IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 46629/2014

9/9/2015

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

09-09-2015
DATE

SIGNATURE

In the matter between:

LETSEMA TELECOMMS (PTY) LTD Plaintiff

AND

TELKOM SA LTD Defendant

DATE OF HEARING : **04 AUGUST 2015**

DATE OF JUDGMENT : **09 SEPTEMBER 2015**

JUDGMENT

MANAMELA AJ

Introduction

[1] The plaintiff and defendant concluded a written agreement in terms of which the plaintiff was to supply micro optic fibre cables (the fibre cables) to the defendant for a period of 2 years commencing on 01 May 2012 (the agreement).[1] The defendant was to source the fibre cables by placing an order with the plaintiff as specified in the agreement. No orders were to be placed until the plaintiff has erected what is called a "*Local Test Facility*" or "*Local Testing Facility*" in accordance with specifications provided to the plaintiff by the defendant.[2] The local test facility was to be operational (approved by the defendant) within 6 months from the commencement date.[3]

[2] It appears that the local test facility was erected, but its approval by the defendant appears to be a matter of dispute. On 15 April 2013 the defendant informed the plaintiff that it will no longer continue with the agreement and sent a letter to the plaintiff in this regard.[4] The letter refers to failure by the plaintiff to remedy a breach despite an earlier written notice. The plaintiff pleaded that it considers the defendant's letter to constitute a repudiation of the agreement. It accepted the repudiation and cancelled the agreement.

Plaintiff's Claim and the Particulars of Claim

[3] The plaintiff issued summons against the defendant in June 2014. It claims damages in an amount of R2 721 000.00 for expenses incurred in erecting the local

[1] A copy of the agreement is attached as annexure "A" to the particulars of claim on indexed pp 21- 116.
[2] See clause 2.2 of the agreement on indexed pp 28-29.
[3] *Ibid.* See further para 4.4 of the particulars of claim on indexed pp 14-15.
[4] See annexure "B" to the particulars of claim on indexed p 117.

test facility. The material part of the plaintiff's particulars of claim to the summons is as follows:

"12.1 As a result of Defendant's aforesaid repudiation, Plaintiff suffered damages in the sum of R2, 721, 000.00 in respect of expenses incurred in erecting a local test facility in accordance with the international specification... in compliance with the condition as contained in the written contract.

12.2 The damages flow naturally and generally from the kind of anticipatory breach in question, alternatively given the fact that the Defendant knew that the Plaintiff would have to construct the test facility, and that its construction would be expensive, and knew further that if it cancels or repudiates the agreement the money spent by the Plaintiff on the facility would be lost, the damages were foreseeable when the contract was concluded and the recovery of damages was therefore within the contemplation of the parties when the contract was concluded."

Defendant's Exception

[4] The defendant filed a notice of exception to the particulars of claim on the grounds that same is vague and embarrassing; alternatively, fail to disclose a cause of action. However, the exception ultimately delivered was only contending that the there is no cause of action disclosed by the particulars of claim. The exception also underwent some amendment. But, nothing turns on this for this judgment.

[5] Essentially, the defendant complains that the plaintiff's claim is excluded by clauses 13.1 and 13.2 of the agreement. Clause 13.1 reads as follows:

"Subject to clause 13.3 (Limitations of Liability) the total respective liability of Telkom and the Supplier, respectively, in respect of a claim arising in terms of this Agreement (whether arising from negligence, breach of contract or otherwise howsoever) (in this clause, "**Default**") will be limited to the aggregate of the Fees paid (or payable if not fully paid) by Telkom to the Supplier hereunder with respect to the work involved under the applicable Order, unless specifically, and by reference to this clause, agree [sic] to the contrary in any Order under this Agreement, in which event the limitation shall be as set out in the Order."

and clause 13.2 reads as follows:

"Subject to clause 13.3 (Limitation of Liability), in no event shall either party be liable to the other party for indirect or consequential loss or damage [sc. damages], loss of profits, business, revenue, goodwill or anticipated savings suffered by the other party during the term of this Agreement."

[6] As stated above, the defendant's exception was amended. It was initially only based on clause 13.2 in that the damages claimed by the plaintiff were considered by the defendant to constitute "indirect or consequential loss or damages" as it is for expenses relating to the erection of the local test facility. After it was amended, it expanded to the provisions of clause 13.1. Relying on clause 13.1 the defendant contends that, plaintiff's claim is excluded by virtue of the limitation of claims contained in this clause. According to the defendant only claims arising from the

agreement in respect of the "*aggregate of the Fees paid (or payable if not fully paid)*" under an order placed by the defendant are possible. Both *Fees*[5] and *Order*[6] are defined in the agreement.

[7] Defendant's counsel submits that direct loss or damage would be fees paid or payable in respect of products ordered.[7] Therefore, expenses incurred in erecting the test facility are indirect expenses, since they do not fall in the basket of direct loss or damage. He also argued that plaintiff's claim was effectively excluded by clause 13.1 and for that clause 13.2 was not really necessary. This and the other interpretations given to the clauses by the defendant discussed above are challenged by the plaintiff.

Plaintiff's Defences to the Exception

[8] Plaintiff's counsel submitted at the hearing of this matter that, the limitation in clause 13.1 applies only where there in an order. If there is an order, there is no claim, he explained. He also did not agree that fees or price of products ordered or delivered can constitute a loss or damage. He submitted that if fees or prices were direct loss or damage the provisions of clause 13.1 would be superfluous. This, as I understand, would be provided for in clause 13.2 and as such rendering clause 13.1 superfluous or unnecessary. It should be borne in mind that defendant's counsel, on the other hand, has considered provisions contained in clause 13.2 unnecessary for purposes of the limitation.

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[5] See clause 1.1.9 where Fees is defined as "the fee payable by Telkom for the Products calculated in accordance Annexure 3 (Fees) and set out in the relevant Order".

[6] See clause 1.1.13 where Order is defined as "a purchase order for Products substantially in the form set out in Annexure 2 (Form of Order)".

[7] See para 3.13 of the defendant's heads of argument.

[9] According to the plaintiff the damages suffered by the plaintiff flow from expenses incurred as at March 2013 in erecting the test facility. And here are the plaintiff's reasons in this regard. With the loss having already been suffered by the time the acceptance of the repudiation took place, the expenses were already incurred and therefore not indirect, it is contended. The particulars of claim clearly states that the damages were suffered by the plaintiff as a result of the repudiation of the agreement by the defendant. There is thus an allegation that the damages flowed directly from the breach and if this allegation is proved it would defeat the defence raised by the exception that the damages are excluded by clause 13.2 because they are indirect.

Applicable Legal Principles

[10] It is trite that the purpose of an exception on ground that it discloses no cause of action is to avoid the leading of unnecessary evidence.[8] However, if evidence can be led which can disclose a cause of action alleged in the pleadings, the particular pleadings would not be excipiable.[9] The corollary is that a pleading is excipiable on the basis that no possible evidence led on it can disclose a cause of action.[10] This, does not, in any way, amount to saying the disclosed cause of action is meritorious. I will deal with this further below.

[11] Another principle is where exceptions involve interpretation of a contract, as in this matter, the excipient ought to demonstrate that the particular contract is

[8] See ***Dharumpal Transport (Pty) Ltd v Dharumpal*** 1956 (1) SA 700 (A) at 706 E.
[9] See ***McKelvey v Cowan NO*** 1980 (4) SA 525 (Z) at 526D-E.
[10] See ***South African National Parks v Ras*** 2002(2) SA 537 (C) at 543A-B.

unambiguous.[11] The rules of interpretation as recognised and continuously developed by our courts are useful in the interpretation exercise. However, these rules are to be applied with caution. In ***Telematrix (Pty) Ltd v Advertising Standards Authority SA*** Harms JA warned against the employment of an "*over-technical approach*". The learned judge of appeal held that, such an approach would destroy the utility of exceptions and urged a sensible approach, when dealing with exceptions for them to meet their purpose.[12]

Application of the Legal Principles to the Facts

[12] The defendant's contention that the plaintiff's claim is excluded by either clause 13.1 or 13.2 or both clauses, is primarily grounded upon the following. Firstly, that the aforesaid clauses are clear and unambiguous. Secondly, that the meaning or interpretation given to the clauses by the plaintiff do not resonate with the approach taken by our courts. I deal next with these and the plaintiff's submissions under separate subheadings reflecting the impugned clauses.

Clause 13.1

[13] As stated above, Mr Hussein-Yousuf for the defendant submitted that clause 13.1 specifically limits the total liability to the fees paid or payable in terms of the products ordered. It does not matter the origin or cause of the liability, he said. He submitted repeatedly at the hearing and his written heads of argument that, the

[11] See ***Sacks v Venter*** 1954(2) SA 427 (W) quoted in ***Michael v Caroline's Frozen Yoghurt (Pty) Ltd*** 1999 (1) SA 624 (W) at 632B-E.
[12] See ***Telematrix (Pty) Ltd v Advertising Standards Authority SA*** 2006 (1) SA 461 (SCA) at 465G-466H.

agreement was not more than an agreement to do business.[13] He summed up that the current claim by the plaintiff is for expenses incurred in erecting the local test facility and therefore excluded, as it not for fees paid or payable in terms of the agreement.

[14] The argument by Mr Beaton on behalf of the plaintiff in this regard is also stated above. He essentially argued that, this clause was limited to *Fees* payable in terms of an order and is therefore not applicable to claims based on loss or damages, as in this matter, for erection of a local test facility.

[15] In his supplementary heads of argument Mr Hussein-Yousuf made submissions in response to Mr Beaton's submissions regarding *Fees* not constituting loss or damages. He referred to the definition of damage as contained in ***Law of South Africa*** *(LAWSA)* which states that "the diminution ... in the utility or quality of a patrimonial or personality interest in satisfying the legally recognised needs of the person involved".[14] He presented an analogy through examples: if the defendant was not to pay *Fees* to the plaintiff, the plaintiff's patrimony would diminish and so would be the situation, when the defendant had paid for defective goods supplied by the plaintiff. I do not agree with this analogy or submission. The law of damages does not extend to all forms of claims or non-payment for services rendered or goods sold.[15] In my judgment, the *Fees* payable by the defendant in terms of the agreement with the plaintiff can never be loss or damages when they are not paid. Simply put, you cannot lose what you do not have.

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[13] See para 3.6 of the defendant's heads of argument.

[14] See Law of South Africa (LAWSA) (First Reissue) (Vol7) at para 10 on p 9. See further para 6 of the defendant's supplementary heads of argument.

[15] See generally Potgieter JM, Steynberg L and Floyd ***Visser & Potgieter Law of Damages*** 3rd edition (Juta Cape Town 2012) on pp 5-9.

[16] My further understanding of clause 13.1 is that, it limits the liability of the defendant to the maximum amount payable in terms of an order placed with the plaintiff, as a supplier. The liability envisaged by this clause is stated as being contractual or delictual or of any other form ("otherwise howsoever")[16], although I battle to understand the full meaning of the aforesaid. The limitation of liability is linked to the Fees paid (or payable if not fully paid) by the defendant to the plaintiff "with respect to the work involved under the applicable Order, unless specifically, and by reference to this clause, agree [sic] to the contrary in any Order under this Agreement, in which event the limitation shall be as set out in the Order".[17] In my view, clause 13.1 does not preclude a claim which is not based on any *Order* placed by the defendant with the plaintiff. I am aware that the contention by the defendant is contrary to my aforesaid views. Therefore, considering the divergent interpretations, I consider the meaning of this clause not clear and therefore ambiguous.[18]

Clause 13.2

[17] In the alternative to submissions based on clause 13.1, the defendant labelled the expenses for erection of the local test facility to be "indirect or consequential loss or damage" or both as contemplated in clause 13.2. Both terms or concepts (i.e. indirect or consequential) are not defined in the agreement. The parties applied the dictionary meanings of the concepts. I will deal with this in a moment.

[16] See para [5] for a complete reading of clause 13.1
[17] *Ibid.*
[18] See ***Sun Packaging (Pty) Ltd v Vreulink*** 1996 (4) SA 176 (A) at 186J-187B.

[18] Relying on clause 13.2 the defendant argues that, the purpose of the agreement was for the supply of the fibre cables by the plaintiff when needed by the defendant. The fees paid or payable for the fibre cables or products ordered and supplied would constitute a direct loss or damage, it is submitted.[19] And as there is no agreed obligation for the defendant to pay for expenses relating to the erection of the local test facility, which was in fact a suspensive condition to the agreement,[20] a claim for recovery of these expenses would be indirect or consequential.

[19] It is submitted on behalf of the defendant that when interpreting documents, it is required that, the language in a document be given its grammatical and ordinary meaning, unless this would result in "some absurdity or some repugnancy or inconsistency" with the rest of the instrument and not merely in isolation.[21] I agree with this submission. As I have already mentioned, both parties resorted to the dictionary for the meaning of the impugned words. They drew the court's attention to the following meanings. The ***Oxford Dictionary*** defines "indirect" as "not immediately resulting from an action or cause";[22] the ***Shorter Oxford English Dictionary*** 6th edition (2007) as "without intermediary agency; indirect connection or relation; so as to affect directly or without delay, at once, instantly" and ***Collin Dictionary Online*** as "not coming as a direct effect or consequence – "indirect benefits""[23]

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[19] See paras 3.11-3.13 of the defendant's heads of argument.
[20] See para [1] above and its accompanying footnote 2.

[21] See ***Coopers and Lybrand and Others v Bryant*** 1995 (3) SA 761 (A) at p767-768. See further Christie RH and Bradfield GB ***The Law of Contract in South Africa*** 6th edition (LexisNexis Cape Town 2011) on p 213 and the authorities referred to there.
[22] See para 3.4 of the plaintiff's heads of argument.
[23] See paras 21-23 of the defendant's supplementary heads of argument.

[20] However, when dealing with interpretation of documents like contracts, as in this matter, our courts have called for more than "grammatical and ordinary meaning". The Constitutional Court in ***Kwazulu-Natal Joint Liaison Committee v Member of the Executive Council, Department of Education, KwaZulu-Natal and others (Centre for Child Law as amicus curiae)***[24] quoted with approval the following from ***Natal Joint Municipal Pension Fund v Endumeni Municipality***[25]

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used."

[quoted without references, but with added underlining]

[24] 2013 (6) BCLR 615 (CC) on p 651 at para 129.
[25] 2012(4) SA 593 (SCA) and [2012] 2 All SA 262 (SCA) at para [18].

Conclusion

[21] Applying the above rules and guidelines of interpretation, I do not agree that the plaintiff's claim for damages or loss relating to the erection of a local test facility constitute "indirect or consequential loss or damage". In my view, this conclusion is reached when one automatically assumes claims for *Fees* or based on an *Order* to be direct or inconsequential loss. Or even more, that those claims are the only direct or inconsequential loss. Indirect or consequential loss or damage cannot be determined only by reference to the purpose of the agreement, the whole agreement should be considered. Also, indirect or consequential loss cannot be determined by what the one party's obligation towards the other is or ought to be. For, I do not consider it a subjective enquiry denoted by the intentions of the parties, but an objective one wherein the origin or flow of the loss or damages is assessed against the whole agreement. The plaintiff has sued on the basis of breach of the agreement arising out of an alleged repudiation by the defendant and this cannot be indirect or consequential loss.

[22] Whether or not plaintiff would succeed in proving its claim as pleaded against the defendant, is not for the court to decide at this juncture. The plaintiff would have an opportunity to lead evidence on its cause of action as alleged in the pleadings before the trial court.[26] At this stage, I am only to examine the particulars of claim, on the assumption that the plaintiff could prove its claim. And I have already expressed such a view. Therefore the exception cannot succeed.

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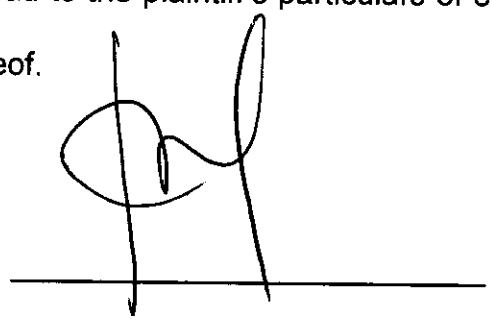
[26] See ***South Africa National Parks*** **v** ***Ras*** 2002 (2) SA 537 (C) at 543A-B, and [2001] JOL 8273 (C) on p 11 under parallel reporting; ***McKelvey*** **v** ***Cowan NO*** 1980 (4) SA 525 (Z) at 526H.

Order

[23] In the premises, I make the following order:

1. The defendant's exception is dismissed with costs, and

2. The defendant is directed to plead to the plaintiff's particulars of claim within 10 (ten) days of date hereof.



K.LA.M. MANAMELA

Acting Judge of the High Court

APPEARANCES :

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Instructed by	:	Naidoo and Associates Inc, Pretoria
For the Defendant	:	Adv. S Hussein-Yousuf
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