THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number : 397/06

In the matter between :

THE TRUSTEES FOR THE TIME BEING OF THE BUS INDUSTRY RESTRUCTURING FUND	**APPELLANTS**
and	
BREAK THROUGH INVESTMENTS CC	**FIRST RESPONDENT**
AHMED BHAYLA	**SECOND RESPONDENT**
FAZUL AHMED BHAYLA	**THIRD RESPONDENT**
BASFOUR 2488 (PTY) LTD	**FOURTH RESPONDENT**

CORAM : **SCOTT, BRAND, LEWIS, JAFTA JJA *et* MALAN AJA**

HEARD : **3 SEPTEMBER 2007**
DELIVERED : **14 SEPTEMBER 2007**

Summary: Exception against particulars of claim – objection that claim precluded by contractual provision – held that properly construed provision has no bearing on claim at all.

Neutral citation: This judgment may be referred to as *The Trustees, Bus Industry Restructuring Fund v Break Through Investments* [2007] SCA 101 (RSA)

JUDGMENT

BRAND JA/

BRAND JA:

[1] The appellants are the trustees of the Bus Industry Restructuring Fund ('the Fund'). They appeal against the upholding of an exception to their particulars of claim by Kruger J in the Pietermaritzburg High Court. His judgment has since been reported as *Trustees, Bus Industry Restructuring Fund v Break Through Investments CC* 2006 (3) SA 434 (N) and [2006] 1 All SA 189 (N). The appeal against that judgment is with the leave of the court *a quo.*

[2] The issues between the parties will best be understood in the light of the background which follows. I first deal with matters procedural. According to their particulars of claim, the appellants claim payment of the sum of R297 340.87 from each of the four respondents in the alternative. As the basis for their claim, they rely on two independent causes of action, the one being statutory and the other contractual. Two exceptions were raised by the respondents. The first pertained to the statutory cause of action (formulated in para 55 of the particulars, quoted in para 9 of the court *a quo'*s judgment) while the second was directed at the claim founded in contract. The court *a quo* upheld both exceptions with costs and granted the appellants' leave to amend their particulars of claim.

[3] The order upholding the first exception is not appealed against, save for the award of costs associated with that order. The appeal is in turn only resisted by the first, second and fourth respondents. The third respondent abides the decision of this court. Finally, since the fourth respondent derived no assistance from the upholding of the second exception, its resistance to the appeal is limited to issues relating to the costs order associated with the upholding of the first exception. Apart from issues of costs, the main dispute therefore lies between the appellants, on the one hand, and the first and second respondents, on the other. Accordingly I shall refer, where appropriate, to the second exception as 'the exception' and to the first and second respondents as 'the respondents'.

[4] I revert to the facts, for which we must look – by the nature of exception proceedings – at the allegations in the particulars of claim as they stand. These allegations are not always easy to follow. Fortunately they can, for present purposes, be limited to broad outline. The Fund was set up with effect from 1 November 1999, pursuant to an agreement, referred to as the tripartite agreement, between the Minister of Transport, the South African Bus Operators' Association, representing employers within the passenger transport industry and various labour unions representing employees in that industry. The purpose of the tripartite agreement was to facilitate the restructuring of the passenger bus industry. The Fund was established to provide financial assistance to bus operators/employers in paying retrenchment benefits to employees who, it was anticipated, would lose their jobs in the restructuring process.

[5] The National Department of Transport was obliged to and did make a substantial contribution to the Fund. Participating bus operators were also required to pay contributions to the Fund, which were calculated in accordance with formulae provided for in the tripartite agreement. One of the participating operators was an entity known as Kwa-Zulu Transport (Pty) Ltd (KZT). After a tender process, KZT was awarded various subsidised contracts by the Kwa-Zulu Natal Department of Transport ('the Department of Transport'). In August 2001, KZT was, however, placed under liquidation. Though KZT had paid part of the contributions for which it became liable under the tripartite agreement to the Fund, there was still a substantial amount outstanding at the time of its liquidation.

[6] Pursuant to the liquidation of KZT, its liquidators sold its bus transportation business to the fourth respondent, Basfour 2488 (Pty) Ltd ('Basfour'), in terms of an agreement of sale, attached to the particulars of claim. From the agreement of sale it appears that, as part of the business sold, Basfour took over the subsidised contracts awarded to KZT and also assumed liability for the amounts owed by KZT to the Fund. According to the particulars of claim, both the Department of Transport and the Fund gave their consent to these assignments.

[7] In the result, Basfour took over the whole of the KZT business. Nonetheless, so the particulars of claim proceeded, each of the depots of that business was subsequently conducted by a different entity as an independent enterprise. As part of

this process, the particulars alleged, Basfour assigned its rights and obligations *vis-à-vis* the Department of Transport – under the subsidised contracts – as well as its obligation to make payment to the Fund of the amounts previously owed by KZT under the tripartite agreement to the first, second or third respondents. Again, the particulars alleged, both the Department of Transport and the Fund agreed to these further assignments by Basfour. It is on the basis of these assignments that the appellants claimed the amounts previously owed by KZT from the first, second and/or third respondents. The alternative claim against Basfour (as the fourth defendant) provided for the contingency of the subsequent assignments to the other respondents proving to be invalid.

[8] Pivotal to the first, second and third respondents' exception against the claim thus formulated, is clause 19.5 of the agreement of sale between Basfour and the liquidators of KZT. It provides:

'The buyer [ie Basfour] may not cede, delegate, assign or sub-contract any of its rights or obligations in terms of this agreement to any person without the prior written consent of the liquidators.'

[9] With reference to the wording of clause 19.5, the respondents contended – and the court *a quo* held (in para 22 of its judgment) – that on a proper interpretation, the expression 'obligations in terms of the agreement' included KZT's obligations to the Fund that were taken over by Basfour pursuant to the agreement. In accordance with this interpretation of clause 19.5, Basfour required the written consent of KZT's liquidators before it could lawfully assign these obligations to any of the respondents. Since the appellants did not allege that any such written consent had been provided by the liquidators, so the respondents argued and the court *a quo* held, the allegations relied upon in the particulars of claim were insufficient to found a cause of action against the first, second or third respondents.

[10] The appellants' opposing contention was – and still is – that clause 19.5 merely precluded Basfour from ceding or assigning, without the prior consent of the KZT liquidators, rights or obligations between the liquidators and Basfour granted or imposed by the sale agreement itself; or conversely stated, that clause 19.5 did not relate to rights or obligations arising from other contracts which were acquired by Basfour pursuant to or as a result of the sale agreement. Thus understood, the

appellants argued, clause 19.5 had no bearing on the rights or obligations which Basfour might have in respect of third parties, such as the Fund or the Department of Transport, as a result of acquiring KZT's business pursuant to the sale agreement.

[11] It is thus apparent that the outcome of the appeal turns on the interpretation of clause 19.5, and more particularly, on the correct meaning of the words 'any of its [Basfour's] obligations in terms of this agreement'. Should the import of these words be limited to Basfour's obligations towards the KZT liquidators imposed by the agreement itself, or does it also include obligations of KZT to third parties which, but for the agreement, would not have passed to Basfour? That is the crucial question. Because the respondents chose the exception procedure – instead of having the matter decided after the hearing of evidence at the trial – they had to show that the appellants' claim is (not may be) bad in law. In the present context they therefore had to show that clause 19.5 cannot reasonably bear the narrower meaning contended for by the appellants (see eg *Lewis v Oneanate (Pty) Ltd* 1992 (4) SA 811 (A) at 817F-G; *Vermeulen v Goose Valley Investment (Pty) Ltd* [2001] 3 All SA 350 (A) para 7).

[12] As the starting point of their argument in support of the wider meaning for which they contend, the respondents refer to the extensive meaning usually conveyed by the term 'any' – which is used twice in clause 19.5 – as appears, for example, from the following statement in *S v Wood* 1976 (1) SA 703 (A) at 706E-G:

'The word "any" is, according to the *Oxford Dictionary*, the indeterminate derivative of *one, an* or *a,* and means "whichever, of whatever kind, of whatever quantity". Quantatively it means a quantity or number however large or small . . . . Judicially the word "any" has been defined as a word of very wide import, "and *prima facie* the use of it excludes limitation" . . . .'

[13] Departing from this premise, the respondent's argument went as follows: The expression 'in terms of' means the same as 'pursuant to' or 'arising from' the sale agreement and it therefore does not restrict the unqualified reach of 'any'. The appellants' narrower interpretation requires a distinction to be drawn between the *nature* of the obligations incurred by Basfour pursuant to the sale agreement. On the wide and unrestricted wording of clause 19.5, there is simply no room for such a distinction. Moreover, the wording of the clause does not distinguish the obligations

which Basfour incurred to the liquidators from those which it incurred to third parties; nor does the wording allow for a distinction between the sale agreement and the agreements concluded between KZT and third parties. The words under consideration therefore intended the prohibition in the clause to apply to any obligation which, but for the sale agreement, would not have been incurred by Basfour. Since the 'business' sold to Basfour, as defined in the sale agreement, specifically included KZT's obligation to pay the Fund, so the respondents' argument concluded, this obligation had undoubtedly been incurred by Basfour in terms of the sale agreement.

[14] The respondents' argument brings to mind the statement by Conradie JA in *Lloyds of London Underwriting Syndicates 969, 48, 1183 and 2183 v Skilya Property Investments (Pty) Ltd* [2004] 1 All SA 386 (SCA) para 14, that:

'Sophisticated semantic analysis is not the best way of arriving at an understanding of what the parties meant to achieve by [the provision in their agreement]. A better way is to look at what, from the point of view of commercial interest, they hoped to achieve by [that] provision.'

[15] The respondents rightly asserted that the words in clause 19.5 must be given their ordinary grammatical meaning. But at the same time, these words must be read in context. As Jansen JA explained in *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) at 646B-D:

'[T]he 'ordinary' meaning of words appearing in a contract will necessarily depend upon the context in which they are used, their interrelation, and the nature of the transaction as it appears from the entire contract . . .. The meaning of a contract is, therefore, not necessarily determined by merely taking each individual word and applying to it one of its ordinary meanings.'

[16] The nature of the transaction under discussion, as it appears from the sale agreement, is that the liquidators of KZT sold the business of the company 'as a going concern'. Apart from KZT's obligations to the Fund, the 'business', as defined in the agreement, also included most of KZT's corporeal assets, both immovable and movable, as well as KZT's rights and obligations under the subsidised contracts awarded to KZT by the Department of Transport. It is clear that the words 'in terms of', when used in clause 19.5 with reference to obligations, must bear the same meaning as when used with reference to rights. If the prohibition against assignment without consent must therefore be understood as applying to KZT's former

obligations towards the Fund, it must of necessity be understood as applying equally to cessions of the rights acquired by KZT from its subsidised contracts with the Department of Transport.

[17] On the respondents' interpretation, the purpose of clause 19.5 could only have been to give the KZT liquidators some measure of ongoing control over the future disposal of rights and obligations comprising KZT's business. However – and apart from the commercial absurdity of assuming such an intention, to which I shall presently return – clause 19.5 is manifestly inept at achieving the presumed intention. As I have said, the KZT business sold to Basfour included corporeal property – both movable and immovable – and incorporeal property (rights). If the liquidators wanted to retain control, one would have expected them to restrict Basfour's right to transfer all forms of assets acquired in terms of the agreement, yet clause 19.5 is confined – on the respondents' interpretation – to rights and therefore does not extend to the corporeal property acquired pursuant to the agreement. The respondents' answer to this inconsistency was that there is nothing in law which precludes the parties to a contract from restricting the disposal of incorporeal property (or any other property for that matter) and not to restrict the disposal of other property sold in terms of the same agreement. As a matter of abstract law, the answer is clearly right. Yet, the question remains why the parties to the sale agreement under consideration would have intended to do so. To this question the respondents suggested no answer and I can think of none.

[18] In the context of the transaction at issue, further questions raised by the respondents' interpretation of clause 19.5 are these: Why would the liquidators of KZT have sought to retain control over part of KZT's erstwhile business, potentially even after Basfour had performed all its obligations under the sale agreement? Why would Basfour and the Department of Transport, for example, not be able to agree between themselves whether, and if so, to whom, the subsidised contracts should be transferred? Why would the KZT liquidators insist that the two parties to the subsidised contracts were required to seek and obtain their consent again, even after Basfour had performed all its obligations under the sale agreement?

[19] What is more, these questions must, of course, be considered against the background that the sellers were the liquidators of KZT. Their statutory responsibilities, as pointed out by the appellants, were, in essence, to obtain the best value for KZT's assets for the benefit of the creditors; to present a report to creditors; to file a liquidation and distribution account; to distribute the estate in accordance therewith; and so forth. It is therefore unlikely in the extreme that they would have insisted on controlling what the purchaser of KZT's business (Basfour) did with any part of that business after acquiring it and paying the purchase price. Indeed, the liquidators would have expected to be discharged from their duties by the Master as soon as the winding-up of KZT was completed. After their discharge they would not be in a position to approve, or veto, any assignment by Basfour. This renders it even more unlikely that the parties to the sale agreement would have intended to bestow control over KZT's erstwhile business on the liquidators for an indefinite future period.

[20] For their answer to these seemingly absurd commercial consequences of their interpretation, the respondents relied on the statement by Diemont JA in *Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 (1) SA 254 (A) at 262D-E that:

'The ways of businessmen sometimes pass understanding, at least the understanding of lawyers, so that it has been said more than once that a court must hesitate to set itself up as an arbiter of business efficacy.'

[21] I am not persuaded by this answer. I believe the statement relied upon can only hold true if the commercially nonsensical meaning appears so clearly from the wording of the contract that it cannot be avoided; that is, if the provision under consideration is not reasonably capable of any alternative interpretation. If an alternative interpretation is available, the court will not accept a meaning which would lead to absurd practical and commercial consequences (see eg *Cape Provincial Administration v Clifford Harris (Pty) Ltd* 1997 (1) SA 439 (A) at 446H-I). With reference to clause 19.5 there is, in my view, indeed an alternative interpretation available (and the literal one at that). That is the interpretation contended for by the appellants, namely, that the clause pertains only to rights and obligations between the parties to the agreement. Thus understood, Basfour only

required the liquidator's prior written consent for the assignment of an obligation owing to, or a right enforceable against the KZT liquidators, which arose from the sale agreement itself. According to this interpretation the purpose of the clause is relatively easy to understand: what the liquidators sought to protect themselves against was the substitution of Basfour as their debtor/creditor under the sale agreement by some unknown entity, without their written consent.

[22] During argument in this court, the respondents sought to advance a novel purpose that would be served by clause 19.5 having the wider meaning for which they contended. Broadly stated their argument went as follows: Unless and until the assignment of KZT's obligation to Basfour had been approved by the Fund, the KZT liquidators remained at risk of being held liable by the Fund. In that event, the only remedy available to them would be to seek an indemnity from Basfour in terms of the sale agreement. During this period of uncertainty it would therefore be in the liquidator's interest to prevent Basfour from assigning its obligations to pay the Fund, which it had undertaken in terms of the sale agreement, to some unknown entity. It is true, the argument acknowledged, that once the Fund had approved the assignment to Basfour – as it eventually did – the KZT liquidators would no longer have any interest to protect because they would no longer be liable to the Fund. Yet, so the respondents argued, one should not confuse the purpose and the effect of clause 19.5 because for some unknown reason, including oversight, the parties may have agreed on a contractual protection for the liquidators which was wider in effect than required by the purpose it was originally intended to serve.

[23] I do not accept this argument. I believe its underlying reasoning is fundamentally flawed and that, properly analysed, it carries the kernel of its own destruction. The argument departs from the premise that, as long as the assignment to Basfour had not been approved by the Fund, Basfour would not have any obligation towards the Fund. Its potential liability could only be towards KZT pursuant to the sale agreement. But that contractual right of the KZT liquidators was already protected on the narrow interpretation of clause 19.5, because from Basfour's point of view it was an obligation arising from the sale agreement itself. The question that concerns us is whether an interpretation of clause 19.5 which extends the ambit of

its operation to an obligation by Basfour towards the Fund, can serve any interest of the KZT liquidators.

[24] According to the respondents' argument, the crucial moment was when the Fund approved the assignment to Basfour. Prior to the approval, the KZT liquidators required the protection of clause 19.5 – which was provided for even on its narrow interpretation. After the approval, the KZT liquidators were no longer liable to the Fund and they therefore needed no protection from clause 19.5. The result is that the moment when clause 19.5 – on its narrow interpretation – ceased to afford the KZT liquidators any protection coincided with the moment when they ceased to require any protection from the clause. I think the inevitable conclusion to be drawn from all this is that, on the respondents' own argument, the only protection the KZT liquidators could possibly require from clause 19.5 would be afforded by the narrow construction of that clause. Logic therefore dictates that the KZT liquidators could derive no possible benefit from the wider construction of the clause contended for by the respondents. This only serves to illustrate that the parties to the contract probably intended the clause to bear the narrower meaning. It follows that, in my view, the respondents did not even come close to satisfying the test on exception – that clause 19.5 cannot reasonably support the interpretation relied upon by the appellants. On the contrary, I think that the interpretation advanced by the appellants is probably the correct one.

[25] It follows that the appeal against the upholding of the second exception must succeed. This brings me to the costs order associated with the upholding of the first exception. In considering this issue, it is apparent that the costs order by the court *a quo* in favour of the respondents was based on the premise that both exceptions had been upheld. Since that premise no longer holds good, the costs issue needs to be reassessed. In this regard the appellants argued that, on a proper analysis of the position that eventually held true, two independent exceptions were taken of which one was successful and the other not. In the event, they argued, a fair result would be achieved by making no order as to costs. It is true, they conceded, that the fourth respondent (Basfour) had no direct interest in the second exception. But, so they argued, since the four respondents at all times made common cause in the court *a quo* and were at all times represented by the same legal team, no distinction

between them in the costs order would be justified. I agree with these arguments. With reference to the costs in the court *a quo,* I therefore propose to make the suggested order.

[26] As to the costs of appeal, it is clear, in my view, that the appellants have been substantially successful and that costs should follow that event. Yet the fourth respondent made it clear from the outset that it only had a relatively minor interest in the outcome of the appeal. Since the real interest in the outcome of the appeal lies with the first and second respondents, they should, in my view, be held liable for the appellants' costs.

[27] For these reasons:

(a) The appeal is allowed with costs, including those occasioned by the employment of two counsel, such costs to be paid by the first and second respondents, jointly and severally, the one paying the other to be absolved.

(b) The order made in the court *a quo* is set aside and replaced by the following:

1. 'The first exception is upheld.
2. Paragraph 55 of the plaintiff's particulars of claim is struck out.
3. The plaintiff is granted leave, if so advised, to amend its particulars of claim within fifteen days.
4. The second exception is dismissed.
5. There will be no order as to costs.'

……
F D J BRAND
JUDGE OF APPEAL

Concur:

SCOTT JA
LEWIS JA
JAFTA JA

MALAN AJ