

**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

Case Number: 17501/2014

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED.	
<div style="font-size: 1.5em; margin: 0;">24/3/16</div> <div style="font-size: 0.8em; margin-top: 5px;">DATE</div>	<div style="font-size: 1.5em; margin: 0;">[Signature]</div> <div style="font-size: 0.8em; margin-top: 5px;">SIGNATURE</div>

24/3/2016

In the matter between:

H & H GEAR REPAIR CENTRE

PLAINTIFF

And

BOATING INTERNATIONAL CC

DEFENDANT

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**JUDGMENT**

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**Fabricius J,**

1.

**Pleadings:**

Plaintiff's case is founded on contract. Its case, as per the Particulars of Claim, is that it entered into an oral agreement with Defendant on 15 October 2013, whilst being presented by Hanno Smit (Junior). This agreement was entered into at the Defendant's premises. It was alleged that the express, alternatively tacit terms of the agreement were that Plaintiff deposited a boat and trailer with the Defendant for the repair and/or service of the boat's engines and the fish finder. The boat and trailer were to be kept by the Defendant pending the service and repair. It was pleaded that Defendant was unable to return the boat and trailer to the Plaintiff and accordingly breached this agreement, with the result that Plaintiff suffered damages. Plaintiff's alternative claim was based on delict, but I was told by Plaintiff's Counsel at the argument stage that this would not be relied upon. Defendant's plea was that its representatives completed in manuscript a pre-printed job card of which a copy

was attached. Plaintiff's representative Mr Smit Junior signed this job card and this was evident on the bottom part of this card immediately below printed "Terms and Conditions". It was pleaded whilst Defendant would repair the said boat, it was not liable for any loss or damage which the Plaintiff may suffer of whatsoever nature, wheresoever and howsoever caused, in terms of the conditions which appeared on the said job card. Defendant also pleaded that the boat was stolen. In Plaintiff's replication it was denied that Hanno Smit Junior had the authority to bind the Plaintiff to the terms that appear on the job card. It was pleaded that Smit Junior was unaware of the conditions and that Defendant failed to disclose them. Accordingly it was not bound by those terms. In Defendant's rejoinder, it was pleaded that prior to the signature on the job card by Smit Junior, five previous similar job cards had been signed either by Smit Junior or his father Smit Senior. All of these job cards contained the same terms and conditions. Accordingly, Plaintiff's representatives were aware of these conditions or ought to have been aware thereof. It was also pleaded in the rejoinder that Plaintiff represented to Defendant that Smit Junior

possessed the requisite authority. Accordingly, Plaintiff was estopped from relying on such lack of authority.

2.

**The job card:**

Apart from setting out the details of the items that had to be repaired, which are not relevant to the present issue, the following appears at the bottom of the job card:

"Terms and Conditions". These words are legible and anyone signing this job card at the place beneath such terms that appear in very small print, would notice that "Terms and Conditions" are referred to herein. The actual terms are in really small print, to such an extent that they are difficult to read, are the following:

1. "Boating International is not liable for any loss or damage I may suffer of whatsoever nature, wheresoever and howsoever caused, including any loss or damage caused by the negligence or recklessness of Boating International's servants, employees, agents or any other persons.

Furthermore, all goods, including but not limited to motors, boats and trailers are transported and stored at my own risk.

2. I hereby authorise Boating International to carry out the work listed above at my expense and to replace and supply such parts and materials, including oils and petrol, which may be necessary to complete said work". The remainder of the terms are not relevant hereto. Beneath the terms the words, clearly legible, "Customer's Signature" appear, and the job card was signed by Smit Junior as I have said. Beneath the words "Customer's Signature" appear the words, ("Duly Authorised"), also clearly visible.

3.

**The evidence: Smit Senior:**

He testified that he was the sole member of Plaintiff and that on five prior occasions he or his son had taken the particular boat to Defendant for certain repairs. The practice was that after a job card had been completed and signed either by himself or by his son, the Defendant would phone him about two days thereafter and inform

him of the cost of repairs which he would then approve. His son had no authority to enter into any contract on behalf of Plaintiff. The reason for filling in the job card was to indicate which items had been left on the boat. He was not told of any conditions relating to an indemnity, and if he had known that Defendant had left his boat on the pavement, he would not have done business with Defendant. He was later told that the boat had been stolen apparently from the pavement right next to Defendant's property, but not from Defendant's property. When he signed a job card on four previous occasions he could see that there was print above his signature. He never read it and it was also in small print. He agreed that he had signed the previous job cards without knowing what the small print contained. He could have asked. He could, (whilst giving evidence), read that above the fine print the words "Terms and Conditions" appeared. He never asked anybody about this, but did not know that it was of importance. As a businessman he knew that such indemnity clauses were in practice and this was not surprising to him. He would in any event have had no problem with such an indemnity clause, but in the present instance did have such problem, inasmuch as his boat was stolen from the neighbours' premises (as he

had been told). He never told Defendant that it ought not to enter into any agreement with his son. He also admitted that he had been recompensed by his own insurance company.

4.

Smit junior:

He signed the particular job card that is in issue herein. He said that he had not been given any authority by his father to enter into a written agreement. He also stated that the purpose of the job card was to indicate what needed to be repaired and what items had been left on the boat. He was not made aware of any conditions. Whilst giving evidence he was shown this exhibit and could read words "Duly Authorised" beneath his signature and also the words "Terms and Conditions" that appeared above the fine print. He also was aware of indemnity clauses in the business world. When he signed he did not see the words "Terms and Conditions" but in any event paid no attention thereto, and thought nothing of them. That was the case for the Plaintiff. Defendant asked for absolution from the instance with

reference to a number of decided cases and in particular *George v Fairmead 1958*

(2) *SA 465 AD at 472*. In that case a hotel register was signed, and this contained

terms of the contract. The guest had not bothered to read them. In this context the

Court asked the most relevant question namely: "Has the first party – the one who is

trying to resile – been to blame in the sense that by his conduct he has led the other

party, as a reasonable man, to believe that he was binding himself?" (at 471). At

472 A the following appears: "When a man is asked to put his signature to a

document he cannot fail to realise that he is called upon to signify, by doing so, his

consent to whatever words appear above his signature". I was also referred to the

wide terms of the indemnity clause and the fact that on Plaintiff's own version, per

the Particulars of Claim, Smit Junior had been authorised to represent Plaintiff.

Plaintiff referred me to the relevant principles relating to a contract of deposit in

*Amler's Precedents of Pleadings, 8<sup>TH</sup> Edition, L. T. C. Harms at 165*, and sought

to distinguish the principles laid down in *Afrox Healthcare Bpk v Strydom 2002 (6)*

*SA 21 (SCA)*, on the basis that a deposit contract was not the issue in those

proceedings. In reply Defendant's Counsel referred me to the decision of *Mercurius*



*Motors v Lopez 2008 (3) SA 572 SCA*, and submitted that it could be distinguished on a number of material grounds. Plaintiff was not misled by anyone. The indemnity clause and the words "Terms and Conditions" were not hidden away, and were clearly apparent above the customer's signature, although the actual terms were in small print. The words "Duly Authorised" beneath the customer's signature were also clearly visible. The relevant indemnity clause was also not of a surprising nature to Plaintiff according to the evidence of both witnesses.

## 5.

Having regard to the test for absolution from the instance and all relevant submissions, I refused the application. Defendant thereafter closed its case.

## 6.

Plaintiff's claim is based on contract and Plaintiff's Counsel unequivocally submitted this as well during the argument stage. In that case it is for Plaintiff to prove that no exemption clause was applicable to it.

See: *Christie's, The Law of Contract in South Africa, 6<sup>TH</sup> Edition, at 191.*

## 7.

The Defendant's Counsel, to a large extent, relied on various *dicta* in the *Afrox decision* supra and in that context emphasized that both witnesses had been aware of the general practice of service suppliers contracting on terms which contained indemnity clauses. It was not unusual to them. The relevant words and conditions that I have referred to were also clearly visible to a signatory, and were certainly not hidden away, or obscured or misleading in any manner. Furthermore, Brand JA said in *Afrox* that the general principles that I have referred to, including that are contained in *George v Fairmead* supra, as a matter of principle applied to all service providers and persons contracting with them. Plaintiff's Counsel submitted that the normal principles relating to indemnity clauses that contained in *George v Fairmead supra*, did not apply to contracts of deposit. No authority was cited for this proposition and I am not aware of any such decided cases. It also seems quite clear from *Amler's Precedents of Pleadings* supra at 166 that the normal principles

relating to exemption clauses applied to a contract of *depositum* as well. I cannot imagine why they should not so apply.

## 8.

Plaintiff's Counsel also heavily relied on the decision of *Mercurius Motors* supra and the specific facts. The mere reading of this decision and the facts pertaining thereto make it abundantly clear that there is a material and substantial difference between the facts of that case and the evidence in these proceedings. There is no question in these proceedings that the particular exemption clause was inconspicuous and barely legible with reference to conditions on the reverse side of the particular document. In my view the *Mercurius* decision was decided on the particular facts of the case, and is not authority for the proposition that the normal principles relating to exemption clauses were overruled, varied or altered in the context of a contract of deposit. There is also no question in these proceedings that the witnesses for Plaintiff were misled in any manner such as the one contracting party in the *Mercurius* case.

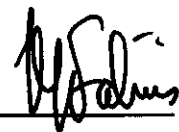
9.

In my view therefore the normal principles apply to the present proceedings, and accordingly I find that Plaintiff was bound by the relevant indemnity clause, that it was not misled in any manner, that it had been aware of the general practice of service providers relying on indemnity clauses, that the clause was not obscure or hidden away, that the words "Terms and Conditions" were clearly visible above the actual conditions which were in small print, and which were immediately above the depositor's signature and that immediately beneath the signature were the words clearly visible "Duly Authorised".

10.

In the result, the following order is made:

**Plaintiff's claim is dismissed with costs.**



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**JUDGE H.J FABRICIUS**

**JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION**

Case number: 17501/14

Counsel for the Plaintiff:

Adv F. J. Erasmus

Instructed by: Cilliers & Reynders Inc

Counsel for the Defendant:

Adv C. Acker

Instructed by: Grant Rae Attorneys

Date of Hearing: 3 March 2016

Date of Judgment: 24 March 2016 at 10:00