Case No 272/92

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ELGIN BROWN & HAMER (PROPRIETARY) LIMITED Appellant

and

INDUSTRIAL MACHINERY SUPPLIERS
(PROPRIETARY) LIMITED. Respondent

CORAM: HOEXTER, SMALBERGER, F H GROSSKOPF, JJA et VAN COLLER, KRIEGLER AJJA

HEARD: 19 March 1993 DELIVERED:

1 April 1993

J U D G M E N T

HOEXTER, JA

HOEXTER, JA

The appellant company ("the plaintiff") carries on the business of marine engineering at Durban. The respondent company ("the defendant") is an industrial machinery supplier and repairer whose main place of business is at Pinetown. In April 1991 the plaintiff instituted an action in the Durban and Coast Local Division against the defendant (which was cited as the first defendant) and two co-defendants. For purposes of this appeal no reference to the claims against the co-defendants is necessary. Relevant to the plaintiff's action are two contracts, as varied from time to time, which are respectively described in the particulars of claim as "the first agreement" and "the second agreement." Against the defendant the plaintiff claimed payment of damages in the sum of R1 482 179,48 flowing from the defendant's alleged

breaches of the second agreement.

The defendant excepted to the plaintiff's particulars of claim on the ground that they lacked averments necessary to sustain a cause of action. Mall AJ upheld the exception with costs, including the costs of two counsel. With leave of the court a quo the plaintiff appeals against the whole of the judgment.

The terms of the first and second agreements are set forth in paragraphs 5 to 12 of the particulars of claim. The main content of these paragraphs may be shortly stated. The first agreement was concluded in June 1987 between the plaintiff and Emopesca E.E. ("Emopesca"). In terms thereof the plaintiff undertook, against payment of a certain contract price, to overhaul two fishing trawlers, the Sistallo and the Fontaeo, including the reconditioning of their diesel engines, within a period of twelve weeks of a defined date. If this period were exceeded the

plaintiff would be liable to Emopesca for penalties. After September 1988 the first agreement was varied by a further agreement that, while the Sistallo would still be reconditioned, the Fontaeo would be scrapped, save that its two engines would be reconditioned by using parts from the two engines of the Sistallo.

The second agreement, which was concluded in November 1988, was a contract between the plaintiff and the defendant. In terms thereof the reconditioning of the aforesaid two engines would be carried out at a certain contract price by the defendant as a sub-contractor to the first agreement. The defendant would use the spares available from all four engines. Prior to delivery the engines would be thoroughly tested on a test-bed, and the engines would be installed and run in by the defendant. The defendant's Standard Conditions of Contract would apply to the second agreement.

In June 1989 Emopesca and the plaintiff and the defendant agreed to vary the first and second agreements. The estimated budget price for completion of the two engines was increased and time limits were set for the reconditioning of the two engines by the defendant. During September 1989 the plaintiff and the defendant further varied the second agreement by agreeing (i) that prior to delivery the engines would not be run on a test-bed; (ii) the engines would be installed in the Sistallo by a technician of the defendant assisted by labour from the plaintiff; and (iii) the engines would be commissioned by the defendant after they had been installed in the Sistallo.

The performance of the engines after they had been installed is described in paragraphs 13 to 17 of the particulars of claim. They initially ran successfully for some thirty hours. On 9 January 1990, when tested under

full load conditions, the port engine failed within five minutes. Both engines were removed and stripped and found to have been damaged during their commissioning. The engines were taken to the defendant's premises where they were once again stripped and overhauled, whereafter at the beginning of March 1990 the defendant returned the engines to the Sistallo. On 28 March 1990, and after being installed, the port engine was tested at Durban and again failed. Both engines were again removed, stripped and found to be damaged.

The computation of the damages claimed by the plaintiffs from the defendant is set forth in paragraphs 23 to 25 of the particulars. The plaintiff alleges (i) that in terms of the first agreement it was obliged to buy two new engines for use in the Sistallo at a cost of R199 646; (ii) that it suffered damages in the sum of R745 839 being wasted costs for items installed on the Sistallo which were

destroyed during the refitting of the engines, items which became redundant when the new engines were installed, labour and wasted fuel costs; (iii) that it suffered loss and damages in the sum of R536 694,48 being the total of penalties payable by it to Emopesca and loss of interest on the contract price payable by Emopesca calculated from 12 November 1989 to 31 May 1990.

Mention has already been made of the fact that it was a term of the second agreement that the defendant's Standard Conditions of Contract ("the SCC") would apply thereto. The plaintiff annexed to its particulars of claim a copy of the SCC. The exception noted by the defendant is based on the provisions of clause 8 of the SCC in which reference is made to the defendant as "IMS".

That clause is in the following terms:-

> "Whilst reasonable care will be taken to ensure that first class materials and workmanship will be used in the execution of the contract IMS will not be liable for any loss or damages whatsoever

> direct or indirect, including penalties or liquidated damages, including consequential damages, due to late or defective delivery, defective, faulty or negligent workmanship or material, or to any act, default or omission of its employees, suppliers or sub-contractors, unless specifically negotiated with IMS and confirmed in writing. Any claim shall be limited to the repair or replacement of any defective or deficient parts, it being at the discretion of IMS whether to repair or replace in every instance. It is a condition precedent to any such claim that the defective or deficient parts shall be delivered at the purchaser's expense to an IMS workshop or a workshop nominated by IMS."

In its notice of exception . the" defendant recited the

provisions of clause 8 of the SCC and then stated:-

> "The amounts claimed by the Plaintiff in paragraphs 23, 24 and 25 are damages in respect of which liability is excluded in terms of the said clause."

The allegations in paragraphs 13 to 17 of the

particulars of claim, in which the performance of the

engines subsequent to their installation in January 1990 is

described, have already been summarised. At this juncture

it is convenient to see in what fashion the plaintiff characterised the defendant's alleged breaches of the second agreement on which the claim for damages is based. This appears from the averments set forth in paragraphs 18(a) and 18(b) of the particulars of claim which are quoted hereunder in full:-

> 18(a)
>
> The First Defendant accordingly breached its obligations in terms of the second agreement, as amended, in that:-
>
> (i) It supplied to the vessel on the first occasion two engines that, as a result of negligence or defective workmanship on the part of the First Defendant's employees, had not been reconditioned to a reasonable and acceptable standard;
>
> (ii) It supplied to the vessel on the second occasion two engines that, as a result of negligence or defective workmanship on the part of the First Defendant' s employees, had not been reconditioned to a reasonable and acceptable standard.
>
> 18(b)
>
> The First Defendant's breaches aforesaid constituted fundamental breaches of its

obligations in terms of the second agreement in
that:-
(i) Its reconditioning of the two engines
in terms of that agreement; and/or (ii) Its performance in terms of that
agreement;

were both totally ineffective and useless for the purpose for which they were intended."

Clause 8 of the SCC contains a limitation of liability clause couched in the widest possible terms. On the face of it the exclusion of liability "for any loss or damages" in the clause refers to every kind of loss or damages. The damages claimed by the plaintiff are alleged to flow from "negligence or defective workmanship" of the defendant's employees. Clause 8 specifically excludes liability for damages "due to ....defective .... or negligent workmanship....or to any act, default or omission of its employees . . . ." If clause 8 means what it says then it relieves the defendant from liability for loss flowing from precisely the breaches of contract pleaded by

the plaintiff in paragraph 18 of its particulars.

Mr Shaw, who argued the appeal on behalf of the plaintiff, sought to avoid such a construction of clause 8 by reliance on two alternative arguments. The first argument was based on the introductory words which preface the exclusionary provisions and which read:-

> "Whilst reasonable care will be taken to ensure that first class materials and workmanship will be used in the execution of the contract ...."

Mr Shaw submitted that the words just quoted created on the part of the defendant a contractual obligation which operated reciprocally with the exclusionary provisions in the remainder of clause 8. From this it followed, so the argument proceeded, that in order to invoke the protective effect of the exclusionary provisions it was a legal precondition that the plaintiff should plead and prove that it had discharged its obligation stipulated in the opening words. This argument appears to me to be untenable. In

Agricultural Supply Association v Olivier 1952(2) SA 661 (T) (Olivier's case) the issue on which an appeal from the magistrate's court turned was the meaning of a non-warranty clause by which the supplier of seeds excluded its liability in certain circumstances. It was held that no cause of action on the part of the buyer lay, and that the exclusion of liability was unaffected by a statement preliminary to the operative clause that the supplier took 'the utmost care to supply seeds, plants, etc., true to name and character'. De Wet J (at 664B-H) endorsed, as being in accordance with our law, and applied the following principle cited by Halsbury Laws of England vol 10 para 352 (Hailsham ed):-

> "In the construction of an instrument the recitals are subordinate to the operative part, and consequently, where the operative part is clear, this is treated as expressing the intention of the parties, and it prevails over any suggestion of a contrary intention afforded by the recitals."

Olivier's case (supra) was discussed in Wijtenburg Holdings, trading as Flaming Dry Cleaners v Bobroff 1970(4) SA 197(T). In the latter case Viljoen J (at 206G) and Phillips AJ (at 214C) came to the conclusion that the decision in Olivier's case was clearly wrong. I am, with respect, unable to agree with that conclusion.

In the instant case the operative part of clause 8 appears to me to be both clear and unambiguous. It is unnecessary to enlarge upon this topic because in any event it seems to me that in the present case the recitals do not in fact reflect any intention contrary to the operative part. The recitals are ushered in by the word "Whilst". It seems to me that it would involve a strained and unnatural interpretation to read the recitals as meaning:-

"On condition that reasonable care will be taken to ensure...."

I agree with Mr Wallis, who appeared for the defendant, that the recitals are properly to be construed as

signifying no more than

"Notwithstanding the fact that reasonable care will be taken to ensure ..."

There is, I consider, a compelling reason which militates against the interpretation supported by counsel for the plaintiff. That interpretation would create an antithesis between the recitals and the operative part which would entirely deprive the exclusionary provisions of contractual force.

I turn to Mr Shaw's alternative argument. While conceding that clause 8 used words of wide import counsel pointed out that its exclusionary terms did not cover the eventuality of "complete non-performance" on the part of. the plaintiff. Next it was urged upon us that no sensible reason existed for drawing a distinction between (a) the situation in which a party contractually bound makes no attempt whatever to perform his part of the contract and (b) the situation in which the contracting party makes

attempts towards performance which are completely ineffectual. In neither case, so it was said, does any benefit accrue to the other party to the contract. Since in paragraph 18(b) of its particulars the plaintiff had pleaded "complete non-performance" it was submitted that clause 8 did not relieve the defendant from liability for the plaintiff's loss.

I am unable to accept Mr Shaw's alternative argument. Its roots are to be found in the outmoded English doctrine of fundamental breach which, in the matter of interpreting exemption clauses, has never been part of our law. According to the doctrine, if I understand it correctly, the position in English law was at one stage thought to be that an exemption clause, no matter how widely expressed, availed the party seeking to invoke it only when he performed his contract in essential respects. It did not avail him when he was guilty of a breach going

to the root of the contract - see the remarks of Denning LJ in Karsales (Harrow) Ltd v Wallis [1956] 2 All E R 866 (CA) at 868I - 869A. The effect in the current state of English law of a "fundamental breach" of contract upon a provision in the contract exempting the party from liability is stated thus by Halsbury, Laws of England, 4th ed. vol 9 para 372 at pp 247 - 8:-

> "At one time it was considered that there was a rule of law whereby no exclusion clause could protect a party from liability for a 'fundamental breach' or breach of a 'fundamental term' of the contract. It is now clear that no such rule of law exists and that the earlier cases are only justifiable on grounds of construction of the individual contract involved. The true principle is that in all cases the question is one of construction, and the court must determine whether the exclusion clause is sufficiently wide to give exemption from the consequences of the breach in question. If the clause is sufficiently wide the result may be that the breach in question is reduced in effect or not made a breach at all by the terms of the clause, notwithstanding that without the clause it would be a breach of sufficient gravity to allow the other party to be discharged from the contract."

See further: Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1966] 2 All ER 61 (HL); Photo Production Ltd v Securicor Transport Ltd [1980] 1 All ER 556 (HL); Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd and another et e contra [1983] 1 All ER 101 (HL).

A South African decision on which Mr Shaw sought to rely was Hall-Thermotank Natal (Pty) Ltd v Hardman 1968(4) SA 818 (D). In that case, which also involved the construction of an exemption clause it was argued (see 834 in fin) that the clause would not protect the plaintiff in a case of fundamental breach of contract. The court found that there was a fundamental breach and upheld the argument (836E). The learned judge (Henning J) began by saying (at 835B-C) that he knew of no rule of our law to the effect that an exemption clause did not avail a party who had committed a fundamental breach of contract. That

notwithstanding he went on to say (at 835 E-F):-

> "In spite of the emphatic language of the exemption clause in this case it appears to me that the parties could hardly have intended that the plaintiff would be exonerated from liability if it failed to perform its obligations at all, or if its performance proved useless, or if it committed a breach going to the root of the contract. After all the parties must have had in mind that both of them would carry out the terms of the contract. It is most unlikely that they contemplated that the plaintiff would be excused from the consequences of a fundamental breach. The clause is in my view to be construed as affording limited protection to the plaintiff against faults or imperfections in the product of its labours, which is otherwise substantially in accordance with the contract.
>
> Mr Feetham conceded that, if the plaintiff committed a fundamental breach, or a breach which went to the root of the contract, the exemption clause would not apply."

In my judgment the concession by counsel to which Henning J

referred was incautiously made, and it represents an

incorrect statement of the legal position. So too does the

learned judge's consequential finding (at 836E):-

> "....that a complete failure of the plant entitled the defendant to repudiate the contract. I am satisfied that the exemption clause does not operate...."

In the instant case one is not concerned with total non-performance on the part of the defendant in the sense that the defendant did nothing whatever to perform under the second agreement. It is therefore unnecessary to consider whether, had there been such complete non-performance, the defendant would have been able to invoke the protection of clause 8. Here the defendant in fact performed, however much such performance may have disappointed the expectations of the plaintiff.

The extent of positive malperformance may no doubt in a particular case be such that the plaintiff is no better off than he would have been had the defendant been guilty of total non-performance. In my view, however, total non-performance on the one hand and positive malperformance on the other are in the law of contract two

separate and distinct concepts; and it is impermissible to treat them as being identical. The extent of a breach and the question whether it is fundamental or goes to the root of the contract are matters relevant in determining whether there is a right of rescission. But the fact of a fundamental breach is irrelevant and alien to the construction of an exemption clause and cannot govern its compass. In the instant case the exemption in clause 8 serves to protect the defendant even if it were to have committed a fundamental breach of the second agreement. Cf the remarks of Didcott J in Government of the Republic of South Africa (Department of Industries) v Fibre Spinners & Weavers (Pty) Ltd 1977(2) SA 324(D) at 339B-F.

In my judgment Mall AJ correctly upheld the defendant's exception. Counsel were ad idem that, should this court so conclude, the order in the court a quo should be altered to provide for the striking out of paragraphs

23, 24 and 25 of the particulars of claim and the prayer relating thereto. Although that is how the prayer to the notice of exception read, Mall AJ merely allowed the exception with costs. The question arises whether counsel's suggestion should be followed. I do not think so. The nature and effect of an order upholding an exception to a combined summons on the ground that it does not disclose a cause of action were recently considered in the as yet unreported judgment of this court in the case of Group Five Building Ltd v The Government of the Republic of South Africa (Case No 400/91, delivered on 18 February 1993). At page 26 of the typed judgment Corbett CJ said the following:-

> "As far as I am aware, in cases where an exception has successfully been taken to a plaintiff's initial pleading, whether it be a declaration or the further particulars of a combined summons, on the ground that it discloses no cause of action, the invariable practice of our Courts has been to order that the pleading be set aside and that the plaintiff be given leave,

if so advised, to file an amended pleading within a certain period of time."

In the present case an order upholding the defendant's

exception results in the plaintiff's particulars of claim

against the defendant (the first defendant in the action)

having to be set aside. It is ordered as follows:-

(1) The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

(2) The order of Mall AJ is altered to read: "a) The exception is upheld.

(3) The plaintiff's particulars of claim as against the first defendant are set aside and the plaintiff is given leave, if so advised, to file amended particulars of claim within thirty days.

(4) The plaintiff is to pay the costs, including the costs occasioned by the employment of two counsel."

(3) The period of thirty days referred to in paragraph 2(b) above will run from date of delivery of this judgment.

G G HOEXTER, JA

Smalberger, JA)
F H Grosskopf, JA) Concur
Van Coller, AJA)
Kriegler, AJA)