

SOUTH AFRICA / JUDGMENT

Imperial Truck Systems (Pty) Ltd v Fuel Logistics Group (A369/2010) [2011] ZAWCHC 351 (3 August 2011) [2011] ZAWCHC 351

COURT

Western Cape High Court, Cape Town

BEFORE

Louw, A Le Grange, ED Baartman

CASE / FILE NUMBER

A369/2010

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Republic of South Africa

In the High Court of South Africa

(Western Cape High Court, Cape Town)

Case No: A369/2010

In the appeal of:

IMPERIAL TRUCK SYSTEMS (PTY) LTDAppellant

And

FUEL LOGISTICS GROUPRespondent

Judgment

delivered: 3 August 2011

LOUW J

- [1] In this appeal brought with the leave of the court a quo (Breitenbach, AJ) granted on 4 March 2010, I will refer to the parties as they were before that court, namely to the appellant as the defendant and to the respondent as the plaintiff.
- [2] The claim by the plaintiff, who owns and carries on a transport contractor business known as Supply Chain Services (SCS), is for damages arising from breach of contract, alternatively, in delict and arises from the theft of two heavy

duty Toyota Hyno trucks (the trucks) from the defendant's premises on Monday 7 June 2004.

[3] By agreement between the parties the quantum of the plaintiff's damage stood over for later decision and the issue of the defendant's

liability for damages was first decided separately.

[4] On 5 January 2010 the court a quo gave judgment on the merits in favour of the plaintiff. On appeal, the defendant seeks the dismissal of the plaintiff's claim.

[5] The business SCS was owned and operated by a succession of corporate entities. The plaintiff was the owner of the business at the relevant time in 2004 and leased the trucks together with a number of other vehicles under a Full Maintenance Lease (the FML agreement) from Imperial Fleet Services (IFS).

[6] The FML agreement, wherein the plaintiff is referred to as 'the Customer', contained a number of standard terms which applied to all the vehicles leased from IFS, including the following:

1. Clause 6.1. provided the upon delivery of the vehicles, all risk of loss, damage or destruction in and to the vehicles passed to and remained with plaintiff until the vehicles are returned to IFS;
2. Clause 6.2 provided that the plaintiff shall insure and keep the vehicles comprehensively insured against all loss or damage caused by theft and other specified eventualities;
3. Clause 4.1 provided that IFS was responsible for the cost and payment of the normal servicing of the vehicles as recommended by the manufacturer of the vehicles in question as well as the cost of any necessary repairs to and replacement of mechanical and electrical equipment in the vehicles, except for repairs or replacements resulting from accidents or the improper or negligent use of the vehicles;
4. Clause 4.2 provided that the plaintiff was obliged to ensure that the vehicles were serviced regularly by a service centre which holds the franchise for the make and model of the vehicle and to this end, it is provided in clause 4.4 that 'The Customer shall at its own cost deliver the vehicle to and collect the vehicle from such service centre whenever the vehicle is to be serviced or repaired and shall ensure that the vehicle is so delivered whenever serviced (sic), maintenance or repair is required and in any event within the intervals recommended by the manufacturer'.

[7] The defendant at the relevant time operated an accredited service centre for Toyota Hyno trucks from premises in Elsies River, Cape Town. The defendant and IFS are both subsidiary companies of Imperial Holdings Limited.

[8] For a number years prior to June 2004, the plaintiff and its predecessor as owners of SCS regularly took the trucks and various

other vehicles leased from IFS under the FML agreement to the defendant at its premises in Elsies River for servicing as required

by clause 4.2 of the FML agreement.

[9] The plaintiff and other transport operators require their vehicles for use on weekdays and to accommodate them, the defendant offered a weekend servicing facility which allowed the transport operators to deposit their vehicles on a Friday to be serviced on the following Saturday and to be picked up over the remainder of the weekend or on the Monday. At the relevant time in 2004, the arrangement worked as follows. To enable the transport operators to pick up their vehicles during the weekend or before the defendant's business opened on the Monday morning, the defendant's service staff handed the keys of the vehicles to the security guards employed by an independent contractor who manned the entrance to the defendant's premises. The guards then kept the keys and handed it over to customers as they came to collect their vehicles over the weekend or early on the Monday morning. Upon arrival of the defendant's staff around 7:30 am on the Monday, the security guards handed over the keys of the vehicles that had not yet

been collected and the defendant's staff took the keys to the defendant's reception office where the keys were then stored in a key safe until the vehicles were collected.

[10] The facts relating to the events of the weekend when the trucks were serviced are largely not in dispute. The plaintiff's transport

manager Mr. Claude Petersen telephoned the defendant's workshop manager, Mr. Ashley Karra on Friday 4 June 2004 and arranged for the trucks and another of the plaintiff's vehicles to be serviced over the coming weekend under the FML agreement. Pursuant to this arrangement, the trucks were driven to the defendant's premises by drivers employed by the plaintiff who handed the keys over to the defendant's employees in the service centre.

[11] The trucks were duly serviced by the defendant on Saturday 5 June 2004 in terms of the FML agreement. No other work was done to the trucks and upon completion of the service the keys were handed to Mr. van Tender, the security guard on duty at the entrance to the defendant's premises. Mr. Karra informed Mr. Petersen by telephone on the Saturday that the trucks had been serviced.

[12] At approximately 7:10 am on Monday morning 7 June 2004, two men arrived at the defendant's entrance gate and upon pointing out the trucks where they were parked on the defendant's premises and after informing van Tonder that they were from the plaintiff, van Tonder who accepted that they were from the plaintiff, handed the keys to the trucks to them. It is common cause that the two men were not employed by the plaintiff and that the trucks were stolen by the two men who collected them. The one truck was later recovered in Bloemfontein but the other truck was never found.

[13] The plaintiff's case as pleaded is that the arrangement made by Petersen and Karra constituted an oral agreement which contained an express, alternatively tacit or implied term that the defendant would take proper care of the trucks while it was in its possession over the weekend and until the trucks were collected by the plaintiff, that it would take steps

and precautions to ensure that the trucks were not stolen during the time the trucks were in its possession and that the defendant would return the trucks to the plaintiff on Monday 7 June 2004. In the alternative, the plaintiff contends that in the circumstances and having regard to their contractual relationship, the defendant owed the plaintiff a legal duty of care to take proper care of the trucks, to take proper steps and precautions to ensure that the trucks were not stolen and to return the trucks to the plaintiff on 7 June 2004. The plaintiff further alleged that the defendant breached the oral agreement, alternatively negligently breached the legal duty of care as a result of which the trucks were stolen and the plaintiff suffered damages.

- [14] The defendant raised a number of defences in its plea including a denial of the tacit, alternatively, implied terms of the agreement referred to above. However, at the trial the defendant did not proceed with all the defences raised in the pleadings. Two main defences were proceeded with:
1. That the plaintiff agreed to and assumed the risk of loss or harm to the serviced vehicles while the vehicles were in the hands of the security contractor's staff.
 2. That the plaintiff bore the risk of loss or damage to the vehicles because of exemption clauses contained in:
 - (1) The FML agreement;
 - (2) The defendant's general conditions of trading;
 - (3) A disclaimer notice displayed on the defendant's premises.
- [15] The evidence establishes and it was readily conceded by the witnesses on behalf of the defendant that trucks were delivered to the defendant's premises for service over the weekend of 4 to 6 June 2004, in terms of an oral agreement concluded between the plaintiff's transport manager Mr. Claude Petersen and the defendant's workshop manager Mr. Ashley Karra and that it was a tacit term of the oral agreement between the plaintiff and the defendant that the defendant would take proper care of the trucks from the time they were deposited on Friday 4 June 2004, that the defendant would take proper steps and precautions to ensure that the trucks were not stolen while under its care and control and that the defendant would return the trucks when the plaintiff came to collect them on Monday 7 June 2004.
- [16] It was common cause at the trial that the trucks were stolen from the defendant's premises and that defendant did not, as was agreed between them, return the vehicles to the plaintiff on 7 June 2004. The court a quo found that the defendant's failure to require the persons collecting the trucks to show that they were authorized to do so by the owners or lawful possessors of the trucks resulted in the trucks being stolen and constituted a failure to take proper steps and precautions to ensure that the trucks were not stolen.

- [17] The court a quo held that the first defence raised by the defendant namely that the plaintiff accepted and acquiesced in the risks presented by the after-hours collection arrangement had not been established. The learned judge held that the evidence did not establish that prior to the theft of the trucks, the plaintiff had collected vehicles serviced over the weekend, during the weekend or early on the Monday morning following the weekend in question. In addition, that the evidence did not establish that there was an after-hours collection arrangement with the plaintiff which formed part of the weekend servicing arrangement. The court consequently found that although the plaintiff did make use of the weekend servicing arrangement, it did not know about the weekend or early collection system and that consequently, the plaintiff did not agree to assume the risk of loss or harm to the vehicles while the keys and consequently, the vehicles were in the hands of the security contractor's staff.
- [18] The findings of fact and the conclusions of law drawn from the facts in regard to this first defence are not attacked on appeal and save to say that I fully agree with the learned judge's approach and findings in regard to these points, nothing further needs to be said in regard thereto.
- [19] The court a quo held that the wording of the disclaimer notice displayed on the defendant's premises was wide enough if it were part of the agreement between the parties, to deprive the plaintiff of the right to recover the loss it sustained as a result of the theft. The defence based on the disclaimer notice did, however, not succeed because it was found not to be part of the agreement. The court considered and analysed the evidence and found that the position of the disclaimer notice on the wall of the service reception area was such that the notice was not seen by many people who entered or left the area to deliver or collect keys for vehicles services by the defendant. This is so, the court found because the notice was displayed off to the right of the reception counter on the other side of the door leading to the area behind the counter and was therefore displayed outside the line of vision of persons who entered or left the area. The court further found that while there were places in the reception area where one would expect to find such a notice, the position where the notice was displayed was not one of the places where one would ordinarily expect to find a notice containing terms governing the contract entered into by persons depositing a vehicle with the defendant for servicing. Given these findings of fact and the further finding that the defendant took no steps to bring the existence and terms of the disclaimer notice to the attention of its clients, which, the court held, it could have done quite easily, the court concluded that the defendant failed to take reasonable steps to bring the existence and terms of the disclaimer notice to the attention of its clients. Finally, on this point, the court held that in view of the defendant's failure to do what was reasonably sufficient to bring the notice and its terms to the attention of its clients, the defendant was not entitled to rely on the notice and its

terms. None of these findings of fact and conclusions of law were raised or attacked in the defendant's application for leave to appeal and the rejection of the defence based on the disclaimer notice displayed on the defendant's premises itself was not raised by the defendant in the application for leave to appeal. Not having raised the issue in the application for leave to appeal, the defendant also did not raise the issue of the defence based on the disclaimer notice in its notice of appeal. However, Mr. Moller, in his heads of argument belatedly sought to resurrect the point on appeal. This he is not entitled to do. The court a quo granted leave to appeal to the full court on 4 March 2010, on the grounds set out in the defendant's application for leave to appeal dated 25 January 2010. As pointed out earlier, the issue of the disclaimer notice displayed on the defendant's premises was not raised in the application for leave to appeal.

[20] I mention in passing that after leave to appeal was granted on 4 March 2010, both the plaintiff and the defendant brought separate

applications in which they sought orders amplifying paragraph 1 of the order granting leave to appeal.

The plaintiff sought an order restricting the basis on which leave to appeal was granted to one issue only namely that related to the defence based on the exemption clause contained in the defendant's general terms and conditions of trading. The defendant on the other hand, wanted the order to read that leave to appeal is granted 'In accordance with the grounds of appeal set out in the notice of application for leave to appeal'. The court a quo dismissed both applications, holding that the order made on 4 March 2010 was not ambiguous in that its meaning and effect was clear and that leave to appeal was granted to argue on appeal any of the grounds raised in the defendant's application for leave to appeal.

[21] It follows that since leave to appeal was granted only on those grounds raised in the application for leave to appeal, the defendant is not entitled to go beyond the grounds raised in the application for leave to appeal. (See *Harlech-Jones Treasure Architects CC and Others v University of Fort Hare* 2002

(5) SA 32 (ECD). During the course of argument, Mr. Mbller stated that the defendant would not seek to amend its notice of appeal to include an appeal on the basis that the court a quo erred in its rejection of the defence based on the disclaimer notice. In view of this statement nothing further needs to be said about this point.

[22] The findings of fact and conclusions of law drawn by the court a quo in respect of the defences based on the exemption clauses in the FML agreement and in the defendant's general terms and conditions of trading are attacked on appeal.

[23] I turn to the defence based on the indemnity provisions set out in clause 14 of the FML agreement. That clause provides as follows:

14. Claims and indemnity

14.1. Subject to any other provision of this Agreement which specifically provides otherwise, the Customer shall have no claim of any nature whatsoever under this Agreement arising out of or in any way directly or indirectly connected with the condition of the vehicle as a consequence of any repairs to the vehicle whether performed by IFS or on its behalf, or the Customer's deprivation of the use of the vehicle during repairs or for any other reason whatsoever and the Customer agrees that, save as specifically stated in the Agreement, no representations or warranties have been made or given by IFS or on its behalf in respect of the vehicle other than those provided by the supplier and/or manufacturer of the vehicle.

14.2. IFS shall not be liable-

14.2.1. for any loss or inconvenience caused to the Customer by reason of any failure or delay in delivering the vehicle to the Customer;

14.2.3. for any loss or damage to any property left in or upon the vehicle after signature of the Customer Vehicle Acceptance Receipt or other confirmation of receipt in writing or on delivery, whichever is the earlier or when the vehicle is in IFS's custody for any purpose under this Agreement;

14.2.3 under any circumstances for any loss of profit or other consequential damage of any nature whatsoever or any inconvenience suffered by the Customer which arises directly or indirectly out of this Agreement.

14.3. Subject to any other provisions of this Agreement which specifically provides otherwise, the Customer indemnifies IFS in respect of any claim of any nature whatsoever which may be made against IFS arising directly or indirectly out of the use or misuse by the Customer of the vehicle under this agreement or the Customer failing to carry out any obligations hereunder.

14.4. Any reference to IFS in this Clause shall include any agent, servant, employee or cessionary of IFS.

[24] The court a quo rejected the defence based on the indemnity clause in the FML agreement on three separate bases namely that:

1. The exemption in Clause 14.1 of the FML agreement is confined to claims 'under this agreement', that is claims brought under the FML agreement. The plaintiff's claim in this matter is not brought under the FML agreement. The claim is brought under the oral agreement which contains the tacit terms relating to the defendant's obligation to return the vehicles to the plaintiff on 7 June 2004 and in the meantime, to take proper care of the vehicles and to take proper steps and precautions to ensure that the vehicles are not stolen while the vehicles are held at the defendant's premises.
2. The defendant's reliance on clause 14.2.2. of the FML agreement was misplaced because the exemption in that clause is confined to the loss of or damage to property left in or upon the vehicle after its delivery to the defendant. It does not extend to the loss of or damage to the vehicle itself;

3. The defendant did not accept and hold the vehicles for servicing over the weekend, as the 'agent, servant, employee or cessionary of IFS' within the meaning of clause 14.4. of the FML agreement. The court held that the defendant was and remained an independent contractor engaged by IFS to service the vehicles in accordance with the manufacturer's service-interval recommendations.

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- [25] Mr. Moller conceded that the defendant cannot rely on the provisions of clause 14.2.2 but submitted that the court a quo erred in respect of the two remaining findings regarding the FML agreement.
- [26] The defendant was not a party to the FML agreement. It is therefore crucial to the defendant's case that the defendant was an agent, servant or employee of IFS since clause 14.4 of the FML agreement extended the exclusion of liability to these categories of entities. Mr. Moller contended that while the plaintiff was obliged under the FML agreement to deliver the leased vehicles for service to an accredited service provider such as the defendant, the defendant acted on behalf of IFS as its agent in carrying out the servicing of the vehicles leased in terms of the FML agreement. The indemnity provisions contained in the FML agreement were designed, so he submitted to protect IFS and its agents (which perforce included the defendant) against liability. In contending that the defendant acted as the agent of IFS, Mr. Moller sought to rely on the evidence of Ms. Lynne Nel who testified on behalf of the defendant and some statements made under cross-examination by Mr. Gayle who testified on behalf of the plaintiff. Ms. Nel, at the time she testified, was the specialized service manager of IFS. As part of her duties she oversaw the litigation aspect of the business and acted as a coordinator between IFS and the attorneys acting on behalf of the company. She explained that in 2004 both IFS and the defendant were 100 per cent subsidiaries of Imperial Holdings Limited through Imperial Group (Pty) Ltd. She further testified that IFS contracted manufacturer approved service centres and franchisees to perform the servicing of leased vehicles. As she saw it, the FML agreement required IFS to service and repair the vehicles and accredited service centres then performed the servicing and repairs on behalf of IFS. Mr. Gayle's remarks which is relied upon were given in answer to questions

regarding the general conditions of trading point. Mr. Gayle did say that IFS took responsibility for and paid for the servicing of the vehicles while the plaintiff saw to it that it had the vehicles serviced in the sense that the plaintiff's job was to get the vehicle to the defendant 'for them to service (the vehicles) on behalf of Imperial Fleet Services'. This evidence means, so it is contended by Mr. Moller that the defendant is the agent, servant or employee of IFS within the meaning of clause 14.4 of the FLM agreement and as such, defendant is entitled to the same protection and indemnity as IFS is in terms of clause 14 of the FML agreement.

[27] In my view the opinion evidence of Ms. Nel and Mr. Gayle as to what the FML agreement entails is firstly not admissible and in any event, to the extent that it provided the context or factual matrix against which the agreement must be interpreted, the evidence does not assist the defendant and the construction placed on clause 14 by Mr. Moller is wrong. The provisions of clause 14 are clear. Clause 14.1. provides that IFS is responsible for the cost of and the payment for the normal servicing of the vehicles as well as the cost of certain necessary repairs to and replacement of mechanical and electrical equipment in the vehicles. The FML agreement does not place any obligation on IFS to service the vehicles. The servicing of the vehicles was required, in terms of clause 4.2 to be done by an accredited service centre. In argument Mr. Moller retreated to an untenable position and submitted that in the context of the defendant and IFS being part of the Imperial family of corporate entities, the defendant was obliged to 'facilitate' and 'procure' the servicing of the leased vehicles. Suffice to say that all of this does not equate to the accredited service centre or the defendant being the agent, servant or employee of IFS. I agree with the finding of the learned judge a quo that the defendant remained an independent contractor who was paid for its services by IFS.

[28] I turn to the defence based on the defendant's general terms and conditions of trading. The defendant's general terms and conditions

of trading are printed on the rear of its standard application for credit facilities form which was signed by Mr. Gayle on behalf of the plaintiff. The defendant relied on two exemption clauses. The first is unnumbered and appears immediately below the heading GENERAL TERMS AND CONDITIONS OF TRADING. It reads:

'DISCLAIMER: THE CREDITOR IS NOT RESPONSIBLE FOR ANY LOSS OF OR DAMAGE TO CUSTOMERS' VEHICLES OR PROPERTY OR THAT OF ANY OTHER PERSON HOWSOEVER CAUSED OR ARISING.'

The second exemption clause relied upon, is clause 16. It reads:

'16. Under no circumstances shall the creditor be liable to the customer or any other person for any loss, harm or damage or any consequential loss arising from or connected with any negligent or other act whatever in or about the sale and/or supply of any goods and/or the performance of any work or services and/or the late or non-delivery of any goods or services.'

[29] In considering the defence based on these two clauses, the court a quo assumed in the defendant's favour, although it was disputed by the plaintiff, that by signing the credit application form, Mr. Gayle bound the plaintiff despite the fact that the form incorrectly refers not to the plaintiff, but to the previous owner of the business Specialized Consumer Services (Pty) Ltd, as the owner of the vehicles. The court a quo further assumed without deciding in favour of the defendant that by signing the credit application form, Mr. Gayle bound the plaintiff to the defendant's general terms and condition of trading printed on the reverse side of the form, despite Mr. Gayle's evidence that he did not read these terms and that he was under the mistaken belief that the form contained only terms and conditions

normally associated with an application for a credit facility and that he was consequently unaware that the reverse side of the form contained terms that indemnified the defendant against any claims from the plaintiff due to the loss of or damage to vehicles left by it with the defendant for servicing.

[30] The court a quo nevertheless held that the general terms and conditions of trading (which included the exemption clauses) did not govern the oral agreement between the plaintiff and the defendant concerning the servicing of the trucks over the weekend in question and in terms of which agreement the plaintiff deposited the trucks with the defendant. I agree with the conclusion and reasoning of the learned judge a quo. The terms of the agreement set out in the credit application form must be seen in the context in which it was concluded and in particular, the nature and purpose of the agreement. Gayle was seeking to obtain credit for minor works and repairs to be done from time to time to the leased vehicles. The credit application form was completed and signed to provide such a credit facility of up to R10 000.00. It was for minor work and repairs not covered by the FML agreement. In the case of the regular servicing of vehicles under the FML agreement, the plaintiff was not doing business with the defendant. It was IFS who was obliged to pay for the servicing of the vehicles and although the plaintiff was obliged under the FML agreement to deliver the trucks to the defendant for servicing, it was IFS who was doing business with the defendant. Seen in its context it was not intended that the wide terms of the exemption should include the situation where the plaintiff delivered those vehicles in terms of an oral agreement to the defendant for servicing under the FML agreement. It is common cause that the work done by the

defendant over the weekend in question was solely regular servicing under the FML agreement that was covered entirely by the FML

agreement. No work of the sort intended to be covered by the credit application form was requested by the plaintiff, was agreed to by the parties or was carried out by the defendant over the weekend.

[31] I agree with the finding of the court a quo that the defence founded on the defendant's standard conditions of trading was misplaced and did not afford the defendant a defence against the plaintiff's claim.

[32] It follows that the appeal cannot succeed and I would therefore make the following order.

The appeal is dismissed with costs.

Louw, J

I agree. A. Le Grange Judge of the Western Cape High Court I agree ED Baartman Judge of the Western Cape High Court It is so ordered W J LOUW Judge of the Western Cape High Court

I agree.

A. Le Grange

Judge of the Western Cape High Court

I agree

ED Baartman

It is so ordered

W J LOUW

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