

IN THE HIGH COURT OF SOUTH AFRICA

DELETE WHICHEVER IS NOT APPLICABLE		
(NORTH CAUTENG HIGH COURT, PRETORIA)		
(1) REPORTABLE : YES /NO	Date: 2010-02-10	
(2) OF INTEREST TO OTHER JUDGES : YES /NO		
(3) REVISED		
DATE <u>10-2-10</u>	SIGNATURE <u>BR Sutherland</u>	Case Number: A233/07

In the matter between:

PALL SOUTH AFRICA (PTY) LIMITED

Appellant
(Plaintiff a quo)

and

GROUP 4 FALCK (PTY) LIMITED

Respondent
(Defendant a quo)

JUDGMENT

SOUTHWOOD J

[1] The appellant appeals against the judgment and order of the court a quo (Ismail AJ) dismissing, with costs, the appellant's claim for damages in the sum of R254 046,58.

[2] The parties prepared a stated case for the court a quo. The issues involved the interpretation of a written agreement in terms of which the respondent provided security services by means of security personnel

to reduce the risk of loss or damage by *inter alia* theft and burglary. The court was required to interpret the exemption clause and the procedural clause which governed claims in terms of the agreement. The court *a quo* upheld the respondent's contention that the appellant was bound to comply with the procedural provisions and because of its failure to do so was not entitled to succeed with its claim.

[3] The relevant agreed facts are as follows:

- (1) On 29 January 2004 the appellant occupied industrial premises at 33 New Road, Midrand, Gauteng ('the premises') and also owned property there. On 29 January 2004 a written agreement ('the agreement') existed between the appellant and the respondent in terms of which the respondent provided security services at the premises, the sole function of which was to reduce the risk of loss or damage by theft, burglary, vandalism or arson, subject to the terms of the agreement, in return for a monthly payment of R10 500.
- (2) On 29 January 2004 a number of men, aided and abetted by Tembi Sibanda, a security guard employed by the respondent, who was at the time acting within the course and scope of his employment with the respondent, guarding the premises, stole the appellant's property at the premises and damaged the premises. The stolen goods were not recovered but the

premises were repaired. As a result of the theft and the damage the appellant suffered damages in the sum of R254 046,58.

(3) Sibanda's participation in the theft was a breach of the respondent's contractual obligation to reduce the appellant's risk of loss or damage by theft, burglary, vandalism or arson.

(4) Clause 8 of the agreement reads as follows:

'8. CONTRACTOR'S RIGHTS AND OBLIGATIONS

8.1 The sole function of the Services provided by the CONTRACTOR through the Security Personnel is to reduce the risk of loss or damage by theft, burglary, vandalism or arson.

8.2 The CONTRACTOR gives no warranty or guarantee that its Security Personnel will be able to reduce or prevent the loss and/or damage referred to in clause 8.1 above.

8.3 The CONTRACTOR shall not be liable to the CLIENT or any third party for any loss or damage of whatsoever nature and howsoever caused, whether direct or consequential, save where such loss or damage is proved to be as a result of gross negligence on the part of the CONTRACTOR or any of its Security Personnel acting within the course and scope of their employment with the CONTRACTOR. In such event the CONTRACTOR'S liability shall be restricted to

three times the monthly contract price (as set out in clause 19 below or any amendment thereto) for any one event or series of events arising from one occurrence.

8.4 In order to succeed in a claim as set out in clause 8.3 above, the CLIENT shall be obliged to comply with the following:

8.4.1 the CLIENT shall notify the CONTRACTOR in writing at the CONTRACTOR'S Head Office, within two working days after the occurrence of the event giving rise to such claim, of all the relevant facts relating to such claim;

8.4.2 the CLIENT'S summons for the recovery of such loss or damage shall be served on the CONTRACTOR within three months after the date upon which such cause of action arose; and

8.4.3 such loss or damage was not suffered by the CLIENT as a result of any breach by the CLIENT of any term of this agreement (express or implied) or as a result of any negligent or wilful act or omission on the part of the CLIENT or its employees.

8.5 Should the statutory minimum wage payable to the CONTRACTOR'S Security Personnel, be increased at any time, then the fee payable by the CLIENT in terms of this contract, or any amendment thereto shall be increased with effect from the effective date of such statutory increase. The CONTRACTOR shall be entitled to adjust the

fees for its services simultaneously with the statutory wage increase. The aforesaid increases shall apply notwithstanding the fact that the CONTRACTOR may be paying its Security Personnel or employees more than the statutory minimum wages as provided for in legislation.

8.6 It is recorded that the services to be rendered by the CONTRACTOR to the CLIENT are in respect of only the premises which are occupied by the CLIENT and the assets of the CLIENT and do not extend to any portion of the premises which are occupied by third parties nor to the assets of third parties, unless specifically agreed to in writing between the parties to this agreement.'

- (5) The theft and the loss suffered by the appellant occurred on 29 January 2004.
- (6) The appellant did not notify the respondent's head office in writing of the theft within two (2) days of the occurrence.
- (7) The appellant served its summons for payment of the damages suffered as a result of the theft on 27 July 2004.
- (8) The appellant averred that the respondent is vicariously liable for the intentional acts of Sibanda and that the provisions of clauses 8.3 and 8.4 are not applicable.

- (9) In its plea the respondent raised the contractual defences afforded to it by clauses 8.3 and 8.4.1 and 8.4.2 of the agreement and the appellant did not replicate thereto.

[4] The agreed issues to be decided on the stated case are as follows:

- (1) Did the appellant's non-compliance with clause 8.4.1 and 8.4.2 of the agreement prevent it from claiming from the respondent the damages which it suffered as a result of the theft?
- (2) Is the appellant's claim limited to R31 500 being three times the monthly contract price in terms of the agreement, notwithstanding the appellant's non-compliance with clauses 8.4.1 and 8.4.2 of the agreement?
- (3) Whether clauses 8.3, 8.4.1 and 8.4.2 are applicable in the light of Sibanda's intentional participation in the theft?

These issues give rise to the following questions of interpretation:

- (i) Does the exemption provision in clause 8.3 exempt the contractor from liability for loss or damage caused by theft by the contractor's security personnel? If so –

- (ii) Does the saving provision in clause 8.3 include loss or damage caused by theft by the contractor's security personnel? If so –
- (iii) Do the provisions of clause 8.4 also apply to a claim against the contractor based on loss or damage caused by theft by the contractor's security personnel?

[5] The appellant argues that clause 8.3 only exempts the respondent from liability for negligence; that loss or damage due to an intentional act (such as theft) is not covered by the exemption contained in clause 8.3 and accordingly that the procedural requirements for a valid claim set out in clause 8.4.1 and 8.4.2 are not applicable. The appellant contends that to interpret clause 8.3 as exempting the respondent from liability for theft leads to absurdity, repugnance or inconsistency with the contract as a whole as the respondent is bound by the contract to provide security services to reduce the risk of loss or damage by *inter alia* theft and burglary. For these contentions the appellant relies on ***Grinaker Construction (Tvl) (Pty) Ltd v Transvaal Provincial Administration 1982 (1) SA 78 (A)*** at 97A-B and ***Hotels, Inns & Resorts SA (Pty) Ltd v Underwriters at Lloyds and others 1998 (4) SA 466 (C)*** para 30.

[6] The respondent contends that in accordance with the ordinary meaning of the words used in the contract clause 8.3 does not exempt the respondent from liability for an intentional act (such as theft),

accordingly that the respondent would be liable for the theft and that the appellant would be entitled to succeed in its claim only if it had complied with clause 8.4.1 and 8.4.2 of the contract.

- [7] The court *a quo* clearly preferred the reasoning of the respondent.
- [8] In their heads of argument neither party has given close attention to the wording of the contract which must be the starting point for its interpretation. The appellant has referred only to the alleged absurdity of undertaking to provide security services to reduce the risk of loss or damage by theft and burglary while stipulating not to be liable for loss or damage caused by either. It has not referred to the clear wording of clause 8.3 which unambiguously exempts the respondent from liability for 'any loss or damage of whatsoever nature and howsoever caused, whether direct or consequential' and explained why effect should not be given to this provision. On the other hand, the respondent has not properly explained how the saving provision in clause 8.3 can relate to an intentional act such as theft. Such a finding must rest on the wording of the savings provision which simply does not refer expressly or impliedly to an intentional act and is pertinently limited to loss or damage caused by the gross negligence of the respondent or any of its security personnel acting within the course and scope of their employment with the respondent.

[9] The rules of interpretation were comprehensively dealt with in ***Coopers & Lybrand v Bryant 1995 (3) SA 761 (A)*** at 767E-768E. The golden rule of interpretation is to give the language of the document its grammatical and ordinary meaning unless this would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument. Particular words or phrases must not be interpreted on their own or *in vacuo*. The correct approach to the application of the golden rule of interpretation, after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard to –

- (1) the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract; and
- (2) the background circumstances which explain the genesis and purpose of the contract, i.e. the matters probably present to the minds of the parties when they contracted.

Reference may be had to extrinsic evidence only when the language of the document is on the face of it ambiguous.

[10] The power of the court to deviate from the ordinary meaning of the words used is limited. Where the ordinary sense necessarily leads to some absurdity, or to some repugnance or inconsistency with the rest

of the contract, the court may modify the meaning just so much as to avoid that absurdity or inconsistency but no more – see ***Metcash Trading v Credit Guarantee Insurance Corporation of Africa* 2004 (5) SA 520 (SCA)** para 10. The court may not depart from the ordinary meaning merely because it would be fair or equitable to do so – see ***Scottish Union and National Insurance Co v Native Recruiting Corporation* 1934 AD 458** at 468; ***SA Forestry Co v York Timbers* 2005 (3) SA 323 (SCA)** paras 30-32. The court also may not deviate from the clear meaning because it thinks the contract is a hard bargain – see ***Scottish Union and National Insurance Co v Native Recruiting Corporation* supra** at 465: ***SA Forestry Co v York Timbers* supra** para 30.

- [11] It is also important to bear in mind that there is no general rule that exemption clauses should be construed differently from other provisions in a contract but that where an exclusion clause limits or ousts common law rights the court should consider with great care the meaning of the clause, especially if it is very general in its application – see ***Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA)** paras 37-40. But, if the language of the exemption clause is such that it exempts the *proferens* from liability in express and unambiguous terms, effect must be given to that meaning – see ***Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (SCA)** at 989G-I. It is only where there is ambiguity that 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 – or that recourse may be had to surrounding circumstances – see ***Van der Westhuizen v Arnold supra*** para 40; ***Coopers & Lybrand v Bryant supra*** at 768D-E.

[12] The parties obviously approached this matter on the basis that the meaning of the contract is clear. In my view it is clear but not in the manner contended by the parties. In my view the exemption provision in clause 8.3 clearly and unambiguously excludes liability on the part of the respondent for all loss or damage caused by any unlawful and intentional or negligent act (i.e. delictual liability) or any breach of contract (i.e. contractual liability) and provides that the respondent will be liable only for loss or damage caused by gross negligence on the part of the respondent or any of its security personnel acting within the course and scope of their employment with the respondent. This liability is so precisely defined by the language of the contract that it cannot be found to include liability for an intentional act such as theft. That is effectively the end of the matter.

[13] I am not persuaded by the reasoning in ***Hotels, Inns & Resorts SA (Pty) Ltd v Underwriters at Lloyds and others 1998 (4) SA 465 (C)*** at para 30 as it does not apply (or even refer to) the rules of interpretation referred to in this judgment and is not based on the wording of the agreement. It is clearly the court's view of what would be fair and equitable. As already pointed out the court cannot ignore

the clear and unambiguous language of the contract simply because it leads to what the court considers to be a harsh result. As pointed out in ***First National Bank of SA Ltd v Rosenblum and Another 2001 (4) SA 189 (SCA)*** para 12 a party may validly contract out of liability for theft even when he or she is holding the stolen property in safekeeping.

- [14] I am also not persuaded that by interpreting the exemption clause as I have done leads to an absurdity, repugnance or inconsistency with the rest of the agreement. The respondent was not prepared to agree that its security personnel would be able to reduce or prevent the loss or damage referred to in clause 8.1 – it pertinently refused to give a warranty or guarantee to that effect. This can only be due to a concern about the security personnel – their possible incompetence and/or dishonesty and/or unreliability. The respondent must therefore protect itself against liability for damages caused by breach of contract and negligent and intentional delictual acts which could far exceed in value what the respondent receives for providing the service. Clearly that is why the parties agreed that the respondent's liability for loss or damage caused by gross negligence would be limited to three times the monthly contract price. Potentially the respondent could be liable for very large sums of damages while it receives only R10 500 per month for its services. The present case illustrates the point.

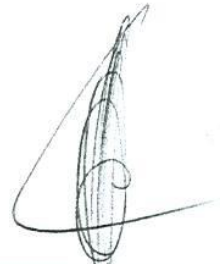
Order

[15] The appeal is dismissed with costs.



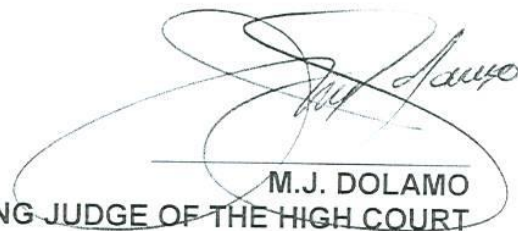
B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree



A.P. LEDWABA
JUDGE OF THE HIGH COURT

I agree



M.J. DOLAMO
ACTING JUDGE OF THE HIGH COURT

CASE NO: A233/07

HEARD ON: 3 February 2010

FOR THE APPELLANT: ADV. J.A. COETZEE SC
ADV. J. ROUX

INSTRUCTED BY: AJ van Rensburg Inc.

FOR THE RESPONDENT: ADV. I. GREEN

INSTRUCTED BY: Friedland Hart Solomon & Nicolson

DATE OF JUDGMENT: 10 February 2010