



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 1 October 2021

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

UPS SCS South Africa (Pty) Ltd v Hendrik Cornelis van Wyk t/a Skydive Mossel Bay (421/20) and (422/20) [2021] ZASCA 131 (1 October 2021)

Today the Supreme Court of Appeal (SCA) handed down judgment dismissing an application in terms of s 17(2)(b) of the Superior Courts Act 10 of 2013 for leave to appeal against the whole of the judgment of the court below; and also dismissed the appeal, thereby upholding an order of the Western Cape Division of the High Court, Cape Town (high court). The issue before the SCA was whether the respondent had proved its claim that the appellant was liable for the damages arising out of a breach of contract.

The respondent was the owner and operator of a skydiving business. In 2007, he sent an aircraft engine for inspection and repair to America's Aircraft Engines Inc, a specialist in refurbishing aircraft engines in the United States of America (USA). As he did not immediately need to use it, the engine remained in the USA for some time. In 2012, when he needed the engine back in South Africa (SA), he instructed America's Aircraft Engines to proceed with an overhaul of the engine. This was completed towards the end of 2012 and the respondent made enquiries about transporting the engine back to South Africa.

In December 2012, the respondent contacted the appellant, UPS SCS South Africa (Pty) Ltd, the South African branch of an international delivery business. This resulted in the exchange of a number of emails, which gave rise to a contract in terms of which the appellant would arrange for the engine to be collected from the USA and conveyed to SA. The appellant thereafter sent the respondent a credit application form to be completed so that the process could be started, and which the respondent signed.

The aircraft engine never arrived at its destination in South Africa as the cargo had been damaged whilst in transit within the USA. The truck and trailer carrying the aircraft engine had allegedly caught fire as a result of equipment malfunction, and the truck and its cargo appeared to be a total loss. The respondent was asked to provide the appellant with a quotation or estimate of the value of the engine and he was sent an insurance claim form. On 1 October 2013, he was informed by the appellant that

the shipment had not been insured, and that according to the appellant's terms and conditions for ocean freight shipments they were only liable to pay US \$500 per shipment.

The respondent instituted action against the appellant in the high court, for payment of the amount of R386 140.30 in respect of the loss of the aircraft engine, plus interest and costs. The high court found in favour of the respondent. The appellant admitted that a written agreement was concluded between the parties, and that the written agreement incorporated standard trading conditions containing wide ranging clauses limiting its liability and that the respondent had signed the credit application and was bound by its terms. The respondent's case was that the standard trading conditions incorporated in the credit application were not applicable to the contract of carriage between the parties. The respondent had only completed the credit application form as a formality for the purposes of allocation of an account number by the appellant. He had not sought credit.

The SCA held that the appellant did not explain to the respondent that the credit application, that he was required to sign, to open the account incorporated provisions that excluded or limited the appellant's liability for loss or damages. Furthermore, the standard trading conditions and the relevant clauses which the appellant sought to rely on appeared in fine print, and were not conspicuously legible. They appeared on the second and third pages of the credit application, and could only be read with extreme difficulty and concentrated effort.

The SCA concluded that the respondent, in the circumstances, did not contract on the basis of the conditions relied upon by the appellant. The position was therefore that the appellant undertook as carrier to arrange for the transport of the engine from the USA to South Africa. It failed to perform and the engine was destroyed. It was under an obligation to cause the engine to be conveyed in accordance with the contract and it breached that obligation because the engine was destroyed while in the possession of the appellant or its agents. It was accordingly obliged to compensate the respondent for the damages caused by its breach of contract.