THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 421/2020

Case No: 422/2020

In the matter between:

UPS SCS SOUTH AFRICA (PTY) LTD **APPELLANT**

and

HENDRIK CORNELIS VAN WYK t/a SKYDIVE MOSSEL BAY **RESPONDENT**

Neutral citation: *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)

Coram: PONNAN, WALLIS, SALDULKER, MOKGOHLOA AND MABINDLA-BOQWANA JJA

Heard: 19 August 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be at 10h00 on 1 October 2021.

Summary: Contract – terms – contract of carriage concluded by way of exchange of emails – customer thereafter signing credit application with standard trading conditions containing exemption from liability for loss or damage – exemption

clauses not brought to the customer’s attention – exemption clauses not part of the contract – quantum of claim – item destroyed during carriage – replacement value of item.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Henney J sitting as court of first instance):

1 The application in terms of s17(2)*(b)* of the Superior Courts Act 10 of 2013 for leave to appeal against the whole of the judgment of the court below is dismissed with costs, such costs to include the costs of two counsel.

2 The appeal is dismissed with costs, such costs to include the costs of two counsel.

JUDGMENT

Saldulker JA (Ponnan, Wallis, Mokgohloa and Mabindla-Boqwana JJA concurring):

[1] Mr Hendrik Cornelis Van Wyk, the respondent, is the owner and operator of a skydiving business, trading under the name and style of Skydive Mossel Bay, situated at the Mossel Bay Airfield, in the Western Cape. He used Cessna aircraft for this purpose. 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, he instructed America's Aircraft Engines to proceed with an overhaul of the engine. This was complete towards the end of 2012 and Van Wyk made enquiries about transporting the engine back to South Africa (SA). It needed to be conveyed from Collinsville, Oklahoma, to the George Airport in SA.

[2] In December 2012, Van Wyk contacted the appellant, UPS SCS South Africa (Pty) Ltd (UPS), the South African branch of an international delivery business. This resulted in the exchange of a number of emails, of which, the following are pertinent.

(i) On 12 December 2012, Van Wyk requested a quotation for the conveyance of a crate containing the aircraft engine by sea from the USA to South Africa. He asked for the cheapest quotation and for an estimate of how long it would take.

(ii) On 24 December 2012, UPS represented by Mr Dirk Swanepoel (Swanepoel) responded to Van Wyk, and attached an estimate of the charges in the amount of R11 070.05 on a document entitled 'Seafreight Import Estimate-LCL' ('the quotation'). Swanepoel also requested a detailed description and value of the engine, presumably for the purpose of providing an estimate of the duration of the transit.

(iii) On 21 January 2013, Van Wyk replied indicating that the engine had been shipped to America's Aircraft Engines in 2007 for an overhaul which was now completed, and that the cost of the overhaul process was $21 500. Van Wyk enquired whether the conveyance of the aircraft engine would attract any import duty, and enquired further about the duration of conveyance via sea freight.

(iv) On 22 January 2013, the following emails were exchanged between Swanepoel and Van Wyk:

[a] At 07h57, Swanepoel informed Van Wyk that the engine would take approximately 45 days in transit by ocean freight, and that it would not attract import duty. However, VAT would be payable on the value of the engine, and not just on the value of the repair. Swanepoel indicated that an ITAC[1] certificate might be required depending on the documentation Van Wyk had available.

[b] At 9h55, Van Wyk responded to Swanepoel advising him that the value of the engine and the repair was the same. He added:

'I would like to go ahead with this.

What do you need from me.'

[c] At 10h14, Swanepoel advised Van Wyk that 'the first step' would be to open an account with UPS-SCS. He also asked for information in order to see whether an ITAC permit would be required and the address and contact details for the pick-up of the cargo and shipment.

[d] At 10h24, Van Wyk replied that he did not have an account with UPS. He enquired:

'Can I not just make a full upfront payment?

---

[1] International Trade Administration Commission of South Africa.

Else, send me the procedure for opening an account please'.

[e] At 10h34, Swanepoel informed Van Wyk that it was not an option not to have an account for US shipments and that the only way 'we can move ocean on the US lane is if a valid account number exists (even if it is a COD account)'. He advised that shipments to and from the USA were called Regulated Trade and a multitude of rules and regulations imposed by the US Government and US Customs had to be complied with. He attached a copy of the credit application to be completed so that 'we can start the process'.

[f] At 16h12, Van Wyk signed the credit application form and returned it to Swanepoel. On the relevant portion of the first page and under the heading 'Credit Application', which appears in bold print, Van Wyk filled in his personal and business details in manuscript. In addition, in the middle of the same page, and in smaller print, the words 'Credit Facilities Required' appear in bold print. Van Wyk entered the amount of 'R30 000' next to the words 'Credit Limit' and next to the words 'Payment Terms' Van Wyk entered the words 'Pay Up Front'.

[3] The parties are agreed that this exchange of emails gave rise to a contract in terms of which UPS would arrange for the engine to be collected from Collinsville, Oklahoma and conveyed to George. The initial dispute is over the precise terms of that contract, but first it is necessary to complete the narrative.

[4] On 31 May 2013, Swanepoel sent an email to Van Wyk informing him that the aircraft engine was scheduled for pick-up the following day at America's Aircraft Engines. On 10 June 2013, Van Wyk sent an email to Swanepoel informing him that there was a change of circumstances, and that he required the engine urgently. The reason was that an engine on one of his planes was nearing its permissible 1500 flying hours after which it would require to be taken out of service and reconditioned. A replacement was accordingly needed. He enquired about the cost of transporting the engine via air freight. Swanepoel's response was that he had made arrangements for the cargo to be intercepted once it arrived in New York and could then be sent by air. Swanepoel also informed Van Wyk that the engine was on a feeder truck from Dallas *en route* to New York, and that it would then be flown from New York on a direct service to Johannesburg.

[5] It transpired that this was all academic. The aircraft engine never arrived at its destination in South Africa. On the afternoon of 12 June 2013, Van Wyk was informed by Swanepoel, once again by email, that 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. He was asked to provide UPS with a quotation or estimate of the value of the engine. Van Wyk was sent an insurance claim form, but on 1 October 2013, he was informed by UPS 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.

[6] Aggrieved, Van Wyk instituted an action against UPS in the Western Cape Division of the High Court, Cape Town (high court), for payment of the amount of R386 140.30 in respect of the loss of the aircraft engine, plus interest and costs. Subject to a deduction in respect of travelling costs this was the amount that he paid to obtain a replacement reconditioned engine from a South African supplier.

[7] In the particulars of claim, Van Wyk pleaded that as a result of the various emails exchanged, a written agreement had come into existence between the parties on or about 22 January 2013, alternatively on or about 31 May 2013, in Johannesburg, alternatively in Mossel Bay, for the conveyance of the aircraft engine by the appellant from Oklahoma, USA to George, SA. He alleged that, the appellant had failed to deliver the engine, as it had been damaged while in transit in the US, and was a total loss. In an attempt to pre-empt reliance on various conditions attached to the credit application, Van Wyk alleged that the agreement was governed by the provisions of the Consumer Protection Act 68 of 2008 (CPA), because the agreement was for the 'supply' of a 'service' as contemplated by the CPA. He pleaded that he was unaware of those conditions and they were not drawn to his attention by the appellant as required in terms of ss 49(3) to 49(5) of the CPA.[2]

[2] Sections 49(3) to 49(5) of the Consumer Protection Act 68 of 2008 provides as follows:
'(3) A provision, condition or notice contemplated in subsection (1) or (2) must be written in plain language, as described in section 22.
(4) The fact, nature and effect of the provision or notice contemplated in subsection (1) must be drawn to the attention of the consumer—
(a) in a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances; and

Insofar as necessary, an order in terms of s 52(4)*(a)*(ii) of the CPA severing all the provisions attached to the credit application purporting to limit the risk or liability of the appellant from the rest of the agreement was sought.

[8] UPS advanced the following defence on the merits of the claim. It admitted that a written agreement was concluded between the parties on 22 January 2013, which incorporated standard trading conditions containing wide-ranging clauses limiting its liability, viz clauses 13.2, 32, 33, 35.2, 36, 36.1, and 36.2.[3] It pleaded

---

(b) before the earlier of the time at which the consumer—

(i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility; or

(ii) is required or expected to offer consideration for the transaction or agreement.

(5) The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice as contemplated in subsection (1).'

[3] Clause 13.2: Where the Company employs independent third parties to perform all or any of the functions required of the Company, the Company shall have no responsibility or liability to its customers for any act or omission of such third party, even though the Company may be responsible for the payment of such third party's charges, but the Company may, if suitably indemnified against all costs, including attorney and client costs, take such action against the third party on its customer's behalf as its customer may direct.

Clause 32: The Company shall not in any circumstances be liable for any loss or damage to goods or for non-delivery or mis-delivery whether on grounds of breach of contract or negligence, unless it is proved that the loss, damage non-delivery or mis-delivery occurred whilst the goods were in the actual custody of the Company and under its actual control.

Clause 33: Subject to the terms of Clause 32 above the Company shall be under no liability whatsoever, whether on grounds of breach of contract or negligence, in respect of any type of loss or damage, however arising, and whether in respect of or in connection with any goods or any instructions, business, advice, information or services or otherwise, unless it is proved that the loss or damage was caused by gross negligence of the Company.

Clause 35: Notwithstanding anything hereinbefore contained, the Company shall be discharged from all liability-

Clause 35.2: For loss or non-delivery of the whole of the consignment, however caused, unless notice be received in writing within 28 (TWENTY-EIGHT) days of the date upon which the good should have been delivered.

Clause 36: In no case whatsoever shall any liability of the Company, however arising, exceed the values of the goods or the value declared by the customer for insurance, customs or carriage purposes, or an amount determined as set out below, whichever is the lowest.

further that Van Wyk had signed the credit application form and was accordingly bound by its terms, which were written in plain language and sufficiently conspicuous to attract his attention As the owner of a skydiving business, he would have understood the meaning and import of the terms and conditions of the agreement specifically those limiting the liability of the appellant. UPS pleaded that in the event of it being found that it was liable for the loss of the engine, its liability was limited to R100 per 1000 kilograms or part thereof in terms of clause 36.2 of the agreement.

[9] In response, Van Wyk filed a replication denying that the standard trading conditions incorporated in the credit application were applicable to the contract of carriage between the parties. Van Wyk stated that the contract was concluded upon receipt by UPS of his email to Swanepoel on 22 January 2013 at 9h55 to 'go ahead'. He had not sought credit, and had completed the form as a formality for the purposes of allocation of an account number by the appellant. Furthermore, the appellant did not explain to Van Wyk, nor did Van Wyk reasonably understand, that the second and third pages of the credit application, which had not been furnished to him, prior to receipt of the credit application, incorporated terms and conditions, which would apply to the contract of carriage between the parties.

[10] The matter came before Henney J, who found in favour of the respondent, and made an order in the following terms:

'a) The defendant's special plea is dismissed;

b) That in terms of section 52(4)*(a)*(ii) of the Consumer Protection Act 68 of 2008, the clauses in the agreement concluded between the Plaintiff and the Defendant identified as annexure PC9.2 purporting to limit the risk or liability of the Defendant, is severed from such agreement and in the absence of such clauses the Defendant is therefore held liable for the loss incurred by the Plaintiff, caused by the destruction of his aircraft engine when it was conveyed from the United States of America, to George in the Western Cape.

Clause 36.1: Inward and outward consignments received or to be forwarded by airfreight- R50 per consignment:

Clause 36.2: Inward and outward consignments received or to be forwarded by sea freight or other surface carriage, excluding parcel post – R100 per 1000 kilograms or part thereof.'

c) The Defendant is to pay an amount of R386 140,30, with interest thereon at the prescribed rate of 15,5% per annum from 12 June 2013 to date of payment;
d) That the Defendant pays the costs of suit, including the wasted costs occasioned by the removal of the matter from the trial roll on 5 September 2018.'

[11] UPS applied for leave to appeal against the judgment and order of the high court, and on 26 May 2020, Henney J granted leave to appeal to this Court on a limited basis, viz (i) whether Van Wyk had proven his claim based on the fact that UPS did not comply with the provisions of the CPA; and (ii) whether Van Wyk had proved the quantum of its claim. UPS then applied in terms of s 17(2)*(b)* of the Superior Courts Act 10 of 2013 for leave to appeal to this Court against the whole judgment and order of the high court. The two judges who considered the petition referred the application for leave to appeal for oral argument to this Court in terms of s 17(2)*(d)*. This application was heard together with the appeal and the arguments raised therein were considered together with those arising from the terms of the limited appeal consequent upon Henney J's order.

[12] In finding for Van Wyk, the high court said:

At para 89:

'In coming back to the credit agreement in this case, also known as PC9.2, it is clearly an agreement as contemplated in section 49(1)*(a)*,*(b)* and *(c)* of the CPA. The clauses on which the Defendant relies clearly seek to limit exposure to, or indemnify the Defendant against any liability based on the agreement concluded with the Plaintiff for the damages he sustained due to the loss of his aircraft engine. The Plaintiff was furthermore presented with two full pages, which was not very conspicuous or clearly delineated, and in relation to which no effort was made to draw the Plaintiff's attention to any of the provisions. It was furthermore written in extremely small font, which even the court on the original document found extremely difficult to read, and which contains the very clauses mentioned in section 49(1), against which the act seeks to protect the consumer.'

And at para 92:

'The Plaintiff in his evidence stated that his attention was not drawn to these provisions. I furthermore agree with the submissions made by Mr Acton, insofar as this case is concerned, that a supplier such as the Defendant is not in a position to determine the level of a sophistication of a customer, particularly in a case when all contact with the customer had been by email. . . .'

And at para 93:

‘I am furthermore in agreement with the submission that even the most experienced business person is unlikely to understand the nature and effect of the clauses in question, without explanation. I also agree with the submission, and as stated above, that it seems that the obligations placed on a supplier such as the Defendant, are absolute.’

[13] In other words the trial judge proceeded on the footing that the contract between the parties included the terms and conditions attached to the credit application. He found for Van Wyk on the basis that those terms were invalidated by the provisions of the CPA. In my view, however, he erred in holding that the contract included those terms and conditions. It appears from the exchange of emails that when Van Wyk gave the ‘go ahead’ on 22 January 2013 at 9h55, the credit application incorporating the standard trading conditions containing clauses exempting UPS from liability for loss or damage had not been furnished, nor brought to Van Wyk’s attention by Swanepoel. Van Wyk made clear that he had not sought credit. He had only signed the credit application so as to be allocated an account number, which he was told was required for shipments to and from the USA, where a number of rules and regulations had to be complied with. Van Wyk understood that the completion and signing of the credit application was to enable UPS to capture his details and allocate him an account number, in order for him to get his aircraft engine back to SA. Despite a lengthy and repetitive cross-examination he was firm in his evidence that he did not think that he was binding himself 'to all sorts of fine print that I can't even read'.

[14] As is evident from the pleadings, UPS based its entire case on the proposition that the credit application form, with the standard terms and conditions, constituted the contract. It relied on the fact that above Van Wyk's signature on the credit application appeared the word ‘Conditions’ and the following:

‘The Company reserves the right to discontinue any account and summarily to cancel any agreement in respect of which payments have fallen in arrears, and in the event of these being exercised, all amounts owing shall immediately become due and payable on demand. It is mutually agreed that any action arising between the parties may be instituted in the Magistrates Court although the cause of action or amount of the action may exceed the jurisdiction of that court, it is agreed that interest will be charged at a maximum permissible

rate allowed by law on amounts not settled within the agreed terms of credit. I, the undersigned, hereby certify that I am duly authorised to sign this document, copy of which has been handed to me and agree to the Terms and Conditions stated therein and acknowledge that all business will be governed by and subject to the terms of the Standard Trading Conditions and Terms and Conditions of Carriage printed overleaf, which are in my possession and by which I agree to be bound for any business which we may conduct with either or both the Freight and Warehousing Division and the International Express Parcels Division (United Parcels Services).'

[15] However, Mr Morrison SC, who appeared before us for UPS, in contradistinction to the pleaded case, changed tack and instead sought to rely upon the following provision that appeared at the foot of the original quote provided to Van Wyk by UPS:

'This estimate is based on rates and rates of exchanges subject to fluctuation beyond our control.

Credit facilities are subject to completion and approval of our Credit Application form.

All business conducted is subject to our Standard Trading Conditions a copy of which is available upon request.

Your attention is drawn to the fact that this is an estimate of normal anticipated charges and is therefore subject to third party charges without any prior notice. This estimate excludes 14%VAT where applicable.'

Mr Morrison contended that according to this the credit facilities were subject to the completion and approval of the credit application form and all business was conducted subject to the standard trading and conditions. He contended that the terms and conditions were part of the quotation that Van Wyk had accepted. This submission in my view, is opportunistic, as the point now being advanced by Mr Morrison was never raised in the pleadings, nor in the evidence in the court a quo. It had never been put to Van Wyk in cross-examination that the quote represented the agreement between the parties, and that he had bound himself to the terms and conditions therein. It bears emphasis that no witnesses were called to testify on the appellant's behalf at the trial. There was thus simply no evidence to gainsay the evidence of Van Wyk.

[16] In my view, the attempt to rely on this provision in the quotation cannot be countenanced. It was not UPS's pleaded case and was not canvassed in evidence

with Van Wyk. One can only speculate as to his response had it been raised with him. Given the terms of the plea, its introduction would have required an amendment and, had that been granted, potentially a postponement of the trial in order to amend the replication. It is not a legal issue arising on the facts of this case as it is apparent that had it been raised further factual issues would have needed to be canvassed. UPS therefore had to stand or fall by the case it had pleaded based on the credit application.

[17] UPS did not explain to Van Wyk that the credit application that he was required to sign to open the account, incorporated provisions that excluded or limited UPS' liability for loss or damage. Furthermore, the standard trading conditions and the relevant clauses which UPS seeks to rely on appear in fine print, and are not conspicuously legible. They appear on the second and third pages of the credit application, which can only be read with extreme difficulty and concentrated effort. Importantly the credit application was sent without the conditions being attached and were described by Swanepoel as needing to be completed so that 'we can start the process'. Nothing was said to Van Wyk to disabuse him of the notion that all of this was merely a matter of formality.

[18] In this regard the following passage in *Mercurius Motors v Lopez* [2008] ZASCA 22; [2008] 3 All SA 238 (SCA); 2008 (3) SA 572 (SCA) para 33, is patently on point:

'A person delivering a motor vehicle to be serviced or repaired would ordinarily rightly expect that the depositary would take reasonable care in relation to the safekeeping of his vehicle entrusted to him or her. An exemption clause such as that contained in clause 5 of the conditions of contract, that undermines the very essence of the contract of deposit, should be clearly and pertinently brought to the attention of a customer who signs a standard instruction form, and not by way of an inconspicuous and barely legible clause that refers to the conditions on the reverse side of the page in question. Moreover, the caption immediately above the signature is misleading in that a customer is directed to that provision and away from the more important provision in small print on the left-hand side of the document which refers to the conditions on the reverse side of the document which are themselves not easily accessible. It will be recalled that Mr Lopez's unchallenged evidence was that the conditions on which Mercurius now relies were not brought to his attention.'

(*See also Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) at 318C and *Du Toit v Atkinson's Motors Bpk* 1985 (2) SA 893 (A) at 904I to 905B.)
In the circumstances, Van Wyk did not contract on the basis of the conditions relied upon by UPS. The position is therefore that UPS 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. The fact that at the time of its destruction the engine was in the possession of a subcontractor does not alter UPS's position as the carrier under a contract of carriage. 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 UPS or its agents. It was accordingly obliged to compensate Van Wyk for the damages caused by its breach of contract.

[19] As regards the quantum, the measure of the damages is such amount as was necessary to place Van Wyk in the same position as he would have been in had the contract been performed. In that event he would have been in possession of a fully reconditioned engine certified for 1500 flying hours. Van Wyk testified to the damages he incurred when his engine was destroyed, and that the amount claimed was for the replacement value of a similar engine. Mr Anderson who is an aircraft engineer of many years standing and experience testified in substantiation of the quantum claimed by Van Wyk. His evidence, based on his expertise and experience regarding the repair and maintenance of engines, as well as the costs to have such an engine overhauled was not disputed by any other evidence. He was qualified to testify as to the cost that would have to be incurred to replace such an aircraft engine with a similar overhauled engine. There appears to be no reason to reject his evidence, more especially as the appellant called no evidence of its own on this score. There was nothing to gainsay Van Wyk's evidence that this was what he needed to pay in order to obtain a replacement engine.

[20] In view of all of the aforegoing, the appeal must fail. In the circumstances, it is not necessary to deal with the issues relating to the CPA or the National Credit Act 34 of 2005. For the reasons already stated the application for leave to appeal must also be dismissed. The introduction of those further issues would not have affected the outcome of the appeal.

[21] In the result, the following order is made:

1 The 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 is dismissed with costs, such costs to include the costs of two counsel.

2 The appeal is dismissed with costs, such costs to include the costs of two counsel.

_____

H K SALDULKER

JUDGE OF APPEAL

APPEARANCES:

For appellant:	L J Morrison SC (with M D Silver)
Instructed by:	David Kotzen Attorneys c/o Lovius Block Bloemfontein
For respondent:	R A J Acton
Instructed by:	Oosthuisen Marais & c/o Phatshoane Henney Bloemfontein