Reportable
Case No 152/2003

In the matter between:

THE JOHANNESBURG COUNTRY CLUB **Appellant**

and

ELEANOR EDITH STOTT **Respondent**
PETER DENNIS MAY NO **Third Party *a quo***

Coram: HARMS, MARAIS AND CAMERON JJA
Heard: 20 FEBRUARY 2004
Delivered: 18 MARCH 2004

Subject: Exemption clause – interpretation

J U D G M E N T

HARMS JA/

HARMS JA:

[1] The late Mr Stott was a member of the appellant, the Johannesburg Country Club. So was his wife, the respondent.[1] While playing golf on the sixth fairway at the club on 4 March 2000, he apparently sought shelter under a cover of some sorts during a rainstorm. Lightning struck and he was severely injured and subsequently passed away on 24 March. Mrs Stott is seeking to hold the club liable for her loss, alleging that he had been killed as a result of the negligence of the club. At this juncture the grounds of negligence are immaterial. Her main claim for R5,9m is a dependant's claim but she also claims R20 000 for funeral and burial expenditures.

[2] The club has rules as clubs are wont to have. To these Mr and Mrs Stott bound themselves when they joined the club, she in 1994 and he much earlier. The rules contain an exemption clause as club rules are wont to contain. The club, in a special plea, relied on the exemption clause. Mrs Stott in joining issue with the club on the special plea, apart from denying that the exemption clause did not indemnify the club, pleaded that she was not bound by the exemption clause because she had been unaware of it.

[3] The court below (Kirk-Cohen J in the TPD) acceded to a request to decide the special plea as a separate issue and after hearing evidence

[1] There is a second respondent representing the deceased estate on record but this respondent is not involved in the present dispute.

dismissed it with costs. It subsequently granted the necessary leave to appeal to this court.

[4] The clause is in these terms:

'**DAMAGE TO OR LOSS OF PROPERTY, AND INJURY TO PERSONS**

(a) Members shall pay for the replacing or repairing (as the Committee may determine) of any article, or property of the Club, which shall be broken or damaged by them or their guests.

(b) The Club shall in no circumstances whatsoever be liable for any loss of or damage to the property of any member or guests brought onto the premises of the Club whether occasioned by theft or otherwise, nor shall the Club be held responsible or in any way liable for personal injury or harm however caused to members or their children or their guests on the Club premises and/or grounds.'

[5] The approach to the interpretation of exemption clauses is well known.[2] In *First National Bank of SA Ltd v Rosenblum and another* 2001 (4) SA 189 (SCA) para 6 Marais JA said:

'Before turning to a consideration of the term here in question, the traditional approach to problems of this kind needs to be borne in mind. It amounts to this: In matters of contract the parties are taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which he, she or it is to be absolved is plainly spelt out. This strictness

[2] See also *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) para 37-38 per Lewis AJA.

in approach is exemplified by the cases in which liability for negligence is under consideration. Thus, even where an exclusionary clause is couched in language sufficiently wide to be capable of excluding liability for a negligent failure to fulfil a contractual obligation or for a negligent act or omission, it will not be regarded as doing so if there is another realistic and not fanciful basis of potential liability to which the clause could apply and so have a field of meaningful application. (See *South African Railways and Harbours v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A) at 419D - E.)

Scott JA, in *Durban's Water Wonderland (Pty) Ltd v Botha and another* 1999 (1) SA 982 (SCA) 989 stated:

'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 804C.) 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 310C-D).'

[6] The question then is whether the provision 'plainly' absolves the club from a dependant's claim. The answer to the general question is that it was not possible for Mr Stott to exempt the club from such liability as one cannot

forego the autonomous claims of dependants.[3] But, argues the club, since Mrs Stott was also a member, she, too, exempted the club from any liability because she undertook not to hold the club responsible or 'in any way liable' for 'harm however caused to members'. Counsel stressed the wide meanings of the words 'any' and 'harm' and the phrase 'however caused'. (Since 'however caused' deals with causation and not liability it can safely be discounted for present purposes.)

[7] The main thrust of the club's argument was that, having regard to the social nature of the club, its members chose not to hold the club liable for loss or damage and, by adopting the rules, they agreed not to do so. One can understand that club members may consider that to hold a social club liable for damages would be contrary to the spirit of the club. But that does not answer the question of whether they have in fact entered into such an agreement. One wonders, if that had been the intention, why have they not simply agreed in clause (b) that 'no member shall have any claim for damages against the club'. A cursory analysis of the clause indicates that they did not have such all embracing intention.

[8] The clause falls into two parts, the first dealing with liability for loss or damage to property. This liability is not unqualified: it only applies to property brought onto the premises. The exclusion of liability is in part also ineffective. Guests who have been brought onto the property are not bound

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[3] *Jameson's Minors v Central South African Railways* 1908 TS 575.

by the exclusion since they are not parties to the agreement. The member is, furthermore, not the club's underwriter and undertakes no liability in its stead towards his guest. In this regard clause (a) appears to be different.

[9] The second part of clause (b) is the only part relied on by the club. From what has been said before it follows that this provision is also partially ineffective, at least to the extent that it purports to provide an exemption against the claims of guests and children. It does not even deal with the claim of a dependent spouse who is not a club member – a clear indication that the claims of dependants' were not contemplated. As the respondent submitted, the real inquiry whether a member's claim for lost support is subject to the exclusion depends on the question of whether or not such claim is covered by the words 'personal injury or harm however caused to members . . . on the club premises'. With 'personal injury' we do not have to be concerned because the club accepts that Mrs Stott's claim is not for personal injuries. However, had Mr Stott survived the lightning strike, his claim for personal injuries would no doubt have been hit by this exclusion and Mrs Stott would also not have had a claim because a dependant's claim arises only upon the death of the breadwinner.

[10] The nature of a dependant's claim in contradistinction to a damages action for bodily injuries was dealt with by Corbett JA in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838H-839C in these terms:

'In the case of an Aquilian action for damages for bodily injury . . ., the basic ingredients of the plaintiff's cause of action are (a) a wrongful act by the defendant causing bodily injury, (b) accompanied by fault, in the sense of *culpa* or *dolus*, on the part of the defendant, and (c) *damnum*, ie loss to plaintiff's patrimony, caused by the bodily injury. The material facts which must be proved in order to enable the plaintiff to sue (or *facta probanda*) would relate to these three basic ingredients and upon the concurrence of these facts the cause of action arises. In the usual case of bodily injury arising from a motor accident this concurrence would take place at the time of the accident. On the other hand, in the case of an action for damages for loss of support, the basic ingredients of the plaintiff's cause of action would be (a) a wrongful act by the defendant causing the death of the deceased, (b) concomitant *culpa* (or *dolus*) on the part of the defendant, (c) a legal right to be supported by the deceased, vested in the plaintiff prior to the death of the deceased, and (d) *damnum*, in the sense of a real deprivation of anticipated support. The *facta probanda* would relate to these matters and no cause of action would arise until they had all occurred.'

[11] On whether the adjective 'personal' qualifies the noun 'harm' there was some debate, the club contending that it does not. I am satisfied that grammatically it does qualify 'harm' and the next question is whether a dependant's claim is a claim for 'personal harm'. Irrespective of the many meanings that can be attached to the word 'harm', I am satisfied that one would not ordinarily refer to a dependant's claim as one for 'personal harm'; it would rather be called a claim for financial loss. In contradistinction to 'personal injury', 'personal harm' refers to defamation claims and the like. It cannot have the all embracing meaning the club wishes to attribute to it.

Otherwise damage to property would be covered, which is not by this part of the clause but by the first part. Intellectual property claims or claims based on breach of contract, which are not otherwise excluded, can also not by any stretch of the imagination be covered by these words – another clear indication that club members did not agree never to sue the club on any ground. The respondent's claim for funeral and burial expenses can hardly be classified under 'personal harm' and is likewise not covered by the terms of the exclusionary words.

[12] A final consideration is the radical nature of the exclusion of liability for damages for negligently causing the death of another. Clear wording, which is absent in this case, is necessary for reaching this result. Whether it can be done effectively may, in the light of the conclusion reached, be left open. It is arguable that to permit such exclusion would be against public policy because it runs counter to the high value the common law and, now, the Constitution place on the sanctity of life.[4] This court in *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) left scope for such a conclusion. In England, Wales and Northern Ireland, for instance, the legislature has intervened by declaring such exemptions unlawful though the legislation goes further and encompasses also the exemption found to be in order under

[4] See *S v Makwanyane* 1995 (3) SA 391 (CC); *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC); *Ex parte Minister of Safety and Security: in re S v Walters* 2002 (4) SA 613 (CC).

our law in *Afrox*.[5] The conduct sought to be exempted from liability may involve criminal liability, however, and the question is whether a contractual regime that permits such exemption is compatible with constitutional values, and whether growth of the common law consistently with the spirit, purport and objects of the Bill of Rights requires its adaptation. At our request the parties provided us with argument on this issue, but in the light of the proper reading of the contractual exclusion set out above, it is not necessary to determine it now.

[13] The appeal is dismissed with costs, including the costs of two counsel.

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L T C HARMS
JUDGE OF APPEAL

CAMERON JA concurred

[5] Unfair Contract Terms Act 1977 s 2(1).

MARAIS JA:

[14] I agree that the appeal should be dismissed with costs. However, as at present advised, I do not wish to be thought to be lending any credence to the viability of the notion that a contractual exclusion of liability for negligently caused death is necessarily contrary to public policy or constitutional values.

[15] Slight negligence may have no consequences in one case; in another it may have catastrophic consequences. Death is but one of them. I would need considerable persuasion before concluding that a party to a contract who wishes to protect himself or herself against the possibility that a moment's inattention may result in an enormous civil liability for damages, is to be prohibited by law from doing so despite the other party's willingness to contract on that basis.

[16] A negligent causing of death is *ex hypothesi* not an intentional infraction of the right to life. It is an unintended consequence. It is so that it may expose the negligent party to a charge of culpable homicide and no consensual exclusion of civil liability will avail a party so charged. But the same applies to the negligent driving of a motor vehicle which results in serious injury to a passenger who has agreed to an exemption clause which protects the driver against claims for damages arising out of his negligence. It has never been doubted that such a clause is valid and binding in our law. In short, the fact that the clause exempts a party from the civil law consequences of conduct which is a criminal offence in which negligence is the essential element has not been regarded as contrary to public policy simply because the conduct also constitutes a criminal offence.

[17] However, it is unnecessary to decide the question and my tentative adverse reaction to the suggestion that death makes a difference should not be thought to be my last word on the subject.

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R M MARAIS
JUDGE OF APPEAL