THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 852/2015

In the matter between:

G4S CASH SOLUTIONS (SA) (PTY) LIMITED **APPELLANT**

and

ZANDSPRUIT CASH & CARRY (PTY) LIMITED **FIRST RESPONDENT**

DEVLAND CASH & CARRY (PTY) LIMITED **SECOND RESPONDENT**

Neutral citation: *G4S Cash Solutions v Zandspruit Cash & Carry (Pty) Ltd* [2016] ZASCA 113 (12 September 2016)

Coram: Lewis and Mathopo JJA and Schoeman, Fourie and Potterill AJJA

Heard: 25 August 2016

Delivered: 12 September 2016

Summary: Interpretation of time-limitation clause in written services agreements: whether or not delictual claims are subject to the time-limitation clause: nature of interpretative process considered: delictual claims held not to be subject to the time-limitation clause.

ORDER

On appeal from: On appeal from: Gauteng Local Division of the High Court, Johannesburg (Satchwell J, Phatudi and Matojane JJ concurring, sitting as full court of appeal):

The appeal is dismissed with costs, including the costs of two counsel, where so employed.

JUDGMENT

Fourie AJA (Lewis and Mathopo JJA and Schoeman and Potterill AJJA concurring)

[1] The issue in this appeal is whether a time-limitation clause in written agreements concluded by the parties precluded the respondents from instituting delictual claims for damages against the appellant. The Gauteng Local Division of the High Court, Johannesburg (Van Oosten J), dismissed the appellant's special plea based on the time-limitation clause, which decision was confirmed on appeal to the full court of that division. The present appeal against the judgment of the full court is with the special leave of this court.

[2] The appellant is G4S Cash Solutions (SA) (Pty) Limited (formerly known as Fidelity Cash Management Services (Pty) Ltd), a company conducting the business of collecting, conveying, storing and delivering money on behalf of clients requiring such services. The respondents are retailers who concluded 'cash management and ancillary services agreements' with the appellant on 6 April 2005 and 6 December 2006, respectively. The agreements are similarly worded, save for

the personal details of the respective respondents. It is pertinent, by way of background, to refer to the material terms of the agreements in some detail.

[3] The services to be provided by the appellant to the respondents are defined as, inter alia, the 'collection, conveyance, storage or delivery of money'. Clause 5.1 of the agreements provides that the appellant shall 'collect, convey, store and deliver money in accordance with its operating methods as amended from time to time'. Clause 5.3 deals with the handing over of money by the respondents to the appellant and reads as follows:

'Before handing over Money to an employee of Fidelity, the Client shall verify the identity of such Fidelity employee by reference to the employee's personal official Fidelity identity card. If the Client fails to do so, Fidelity shall not be liable for any Money lost or stolen. Fidelity shall provide the Client with details of the nature and style of official Fidelity identity cards in use, and Fidelity shall provide an official Fidelity receipt for each Container received by it.'

[4] Clause 9 is headed 'Liability and Risk'. The relevant sub-clauses are the following:

'9.1 Fidelity shall not be liable for any loss or damage howsoever arising or for any reason whatsoever suffered by the client pursuant to or during the provision of Services by Fidelity unless such loss or damage is the direct result of the gross negligence of or theft by Fidelity employees, acting within the course and scope of their employment, and occurs while the money is in the custody of Fidelity. In these circumstances, Fidelity's liability shall be limited to a maximum sum of R20 000.00 per event in respect of drop cash services and in respect of all other services shall be limited to a maximum of R100 000.00 per event. Subject to what is stated above, Fidelity shall not be liable for any loss or damage suffered by the client as a result of the acts or omissions of its employees caused by threats of physical or other harm to such employees or their families.

9.2 Save for where it is expressly provided for in terms of this Agreement, Fidelity has no other liability to the Client for any loss or damage whatsoever and howsoever caused at all. It is also agreed that, notwithstanding any other clause in this Agreement, should the Client be in breach of the Agreement in any way whatsoever, Fidelity shall be relieved of its obligations and

duties in respect of the Agreement until such time that the Client subsequently rectifies the breach if such breach is capable of rectification.

9.3 Should any loss or damage to the Client arise as a result, directly or indirectly, of or during a breach by the Client or its employee(s), or by anyone acting on the Client's behalf or in furtherance of the Client's interests, of any clause of the Agreement or any measures specified by Fidelity from time to time, or the involvement in any way of the Client's employee(s) in the event giving rise to the loss or damage, Fidelity shall be relieved of its obligations and duties, and shall have no liability to the Client for such loss or damage whatsoever.

9.4 . . . .

9.5 Fidelity will in no circumstances be liable for any consequential loss or damage, howsoever arising.

9.6 In the event of any Services to be rendered by Fidelity, the Client shall be solely responsible for the security of its Premises and in the event of a loss occurring on such Premises as a result of criminal conduct not attributable to the gross negligence or theft by Fidelity or its employees acting within the course and scope of their employment, Fidelity shall not carry the risk of loss for Money lost or stolen as a result thereof, despite such money being in the custody of Fidelity. In that event the risk of such loss shall be carried by the Client.

9.7 Subject to paragraph 9 read as a whole, Fidelity's liability in respect of any loss will commence from when the Money is in the Custody of Fidelity, which Custody the parties agree, commences upon the physical collection of the Money, against an official Fidelity receipt, by Fidelity employees acting in the course and scope of their employment in the performance of the Service, and shall cease upon the physical delivery of the Money, against an official Fidelity receipt. The continuing presence of any Fidelity employee after the physical delivery of the Money shall not be deemed to be a continuation or recommencement of Fidelity's liability.

9.8 Fidelity shall be relieved of all liability for any shortages within a Container where such Container has been delivered and there is no evidence that the seal or Container has been tampered with.

9.9 The Client shall notify Fidelity immediately of the discovery of a loss, which notification shall be confirmed in writing within 24 hours. Fidelity shall not be liable in respect of any claim unless written notice of the claim has been given within three (3) months and summons has been issued and served within 12 months from the date of the event giving rise to the claim.'

Sub-clause 9.9 is the time-limitation clause alluded to above.

[5] Clause 15 deals with insurance and records the appellant's undertaking to assist the respondents in effecting insurance cover against the loss of money caused by an armed robbery or by the negligence or dishonesty of employees or agents of the appellant during the performance of the services to be undertaken by the appellant.

[6] The events giving rise to the respondents' claims against the appellant are set out in their particulars of claim and may be summarised as follows:

(a) On 3 April 2010 and 12 March 2011, respectively, the respondents fell victim to thefts perpetrated by unknown third parties. The perpetrators imitated the procedure of the appellant, utilising vehicles, personnel uniforms, collection boxes and identification cards identical to that used by the appellant, thereby deceiving the respondents into believing that they were dealing with employees of the appellant.

(b) During the course of the theft of 12 March 2011, an employee of the second respondent sought to verify the identity of the third party perpetrator as being an employee of the appellant, by telephoning the appellant's call centre. The call centre operator confirmed that the perpetrator was an employee of the appellant.

(c) Thus, utilising the exact procedure employed by the appellant in conducting collections of cash for purposes of cash in transit collections and deposits from the respondents' premises, the perpetrators collected amounts of R265 465,25 and R641 744 from the respondents respectively and appropriated same.

[7] The respondents further alleged that:

(a) The appellant had failed to put in place the necessary procedures in order to ensure that its cash security uniforms, identification cards, collection boxes and transit vehicles could not be copied or duplicated and used by third parties.

(b) The appellant had failed to advise the respondents that its uniforms and identification cards were lost or stolen; that cash in transit vehicles were being

utilised by unauthorised third parties and that previous similar incidents had occurred within the industry.

(c) The appellant accordingly owed the respondents a legal duty (described as 'a duty of care'), to disclose its relevant conduct, and the failure to disclose same, constituted wrongful conduct.

(d) The appellant's wrongful conduct constituted reckless, alternatively grossly negligent conduct, as a consequence of which the respondents suffered damages in the amounts so misappropriated.

[8] The respondents' summons was served on the appellant on 28 June 2012, more than 12 months after the alleged events giving rise to the claims. In addition to a plea to the merits, the appellant raised a special plea alleging that the respondents' claims were time-barred by virtue of the provisions of clause 9.9 of the agreements.

[9] The respondents replicated to the special plea, alleging, inter alia, that their claims did not arise from the agreements, but by virtue of delict, and therefore did not fall within the ambit of the time-limitation clause. In the event, the matter proceeded to trial and by agreement between the parties it was ordered in terms of Uniform rule 33(4) that the special plea be heard first, with the remaining issues to stand over for later determination, if necessary.

[10] No evidence was led at the trial and, after argument, Van Oosten J held that the time-limitation in clause 9.9 of the agreements did not apply to the respondents' delictual claims. The trial court accordingly dismissed the special plea. As recorded above, the appellant's subsequent appeal was dismissed by the full court which agreed with Van Oosten J that clause 9.9 of the agreements did not apply to delictual claims and that the respondents' claims were accordingly not time-barred.

[11] It is common cause that the respondents' claims are in delict for the loss suffered as a consequence of the theft of their money, caused by the alleged wrongful and reckless or negligent conduct of the appellant. The appellant raised the special defence that the claims were time-barred by virtue of clause 9.9 of the agreements and accordingly bore the onus of proving this defence. See *Gericke v Sack* 1978 (1) SA 821 (A) at 827H and *Masuku & another v Mdlalose* 1998 (1) SA 1 (SCA) at 11B-C.

[12] To determine whether or not the respondents' delictual claims are time-barred, it is necessary to interpret the agreements and in particular clause 9.9 thereof. Whilst the starting point is the words of the agreements, it has to be borne in mind, as emphasised by Lewis JA in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) para 27, that this court has consistently held that the interpretative process is one of ascertaining the intention of the parties ─ in this case, what they meant to achieve by incorporating clause 9.9 in the agreements. To this end the court has to examine all the circumstances surrounding the conclusion of the agreements, ie the factual matrix or context, including any relevant subsequent conduct of the parties.

[13] As recorded above, the special plea was determined separately and at the hearing neither party presented any evidence. In the result no facts were available to the court in the interpretative process regarding the circumstances surrounding the conclusion of the agreements or of any relevant subsequent conduct of the parties. The only available evidence upon which the court had to determine what the parties meant to achieve by incorporating clause 9.9 in the agreements, and in particular whether or not they intended including delictual claims within the ambit of clause 9.9, was the agreements themselves. Whilst it is not for the court to prescribe to litigants whether or not, or to what extent, they should present

evidence, it seems to me that a party bearing the onus in a dispute regarding the proper interpretation of a contract, should bear in mind that to simply rely on a linguistic interpretation alone may not suffice to discharge the onus. Therefore, if available, relevant evidence regarding the factual matrix in which the contract was concluded and the subsequent conduct of the parties, should be called in aid of the interpretative process.

[14] Turning to the wording of the agreements, and in particular clause 9 thereof read within the context of the agreements as a whole, it has to be borne in mind that the nature and commercial purpose of the contractual relationship between the parties is that of a services agreement in terms of which the appellant is to perform cash management services for the respondents, which would entail the collection, conveyance, storage or delivery of money by the appellant. Clause 9 deals with 'Liability and Risk', providing for exclusions and limitations to the appellant's liability for loss or damage suffered by the respondents 'pursuant to or during the provision of services'. In particular, clause 9.1 provides that the appellant shall not be liable for any loss or damage howsoever arising or for any reason whatsoever suffered by the respondents 'pursuant to or during the provision of services' by the appellant, unless such loss or damage is the direct result of the gross negligence of or theft by the appellant's employees, acting within the course and scope of their employment, and which occurs while the money is in the custody of the appellant. In my view, this wording clearly conveys that the loss or damage in respect of which the appellant wished to restrict its liability is a loss or damage suffered by the respondents pursuant to or during the provision of services by the appellant to the respondents. Differently put, it is a loss or damage which has its genesis in the provision of services by the appellant to the respondents.

[15] This construction of clause 9.1 is fortified by clauses 9.6 and 9.7, as well as other provisions of the agreements, such as clauses 5.3 and 15.

(a) Clause 9.6 deals with the respondents' responsibility for the security of their premises 'in the event of any services to be rendered by [the appellant]', and limits the appellant's liability for the loss that the respondents may suffer in the event of the theft of their money at their premises whilst such money is in the custody of the appellant's employees.

(b) Clause 9.7 makes it clear that the appellant's liability in respect of any loss will only commence when the money is in the custody of the appellant, ie upon the physical collection of the money by the appellant's employees.

(c) Clause 5.3 records that where the appellant provides services in terms of the agreements, the respondents shall, before handing over money to an employee of the appellant, verify the identity of such employee by reference to the employee's personal official Fidelity identity card.

(d) Clause 15 relates to insurance which the respondents may effect with Fidelity Insurance Limited against the loss of money caused by an armed robbery or by the negligence or dishonesty of employees or agents of the appellant 'during the performance of the services' in terms of the agreements.

[16] Turning to clause 9.9, it follows from the above interpretation that the sub-clause envisages a loss and resultant claim arising pursuant to or during the provision of services by the appellant to the respondents in terms of the agreements. In my view the clear wording of the agreements shows that the parties did not contemplate that clause 9.9 would encompass delictual claims of the nature averred in the respondents' particulars of claim. These delictual claims did not arise pursuant to or during the services rendered by the appellant, nor while the money was in the possession of the appellant, but in circumstances where the respondents handed over the money to unknown third parties. Had the appellant intended the time-limitation in clause 9.9 to also apply to delictual claims of this nature, it could easily have drafted the agreements to include such claims. Its

failure to do so justifies the inference that the parties did not intend clause 9.9 to encompass the respondents' delictual claims.

[17] Counsel for the appellant valiantly attempted to avoid the consequences referred to above that flow from the wording of the agreements. He singled out certain words and phrases in clause 9, which, he submitted, were indicative of an intention to include both contractual and delictual claims under the time-limitation provisions of clause 9.9. Firstly, he pointed to the use of the word 'any' in the phrases 'any loss or damage' (clause 9.1), 'any consequential loss or damage' (clause 9.5) and 'any claim' (clause 9.9), which, in his submission, shows that the parties intended clause 9 to be widely construed. He further submitted that the employment of the phrases 'howsoever arising or for any reason whatsoever suffered' (clause 9.1), 'whatsoever and howsoever caused' (clause 9.2), 'such loss or damage whatsoever' (clause 9.3) and 'howsoever arising' (clause 9.5), supports the broader interpretation that he contends for. Therefore, the submission continued, upon a proper construction of clause 9 the commercially sensible intention was to exclude liability on the part of the appellant for all claims related to the cash management services, save for claims arising from acts of gross negligence or theft by the appellant's employees. In the result, clause 9.9 must be given a wide and unrestricted meaning, encompassing the respondents' delictual claims.

[18] The main difficulty that I have with this method of interpretation is that the words and phrases emphasised by the appellant's counsel, are read in isolation and not within the contractual setting as appears from the agreements as a whole. The well-known warning sounded by Rumpff CJ in *Swart en 'n ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202C, comes to mind:

'Wat natuurlik aanvaar moet word, is dat, wanneer die betekenis van woorde in 'n kontrak bepaal moet word, die woorde onmoontlik uitgeknip en op 'n skoon stuk papier geplak kan word

en dan beoordeel moet word om die betekenis daarvan te bepaal. Dit is vir my vanselfsprekend dat 'n mens na die betrokke woorde moet kyk met inagneming van die aard en opset van die kontrak, en ook na die samehang van die woorde in die kontrak as geheel.'

The context which is ignored is the recurring theme that the loss or damage envisaged in the agreements, and in particular in clause 9, is a loss or damage suffered by the respondents pursuant to or during the provision of services by the appellant. Therefore the exclusion of the appellant's liability is in respect of loss or damage suffered by the respondents pursuant to or during the provision of such services. To single out words and phrases in an attempt to arrive at a different conclusion simply means that the context in which they are used is ignored.

[19] Insofar as the use of the word 'any' is concerned, it has to be borne in mind that, whilst it is a word of wide and unqualified generality and prima facie unlimited, it may be restricted by the subject matter or the context. See *R v Hugo* 1926 AD 268 at 271 and *Arprint Limited v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 (1) SA 254 (A) at 261B-D. The present is a clear case where the use of the word 'any' is restricted by the context as appears from the wording of the agreements as a whole, and in particular clause 9 thereof.

[20] Counsel for the appellant also had a second string to his bow. He contended that the respondents' delictual claims were in any event incompetent. Relying on authorities such as *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd* [1984] ZASCA 132; 1985 (1) SA 475 (A) at 501E-G and *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC); [2014] ZACC 28 paras 63 and 65, he submitted that, in view of the existing contractual relationships between the parties, policy considerations dictate that delictual liability should not be extended to enable respondents to bring delictual claims for pure economic loss against the appellant.

[21] The difficulty that I have with this line of attack is that the competence of the delictual claims was not an issue which Van Oosten J had separated out for determination in terms of Uniform rule 33(4). The special defence that the respondents' delictual claims were time-barred by virtue of the provisions of clause 9.9 of the agreements, was the sole issue that had to be heard separately. In this regard the full court correctly held that:

'This court is not asked to determine whether or not sufficient facts have been pleaded to found any or this delictual claim or whether or not a delictual claim for pure economic loss is appropriate in the circumstances of this case or whether or not Aquilian liability should be extended in the light of these particular facts or relevant policy issues. The only question set out in the special plea is whether or not plaintiffs' claim in delict (good, bad or indifferent) had prescribed by reason of the provisions of sub-clause 9.9 of the agreement.'

[22] I have no doubt that had the competence of the delictual claims been in issue, the parties, or at least the respondents, would have presented evidence regarding the question whether a duty to prevent loss of this nature should be held to exist. This would have involved considerations of policy, as well as a careful weighing-up of the interests of the parties involved, taking into account the public interest. See J Neethling, J M Potgieter and P J Visser *Law of Delict* 5 ed (2006) at 268-274.

[23] I should add that during argument in this court, counsel for the appellant also relied on clause 9.2 of the agreements for the submission that the delictual claims of the respondents were not competent. As recorded above, clause 9.2 states that, save where it is expressly provided for in terms of the agreements, the appellant has no other liability to the respondents for any loss or damage suffered. This clause too should be read in context, ie relating to loss or damage suffered by the respondents pursuant to or during the provision of services by the appellant. However, counsel for the appellant emphasised the words 'no other liability' and submitted that they exclude any other claim including a delictual claim unrelated to

a loss or damage suffered pursuant to or during the provision of services by the appellant. In my view the context provided by the agreement as a whole simply does not allow for this extraordinarily wide interpretation. One may ask why the respondents would for no apparent reason agree to relinquish all other existing or future rights which they may have, or may acquire, against the appellant. Absent any evidence justifying this conclusion, there is simply no basis on the wording of the agreements alone for this contention.

[24] For all the above reasons I conclude that the appellant failed to discharge the onus of proving its special defence. The appeal accordingly falls to be dismissed.

[25] With regard to costs, the respondents as the successful parties are entitled to their costs. In my view the matter justified the employment of two counsel. For the benefit of the Taxing Master I should record that counsel for the respondents was assisted in the appeal by Attorney Z E Patel who, under s 4(2) of the Right of Appearance in Courts Act 62 of 1995, has the right of appearance in the high court.

[26] In the result the following order is made:
The appeal is dismissed with costs, including the costs of two counsel, where so employed.

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P B Fourie
Acting Judge of Appeal

Appearances:

For the Appellant:	M A Chohan SC (with him G M Goedhart)
Instructed by:	Norton Rose Fulbright South Africa, Sandton Webbers Attorneys, Bloemfontein
For the Respondents:	H P van Nieuwenhuizen (with him Z E Patel)
Instructed by:	Ziyaad E Patel Attorneys, Melville, Johannesburg Phatshoane Henney Attorneys, Bloemfontein