THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 498/05
Reportable

In the matter between :

C R H HARTLEY APPELLANT

and

PYRAMID FREIGHT (PTY) LTD t/a SUN COURIERS RESPONDENT

CORAM : MTHIYANE, NUGENT, CLOETE JJA, MALAN *et* CACHALIA AJJA

HEARD : 1 SEPTEMBER 2006

DELIVERED : 14 SEPTEMBER 2006

Summary: Contract: *caveat subscriptor*; party to a contract allowing his wife to sign knowing that the contract would contain terms and conditions: thereafter contending that the other party's representative knew or ought to have known that he was unaware of the ambit of exclusionary clauses; unilateral mistake not excusable.

Neutral citation: This judgment may be referred to as Hartley v Pyramid Freight (Pty) Ltd [2006] SCA 100 (RSA).

JUDGMENT

CLOETE JA/

CLOETE JA:

[1] On 12 October 2001 the appellant, Mr Hartley, and his wife went to the Polokwane branch of the respondent, Pyramid Freight (Pty) Ltd, which traded as Sun Couriers. There the appellant countersigned American Express travellers' cheques which had a face value of US $16 000 whilst his wife, with some assistance from an employee of the respondent, Mrs Barnard, completed and signed the respondent's standard form document entitled 'dispatch note'. It was common cause that the dispatch note constituted a contract between the appellant and the respondent in terms of which the respondent undertook for reward to convey the travellers' cheques from Polokwane to an address in the Jersey Islands.

[2] To the left of the place for signature, where the appellant's wife in fact signed the dispatch note, the following appeared in red ink:

'This shipment is accepted by Sun Couriers subject to the conditions of carriage printed on the reverse of the copies hereof, which conditions the Sender acknowledges by signing this shipment, to have read and understood. In particular, your attention is drawn to Sun Couriers maximum liability of R50,00 per shipment for loss or damage.

If you wish Sun Couriers to accept a higher liability the value of this shipment must be declared in the space provided. Refer the published tariff for conditions and exclusions.'

The conditions of carriage printed on the reverse included the following:

'8.2 Subject to what is stated below, the **Courier** will accept the responsibility up to the value of the goods declared on the **Dispatch Document**. If no value is declared, the maximum responsibility that will be accepted is R50,00.

8.6 The maximum compensation in respect of any single shipment of goods shall be R100 000.

8.7 The **Courier** accepts no responsibility in respect of and will not pay compensation in the event of loss or damage to jewellery, precious stones and metals, negotiable instruments, or any article exceeding R3 000 of value per kilogram of gross mass, irrespective of the contents.'

It was common cause that the travellers' cheques were negotiable instruments as contemplated in clause 8.7.

[3] The travellers' cheques were lost by the respondent. The appellant sued for their value in the Johannesburg High Court. The respondent relied on the clauses I

have quoted as excluding or limiting liability on its part. The appellant replicated that he never intended to exempt the respondent from liability or to limit its liability and that he was unaware of the existence of the clauses in question.

[4] At the trial the main thrust of the appellant's case was that Mrs Barnard had made express oral representations inconsistent with the conditions printed on the reverse of the dispatch note. Shongwe J found that she had not and dismissed the appellant's claim but subsequently granted leave to appeal to this court.

[5] The cross-examination of the appellant during the trial revealed that at the time the contract between the parties was concluded, the appellant knew:

(i) that a written contract was going to be concluded between himself and the respondent, and signed by himself or his wife;

(ii) that the document containing the agreement would have standard terms and conditions; and

(iii) that there could well be 'exclusions' in the contract.

(This evidence is not surprising in view of the fact that the appellant is a senior attorney with 44 years experience who practised commercial law in Zimbabwe and who did a fair amount of contract work and a fairly substantial amount of litigation.) The appellant also conceded in cross-examination that he could have read the conditions of carriage had he wished, but that he did not do so. Had the evidence stopped there, there would have been actual *consensus* and the appellant would have been bound by the exclusionary clauses on the basis that he had agreed to be bound by the conditions of carriage, whatever they might have been.[1] But the appellant said in evidence that he was labouring under a mistake.

[6] Although I do not consider that the appellant's evidence went this far, I shall accept in his favour that, when the contract was entered into on his behalf, he believed that the respondent would be obliged to compensate him for the value of the travellers' cheques if they were lost whilst in its custody. On that basis, there was

[1] *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (SCA) at 991E-F.

dissensus: Mrs Barnard obviously intended to contract subject to the conditions of carriage, which excluded such liability.[2] The question then arises whether, despite the appellant's unilateral mistake, the *caveat subscriptor* rule applies and the appellant is nevertheless bound by the exclusionary clauses on the basis of quasi-mutual assent.

[7] On appeal, the appellant's counsel (who did not represent the appellant at the trial) expressly disavowed any reliance on representations made by Mrs Barnard as being in conflict with the exclusionary clauses. Instead, he submitted that Mrs Barnard knew, or ought reasonably to have known, that the appellant was contracting under the mistaken belief that the respondent would be liable if the travellers' cheques were lost. If this is so, it could be argued that the respondent's reliance on the doctrine of quasi-mutual assent would not be reasonable and the appellant would not be bound by the exclusionary clauses.[3]

[8] The submissions made by the appellant's counsel in support of the case sought to be made out on appeal may be summarised as follows:

(i) Mrs Barnard would have observed that the appellant and his wife were anxious about the security of the consignment, and in particular the possibility of the loss or misappropriation of the travellers' cheques;

(ii) it would have been clear to Mrs Barnard that the appellant and his wife were not experienced clients who had previously used the services of the respondent to courier travellers' cheques;

(iii) Mrs Barnard herself was aware that as a rule customers tended not to read the dispatch note, and for this reason she would give instructions or directions regarding its completion;

(iv) Mrs Barnard would have seen that the appellant was involved in signing the

---

[2] cf *Constantia Insurance Company Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA) para 16 at 353G-H.

[3] *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A) at 241A-E, and authorities referred to; *Constantia Insurance Co Ltd v Compusource (Pty) Ltd*, above n 2, paras 16 to 23.

travellers' cheques and that his wife was having difficulty getting to grips with how to complete the dispatch note;

(v) Mrs Barnard would have been aware both from her interaction with the appellant's wife and from her previous dealings with the public that it was highly improbable that the appellant or his wife had read or were aware of the standard conditions;

(vi) the exclusionary clauses operated particularly harshly towards the consignor of a negotiable instrument by excluding all liability in respect of loss thereof; and they also operated harshly against the consignor who omitted to fill in the value of the consignment on the face of the dispatch note;

(vii) the exclusionary clauses constituted a drastic curtailment of the rights which the appellant would otherwise have enjoyed against the respondent, in the event of the loss of the travellers' cheques while in the possession of the respondent;

(viii) Mrs Barnard either directed the plaintiff's wife not to fill in the value of the consignment or, if she did not actually give a direction in this regard, she was aware that the value was not indicated; and the fact that the value of the consignment was not filled in was itself a clear indication that the plaintiff's wife was not aware of the R50,00 limitation, let alone the total exclusion of liability in the case of negotiable instruments;

(ix) Mrs Barnard was aware of the provisions of the exclusionary clauses, and in particular the provisions of clauses 8.6 and 8.7, and she appreciated the importance of a consignor such as the appellant being made aware of such limitations; and

(x) Mrs Barnard stated that she did not draw these provisions to the attention of the appellant and his wife because she assumed that they could read. But she actually knew, or ought reasonably to have known, that neither the appellant nor his wife were aware of the exclusionary clauses. She should therefore have brought them to the attention of the appellant or his wife.

[9] However, the question is not whether Mrs Barnard knew or ought to have known that the appellant was unaware of the exclusionary clauses. The question is whether she knew or ought to have known that the appellant was labouring under a

mistake and the evidence does not go that far. She did know that the appellant and his wife were anxious about the safety of the travellers' cheques but the evidence does not establish that she knew, or ought to have known, that the appellant was under the impression that the respondent would compensate him should they be lost – so, possibly, placing her under an obligation to correct his misconception. She presented the appellant and his wife with a document which the appellant appreciated would constitute his contract with the respondent and which he realised would contain terms and conditions,[4] and could well contain exclusions, which it did. The fact that the appellant's wife did not appreciate this and (at best for the appellant) did not understand the meaning, contents or import of the document, is irrelevant. The appellant himself was indifferent to the provisions of the conditions of carriage which he knew would be contained in that document. He did not bother to read them. There was no obligation on Mrs Barnard to point out the possible consequences.[5] To hold otherwise would be to introduce a degree of paternalism in our law of contract at odds with the *caveat subscriptor* rule.

[10] For these reasons I conclude that the appellant's mistake was not excusable. It follows that the exclusionary clauses were part of the contract between the parties. Clause 8.7 is fatal to the appellant's claim.

[11] The appeal is dismissed with costs.

_____
T D CLOETE
JUDGE OF APPEAL

Concur: Mthiyane JA
Nugent JA
Malan AJA
Cachalia AJA

[4] These facts distinguish the decision in *Sun Couriers (Pty) Ltd v Kimberley Diamond Wholesalers* 2001 (3) SA 110 (NC) relied on by the appellant's counsel on appeal.
[5] cf *Afrox Health Care Bpk v Strydom* 2002 (6) SA 21 (SCA) para 36. The present is an *a fortiori* case because of the subjective knowledge of the appellant.