THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 936/2013

Not Reportable

In the matter between:

Belet Industries CC t/a Belet Cellular **Appellant**

and

MTN Service Provider (Pty) Ltd **Respondent**

Neutral Citation: *Belet Cellular v MTN Service Provider* (936/2013) [2014] ZASCA 181 (24 November 2014)

Coram: Lewis, Cachalia, Bosielo, Saldulker JJA and Meyer AJA

Heard: 13 November 2014

Delivered: 24 November 2014

Summary: Practice – Pleadings – Exception on ground that particulars of claim bad in law because term of contract limiting liability of the parties to each other prohibits the recovery of the type of damages claimed – Language of the limitation clause, when read in the context of the agreement as a whole, not clear – Excipient did not establish that limitation clause cannot reasonably bear the meaning contended for by the appellant – Appeal upheld.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Bava AJ sitting as court of first instance):

(a) The appeal succeeds with costs.

(b) The order of the court a quo is set aside and replaced with:

'The second exception is dismissed with costs.'

JUDGMENT

Meyer AJA (Lewis, Cachalia, Bosielo and Saldulker JJA concurring)

[1] This appeal has its origin in three exceptions in the South Gauteng High Court, Johannesburg, raised by the respondent, MTN Service Provider (Pty) Ltd (MTN), against the summons of the appellant, Belet Industries CC (Belet), asserting that the particulars of claim lacked averments necessary to sustain an action. Bava AJ upheld one of the exceptions with costs. Contrary to principle and standard practice his judgment is wholly unreasoned. The appeal against the upholding of the exception as well as the costs order in favour of MTN is with the leave of this court.

[2] By the nature of exception proceedings the correctness of the facts averred in the particulars of claim must be assumed (see for example *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) paras 3-10; *Stewart & another v Botha & another* 2008 (6) SA 310 (SCA) para 4). According to the particulars of claim the parties concluded a written 'Dealer Agreement' on 14 October 2010 (the agreement) in terms of which Belet (referred to as 'the Dealer') was appointed to market, promote and facilitate the distribution by MTN (referred to as 'the Service Provider') of network services and stock. In consideration for its

services MTN was obliged to pay to Belet 'commissions' as provided for in the agreement. The agreement was to continue for an indefinite period unless terminated earlier in accordance with its terms.

[3] Effect was given to the agreement and Belet conducted the business of an MTN dealer through two dealer stores. MTN, however, cancelled the agreement with effect from 5 November 2011 as a result of an alleged breach on the part of Belet. The breach and MTN's entitlement to cancel the agreement as a result are disputed by Belet. It asserts that MTN's cancellation constituted a breach or repudiation of the agreement. According to the particulars of claim Belet elected to accept the repudiation and to cancel the agreement. As a result of MTN's repudiation of the agreement, so the particulars of claim proceed, Belet suffered damages in the total sum of R15,4 million, which amount plus interest and punitive costs it now claims from MTN.

[4] MTN contends that clause 40.1 of the agreement precludes Belet from claiming the damages it seeks to claim in its summons. Belet's rival contention is that clause 40.1 merely excludes the recovery of consequential damages. The limitation clause in issue reads as follows:

'Except for consequential damages which arise as a result of the Dealer not complying with the provisions of clause 31, the liability of the parties to each other under this Agreement will be limited to direct damages. For the avoidance of doubt, this excludes financial loss, loss of business, profit, savings, revenue or goodwill suffered or sustained by the Dealer howsoever arising.'

(Clause 31 enjoins Belet, inter alia, to comply with applicable licence conditions, regulatory requirements and directives from a competent regulatory authority.)

[5] As was said by Brand JA in *Trustees, Bus Industry Restructuring Fund v Break Through Investments CC & others* 2008 (1) SA 67 (SCA) para 11-

'Because the respondents chose the exception procedure - instead of having the matter decided after the hearing of evidence at the trial - they had to show that the appellants' claim is (not may be) bad in law. In the present context they therefore had to show that clause 19.5 cannot reasonably bear the narrower meaning contended for by the appellants (see eg *Lewis v Oneanate (Pty) Ltd and Another* 1992 (4) SA 811 (A) at 817F - G; *Vermeulen v Goose Valley Investment (Pty) Ltd* [2001] 3 All SA 350 (A) para 7).'

The same holds true in this case. MTN had to show that clause 40.1 cannot reasonably bear the meaning contended for by Belet.

[6] In the past decade there have been significant developments in the law relating to the interpretation of instruments (see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 18-26). The present state of the law on the correct approach to interpretation was concisely stated by Lewis JA in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) paras 24-25, thus:

'The court asked to construe a contract must ascertain what the parties intended their contract to mean. That requires a consideration of the words used by them and the contract as a whole, and, whether or not there is any possible ambiguity in their meaning, the court must consider the factual matrix (or context) in which the contract was concluded. See *KPMG Chartered Accountants (SA) v Securefin Ltd* [2009 (4) SA 399 (SCA) para 39] . . . In addition, a contract must be interpreted so as to give it a commercially sensible meaning: *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* [2010 (2) SA 498 (SCA) para 13].'

[7] And recently Wallis JA said the following in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12:

'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise". Accordingly it is no longer helpful to refer to the earlier approach.'

[8] MTN argues that the unambiguous meaning of clause 40.1 is that apart from consequential damages suffered by MTN as a result of Belet's breach of the obligations imposed upon it under clause 31, the liability of the parties to each other for the recovery of consequential damages is excluded and their liability is limited to the recovery of direct damages. The types of loss listed in the second sentence of clause 40.1, MTN argues, are matters *ejusdem generis* the 'direct damages' referred to in the preceding sentence. The second sentence defines the meaning which the

parties attributed to 'direct damages'. Or as counsel put it in MTN's heads of argument: '. . . the parties' liability to each other is limited to direct damages only' and '*"for the avoidance of doubt"* (ie should any doubt arise regarding the understanding of what the parties meant by "direct damages") financial loss, loss of business, profit, savings, revenue or goodwill are excluded'.

[9] Belet's opposing contention is that on a proper interpretation of clause 40.1 the types of loss listed in the second sentence are matters *ejusdem generis* 'consequential damages', the recovery of which is excluded except in the event of a breach by Belet of the provisions of clause 31. The second sentence of the limitation clause only serves to illustrate what could constitute consequential damages. The meaning of the clause, Belet argues, at best for MTN, is ambiguous and the court a quo should therefore not have upheld the exception.

[10] Thus, the issue between the parties turns on the interpretation of clause 40.1 and more particularly whether the types of loss listed in the second sentence of the limitation clause are matters *ejusdem generis* the 'consequential damages' or the 'direct damages' referred to earlier on in the clause. The crucial question, therefore, is whether the addition of the last sentence in the limitation clause serves to alter what I conceive to be the plain meaning of the first sentence. Both parties assume that what the clause means by 'direct' and 'consequential' damages are 'general' or 'intrinsic' damages and 'special' or 'extrinsic' damages respectively (see LTC Harms *Amler's Precedents of Pleadings* 7 ed, 2009 at 118-119).

[11] The language of clause 40.1, when read in the context of the agreement as a whole, is not clear. It has not been established that the clause cannot reasonably bear the meaning contended for by Belet. Without an examination of the factual matrix to ascertain the intention of both parties it is not even possible to determine the question whether commission payable to Belet constitutes direct or extrinsic damages.

[12] I conclude, therefore, that MTN has not shown that Belet's claim is bad in law. The limitation clause gives rise to difficulties of interpretation and (this being an exception) cannot be construed without the benefit of evidence relating to the full factual matrix. At least two possible meanings are available on the language used.

In my view the proper meaning of clause 40.1 and the nature of the damages claimed should only be determined after the hearing of evidence at the trial.

[13] In the result the following order is made:

(a) The appeal succeeds with costs.

(b) The order of the court a quo is set aside and replaced with:

'The second exception is dismissed with costs.'

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PA Meyer

Acting Judge of Appeal

APPEARANCES

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