THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 917/2018

In the matter between:

INNOVENT RENTAL & ASSET MANAGEMENT SOLUTIONS (PTY) LTD **APPELLANT**

and

TRANSNET SOC LTD **RESPONDENT**

Neutral citation: *Innovent Rental & Asset Management Solutions (Pty) Ltd v Transnet SOC Ltd* (917/2018) [2019] ZASCA 106 (5 September 2019)

Coram: WALLIS, MBHA, ZONDI, VAN DER MERWE and MBATHA JJA

Heard: 29 August 2019

Delivered: 5 September 2019

Summary: Master rental agreement – termination by effluxion of time – obligations of lessee in regard to return of equipment – meaning of 'decommissioned' in rental agreement.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Nicholls J, Moshidi and Coppin JJ concurring, sitting as court of appeal): The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Wallis JA (Mbha, Zondi, Van der Merwe and Mbatha JJA concurring)

[1] The appellant, Innovent Rental & Asset Management Solutions (Pty) Ltd (Innovent), finances the acquisition and leasing of equipment. On 17 February 2005 it concluded a Master Rental Agreement with the respondent, Transnet SOC Ltd (Transnet),[1] under which it would acquire equipment in accordance with the specifications of Transnet and lease that equipment to Transnet in accordance with the terms set out in the rental schedule to the Master Rental Agreement. The agreement was subsequently revised when the first tranche of equipment was acquired and leased to Transnet. Subsequently five rental schedules were concluded in relation to additional equipment. All of those agreements have come to an end. Some of the equipment has been returned and the present dispute arises from the condition in which it was returned. Compensation has been agreed in respect of equipment not returned.

[2] The dispute revolved around the condition of the equipment that was returned and the provisions of the clauses of the Master Rental

[1] Then known as Transnet Limited t/a Transtel.

Agreement dealing with the return of equipment. The relevant clauses read as follows:

'11.1 User shall, on termination of this agreement, return the equipment in good working order and condition, fair wear and tear excluded, together with all applicable documents, licences and insurance policies to Hirer's nominated address at User's cost and expense. Equipment must be securely packed and crated in a manner that protects the equipment against damage during transportation.

11.2 The equipment shall not be regarded as returned unless (where applicable) it is decommissioned in accordance with the original manufacturer's specifications and appropriate certificates have been supplied.

11.3 If it is not possible for User to return the equipment to Hirer in accordance with the provisions of this agreement then the User must immediately at the expiration or earlier termination of the renting of the equipment in terms of this agreement and at the User's cost deliver to Hirer replacement equipment approved by Hirer and of a similar nature to the equipment, provided that Hirer may in its sole discretion accept payment of an amount equal to the Residual Value of the equipment instead of delivery of such replacement equipment. …'[2]

[3] Innovent contended in the high court that the equipment had not been returned in good order and condition, and that in terms of clause 11.2 it was to be regarded as not having been returned, because it had not been decommissioned in accordance with the manufacturer's specification and was not accompanied by appropriate certificates. Keightley J sitting in the Gauteng Division of the High Court, Johannesburg, upheld the latter claim. She refused leave to appeal, but this court granted leave to appeal to the full court. In a judgment by Nicholls J (Moshidi J and Coppin J concurring), it upheld the appeal and substituted an order of absolution from the instance with costs for the order of the high court. This further appeal is with the special leave of this court.

[2] 'User' refers to Transnet and 'Hirer' to Innovent.

[4] The only issue is whether, on the proper interpretation of clause 11.2 of the Master Rental Agreement, the equipment had to be decommissioned in accordance with specifications prescribed by the original manufacturer. Innovent contended that Transnet was so obliged and that its failure to do so meant that the equipment should be treated as not having been returned, affording it the right to claim monetary compensation in accordance with clause 11.3. It was common cause that the original manufacturer had not prescribed any special procedures for decommissioning the equipment and, accordingly, that nothing had been done in this regard when the equipment was returned. Transnet for its part contended that, in the absence of any such specifications from the manufacturer of the equipment, no obligations were imposed upon it by clause 11.2.

[5] It is helpful to start by looking at the meaning of 'decommissioned'. In the heads of argument filed on behalf of Innovent it was submitted that it meant simply 'uninstalled'. In other words, it conveyed only that the equipment should be removed from the place where it was installed and returned, without there being any special procedures or processes to be followed in removing it. It was submitted that this was the ordinary meaning of the word.

[6] That approach was not entirely in accordance with any of the dictionaries I have consulted. According to the Shorter Oxford English Dictionary[3] the word 'decommissioned' means:

'Take (a ship, installation etc) out of service.'

The Collins English Dictionary[4] is to similar effect:

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[3] *Shorter Oxford English Dictionary* 6h ed (2007).

'To dismantle or remove from service (a nuclear reactor, weapon, ship, etc which is no longer required).'

The Business Dictionary[5] gives the following definition for 'decommissioning':

'Planned shut-down or removal of a building, equipment, plant, etc from operational usage.'

[7] In the context of the buildings, plant, factories, ships or armaments referred to in these definitions, one can readily understand that the process of taking them out of active service would be technical and that the original manufacturer might specify how that should be done. In many instances this might also be necessary because the decommissioning would be subject to regulatory statutes or regulations, particularly of an environmental character. Thus, in the case of a nuclear reactor there might be a need to specify how to deal with radioactive material. In the case of mining equipment, as well as the mine itself, it would need to be decommissioned in such a way as, for instance, to prevent pollution and ensure that the mining activity would not lead to subsidence or the catastrophic appearance of sinkholes. In the case of armaments, the need for detailed specifications on the disposal of explosives is apparent. In instances such as those the manufacturer might well think it appropriate to provide decommissioning specifications at the outset. [6]

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[4] *Collins English Dictionary* 12 ed (2014).

[5] *Business Dictionary* www.businessdictionary.com\definition\decommissioning.html (accessed 29 August 2019).

[6] Merchant shipping that is EU flagged or visiting European ports must have and carry an Inventory of Hazardous Materials in terms of the EU Ship Recycling Regulations 2013. European flagged vessels may only be decommissioned at shipyards in the EU that are certified as green and in accordance with a ship recycling plan that has been approved in advance of the commencement of decommissioning. The regulations came into full force on 31 December 2018.

[8] However, not every piece of plant or technical equipment would require of the manufacturer to specify at the time of manufacture how the process of taking it out of service should be undertaken. Much plant and equipment can be stripped down and removed quite simply. Often equipment is simply scrapped when its useful life ends and it matters not how it is dismantled and sent away for scrapping. Many buildings, including factories and parts of power stations, are demolished with brute force and fairly simple equipment such as sledgehammers or larger equipment such as wrecking balls, bulldozers and front-end loaders. None of this requires specifications from the original builder or manufacturer as to the process of decommissioning.

[9] Understanding that manufacturers will only specify conditions for decommissioning in certain instances, explains why, in clause 11.2, the words '(where applicable)' qualify the circumstances in which compliance with such specifications and furnishing an appropriate certificate to confirm such compliance was required of the user of the equipment. It was only where the original manufacturer had seen fit to specify the manner of decommissioning that it was necessary for the user to ensure that the original manufacturer's instructions were followed.

[10] Counsel for Innovent submitted that clause 11.2 contained a presumption that in all cases there needed to be decommissioning in accordance with the original manufacturer's specifications. He sought to overcome the difficulty that it was common cause that the original manufacturer had done nothing of the sort, by taking the court on a tour of the background to the conclusion of the Master Rental Agreement. This, so he submitted, revealed that Transnet, through the various consultants and firms that it dealt with in regard to the design,

manufacture and installation of the equipment, was solely responsible for the nature of that equipment. Innovent, as the financier of its acquisition, was entitled in the light of clause 11.2 to assume that Transnet would ensure that the manufacturer would specify the requirements for decommissioning. That it failed to do so could not be laid at Innovent's door and meant that Transnet did not comply with its obligations under clause 11.2.

[11] The submission is based on a fundamental fallacy in the interpretation of contracts – one that the courts have time and again rejected. The starting point is clause 11.1. Under that clause Transnet was obliged to restore the equipment to Innovent on termination of the Master Rental Agreement in good order and condition, fair wear and tear excepted. If it did not do so, then Innovent were entitled to be compensated therefor in terms of clause 11.3. Similarly, if it returned the equipment, but it was not in good order and condition, Innovent were entitled to compensation under clause 11.3. In both instances the compensation could take the form of either replacement equipment or money.

[12] Clause 11.2 dealt with the different situation where the equipment had been returned in good order and condition, fair wear and tear excepted, but was equipment that, in addition to the conventional documents, licences and insurance policies referred to in clause 11.1, had to be decommissioned in accordance with specifications prescribed by the original manufacturer. Such equipment 'shall not be regarded as returned' unless those specifications were complied with and compliance had been appropriately certified. In other words, even though that equipment was returned in good order and condition, it would not be accepted as having

been returned at all, unless there was compliance with the original manufacturer's decommissioning specifications and that had been certified.

[13] The fallacy in counsel's argument lay in describing clause 11.2 as a presumption, and treating it as an independent enacting provision when in substance it is a proviso to clause 11.1. The correct approach was set out as follows in *Mphosi*:[7]

'According to Craies *Statute Law* 7th ed at 218 -

"the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect".

In *R v Dibdin* [1910] P 57 (CA), Lord Fletcher Moulton at 125 in the Court of Appeal said:

"The fallacy of the proposed method of interpretation (ie to treat a proviso as an independent enacting clause) is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The Courts … have frequently pointed out this fallacy, and have refused to be led astray by arguments such as those which have been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in a proviso."'

[14] Counsel submitted that this construction was not commercially sensible, because in those circumstances Innovent, as the financier, would have no control over whether there was compliance with a formal decommissioning process laid down by the original manufacturer of the

[7] *Mphosi v Central Board for Co-Operative Insurance* 1974 (4) SA 633 (A) at 645C-F.

equipment. When, as occurred here, the equipment in final form as installed was purpose-built to fit the client's needs, in accordance with specifications it had devised, it would be able to circumvent the potential exclusion in clause 11.2 by purposely ensuring that the original manufacturer did not specify any requirements for decommissioning.

[15] There are two answers to this. The first is that there was no evidence that Transnet was aware of the provisions of clause 11.2 in a standard form contract at the time it was working with its advisers on the design and manufacture of the equipment, or thought that it was under any obligation to obtain decommissioning specifications from the original manufacturer. No such obligation was specified in that clause or in clause 3.2, which stated that Transnet specially selected the equipment. The second is that if it was important to Innovent in every case, bearing in mind that it was accepted that the Master Rental Agreement was a standard form agreement that it used in relation to transactions of this type, it was open to it to include appropriate stipulations in its agreement to secure that situation, or at least make enquiries and demand production of the specifications before committing itself to providing the sought-for finance.

[16] Ms Coetzee explained in her evidence that Innovent's business model relied on its receiving only modest rentals during the subsistence of the agreement, sufficient to cover the cost of its acquisition, and securing a profit at the end of the agreement by reselling, or again leasing, the equipment. However, far from that assisting Innovent, it demonstrated that the interpretation of clauses 11.1 and 11.2 set out above was correct. (I mention this evidence only to demonstrate that it provides a commercial background that is consistent with my

construction of the clauses.) The business model provides the explanation for Innovent requiring that the equipment be returned in good order and condition, fair wear and tear excepted, together with all applicable documents – operating manuals would be an example – licences and insurance policies. Furthermore the equipment had to be securely packed and crated in a manner that protected it against damage during transportation. The background of the business model shows clearly that clause 11.1 was designed to facilitate Innovent earning its profit by reselling, or re-letting, the equipment on the second-hand market.

[17] Clause 11.2 fits neatly into that structure. If the manufacturer had specified decommissioning in a particular manner and after decommissioning the equipment was to be sold, a prospective purchaser would want to know that decommissioning had been undertaken as specified. The position would be no different from that of the purchaser of a second-hand motor vehicle wishing to be satisfied that the vehicle had been maintained in accordance with the manufacturer's service manual.

[18] For those reasons Innovent's contentions concerning the proper construction of clause 11.2 cannot be accepted. The full court was correct in its conclusion and in upholding Transnet's appeal. I have my doubts as to the correctness of its substituting an order for absolution from the instance for the order granted by the trial court, but there was no cross-appeal, so that order must stand.

[19] In response to a question posed by a member of the Bench, counsel sought to resurrect the alternative claim based on the proposition that the equipment was not in fact returned in good working order, fair wear and

tear excepted. In my view it was not open to him to do so. Keightley J made no factual findings in respect of that claim and, on appeal to the full court, the only issues argued were the proper interpretation of clause 11.2 and a question of prescription that was abandoned before us. Counsel accepted that special leave was only sought and granted on the basis that those two issues were the live issues in the case. There is a limited power, where no prejudice would result, to permit a legal point, even one deliberately abandoned, to be revived on appeal. However, this is not a legal point, but a factual issue on which we have received no submissions and have no findings from the trial court. The evidence of one of Transnet's witnesses, the person responsible for the design, installation, maintenance and removal of the equipment, was not properly recorded and was reconstructed from counsel's notes. On grounds of fairness alone it would not be open to us to make the requisite factual findings suggested by counsel. There were disputes of fact and we would not be in a position to resolve them fairly.

[20] The following order is made:

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

M J D WALLIS

JUDGE OF APPEAL

Appearances ,

For appellant: A Joubert SC (with him G P van Rhyn.) Heads of argument prepared by A R G Mundell SC and G P van Rhyn.

Instructed by: Otto Krause Inc, Roodepoort,
Adrie Hechter Attorneys, Bloemfontein

For respondent: R Bedresi SC (with him A J Lapan)

Instructed by: Poswa Incorporated, Sandton
Phatshoane Henney Attorneys, Bloemfontein.