a quo* incorrectly applied the principles underlying the *contra proferentem* rule in exclusion clause cases to reach the conclusion that the indemnity clause did not protect the appellant from its employee's negligence.

[9] It is common cause that the appellant bears the onus of establishing, on a balance of probabilities, that the indemnity clause is enforceable against the respondent. It is also so that indemnity provisions in general should be construed restrictively.¹ The proper approach to the interpretation of indemnity clauses is

¹ See *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).

succinctly set out by Scott JA in these terms in *Durban's Water Wonderland (Pty) Ltd v Botha*.²

'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 [1952 AC 192].'

[10] 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, as previously stated, appears on the front portion of the document. It is couched in wide terms but must be read in the context of the contract as a whole, including its reverse side. This portion of the document unequivocally states at its commencement 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 'THIS BOOKING FORM'. This 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 wide enough to exclude liability for negligence ('any liability whatsoever') one is nevertheless driven to refer to the reverse side of the document and particularly the conditions appearing there, in order to interpret the indemnity clause. 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

² (Above) at 989 G-J.

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.' 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'.

[11] It is unnecessary on the particular facts of this case to decide whether there would, in the absence of the exemption clause, be absolute liability under the contract. It is also unnecessary to decide whether the exemption clause, again on the particular facts of this case, exempts the appellant from liability for damage caused by all negligence regardless of the activity.

[12] 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.

[13] 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*,

[14] 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 occurs

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.

[15] 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. Mr A W Dott, the appellant's founder, was in examination-in-chief asked to tell the court how the contractual indemnities came to be formulated. He said:

' . . .operating in the realms in sub-Saharan Africa, and obviously what we might refer to as wild life and rough conditions and third world sort of anomalies, obviously one is more subject to risk than someone who might be taking a simple tour through New York, well maybe that's not a good example, but you know, in Germany for example. And obviously as the industry has evolved and I was one of the pioneers in the industry. . .we came upon more and more situations which made it untenable to operate and more and more difficult to operate. . . So it became common practice to obviously try and exclude with certain limited indemnities any absolutely ridiculous risk which made it impossible to carry on normal business practice within the region.'

[16] Significantly absent from Mr Dott's recital of the risks the appellant wishes to exclude are those inherent in ordinary road transportation. This is another pointer in the direction of interpreting the expression 'driving' in the restricted way we have suggested. Moreover, road transportation is dealt with quite differently in the appellant's business set-up. The appellant is obliged in terms of the Cross-Border

Road Transportation Act 4 of 1998 to have a permit which requires it to hold minimum passenger liability insurance. The court *a quo* heard evidence that this requirement is imposed for the good of passengers and generally for ensuring the health of the tourism industry and has met with general approbation from all carriers. Contracting out of this liability altogether would be so perverse that we cannot accept that the appellant would have done so.

[17] The appeal is dismissed with costs.

R H ZULMAN and J H CONRADIE
JUDGES OF APPEAL

CONCUR:) FARLAM JA
) MLAMBO JA
) MAYA JA