

SOUTH AFRICA / JUDGMENT

SASFIN Bank Ltd v Ke Concepts (Pty) Ltd

[2007] ZAGPHC 380; 18263/06 (8 May 2007)

[2007] ZAGPHC 380**COURT**

High Courts - Gauteng

BEFORE

Willis

CASE / FILE NUMBER

18263/06

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Source record**NOT****REPORTABLE****IN****THE HIGH COURT OF SOUTH AFRICA****(WITWATERSRAND****LOCAL DIVISION) JOHANNESBURG****CASE****NO: 18263/06****DATE:**

2007/05/08

In

the matter between:

SASFIN

BANK

LIMITED.....

Applicant

and

KE

CONCEPTS (PTY)

LIMITED.....

Respondent

JUDGMENT

WILLIS, J: The defendant has excepted to the plaintiff's declaration on a number of grounds, one of which goes to the root of the plaintiff's claim according to the defendant, and accordingly if it is successful on this ground, other grounds, namely that the declaration is a major embarrassment, become irrelevant.

It is common cause that the plaintiff's claim arises from an agreement between the parties, which is annexed as Annexure PD1 to the plaintiff's declaration. The plaintiff has particularised its claim for some R9 525 million, together with interest and costs, inter alia as follows;

"The plaintiff, as a result of the defendant's breach of the agreement and failure to develop the Sasfin solution, is unable to utilise the defendant's prospective performance or any part thereof.

14. The plaintiff has suffered, alternatively will suffer damages amounting to R9 525 million as a result of the defendant aforesaid breaches of the agreement, and its inability to comply in any material respects with its obligations and terms thereof.
15. The amount of R9 525 million represents the difference between the reasonable costs of the plaintiffs developing and implementing a comparative solution as a result of the defendant's failure to perform in terms of the agreement, and the total amount which the plaintiff would have been obliged to pay to the defendant in terms of the agreement, had the defendant complied with its obligations in terms thereof.
17. The damages so suffered, were within the contemplation of the parties at the time of the agreement, and at all times thereafter,

alternatively flow naturally and generally

from the breaches of the agreements in question.

19. In the premises the defendant is indebted to the plaintiff in the sum of R9 252 million".
Clause 16.1 of the applicable agreement contains the following:-"Whether or not advised of their possibility, KE will not be liable whether in contract, delict or otherwise;

16.1.1 Any costs of procurement of substitute goods, technology, services or rights;

16.1.2 Loss of profits, contracts or goodwill;

16.1.3 Any incidental or consequential damages, losses or expenses;

16.1.4 Interruptions or loss of use, loss or corruption of data;

16.1.5 Wasted management or staff time".

Mr Peter, who appears for the defendant, has submitted that the plaintiffs claim is expressly excluded, at least by clause 16.1.1 and 16.1.2 of this agreement.

Mr Miltz, who appears for the plaintiff, has retorted that Clause 15 of the agreement contains certain warranties. Mr Miltz submits that clearly the party included those warranties for a purpose, and could not have intended the warranty to be of no consequence whatsoever. Accordingly, so he submitted, this meant that it could not be concluded *ex facie* the contract, that Clause 16 excluded the liability upon which the plaintiff has based its claim. He also referred to Clause 18, which provides for breaches of the agreement to be remedied under certain terms and conditions and for the agreement to be cancelled upon failure to remedy such breaches. In my view this clause is irrelevant to the issue in hand. Clause 16 precludes a claim of the nature upon which the plaintiff intends to rely.

Mr Peter spent some time addressing the court on whether the warranties were properly so-called, according to South African law or whether these were warranties in English law. I do not think that much turns on this point. I accept Mr Miltz's argument to this limited extent, that it must be accepted at this stage that the warranties were there for a purpose, and that it could not have been contemplated that breach of the warranty would have no consequence. It is, however, important to note that the limitation of liability does not exclude all liability howsoever arising. Sub-clauses 16.1.1 to 16.1.5 specify certain circumstances under which there will be no liability, whether arising from contract, delict or otherwise.

In my view Mr Peters exception has been well taken. Clauses 16.1.1 and 16.1.2 would indeed seem to exclude the claim as formulated by the plaintiff, the relevant aspects of which claims I have recorded earlier.

Mr Miltz attempted to persuade me that he could amend the declaration, somehow to reconcile Clause 15, read together with Clause 18 on the one hand, and Clause 16 on the other.

Mr Peter relied very strongly on the following two cases, *Troilip v Jordaan* 1961 (1) SA 238 (A) and *S A Sentraie Ko-op Graan Mpy (Bpk) v Shifren* 1964 (4) SA 716 (A).

In view of the clear and unambiguous provision of Clause 16, I am of the view that the defendant's exception must succeed.

The following is the order of the court.

1. The exception is upheld with costs.
2. The plaintiff's action is dismissed with costs.

Counsel for the Defendant J R Peter

Attorneys for the Defendant Brian Khan Inc.

Counsel for the Plaintiffs/Respondents I Miltz, with him G Goldman

Attorneys for the Plaintiffs Relihan Manamela & Mayer Inc.

Date of Hearing 8 May 2007

Date of the Judgment 8 May 2007

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Prepared on 10 October 2026 · Esheria