THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

CASE NO: 573/2007

MASSTORES (PTY) LTD **Appellant**

and

MURRAY & ROBERTS CONSTRUCTION (PTY) LIMITED **1st Respondent**
S ROCHE PROJECTS **2nd Respondent**

Neutral citation: Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd (573/2007) 94 [2008] ZASCA (12 September 2008)

Coram: **MPATI P, LEWIS, MLAMBO JJA, KGOMO AND MHLANTLA AJJA**

Heard: **22 AUGUST 2008**

Delivered: **12 SEPTEMBER 2008**

Summary: **Appeal against upholding of exception to claim for damages for destruction of warehouse and its contents through negligence on part of contractor effecting additions: excipient raised exemption clause (indemnification by employer) as a bar to the claim. Held that on the interpretation of the clause and the contract as a whole, the clause did preclude an action by the employer against the contractor for destruction of the warehouse and its contents: appeal dismissed.**

ORDER

On appeal from: High Court, Johannesburg (Schwartzman J sitting as court of first instance).

The appeal is dismissed with costs, including the costs incurred by the employment of two counsel.

JUDGMENT

LEWIS JA (MPATI P, MLAMBO JA, KGOMO AND MHLANTLA AJJA concurring)

[1] The appellant (the plaintiff in the high court), Masstores (Pty) Ltd, a wholesaler of a multitude of commodities, engaged the first respondent (the first defendant), Murray & Roberts Construction (Pty) Ltd, to extend one of its stores in Struben's Valley, Roodepoort. I shall refer to the appellant either as Masstores or as the employer, and to the respondent either as Murray & Roberts or as the contractor. Their building contract was embodied in a standard form published by the Joint Building Contracts Committee – a form widely used in the construction industry in South Africa. The second defendant in the matter was a subcontractor of Murray & Roberts and is not party to this appeal.

[2] While employees of the second defendant were cutting the roof of Masstores' existing store with an angle grinder a fire broke out which

destroyed the store and its contents. Masstores sued Murray & Roberts for breach of contract, claiming R169 365 175, the value of the structure destroyed and its contents.

[3] The breaches alleged by Masstores – and which allegedly caused the damage to its building and the contents – include: failure to comply with all laws and regulations; failure to carry out the work in a proper and workmanlike manner; failure to ensure that subcontractors appointed by Murray & Roberts complied with safety levels; and failure to ensure that the work was executed safely and in such a way as not to endanger the lives and property of people in the vicinity of the work. These failures are alleged to have been negligent or grossly negligent.

[4] Murray & Roberts excepted to the particulars of claim on the basis that clause 9.2.7 of the building contract precludes an action against it – exempts it from liability for causing damage to Masstores' existing structure. Clause 9 reads:

'Clause 9 Indemnities

9.1 *Subject to the provisions in terms of 9.2* the contractor indemnifies and holds the employer harmless against any loss in respect of all claims, proceedings, damages, costs and expenses arising from:

9.1.1 Claims from other parties consequent upon death or bodily injury or illness of any person or physical loss or damage to any property, other than the works, arising out of or due to the execution of the works or occupation of the site by the contractor

9.1.2 A non-compliance by the contractor with any law and regulation and bylaw of any local or other authority arising out of or due to the execution of the works or occupation of the site by the contractor

9.1.3 Physical loss or damage to any plant, equipment, or other property belonging to the contractor or his subcontractors

9.2 The employer indemnifies and holds the contractor harmless against loss in respect of all claims, proceedings, damages, costs and expenses arising from:

9.2.1 An act or omission of the employer, the employer's servants or agents and those for whose acts or omissions they are responsible

9.2.2 An act or omission of a direct contractor appointed in terms of 22.0

9.2.3 Design of the works where the contractor is not responsible in terms of 4.0

9.2.4 The use or occupation of the site by the works

9.2.5 The right of the employer to have the works or any part thereof executed at the site

9.2.6 Interference with any servitude or other right that is the unavoidable result of the execution of the works including the weakening of or interference with the support of land adjacent to the site unless resulting from any negligent act or omission by the contractor or his subcontractors

9.2.7 *Physical loss or damage to an existing structure and the contents thereof in respect of which this agreement is for alteration or addition to the existing structure*

9.2.8 Physical loss or damage to the contents of the works where practical completion has been achieved in terms of 24.0

9.2.9 The occupation of any part of the works by the employer or his tenants' (my emphasis).

[5] Schwartzman J in the high court upheld the exception, finding that clause 9.2.7 precluded a claim against Murray & Roberts for negligent breach of contract, but granted leave to appeal against his decision to this court.

[6] The sole question before us is whether clause 9.2.7 has the effect of exempting Murray & Roberts from liability for negligent, or grossly negligent, breaches of the building contract. And that depends on an interpretation of the clause. Counsel for Masstores argue that the clause is ambiguous, riddled with inconsistency and incoherent. The ambiguity contended for would enable the court to interpret the clause in such a way as to conclude that Murray & Roberts would be liable for negligently causing the damages alleged. Counsel for Murray & Roberts, on the other hand, argue that the clause is clear, unambiguous and consonant with the balance of the contract which pertinently allocates various risks to the respective parties. It is a model of clarity, they contend, and excludes Murray & Roberts' liability for negligent breach of contract.

[7] Before considering the alleged ambiguities that might lead to the conclusion that the clause does not exclude liability for the damage caused to the existing structure, it is important to state that an ambiguity is not, in my view, a precondition for a court to interpret a provision by having regard to the context of the contract and the surrounding circumstances. More than ten years ago this court said in *Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd*[1] that the time appeared to be ripe for this court 'to reconsider the

[1] 1996 (1) SA 1182 (A) at 1187E-F.

limitations placed' on the 'use of surrounding circumstances' in interpreting documents'. That said, because this matter was determined on exception by the high court, there is no evidence to which we can have regard in fathoming the intention of the parties: the provision in issue must be construed by examining the words used, the structure of the indemnity provision itself and its meaning within the context of the contract as a whole. And it is as well to recall at this point that there are no special rules that apply to the construction of exemption provisions: *Durban's Water Wonderland (Pty) Ltd v Botha*;[2] *First National Bank of Southern Africa Ltd v Rosenblum*[3] and *Van der Westhuizen v Arnold*.[4]

[8] The contract is one commonly used in the building industry. It describes the subject matter as the 'works', defined as 'the works described in general terms in the schedule, detailed in the contract documents, ordered in contract instructions and including the contractor's and his subcontractors' temporary works. In 8.0 to 13.0, works shall further include materials and goods . . .'. In the schedule the works description is 'Alterations and additions to existing Makro Store at Strubens Valley comprising steel framed building with sheet steel profiled roof covering and cladding together with associated siteworks'.

[9] Clause 7 deals with compliance with building regulations and bylaws, and 7.1, on which Masstores relies, provides:

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[2] 1999 (1) SA 982 (SCA) at 989H-J.
[3] 2001 (4) SA 189 (SCA) para 7.
[4] 2002 (6) SA 453 (SCA) paras 18 and 19. Some of the decisions that have questioned the difference between surrounding and background circumstances are set out in paras 13 and 14.

‘The contractor shall comply with all laws and all regulations and bylaws of local or other authorities having jurisdiction regarding the execution of the works. . . .’

Clause 8.0 governs the risk in the works. Part of the provision is not strictly relevant to the dispute before this court but I shall set much of it out since Murray & Roberts argues that the allocation of risk in this provision is the only basis of its liability under the contract. As the contractor, it takes responsibility for the works, and only the works. The clause is headed ‘Works risk’ and it reads:

‘8.1 The contractor shall take full responsibility for the works from the date on which possession of the site is given to the contractor and up to the issue or the deemed issue of the certificate of practical completion. Thereafter responsibility for the works shall pass to the employer.

8.2 The contractor shall make good physical loss and repair damage to the works, including clearing away and removing from the site all debris resulting therefrom, which occurs after the date on which possession of the site is given and up to the issue or deemed issue of the certificate of final completion and resulting from:

8.2.1 Any cause arising up to the date of issue of the certificate of practical completion

8.2.2 The contractor or his subcontractors carrying out any operation complying with the contractor’s obligations after the date of issue of the certificate of practical completion

8.3 The contractor shall not be liable for the cost of making good physical loss and repairing damage to the works where this results from the following circumstances:

. . .

[The provisions of 8.3.1 to 8.3.5 list circumstances clearly beyond the control of the contractor such as war, rebellion, riot, strike, and confiscation.]

8.3.6 The use or occupation of any part of the works by the employer, the employer's servants or agents and those for whose acts or omissions they are responsible

8.3.7 An act or omission of the employer, the employer's servants or agents and those for whose acts or omissions they are responsible

8.3.8 An act or omission by a direct contractor . . .

8.3.9 Design of the works where the contractor is not responsible . . .

8.3.10 A latent defect in materials and goods specified by trade name, where the contractor has no right of substitution. The contractor hereby cedes any right of action to the employer that may exist against the supplier and/or manufacturer of such materials and goods.

8.4 The limit of the contractor's liability shall not exceed the amount of the contract works insurance. . . . The liability of the contractor in terms of 8.2 shall include:

8.4.1 The cost of making good loss and repairing damage

8.4.2 The replacement value of materials and goods supplied by the employer to the contractor

8.4.3 The additional professional services required of the employer's agents

. . . .'

[10] The effect of clause 8 is that the contractor assumes the risk of any loss or damage to the works, as defined, until they are completed and handed over to the employer. The exceptions to this lie where the loss is caused either by factors beyond the control of the contractor, or when it is caused by the employer and those for whom it is responsible. Nowhere in the clause is provision made for the contractor to be liable other than for the works. And insurance is required only in respect of the works. Nothing is said of the existing structure, and indeed, as Murray & Roberts argues, that is to be expected. Why should the contractor, it asks, assume responsibility for

damage to the existing structure when it is owned by Masstores and its value is considerably greater than the cost of the works? Why would a contractor undertake liability for the destruction of a structure and its contents worth about R169m when the cost of the work to be done by it is only R13m?

[11] Masstores' answer is that if Murray & Roberts did indeed intend to exclude liability for their conduct, it did not succeed. It construes clause 9, particularly 9.2.7, so as not to exclude Murray & Robert's liability for the damage negligently caused to the existing structure and its contents. The effect of the provision, its counsel argue, is to indemnify the contractor against claims by third parties only, or, alternatively, to exclude the contractor's liability only for its non-negligent conduct.

[12] To reach this conclusion Masstores argues that clause 9 is ambiguous. It raises four respects in which the language of the provision gives rise to uncertainty: the use of the words 'indemnify and hold harmless'; the apparent conflict between 9.1.2 and 9.2.7; the use of the words 'any loss' in 9.1 but only 'loss' in 9.2; and the failure to specify all the legal grounds for liability in 9.2.7, especially negligent conduct. To some extent these arguments overlap but I shall deal with each discretely.

Indemnify and hold harmless

[13] The language is not clear, Masstores contends, first, because of the use of the words 'indemnify' and 'hold harmless'. It will be recalled that clause 9.2 states that the 'employer indemnifies and holds the contractor harmless

against loss in respect of all claims, proceedings, damages, costs and expenses arising from' – '9.2.7 Physical loss or damage to an existing structure and the contents thereof in respect of which this agreement is for alteration or addition to the existing structure'. The usual meaning of indemnify is to protect a person against a claim by another – a third party. Similarly, one would hold another harmless against the claim of a third party. Can one indemnify a person against a claim brought by oneself? Thus, the argument runs, the contractor is not indemnified against claims by the employer, but only claims by third parties.

[14] The wording of the clause is admittedly not elegant. One would not normally say 'I indemnify you against claims against you brought by myself'. The typical exclusion clause would state that claims by the other party are excluded, or that a party is exempt from liability against the other. However, although the use of the words 'indemnify' and 'hold harmless' may appear at first to relate only to third party claims, there is ample authority that they mean also 'keep free from, or secure against (hurt, harm or loss);[5] or to 'secure (someone) against legal responsibility for their actions'. Apart from dictionary definitions, which are not decisive,[6] a court must ascertain what words mean by having regard to the intention of the parties, established, as I have said in this case, from an examination of the contract in its entirety.

[5] Shorter Oxford English Dictionary, 1973, Vol 1. See also Concise Oxford English Dictionary 10 ed (2002).
[6] See also *Jonnes v Anglo-African Shipping Co (1936) Ltd* 1972 (2) SA 827 (A) at 835G-836B where similar dictionary definitions of 'indemnify' are set out.

[15] The provision cannot, in my view, be construed to refer only to claims brought by third parties. If the parties had intended clause 9.2.7 to govern claims by third parties they would have said so. They have done so elsewhere in the indemnity clause, in 9.1, which regulates the contractor's liability to the employer: the contractor indemnifies and holds the employer harmless against 'claims from *other* parties consequent upon death or bodily injury or illness of any person or physical loss or damage to any property, other than the works, arising out of' the execution of the works or occupation of the site (9.1.1) (my emphasis). In my view this express reference to claims by third parties tends to suggest that there is no implicit reference to such claims in 9.2.7. Moreover, 9.2 deals expressly and primarily with the situations in which the contractor would be indemnified – for an act or omission by the employer or its servants, or a direct contractor, or the contractor's use and occupation of the site. These are instances where the contractor might otherwise be liable. Why should clause 9.2.7 be different?

[16] Masstores nonetheless argues that unless clause 9.2.7 operates only to exclude claims by third parties, clauses 8.3.7, 8.3.8 and 8.3.9 would be superfluous: they exclude the liability of the contractor in the same circumstances. But clause 8 deals specifically with the works and not with the existing structure. Clause 9.2.7, on the other hand, deals only with the existing structure. The clauses regulate different situations. The argument that the words 'indemnify and hold harmless' govern only claims by third parties must thus fail.

The apparent conflict between clauses 9.1.2 and 9.2.7

[17] A second source of ambiguity contended for by Masstores lies in the juxtaposition of clauses 9.1.2 and 9.2.7. The former, in the first part of the clause that governs the indemnities given by the contractor to the employer, indemnifies the employer against claims resulting from any non-compliance with any law, regulation or bylaw on the part of the contractor. The claim by the employer is in part for just that – non-compliance with safety regulations in executing the works, resulting in physical damage. The high court found, correctly in my view, that clause 9.1, being 'subject to' clause 9.2, is subservient to it: the provisions of 9.2 thus prevail over those of 9.1, and to the extent that 9.1.2 may appear to be in conflict with 9.2.7, the latter must prevail. The indemnity given by the employer to the contractor for all claims for damage to the existing structure thus limits the indemnity given by the contractor to the employer in 9.1.2. The conflict is in any event more apparent than real, for the contractor's obligation is to execute the *works* in accordance with the relevant regulations. The indemnity in 9.2.7 is in respect of the existing structure.

'Any loss' and 'loss'

[18] Counsel for Masstores argue further that clauses 9.1 and 9.2 employ different language in regulating the parties' respective rights. In 9.1 the contractor indemnifies the employer against *any loss* arising in certain situations, whereas in 9.2 the employer indemnifies the contractor against only *loss*, thus causing uncertainty as to the ambit of the indemnities. Clause 9.1 appears to be more extensive in its embrace than 9.2. The argument loses

sight of the use of the word 'all' that appears in 9.2 – the indemnity is against loss in respect of '*all claims. . . .arising from*' the various situations listed in the provisions that follow. 'All claims', in the absence of evidence to the contrary, has a very wide ambit. Not so, argues Masstores. Exemption clauses are to be narrowly construed, particularly when a party seeks to escape liability for negligence.

Failure expressly to exclude negligent conduct as a ground of liability

[19] Masstores relies in this regard on a line of decisions commencing with *South African Railways & Harbours v Lyle Shipping Co Ltd*[7] in which it was held that where an exemption clause in a contract specified various causes of loss for which liability was excluded, but was silent on the question of negligent conduct, liability for negligence was not excluded. The case concerned a provision in a contract for the towing of a ship: it stated that the ship owner accepted assistance or service 'on the condition that [the tug operator] will not be liable for any loss or damage that may be occasioned to the said ship through accident, collision or any other incident whatsoever occurring whilst the tug . . . is engaged in any operation in connection with holding, pushing, pulling or moving the said ship'.[8] It was alleged that the ship in question was damaged as a result of the negligence of the tug operator. In deciding the issue Steyn JA said:[9]

'The question raised on appeal is whether or not the clause quoted above exempts the appellant from liability for negligence. It does not do so either explicitly or in general terms so all-embracing as clearly to draw such liability into the scope of the

[7] 1958 (3) SA 416 (A).
[8] At 418F-G.
[9] At 419A-F.

exemption. It refers in comprehensive language to possible events as a result of which damages may be sustained, but not to the possible legal grounds of responsibility for such damages on the occurrence of any such event, with the result that, having regard only to the wording of the clause, it is open to the interpretation that it bars actions arising from causes of one or more classes, leaving unaffected those founded on causes of one or more other classes. The rule to be applied in construing an exemption of this nature, appears from *Essa v Divaris,* 1947 (1) SA 753 (A) at 756. Generally speaking, where in law the liability for the damages which the clause purports to eliminate, can rest upon negligence only, the exemption must be read to exclude liability for negligence, for otherwise it would be deprived of all effect; but where in law such liability could be based on some ground other than negligence, it is excluded only to the extent to which it may be so based, and not where it is founded upon negligence. Mr Cloete, for the appellant, did not seek to cast any doubt upon the soundness of this rule, either in equity or as a means, indicated by the inherent improbability that any person would be content to forgo all legal protection against the negligence of another, of ascertaining the probable intention of parties to a contract.

What we accordingly have to examine, are the possible causes of action which may arise in relation to this contract. Negligence, of course, is one of them. Is there any other?'

Finding that a breach of contract could give rise to liability, the court held that liability for negligence was not excluded.

[20] The principle is not applicable if there is no doubt but that negligent conduct is included within the embrace of the provision in question. In *Government of the RSA v Fibre Spinners & Weavers (Pty) Ltd*[10] Wessels ACJ

[10] 1978 (2) SA 794 (A) at 805E-G.

said that it is only where the exemption provision is ambiguous – as he considered the provision in *SAR & H v Lyle* to be – that there is room to search for other legal causes of liability that would give meaning to the provision in the absence of negligent conduct. Thus where a clause provided 'you are hereby absolved from all liability for loss or damage however arising' the wording was 'sufficiently comprehensive' to cover liability for negligent conduct.

[21] In *Durban's Water Wonderland (Pty) Ltd v Botha*[11] a disclaimer posted at an amusement park read:[12]

'The amenities which we provide at our amusement park have been designed and constructed to the best of our ability for your enjoyment and safety. Nevertheless we regret that the management, its servants and agents, must stipulate that they are absolutely unable to accept liability or responsibility for injury or damage of any nature whatsoever whether arising from negligence or any other cause howsoever which is suffered by any person who enters the premises and/or uses the amenities provided.'

Scott JA said, having discussed the manner in which the respondent and her daughter had been injured at the park:[13]

'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. . .*) But the

[11] 1999 (1) SA 982 (SCA).
[12] At 988C-E.
[13] At 989G-990B.

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).

What is immediately apparent from the language employed in the disclaimer is that any liability founded upon negligence in the design or construction of the amusement amenities would fall squarely within its ambit. The first sentence contains specific reference to the design and construction of the amusement amenities. Even if this were to be construed as qualifying the 'negligence' contemplated in the second sentence, that qualification would not therefore exclude from the ambit of the disclaimer negligence in relation to such design or construction. Various grounds of negligence were alleged in the particulars of claim. The Court *a quo*, however, found the appellant to have been negligent in one respect only . . . . The ground of negligence relied upon clearly related to the design or construction of the amenity. It follows that the respondents' cause of action was one which fell within the ambit of the disclaimer. I did not understand counsel to contend the contrary.'

[22] In *First National Bank of Southern Africa Ltd v Rosenblum & another*[14] it was similarly argued that the absence of express reference to liability for the dishonest conduct of the bank's employees rendered an exemption clause ambiguous, since not all the legal grounds on which liability could be based had been enumerated. According to the stated case before the court, articles placed in the bank's safe deposit box by the respondents had been stolen from it by employees of the bank. It was assumed that the bank had been negligent in allowing the employees access to the box. The clause had not referred to all the ways in which the theft may have been committed, nor was there reference to the bank's vicarious liability for its employees' wrongdoing.

[14] 2001 (4) SA 189 (SCA).

The respondents argued that not all possible manifestations of theft had been covered, nor the bank's liability for gross negligence.

[23] The Johannesburg High Court found for the respondents. On appeal this court rejected the argument, finding that the bank had successfully immunized itself from liability. The exclusion clause read:

'The bank hereby notifies all its customers that while it will exercise every reasonable care, it is not liable for any loss or damage caused to any article lodged with it for safe custody whether by theft, rain, flow of storm water, wind, hail, lightning, fire, explosion, action of the elements or as a result of any cause whatsoever, including war or riot damage, and whether the loss or damage is due to the bank's negligence or not.'[15]

Marais JA considered that the ambit of the clause was very wide: it covered loss caused by factors beyond the control of the bank and the bank's negligent conduct. Even its employees' dishonest conduct (given that their states of mind could not be attributed to the bank) was included under 'any cause whatsoever'. He said of the general approach to the interpretation of exemption clauses:[16]

'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

[15] Para 2.
[16] Paras 6 and 7.

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 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 *SAR&H v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A) at 419 D – E.)

It is perhaps necessary to emphasize that the task is one of interpretation of the particular clause and that caveats regarding the approach to the task are only points of departure. In the end the answer must be found in the language of the clause read in the context of the agreement as a whole in its commercial setting and against the background of the common law and, now, with due regard to any possible constitutional implication.'[17]

[24] Masstores relies on the first paragraph quoted, Murray & Roberts on the second. In my view, ambiguity need not be the open sesame[18] to construing an exemption clause by having regard to evidence of surrounding circumstances.[19] Given, however, that this appeal is against the upholding of an exception there is no evidence other than the contract itself. It must be viewed in its commercial setting, taking account of the structure and purpose

[17] Contrast *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) where the court found that a portion of an exemption clause purporting to exclude a club's liability for injury to members, their guests and their children was ineffective in so far as guests and children were concerned, and did not cover a dependant's claim for loss of support on the death of a member. The decision turned on the inability of a member to forgo the independent claim of a dependant.

[18] The phrase used by Jansen JA in *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 (1) SA 796 (A) at 805H-806A.

[19] *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) para 22 and the cases cited there.

of the entire contract. I consider that scrutiny of the contract does not support the contention that negligent conduct is excluded from the embrace of clause 9.2.7.

[25] First, the very way in which the contract is structured so as to allocate risks between the parties suggests that it is the event or circumstance that gives rise to liability rather than blameworthy conduct in the form of negligence or otherwise. Clause 8 specifies circumstances that pertain to the works where the contractor will bear the risk, and those, beyond its control, where it is exempt from liability. Clause 9 provides for reciprocal indemnities that pertain to different risks arising in different circumstances. Thus the contractor takes responsibility for the works and bears the risk in them (pursuant to clause 8) in clause 9.1. Under clause 9.2, however, the employer takes the risk for the conduct of its employees or a direct contractor. Liability is strict – not dependent on fault, save in clause 9.2.6. Thus the argument of Masstores that the clause would exempt Murray & Roberts from non-negligent conduct ordinarily giving rise to a claim – such as for innocent breach of the bylaws or regulations which Murray & Roberts had undertaken to comply with – does not succeed. The ground of liability suggested is, it is true, not fanciful or remote, but the contract does not concern itself with fault – only with specified events or circumstances.

[26] Second, clause 9.2.6 itself suggests a different construction from that advanced by Masstores. It provides that the employer indemnifies the contractor against loss arising from '[i]nterference with any servitude or other

right that is the unavoidable result of the execution of the works including the weakening of or interference with the support of land adjacent to the site unless resulting from *any negligent act or omission by the contractor or his subcontractors*' (my emphasis).

[27] In my view, the express inclusion of the one exception in the subclause – liability for a negligent act or omission causing weakening of or interference with adjacent support – indicates that the parties had considered liability for negligent conduct in one situation, and specifically rendered the contractor liable for it. The exclusion of any reference to an exemption from liability for negligent conduct causing damage to the existing structure must be deliberate. In clause 9.2.6 the contractor is made to bear the risk of a negligent act or omission which results in the weakening of the adjacent support of the site. But in clause 9.2.7 there is no exception made in relation to negligence: hence the contractor is indemnified against liability for causing damage to the existing structure irrespective of fault. The express exception in 9.2.6 strengthens the conclusion that in all the other subclauses of 9.1 and 9.2 the presence or absence of negligence plays no role.

[28] Third, the contract anticipates that the parties will insure themselves against risk. Clause 10 regulates insurance. Clause 10.1 requires insurance on the *works* in the joint names of the employer and the contractor. Clause 10.2 provides that when sections of the works are completed or when alterations or additions to an existing structure are required the employer shall effect insurance. Naturally the risk in respect of the existing building lies with

the employer, whose choice it is to insure it. The existing building is not the responsibility of the contractor.

[29] Construed thus in the light of the other contractual provisions, clause 9.2.7 is clearly intended to exclude the contractor's liability for negligently damaging or destroying the existing structure and its contents. Masstores argues that an excipient must show that on any reasonably possible interpretation of the clause no cause of action exists. I consider that Murray & Roberts has shown that the only reasonably possible interpretation of the clause is that Masstores is precluded from suing it for the damage caused to the existing structure and its contents by negligent breaches of the contract.

[30] Does the provision excluding the contractor's liability for damage to the existing structure and its contents also exclude liability for gross negligence? In *Government of the Republic of South Africa v Fibre Spinners & Weavers*[20] the court stated that there was no reason why a clause excluding liability for negligence should not also exclude liability for gross negligence – assuming there is a distinction between degrees of negligence – and that there was no reason why public policy should preclude enforcement of such an exemption. This was endorsed in *First National Bank v Rosenblum*.[21] This argument must also fail. In the circumstances I consider that the high court correctly upheld the exception to the particulars of claim.

[20] 1978 (2) SA 794 (A) at 807C-E.
[21] Above, para 26.

[31] The appeal is dismissed with costs, including the costs incurred by the employment of two counsel.

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C Lewis

Judge of Appeal

Appearances:

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