THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 99/2002
REPORTABLE

In the matter between

Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing
Appellant

and

The Government of the United Kingdom
Respondent

Coram: Schutz, Cloete JJA and Heher AJA

Heard: 19 May 2003

Delivered: 23 May 2003

Exemption clause – faxed quotation not including same – whether fax to be construed as including same nonetheless – whether 'ticket' cases apply – whether reasonable steps taken to bring to attention of recipient of fax – whether consequent quasi-mutual assent.

JUDGMENT

SCHUTZ JA

[1] The issue in this appeal is whether the appellant, Cape Group Construction (Pty)

Ltd t/a Forbes Waterproofing ('Forbes') was successful in its attempt to introduce its standard terms into a contract concluded with the Government of the United Kingdom ('the Government').

[2] The facts are not in dispute. The Government owned a house in Bishopscourt, Cape Town, which was placed at the disposal of the High Commissioner. The Government was the first plaintiff *a quo*. The two other plaintiffs are not involved in this appeal, so the Government is the only respondent before us. The roof of the house developed a leak. Forbes, the defendant below, was called in. It telefaxed a quotation to Mrs Woolley. She was employed by the British Consulate and was its estates manager in Cape Town. This was on or about 24 June 1999.

[3] The fax is on a standard letterhead with the logo of Forbes. It reads: (I have attempted to reproduce the various sizes of the typeface):

'BAH/pg/30860

24 June 1999
British High Commission
P O Box 500
CAPE TOWN
8000

ATTENTION: MRS LISA WOOLEY

Dear Madam

RE: ROOF REPAIRS AT THE BRITISH HIGH COMMISSION IN BISHOPSCOURT

We thank you for your valued enquiry and take pleasure in presenting our quotation as follows.

SCOPE OF WORK

Strip and remove the roofing membrane of the staircase roof and remove the ceiling panels below. Supply and fit a galvanised metal flashing from the staircase roof to underneath the

thatch roof and apply a heatbonded membrane onto the staircase roof, dress into the gutter and onto the metal flashing. Replace the staircase ceiling and redecorate the ceiling and wall surfaces below.

PRICE: R5 850.00
VAT @ 14 % R 819.00

R6 669.00

Assuring you of our best attention and co-operation at all times.

Yours faithfully
FOR: FORBES WATERPROOFING

(Sgd)
BODO HOFFMANN

FORT KNOKKE, 183 SIR LOWRY ROAD ₀ CAPE TOWN 8001
P.O. BOX 892 ₀ CAPE TOWN 8000
TEL: (021) 461-4422 ₀ FAX 461 1389

DIRECTORS: P. JÄCK (MANAGING), B.HOFFMAN

A DIVISION OF CAPE GROUP CONSTRUCTION
Reg. No. 67/03120/07

SEE TERMS AND CONDITIONS OVERLEAF'

[4] Only that one page was sent. There was no 'overleaf'. Nor did Woolley notice the concluding words 'See Terms and Conditions Overleaf'. The repair was urgent and she accepted the quotation telephonically. At that point the contract was concluded and any subsequent communication by Forbes could not affect its terms.

[5] The issue is whether what were called in argument Forbes's 'standard' terms, form part of it. On about 28 June 1999 the original quotation, which did contain certain 'Standard Terms and Conditions' overleaf, was posted. Clause 8, headed 'Limitation of Liability' (Blignault J, *a quo*, with justice described this heading as euphemistic), excludes liability for loss or damage caused by Forbes in sweeping terms. It reads:

'**8. LIMITATION OF LIABILITY**

8.1 Subject to the provisions of any guarantee, neither the contractor nor any of the contractors,

suppliers, associate companies, officers, employees or agents shall be liable for any loss or damage whether direct, indirect, consequential or otherwise, suffered by the employer as a result of any cause arising in connection with any dealings between the contractor and the employer or the execution of the works (including without limitation, late completion for whatsoever reason and any cause arising from anything done or not done pursuant to the contract) whether such loss or damages results from breach of contract (whether fundamental/material or otherwise) delict negligence or any other cause without limitation.

8.2 Without limitation to the aforesaid general limitation of liability the contractor shall not be liable for:-
8.2.1 any delays caused by political unrest, strikes or union action nor any delays caused by an Act of God, war, fire and floods, excessive rains and dangerous winds;
8.2.2 any loss or damage to any property or injury or death of any person or any loss of any person caused by or arising out of the use of or interference with plant, machinery or means of access by persons other than employee of the contract and the employer indemnifies the contractor against claims by third parties in respect of such loss, damage injury or death;
8.2.3 any damage arising from instruction issued to its employees without its authority;
8.2.4 any damage to the property of the employer, including the works, whether such damages are consequential, reasonably foreseeable or otherwise;
8.2.5 any loss by the employer including any loss amounting to consequential loss or lost profit;
8.2.6 any leakages occasioned by abnormal causes or agencies, including non-specified traffic, interference by third parties, including abnormal use and design faults.'

[6] Woolley was on leave from 30 June to 12 July 1999 and did not see the original posted quotation until after the roof of the house had caught fire, as a consequence of the negligence of one of Forbes's workmen. Hence the action, in which the Government accepted the onus of proving the terms of the contract on which it relied, that is that Forbes's standard terms did not form part of it. It was conceded by Forbes, on the other hand, that if the terms and conditions had not been incorporated, it had the contractual duty to carry out the repairs in a proper and workmanlike manner, and without negligence.

Construction of the writing in faxed form

[7] Although Blignault J found for the Government on other points, he did not

decide the logically anterior question; whether on a proper construction of the fax it purported to incorporate Forbes's standard terms and conditions.

[8] The argument for the Government is a simple one. The injunction 'See Terms and Conditions Overleaf' does not convey that there are standard terms, which would be available for inspection if the addressee wished to see them. The natural meaning, so the argument proceeds, is that if no additional terms or conditions are transmitted, there are none applicable to this particular contract. I agree with the argument. The meaning contended for is the natural interpretation, a more probable one than that there were standard terms hovering in the background, and that it was for the Government to obtain them if it wished to ascertain their content.

[9] A comparable case is *Home Fires Transvaal CC v van Wyk and Another* 2002 (2) SA 375(W). An order was faxed to van Wyk. At the foot appeared the words:

> 'This order can only be cancelled on payment of 15 % of the total amount: see reverse side for further conditions.'

The reverse side was not transmitted. Van Wyk read the document, including these words. Believing that they dealt with cancellation, he signed it. He was later to discover that they dealt with much more than cancellation, in terms adverse to him. The supplier contended that the well-established rule, you are bound by what you sign, applied. Farber AJ's response (at 381J to 382D) was:

> 'It need hardly be stated that the rule can have no application if, on a proper construction of the agreement, the terms which it is suggested bind the signatory have not been incorporated therein. (Compare *Stocks Construction (OFS) (Pty) Ltd v Metter-Pingon* (Pty) Ltd 1980 (1) SA 507 (A) at 519B-F.)

Approaching the matter on an objective basis, which I am enjoined to do, it seems to me that by omitting to send the reverse side of the order to the respondents, the appellant must be held not to have intended to conclude a contract on the basis of the terms and conditions therein set forth. To this end, the words appended at the foot of the face of the 'order' which refer to the conditions embodied on the reverse side thereof are meaningless and must be considered *pro non scripto*. Reducing the matter to fundamental principle, the appellant, by its conduct, submitted a written offer to the respondents. The reverse side of the document embodying the offer was not sent to them, founding the inference that what was there set forth was not intended to form part thereof. The respondents in turn must be held to have accepted the offer on the basis of what had been submitted to them. In short, the contract which arose in consequence of the appellant's offer and the respondents' acceptance thereof falls to be approached on the basis that the terms on the reverse side of the order were not intended to form part thereof.'

Goldstein and Boruchowitz JJ concurred.

[10] Forbes's counsel have sought to distinguish this case on the basis that Van Wyk had read the clause and concluded that it referred to conditions of cancellation only. I fail to follow the contention, as, for purposes of the present argument – construction – Mrs Woolley is to be treated as if she had read the words at the foot of the fax. The test is objective.

[11] A similar case is *Poseidon Freight Forwarding Co Ltd v Davies Turner Southern Ltd and Another* [1996] 2 Lloyd's LR 388 (CA). The nature of the issue in the case and the manner of its resolution appear from the following passage from the judgment of Leggatt LJ (at 394):

'This is not a case where a party declares that the terms are available for inspection. It is a case where, on documents sent by fax, reference is made to terms stated on the back, which are, however,

not stated or otherwise communicated. Since what was described as being on the back was not sent, it was a more cogent inference that the terms were not intended to apply.'

[12] Counsel for Forbes, however, have relied on the case of *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA) at 706I-707A para [62]. A form had been faxed to a customer which included a paragraph reading:

> 'All purchases will be made in terms of and subject to the conditions of trade of Helios Power (Pty) Ltd, as printed on the reverse hereof, which by signing this, I acknowledge having read, understood and accepted.'

Again 'the reverse' had not been transmitted. The majority of the court held that the customer was not bound by the terms of this paragraph as there had been no *animus contrahendi* (for reasons not relevant to the case before us). But the minority (Streicher and Nugent JJA) held that the *animus* had been established and that the customer was bound by the 'conditions of trade' for the reason that 'the reverse' referred to was clearly the reverse of of the original document and not that of the incomplete faxed copy. As a matter of construction I have no difficulty with that conclusion. The distinction between the words in that case and in this one may be subtle, but it is nonetheless evident. As a matter of construction, the customer in the *Africa Solar* case was told that by signing he was committing himself to what was clearly an existing set of conditions. In the case before us she was not.

[13] Accordingly, applying the primary rules of construction, I consider that the Government has established that the non-attendant terms and conditions did not form part of the contract. Should I be wrong in that, then the last resort in the interpretation arsenal – the *contra proferentem* rule – would come into play, against Forbes. See *Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 (3) SA 99 (A) at 121-123. On page 121 Grotius is quoted as giving the reason why there is a rule that works against the *proferens*, 'for he has himself to blame for not speaking more plainly'.

[14] Finally, on the question of construction – it is the fact that over the years, exemption clauses as a class have attracted much scathing judicial indignation and wit, most of it well-deserved. Despite that, I agree with Lewis JA where she stated in *Van der Westhuizen v Arnold* 2002 (6) SA 452 (SCA) at 469D-E, that there does not appear to be any clear authority for a general principle that exemption clauses should be construed differently from other provisions in a contract. However, I also agree with what follows (at 469E-G):

> 'But that does not mean that courts are not, or should not be, wary of contractual exclusions, since they do deprive parties of rights that they would otherwise have had at common law. In the absence of legislation regulating unfair contract terms, and where a provision does not offend public policy or considerations of good faith, a careful construction of the contract itself should ensure the protection of the party whose rights have been limited, but also give effect to the principle that the other party should be able to protect himself of herself against liability insofar as it is legally permissible. The very fact, however, that an exclusion clause limits or ousts common law rights

should make a court consider with great care the meaning of the clause, especially if it is very general in its application.'

[15] And in this connection I would also agree with what Denning LJ said in *Anglo-Saxon Petroleum Co Ltd v Adamastos Shipping Co Ltd* [1957] 2 QB 233 (CA) at 269 i f:

'We have repeatedly refused to allow a party to a contract to escape from his just liability under it by reason of an exempting clause, unless he does so by words which are perfectly clear, effective and precise.'

[16] The question of construction with which we are concerned is not that of an exempting clause itself but with the provision said to incorporate it, but the same need for caution is applicable there too.

Alternatively, the 'ticket' cases

[17] Even if there had, as a matter of construction, been an incorporation of the standard terms, I consider that Forbes should in any event fail. The parties are agreed that the 'ticket' cases would apply and they are also agreed as to what the consequent applicable principles are. But they are not agreed as to their application to the facts. The principles are conveniently restated in the judgment of Scott JA in *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) at 991D-992A.

'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 Co Ltd* (1881) 1 EDC 315 at 330-1; *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A) at 239F-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 643G-644A.) 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.'

[18] Forbes concedes that as Woolley did not read the section at the foot of the fax there could be no actual consensus to include it; actual in the sense of a meeting of minds on terms the content of which both parties were aware.

[19] Forbes's argument is mainly based on the second leg of the proposition set out by Scott JA. The argument is that Woolley read the body of the quotation and realised that it contained contractual terms. So far that is correct. Notwithstanding, the argument however proceeds, she did not trouble to find out what all the terms were, but simply accepted the quotation, thus binding herself to all the terms, whatever they might be. The court *a quo* found in the Government's favour on this point, stating that Woolley was entitled to assume that the contractual terms were set out in the body of the

quotation above Mr Hoffmann's signature. I agree with that reasoning, especially as the body of the quotation contains no reference to further conditions. Forbes's counsel criticise this finding, saying that a person in Woolley's position is not entitled to read only portions of a contract, or only those composed of large print, or ignore those that 'appeared in annexures'. As to the last submission there was, of course, no annexure. As to the first two, the essence of the second proposition set out by Scott JA is that a party knows that there are contractual terms which he has not read, but by which he is content to be bound. It is clear from Woolley's uncontradicted evidence that that was not her state of mind.

[20] That Woolley should not have read the words 'See Terms and Conditions Overleaf' is unsurprising. They were tucked away beneath Forbes's address, telephone numbers, names of directors, a further description of the company and its number, and were in printing of a size which did not distinguish it from what had gone before and in no different colour to the preceding information. Counsel for the Government go on to submit that if the argument for Forbes be correct then a party may conceal contractual terms in most unlikely corners of a document which contains contractual matter. There is no reason, they submit, why different parts of a document may not serve different purposes. They further submit that the body of the quotation, from salutation to signature, serves to impart the contractual terms. What follows is preprinted information on a standard letterhead not relevant to the terms of the contract, after which, without obvious separation, Forbes seeks to insert further contractual terms where the reader would not expect to find them.

[21] I agree entirely with Government counsel's submissions in this regard. To make reference to further terms in this way whilst at the same time not transmitting the terms is to set a trap, whether consciously or unconsciously. The doctrine in the 'ticket' cases is designed to bind one who is indifferent as to the extent of his commitment, not one who, although acting reasonably, is ignorant of what is sought to be imposed upon him.

Reasonable steps to draw attention to terms?

[22] This leads to a consideration of the third proposition set out by Scott JA. If there was no actual consensus, the party relying on his terms having been incorporated may yet succeed on the basis of quasi-mutual assent if he demonstrates that he took steps reasonably sufficient to give notice of his terms to the other party. Blignault J held that Forbes did not pass this test. I agree. It would have been the natural thing for the person sending the fax to turn it over after the first transmission and then to fax the standard terms, that is if he or she was alive to the fact that there were terms on the reverse side. Or a reference to the same could have been inserted in the body of the letter, particularly if it had been stated that the terms were standard ones. Or the words relied on could have been given much greater prominence in some manner or another. Instead they were tucked away with non-contractual matter, as has been explained already.

[23] For all of these reasons the appeal is dismissed with costs including the costs of two counsel.

W P SCHUTZ
JUDGE OF APPEAL

CONCUR

CLOETE JA

HEHER AJA