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REPUBLIC OF SOUTH AFRICA

168/97

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

DURBAN'S WATER WONDERLAND (PTY) LTD — ***APPELLANT***

and

INGRID BOTHA — ***FIRST RESPONDENT***
ELMO JACQUES BOTHA — ***SECOND RESPONDENT***

CORAM: ***VAN HEERDEN DCJ, HOWIE, HARMS, SCOTT JJA et MELUNSKY AJA***

HEARD: ***16 NOVEMBER 1998***

DELIVERED: ***27 NOVEMBER 1998***

J U D G M E N T

SCOTT JA/....

SCOTT JA:

In the early evening of 25 November 1988 the first respondent (to whom I shall refer as Mrs Botha) and her 2 ½ year-old daughter, Mariska, were injured when they were flung from one of the amusement amenities (called the 'jet ride') at the appellant's amusement park in Durban. Subsequent investigation revealed that there had been a failure in the hydraulic system governing the vertical movement of the car in which they had been seated. Mrs Botha and her husband (the second respondent), in his capacity as father and natural guardian of Mariska, instituted action for damages in the Magistrate's Court, Durban. In its plea the appellant denied the respondents' allegation of negligence and put in issue the quantum of their respective claims. In addition, it pleaded that the contract which governed Mrs Botha's and Mariska's ride on the amenity in question was subject to a term exempting the appellant from liability in respect of any injury or

damage arising from the use of the amenities. At the instance of the parties the magistrate directed in terms of Rule 29 of the Magistrates' Courts Rules that the issue of the appellant's liability be determined first and that the question of quantum stand over for later determination. In the result, three issues fell to be determined at the trial. They were -

(i) whether a disclaimer contained in a notice painted on the windows of the ticket offices in the amusement park had been incorporated into the contract governing the use of the park's amenities,

(ii) whether on a proper construction of the notice the appellant was exempted from liability for negligence, and

(iii) whether the appellant, as operator of the amusement park, had been negligent.

The magistrate found against the appellant on all three issues. On appeal to the Natal Provincial Division, Didcott J and Wilson J found against the appellant on issues (ii) and (iii), which rendered a decision on the first issue unnecessary. The

present appeal is with the leave of the Court *a quo*.

In this Court counsel were asked to consider whether the finding that the appellant was liable was appealable prior to the determination of the remaining issues, having regard in particular to the conflicting decisions in ***Santam Bpk v van Niekerk*** 1998 (2) SA 342 (C) and ***Raubex Construction (Pty) Ltd h/a Raumix v Armist Wholesalers (Pty) Ltd en 'n Ander*** 1998 (3) SA 116 (O). In response, it was contended by both sides that the finding was indeed appealable and that the ***Santam*** case, in which the contrary was held, had been wrongly decided. I shall return to the question of appealability later in this judgment.

It is convenient at this stage to give a brief description of the ticket offices and to set out shortly how the accident occurred.

The several ticket offices in the park are identical. Each has a round base and a round roof. The wall from about waist height to the roof consists of

glass in aluminium frames and is octagonal in shape. Three or four of the eight window-panes are cashiers' windows with serving hatches. Each is separated by one or more window-panes. The prices of the various amusement amenities are painted on the cashiers' windows against a red background at about head height above the serving hatch. They are directly in the line of vision of patrons purchasing tickets. The disclaimer on which the appellant relies was painted on each window-pane separating the cashiers' windows; an English version on the one side of each cashier's window and an Afrikaans version on the other. The words were painted in white on plain glass in lettering some 2½ centimetres high. Each notice was about 750 to 800 mm by about 600 mm in size with a white-painted border and was at about eye-level. Although not directly in the line of vision of a patron standing at a cashier's window the notices were readily visible and legible. According to the evidence they could be read from about six paces

away.

The notice in English read as follows:

> 'The amenities which we provide at our amusement park have been designed and constructed to the best of our ability for your enjoyment and safety. Nevertheless we regret that the management, its servants and agents, must stipulate that they are absolutely unable to accept liability or responsibility for injury or damage of any nature whatsoever whether arising from negligence or any other cause howsoever which is suffered by any person who enters the premises and/or uses the amenities provided.'

The Afrikaans version, although not an exact translation, was to the same effect.

> 'Die geriewe wat ons hier by ons pretpark voorsien is ontwerp en gebou na die beste van ons vermoë vir u genot en veiligheid. Nietemin spyt dit ons dat daar bepaal moet word dat die bestuur, sy dienaars en agente hoegenaamd geen aanspreeklikheid of verantwoordelikheid aanvaar vir enige besering of skade van watter aard ookal en op welke wyse veroorsaak - hetsy deur nalatigheid of op enige ander wyse - wat deur enige persoon wat die perseel binnegaan en/of van die geriewe gebruik maak, gely word.'

The jet ride consisted of a central cylindrical-shaped structure several metres high from which protruded twenty metal arms. At the outer end of each

was mounted a car so shaped as to represent a jet propelled aircraft. This had a built-up seat for two persons in an open cockpit. A single seat belt for both persons was attached to each side of the seat. In the centre of the cockpit was a lever which could be pulled back or pushed forward. When the machinery was activated the control structure revolved at a rate of about 5 to 6 revolutions per minute causing the cars to travel at a linear speed of approximately 15 km per hour. When the lever in the cockpit was pulled back the arm would lift the car up to a height of about 8 metres and so create the illusion of flying. When the lever was pushed forward the car would descend to its original position just above the ground, unless its descent was arrested by the lever being pulled back again.

On 25 August 1988 Mr and Mrs Botha were on holiday in Durban with their young daughter. It was not their first visit to the appellant's amusement park. Mrs Botha enjoyed the amusement amenities at fun-fairs and when in

Durban the couple would generally visit the park. On the occasion in question Mr Botha was making a film of Mariska with his video camera. Mrs Botha purchased tickets for the amenities at one of the ticket offices. Mr Botha denied having seen the disclaimer notice. Mrs Botha could not recall having seen it; she did remember seeing the notice specifying the prices for the different rides. When asked in cross-examination about the disclaimer notices, she replied that although she could not recall them she was aware that there were such notices at amusement parks and that patrons rode on the amenities at their own risk.

Before leaving the park, Mariska insisted on one final ride. This time she chose the jet ride. A notice at the foot of the central structure of the amenity warned that children of 7 years or under were to be accompanied 'by a parent or guardian'. Although Mrs Botha was experiencing problems with her neck she decided to accompany Mariska. She climbed into one of the cars and sat with

Mariska on her lap, with the seat belt around both of them. After a wait for other people to board the cars, the machinery was set in motion. All went well at first. The car containing Mrs Botha and Mariska ascended and descended in a controlled manner. Suddenly it began to move in a series of violent jerks. According to Mr Botha, who until then had been filming the event, the car rose and fell on three occasions. Mrs Botha said that when the trouble started she immediately released her grip on the lever. According to Mr Jackson, an expert who subsequently examined the mechanism, the problem was caused by a freak failure of one of the hydraulic valves which operated the arm in question. This would have caused the car simply to fall to the lower limit of its vertical range, whereupon it would have bounced up again. He suspected that when this happened Mrs Botha may have instinctively grabbed at the lever causing the bouncing motion of the arm to combine with the lifting mechanism which would have

continued to function when the lever was pulled back. Whatever the precise cause, it was not in dispute that after descending to the lowest point with a thump, the car rose up again and then stopped. The upward momentum was such that the seat to which Mrs Botha and Mariska were strapped parted from the car and they were flung into the air. Fortunately for them they missed the paved area surrounding the amenity and landed in a flowerbed.

Against this background it is convenient to consider first the proper construction to be placed on the disclaimer. 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 804 C.)

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) at 310 C - D).

What is immediately apparent from the language employed in the disclaimer is that any liability founded upon negligence in the design or construction of the amusement amenities would fall squarely within its ambit. The first sentence contains specific reference to the design and construction of the amusement amenities. Even if this were to be construed as qualifying the 'negligence' contemplated in the second sentence that qualification would not therefore exclude from the ambit of the disclaimer negligence in relation to such design or construction. Various grounds of negligence were alleged in the particulars of claim. The Court *a quo*, however, found the appellant to have been

negligent in one respect only and that was the failure to ensure that the seat of the car was properly bolted to the body of the car. In this Court counsel for the respondents did not contend that the appellant had been negligent in any other respect. In my view he was correct in not doing so. The ground of negligence relied upon clearly related to the design or construction of the amenity. It follows that the respondents' cause of action was one which fell within the ambit of the disclaimer. I did not understand counsel to contend the contrary.

The ambiguity which was found to exist by both the magistrate and the Court *a quo* related to the words 'accept liability'. It was held that the notice was capable of meaning no more than that the management, its servants and agents would not accept liability in the sense of admitting liability but would require any claimant to prove his or her claim, presumably in a court of law. The reasoning of the Court *a quo* appears from the following passage in the judgment of Wilson J.

> 'I am satisfied that in considering the meaning to be given to such an exemption clause the Court can and should have regard not only to the wording but also to the context in which they are used and thus to ascertain the intention of the parties. In the present instance we are dealing with a busy fun fair with many rides, water slides and other such amusements. There are undoubtedly hundreds of visitors each day and any reasonable person would assume, correctly in this case, that the proprietors are insured. One can also assume that there will be frequent complaints or requests for compensation arising out of injury or damage to or loss of property belonging to visitors. In these circumstances it would be eminently reasonable for the insurer and the proprietor to decide that they will not accept liability but will require claimants to prove their claims and to bring this to the notice of their patrons. This is what the notice does.'

I cannot agree. Such a construction strikes me as being far-fetched; it is not one to which the disclaimer is fairly susceptible. Its obvious consequence would be that the notices would serve no purpose. Whether there were notices or not, the appellant would always have had the right to require any claim against it to be proved in a competent court. There was, accordingly, no need for the appellant to inform its patrons in advance that it would adopt such an uncompromising attitude

in the future. Nor, in any event, would such an attitude necessarily have served the appellant's interests or those of its insurers. Depending on the circumstances, it could well be to the advantage of the appellant or its insurer to settle a claim as soon as possible. I cannot think that the appellant could ever have intended the notices to have such a meaning; nor could any patron reasonably have thought that this is what was intended to be conveyed. The use of words such as 'do not accept liability' or 'unable to accept liability' ('geen aanspreeklikheid aanvaar') in disclaimers of this kind is not uncommon. In the context in which they are used they mean that liability will not be incurred. No doubt what was intended could have been expressed differently, but that is not the point. In my view, the language used is capable of only one meaning and that, in short, is that the appellant would not be liable for injury or damage suffered by anyone using the amenities, whether such injury or damage arose from negligence or otherwise.

This brings me to the question whether the terms of the disclaimer were incorporated into the contract which was entered into by Mrs Botha when purchasing tickets for the amenities in the park. The respondents' claims were founded in delict. The appellant relied on a contract in terms of which liability for negligence was excluded. It accordingly bore the onus of establishing the terms of the contract. (The position would have been otherwise had the respondents sued in contract. See ***Stocks & Stocks (Pty) Ltd v T J Daly & Sons (Pty) Ltd*** 1979 (3) SA 754 (A) at 762 E - 767 C.)

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 ***The Law of South Africa*** vol 5, part 1 (first reissue) par 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.) The evidence, however, did not go that far. Mrs Botha conceded that she was aware that there were notices of the kind in question at amusement parks but did not admit to having actually seen any of the notices at the appellant's park on the evening concerned, or for that matter at any other time. In these circumstances, the appellant was obliged to establish that the respondents were bound by the terms of the disclaimer on the basis of quasi-mutual assent. This involves an inquiry whether the appellant was reasonably entitled to assume from Mrs Botha's conduct in going ahead and

purchasing a ticket that she had assented to the terms of the disclaimer or was prepared to be bound by them without reading them. (See ***Stretton v Union Steam Ship Company (Limited)*** (1881) 1 EDC 315 at 330 - 331; ***Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis*** 1992 (3) SA 234 (A) at 239 F - 240B.) The answer depends upon whether in all the circumstances the appellant did what was 'reasonably sufficient' to give patrons notice of the terms of the disclaimer. The phrase 'reasonably sufficient' was used by Innes CJ in ***Central South African Railways v McLaren*** 1903 TS 727 at 735. Since then various phrases having different shades of meaning have from time to time been employed to describe the standard required. (See ***King's Car Hire (Pty) Ltd v Wakeling*** 1970 (4) SA 640 (N) at 643 G - 644 A.) It is unnecessary to consider them. In substance they were all intended to convey the same thing, *viz* 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.

I have previously described the notices containing the disclaimer and their location. From that description it is apparent that they were prominently displayed at a place where one would ordinarily expect to find any notice containing terms governing the contract entered into by the purchase of a ticket, *viz* at the ticket office. Any reasonable person approaching the office in order to purchase a ticket could hardly have failed to observe the notices with their bold white-painted border on either side of the cashier's window. Having regard to the nature of the contract and the circumstances in which it would ordinarily be entered into, the existence of a notice containing terms relating thereto would not be unexpected by a reasonable patron. This much is apparent from the evidence of Mrs Botha herself; she knew there were such notices at amusement parks. In all

the circumstances I am satisfied that the steps taken by the appellant to bring the disclaimer to the attention of patrons were reasonable and that, accordingly, the contract concluded by Mrs Botha was subject to its terms.

I return to the question of appealability. It is apparent from what has been said above that the appellant was entitled to succeed on the grounds of a substantive defence which was based on contract and which was quite distinct from the appellant's denial of the allegations made by the respondents to establish their claims in delict. In other words, the defence gave rise to an issue which was not a component of the respondents' cause of action and its resolution was therefore not dependent upon the acceptance or otherwise of the allegations contained in the particulars of claim. An order in relation to a defence of this nature, which in the present case was embodied in the magistrate's order, is distinguishable from the type of order considered in the ***Santam*** and ***Raubex Construction*** cases, *supra*.

There, the question in issue was the appealability of a finding in relation to merely a component of the plaintiff's case, *viz* that the plaintiff had established that the defendant was liable to it in a sum still to be determined.

In terms of s 83 (b) of the Magistrates' Courts Act 32 of 1944 any 'rule or order', to be appealable, has to have 'the effect of a final judgment'. The difficulty that arises in relation to the kind of order considered in the ***Santam*** and ***Raubex Construction*** cases is that it does not finally dispose of any portion of the relief claimed (cf ***Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration*** 1987 (4) SA 569 (A) at 585 F - G); nor can an order of this kind be regarded as a declaratory order since a magistrate has no jurisdiction to make such an order. (Cf ***S A Eagle Versekeringsmaatskappy Bpk v Harford*** 1992 (2) SA 786 (A) at 792 H.) However, as I have indicated, the order made by the magistrate in the present case is distinguishable from the orders considered in the

Santam and ***Raubex Construction*** cases and it is accordingly unnecessary to resolve the conflict between these cases.

In ***Labuschagne v Labuschagne. Labuschagne v Minister van Justisie*** 1967 (2) SA 575 (A) this Court held that an order dismissing a special plea embodying a substantive defence which existed *dehors* the plaintiff's claim was a 'judgment or order' and not an 'interlocutory order' within the meaning of s 20 of the Supreme Court Act 59 of 1959 (as it then read) as the order was

> ''n finale en onherstelbare afhandeling van 'n selfstandige en afdoende verweer wat eerste verweerder geopper het as grondslag vir die regshulp wat hy in die spesiale pleit aangevra het.' (At 583 E - F)

(See also ***Smit v Oosthuizen*** 1979 (3) SA 1079 (A) at 1089 A - D; ***Constantia Insurance Co Ltd v Nohamba*** 1986 (3) SA 27 (A) at 36 A - I.) For the same reason such an order would clearly have the effect of a 'final judgment' within the meaning of s 83 (b) of the Magistrates' Courts Act. (See ***Boshof Munisipaliteit***

v Niemann 1969 (1) SA 75 (O) at 79 C.) To the extent that in the present case the order of the magistrate dismissed the appellant's defence in relation to the disclaimer, the order similarly had the effect of finally and irreversibly disposing of a self-contained defence which existed independently of the respondents' case. It follows that to this extent the order was appealable.

The appeal must therefore succeed. The appellant, however, is not entitled to all the costs relating to the appeal record. This is because it included the heads of argument of both parties filed in the Court *a quo*. Counsel for the appellant readily conceded that they should not have formed part of the record.

The following orders are made:

(1) The appeal is upheld with costs, save that such costs shall not include those relating to pp 253 to 305 of the appeal record.

(2) The order made by the Court *a quo* is set aside and the following order is substituted therefor:

'(a) The appeal is upheld with costs.

(b) The following is substituted for the order made by the magistrate:

The plaintiffs' claims are dismissed with costs.'

D G SCOTT

VAN HEERDEN DCJ)
HOWIE JA)
HARMS JA) - *Concur*
MELUNSKY AJA)