

SOUTH AFRICA / JUDGMENT

Reyneke v Intercape Ferreira Mainliner (Pty) Ltd (108/2012) [2013] ZAECHGHC 47 (23 May 2013) [2013] ZAECHGHC 47

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.D. Pickering, N. Dambuza, C.K. Mey

CASE / FILE NUMBER

108/2012

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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

Case no: 108/2012

Date heard: 20 May 2013

Date delivered:

In the
matter between
MARIA
JACOBA REYNEKE
.....Appellant
vs
INTERCAPE
FERREIRA MAINLINER (PTY) LTD
.....Respondent

JUDGMENT

PICKERING J:

Appellant appeals, with the leave of the court a quo, against a decision of Makaula J to the effect that an indemnity clause in a contract between the parties exempted respondent from liability to appellant, arising out of injuries sustained by her in a motor vehicle accident.

Appellant was a fare-paying passenger on a bus owned and operated by respondent when, at approximately 02h30 on 20 October 2006 and on the main road between Graaff Reinet and Middelburg, the bus left the road and overturned. At the time the bus was being driven by one Williams, an employee of respondent, who was acting within the course and scope of his employment. In consequence of the accident appellant allegedly sustained certain bodily injuries. As a result she instituted a delictual claim for damages action against the Road Accident Fund as first defendant and respondent as second defendant, alleging that the accident was occasioned solely by the negligence of respondent's employee, Williams. Her action against the first defendant was settled in the sum of R25 000,00 in terms of the legislation then in force and she then proceeded against respondent for the balance of her alleged damages in the sum of R396 068,08.

Respondent defended the action, denying that Williams was negligent as alleged, and raising a special plea relying on a disclaimer

whereby, so it was alleged, appellant's claim against it was excluded.

At the commencement of the trial before Makaula J it was ordered, by agreement, that the issues raised by the special plea be determined

separately from the remaining issues relating to negligence and quantum.

The special plea, as amended, reads as follows:

'1. Plaintiff purchased a ticket at Second Defendant's Bloemfontein office prior to the journey on 20 October 2006.

2. The ticket purchased by Plaintiff has inscribed on it, inter alia, the following:

"Disclaimer

All persons entering Intercap coach/bus and/or property owned by Intercap or under its control, do so entirely at their own risk and the liability of Intercap is excluded for any loss or damages (including consequential or special damages or loss of profits), loss of life, bodily injury or damage to or loss of property, of whatsoever nature and howsoever caused and whether or not caused by any form of negligence of Intercap, its directors, its officers, servants, agents or any other person acting on behalf of Intercap,

arising out of or connected in any way with the conveyance or non-conveyance by Intercap of any passenger or persons and/or the

property of any passengers or persons."

3. In addition, the ticket purchased by Plaintiff states that 'a comprehensive version of the Intercap terms and conditions is available at any Intercap office or appointed agent.'

4. The Second Defendant's terms and conditions include the disclaimer set out in paragraph 2 above under the heading "Exclusion of Liability."

5. Prior to commencing the journey on Second Defendant's bus, Plaintiff signed Second Defendant's passenger manifest in which she accepted Defendant's terms and conditions.
6. The exclusion of liability clause excludes Second Defendant from liability for damages resulting from injuries sustained by the

Plaintiff in circumstances described in the Particulars of Claim.

7. By purchasing the ticket and by signing the manifest, Plaintiff accepted Second Defendant's terms and conditions and agreed to the exclusion of Second Defendant's liability as aforesaid.
8. The Plaintiff's claims arise from injuries sustained by her on 20 October 2006 in the accident described in the particulars

of claim.

9. The Plaintiff seeks to hold the Second Defendant liable by virtue of the fact that the accident was caused as a result of the

negligence of the driver, J. Williams, an employee of the Second Defendant.

10. The Plaintiff's claim are excluded by virtue of the provisions of the exclusion of liability clause contained in the terms and conditions referred to hereinabove.
11. In the premises, the Plaintiff does not have a claim against the Second Defendant.'

Appellant replicated to the special plea raising a number of issues. The first such issue was a denial that any contract had been

concluded, whether on the terms alleged by respondent or at all. This denial was premised on an allegation that the contractual terms and conditions alleged by respondent, including the disclaimer, had never been brought to her attention by respondent in circumstances where it had a duty to do so given the fact that respondent had at all relevant times carried on the business of conveying passengers by bus and, for that purpose, had a public transport permit which required it to obtain comprehensive passenger liability insurance and, further, that in the particular circumstances of the case the disclaimer was not a clause which would normally be expected in such a contract.

Appellant alleged further in the alternative that in the circumstances the disclaimer was contra bonos mores and therefore unenforceable. As a further alternative appellant alleged that the disclaimer was ambiguous and that on a strict interpretation thereof, having regard to the contra proferens rule, it was unenforceable.

The issue to be determined by the Court in the light thereof was whether the disclaimer was enforceable to exempt respondent from

liability for the alleged negligence of Williams.

For purposes of the special plea it was accepted that the negligence of Williams was the sole cause of the collision. It was accepted too that the respondent bore the onus of establishing, on a balance of probabilities, that the indemnity clause was enforceable against the appellant. See: *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999

(1) SA 982 (SCA) at 991B-C.

Evidence was led by both parties. The respondent adduced the evidence of Michelle Valentyn who was employed by respondent as a hostess in charge of the bus at the relevant time. Plaintiff and her son testified on her behalf.

It is common cause that plaintiff, a resident of Clocolan in the Free State, wished to travel to Mossel Bay on 19 October 2006 for purposes of visiting a friend and attending a reunion. To this end she requested her son, who lived in Bloemfontein, to purchase a ticket for her on one of respondent's busses travelling from Bloemfontein to Mossel Bay. Her son, Mr. Reyneke, purchased the requisite ticket (Exhibit C) on 11 October 2006 at respondent's Bloemfontein office. It is common cause that this ticket (Exhibit C) was stapled inside a booklet or folder. It is further common cause that the booklet to which the ticket (Exhibit C) had been stapled also contained the disclaimer in question. Printed on the reverse side of the ticket were, inter alia, certain personal particulars of appellant, the date of purchase and price of the ticket, the name of the consultant who sold the ticket to appellant's son and the relevant branch and office of respondent, namely Bloemfontein. Immediately below these particulars appears, in smaller print, the disclaimer in question. Although the opposite or front side of the ticket (Exhibit C) was not handed into Court it was common cause that this side of the ticket was identical to a copy of a pro forma ticket (Exhibit B) which was handed in by consent. The front of the ticket, as appears from Exhibit B, has the word "Intercape" written in red on it. It contains certain "general terms and conditions" not including the disclaimer. Also on the front thereof the sentence is printed "Passengers kindly take note of the terms and conditions on the opposite side of this ticket."

Mr. Reyneke checked the ticket in order to ascertain that his mother's particulars and the dates and time of departure had

been correctly recorded. He did not read any of the terms and conditions printed either in the booklet or on the ticket and was

unaware of the disclaimer contained therein. Respondent's consultant who sold him the ticket did not bring the disclaimer to his attention.

On 19 October Mr. Reyneke fetched appellant by car from Clocolan. On their return to his home in Bloemfontein in the afternoon he handed the booklet and ticket to appellant. Appellant herself did not read the "fine print" contained either on the ticket or in the booklet but also merely checked to ensure that the departure time was correct. At approximately 20h45 plaintiff and her son proceeded to the bus station where, after handing over her luggage, she proceeded to board the bus. According to Mr. Reyneke he watched as plaintiff prepared to board the bus. He saw respondent's employee, Ms. Valentyn, checking a list and ticking off appellant's name. He did not

see appellant signing any document but could not deny that she may have done so.

It is at this point that the versions tendered on behalf of appellant and respondent diverge.

According to Ms. Valentyn she caused appellant to sign the requisite passenger manifest referred to in paragraph 5 – 7 of the special plea. It is common cause that the original manifest was lost after the accident. A pro forma copy was handed into Court as Exhibit A. Each page of the manifest is divided into a number of columns, reflecting, inter alia, each passenger's name, seat number, disembarkation point, telephone and reference number. One such column is headed "I accept terms and conditions". According to Valentyn these terms and conditions are those contained in a further document (Exhibit D) which includes the disclaimer. Exhibit D was kept in a file in a blue bag in the driver's cockpit to which the passengers on the bus did not have access. Valentyn stated that she did not at any time inform the passengers of the existence of exhibit D in the blue bag. She stated further that she caused each passenger, including appellant, to append their signature opposite their name in the column headed "I accept terms and conditions."

In her evidence, however, appellant specifically denied having been requested to sign as alleged and averred that Valentyn had merely ticked her name off the manifest as she boarded the bus. She conceded that she had previously stated in further particulars for trial that she had no recollection of whether she had signed the manifest or not but stated that her memory in this regard had been jogged by seeing Valentyn in Court.

Makaula J rejected appellant's evidence in this regard and accepted that of Valentyn, describing the appellant's alleged

sudden recent recollection upon seeing Valentyn at Court as unconvincing and implausible. In my view, with respect, his

conclusion

in this regard cannot be faulted. It must therefore be accepted that appellant did indeed sign the passenger manifest prior to boarding the bus.

The principles applicable to a "ticket case" such as the present are well settled. In Christie's The Law of Contract in South Africa, 6th Edition, the learned author states as follows at page 187:

"Ideally, the customer reads and understands the document and, by his conduct in going ahead with the contract (entering the cinema or sports ground, boarding a train) he becomes bound to its terms, either because he truly assents to them or, if that cannot be proved, on the basis of quasi-mutual assent, since the supplier is reasonably entitled to assume his assent from his conduct..."

If it is proved that the customer read the document it is not necessary to go further and prove that he understood it in order to

bind him to it. Nor, if the document refers to another document (for instance a railway ticket referring to the railway regulations) is it necessary to prove that a customer who read the first document followed up the reference and read the second...

If it cannot be proved that the customer read the document he will nevertheless be bound by it if the supplier did what was reasonably

sufficient, or reasonably necessary, or everything reasonably possible, to draw his attention to the terms contained or referred to in the document.”

In Durban’s Water Wonderland supra Scott JA stated as follows at 991D – F:

“The principles applicable to so-called ‘ticket cases’ apply mutatis mutandis to cases such as the present where reliance is placed on the display of a notice containing terms relating to a contract. (See Joubert (ed) Law of South Africa vol 5 part 1 (first reissue) para 186.) Had Mrs Botha read and accepted the terms of the notices in question there would have been actual consensus and both she and Mariska’s guardian, on whose behalf she also contracted, would have been bound by those terms. Had she seen one of the notices, realised that it contained conditions relating to the use of the amenities but not bothered to read it, there would similarly have been actual consensus on the basis that she would have agreed to be bound by those terms, whatever they may have been. (Central South African Railways v James 1908 TS 221 at 226.)”

As to whether the supplier did what was “reasonably sufficient” to give its customers notice of the terms of the disclaimer Scott JA stated further at 991J – 992A that this involved “an objective test based on the reasonableness of the steps taken by the proferens to bring the terms in question to the attention of the customer or patron.”

What was said in Naidoo v Birchwood Hotel 2012 (6) SA 170 (GSJ) at para 39 is also apposite:

“Generally, persons who sign contracts are bound by the ordinary meaning and effect of the words. In some instances the principle of quasi-mutual assent is applicable, where it is assumed that the signatory, by signing the document, was signifying his intention to be bound it. In order to rely on quasi-mutual consent, a party has to demonstrate that it took reasonably sufficient steps to bring these terms to the notice of the other party and it was therefore entitled to assume that by his conduct in going ahead, notwithstanding the disclaimer, the other party had assented to the terms thereof. This is the doctrine applicable in the so-called ticket cases where terms and conditions are to be found on the tickets. The purchaser is assumed to have assented to the conditions once he or she purchases a ticket.”

In the present matter, as I have said above, Makaula J correctly accepted the evidence of Valentyn to the effect that appellant had signed the passenger manifest and that therefore she had assented to the terms and conditions contained in the relevant documents. In the event, however, that this conclusion might be wrong he proceeded to deal with the matter on the basis that she had not done so. In this regard he stated as follows:

‘...the plaintiff testified that she did see that there was printing/writing on the ticket. She could see the writing because it was clearly legible. She further testified that she saw that there was also “fine print”. She however, decided not to read both the writing as well as the “fine print.” She was merely concerned about her particulars and time of departure and arrival. She further testified that she knew and expected that the writing contained the terms and conditions of travelling in the defendant’s bus. It is apparent therefore, that the first two questions in the instant matter are answered in the affirmative.”

Again, in my view, these findings by the learned Judge cannot be faulted.

Mr. Pohl, who appeared for appellant, did not seek to argue that the aforementioned findings by the learned Judge were wrong. He

submitted, however, that the disclaimer was ambiguous and that Makaula J had erred in finding to the contrary. He submitted that

because of the ambiguity the disclaimer had to be interpreted contra proferens and that therefore the Court a quo should have found that the disclaimer was unenforceable.

In this regard he placed much reliance on *Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA) where the following was stated at para 9, page 87 E – G:

“The proper approach to the interpretation of indemnity clauses is succinctly set out by Scott JA in these terms in Durban's Water Wonderland (Pty) Ltd v Botha [at 989H - I]:

'The correct approach is well established. If the language of a 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) (1952 AC 192) at 310C - D).”

See too: *First National Bank of South Africa Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA) at para 6.

In developing his argument Mr. Pohl submitted that a proper reading of the disclaimer disclosed that it was couched in very wide terms and that, specifically, there was no reference whatsoever to the exclusion of liability for “negligent driving”. It does not follow, however, from the mere fact that a disclaimer is couched in wide terms that it is therefore ambiguous. However widely phrased a disclaimer may be, if its language upon a proper interpretation thereof expressly and unambiguously exempts the proferens from liability, then effect must be given to it. (Compare the wide disclaimer at issue in the Naidoo case, supra.)

Mr. Pohl submitted, however, with specific reference to the omission of any reference to “negligent driving” in the disclaimer that the present matter was virtually on all fours with the situation that pertained in the Drifters case supra.

The headnote of the Drifters case supra at 83E-G correctly summarises the facts therein as follows:

“The respondent had sustained injuries as a result of a motor vehicle accident negligently caused by the appellant’s employee, while she had been a passenger on a tour arranged by the appellant, for which she had claimed damages from the appellant. The appellant had claimed that it was excluded from such liability on the basis of an indemnity form signed by the respondent before the tour. The front of the form had a wide indemnity clause and a statement that the conditions on the reverse of the form had been read, fully understood and accepted. The reverse conditions contained a more limited clause that exempted the appellant from liability arising from, inter alia, ‘the nature of hiking, camping, touring, driving’.”

The relevant portions of the indemnity form in that matter read as follows:

“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.”

At paragraph 10 of the case the following is stated:

“[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 its 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 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...'

The question that arose for decision was therefore whether liability for damages arising from negligent driving on a public road had been excluded under the contract.

This question was answered in the negative as follows at para 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."

I have set out the relevant passages from the Drifters case in some detail because in my view they demonstrate clearly that that matter is distinguishable. As was submitted by Mr. Muller S.C. who appeared for respondent, it is clear that the ambiguity in the Drifters indemnity clause arose from the context of the terms and conditions of the contract read as a whole and in the context of that appellant's business operations.

In the present matter the relevant provisions of the disclaimer provide that "All persons entering INTERCAPE coach/bus ... do so entirely at their own risk and the liability of INTERCAPE is excluded for any loss or damages ... loss of life, bodily injury ... of whatsoever nature and howsoever caused and whether or not caused by any form of negligence of INTERCAPE or any other person acting on behalf of INTERCAPE, arising out of or connected in any way with the

conveyance, ... by INTERCAPE of any passenger ...”

It is so, as was submitted by Mr. Pohl, that it would have been a very simple matter to have included the words “negligent driving” in the provisions of the disclaimer. The omission of those words is not, however, in my view, decisive of the matter. The disclaimer must be read in the context of respondent’s core business, which is that of the daily conveyance of passengers by bus on public roads. In my view, seen in this context, the phrase “arising out of or connected in any way with the conveyance by INTERCAPE of any passenger” clearly encompasses any loss or damage arising out of or connected to the driving of the bus in question.

Of relevance in this regard, in my view, are the references in the disclaimer to, inter alia, “loss of life” and “bodily injury”. Mr. Pohl submitted that in the absence of any mention of “driving” those references were not related to injuries or death occasioned in consequence of negligent driving on the part of a particular bus driver but rather to injuries or death occasioned in some other manner. He submitted that it was not difficult to imagine a situation where bodily injuries might be occasioned to a passenger who, for instance, fell down the stairs of a bus whilst embarking or who was struck by the lid of a bus trailer whilst waiting to embark. It was circumstances such as these, so he submitted, which the disclaimer was intended to cover.

As was submitted by Mr. Muller, however, the fact that it is possible to conceive of instances where injuries might be occasioned to a passenger in circumstances which were unrelated to the actual driving of a particular bus, does not mean that instances where injuries were occasioned to a passenger in consequence of the negligent driving of a bus are therefore excluded.

Indeed, whilst it is somewhat difficult to conceive of circumstances unrelated to the driving of a bus which might result in the death of a passenger, the converse, it seems to me, is true. The core business of respondent is the daily conveyance of passengers on public highways and, accordingly, the possibility of death ensuing to a passenger in consequence of an accident arising out of the driving of a bus, is, in my view, readily foreseeable and would constitute the main risk against which respondent would seek to protect itself.

I am satisfied therefore that the disclaimer is not ambiguous and that the alternative meaning thereof contended for by Mr. Pohl is, if not fanciful, certainly remote and not the interpretation that a reasonable reader would give to it.

Mr. Pohl submitted further, with reference to the *Drifters* and *Naidoo* cases, *supra*, that in the particular circumstances of this case the court *a quo* should have found that it would be contrary to public policy to enforce the terms of the disclaimer.

If I understood him correctly, this submission was premised on the fact that, at the time of the collision, respondent had “passenger liability” insurance cover in force in the amount of R200 million per incident. In his heads of argument Mr. Pohl stated appellant’s case in this regard as follows:

“It was furthermore the Appellant’s case because of the fact that the Respondent was required to have passenger liability insurance, and in fact had such insurance, a disclaimer excluding liability for negligent driving for a bus operator such as the Respondent, was objectively speaking not to be expected in a contract of this nature. Because it was unexpected, it was absolutely incumbent on the Respondent, through its employees and/or agents, to draw any prospective passenger’s attention to the fact that there was such a disclaimer which, inter alia, excluded liability for negligent driving... Appellant’s case was also that because of the fact that the Respondent was required to take out and keep passenger liability insurance to have and to keep its public transport permit, it would be against public policy (contra bonos mores) to contract out of such liability.”

In advancing these submissions Mr. Pohl relied on the following passage from the Drifters case *supra* at para 16, page 89E – F:

“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.”

The fact that respondent had public liability insurance was apparently gleaned from its Internet website by appellant’s legal representatives. No evidence was led, however, as to whether such website existed at the time that appellant purchased her ticket or as to whether appellant was even aware of the existence of such website. Furthermore, during the course of the hearing of the appeal, Mr. Pohl was constrained to concede that the submissions contained in his heads of argument were incorrect inasmuch as there was in fact no statutory requirement in force at the time obliging respondent to hold any passenger liability insurance as a prerequisite for the issue of its permit. A provision to such effect is contained in section 62 of the National Land Transportation Act no 5 of 2009 which, however, only came into operation on 8 December 2009, after the date on which the accident had occurred.

Mr. Pohl’s reliance on what was stated in the Drifters case, *supra*, whether such dictum was obiter or not, is therefore misplaced.

Apart from this, once it is accepted that respondent was not statutorily enjoined to carry passenger liability insurance as a condition for obtaining a permit then the submission that the disclaimer excluding liability for negligent driving was, objectively

speaking, not to be expected in a contract of this nature falls away. I am further of the view that, objectively viewed, respondent did what was reasonably sufficient to bring the terms of the disclaimer pertinently to the attention of appellant. I am accordingly

unpersuaded that it would be contrary to public policy to enforce the terms of the disclaimer.

In the circumstances the appeal must fail.

The following order will issue:

The appeal is dismissed with costs, such costs to include the costs of two counsel where two counsel were employed.

J.D. PICKERING

JUDGE OF THE HIGH COURT

I agree,

N. DAMBUZA

C. K. MEY

ACTING JUDGE OF THE HIGH COURT

Appearing on behalf of Appellant: Adv. L. Le R. Pohl

Instructed by: Netteltons Attorneys: Mr. Hart

Appearing on behalf of Respondent: Adv. J. Muller S.C.

Instructed by: J.D. Haydock Attorneys: Mr. Haydock

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