THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 693/08

In the matter between:

JUAN JACQUES JACOBS	**APPELLANT**
v	
IMPERIAL GROUP (PTY) LTD	**RESPONDENT**

Neutral citation: *Jacobs v Imperial Group* (693/2008) [2009] ZASCA 167 (1 December 2009).

Coram: Mthiyane, Lewis, Heher, Mlambo, Mhlantla JJA

Heard: 19 November 2009

Delivered: 1 December 2009

Summary: Contract – owner's risk notice – incorporated in contract of service. Service provider entitled to assume that customer saw disclaimer on notice boards.
Motor vehicle stolen – service provider shielded from liability by owner's risk notice.

ORDER

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

The following order is made:

The appeal is dismissed with costs.

JUDGMENT

MLAMBO JA (Mthiyane, Lewis, Heher, Mhlantla JJA concurring):

[1] On 8 September 2005 the appellant, represented by his brother-in-law, Mr Pierre Jacobs (Jacobs), entered into a contract of service with the respondent in terms of which the appellant's motor vehicle, a Vito Mercedes Benz, was left in the respondent's care, at its Potchefstroom Cargo Service Centre, for repairs. To this end Jacobs and the respondent's representative signed an 'order form'. The order form contained on its reverse certain terms and conditions titled 'conditions of contract'. Clause 5 of these conditions of contract provided:

'We acknowledge that Cargo Potchefstroom shall not be liable in any way whatsoever or be responsible for any loss or damages sustained from fire, burglary and/or unlawful acts (including gross negligence) of the representative, agents or employees.'

[2] There was also, at the respondent's service centre, a disclaimer or owner's risk notice displayed prominently on notice boards at three locations, to wit, the passenger vehicle office, the customer reception entrance and at the cashier's window. The disclaimer read:

'Vehicles are left at owner's risk.
Voertuie word hier gelaat op eienaars risiko.'

[3] The vehicle was stolen whilst still under the respondent's custody and the appellant duly instituted an action in the South Gauteng High Court for damages arising from the consequent loss of the vehicle. It was common cause in the proceedings before the high court that Jacobs was not aware of the conditions of contract at the back of the order form he signed. And the court accepted that he did not see the owner's risk notice displayed on the notice boards. The appellant's case was that it was not bound by the owner's risk clause and further that Jacobs did not have authority to bind him to that disclaimer. On the other hand the respondent relied on the owner's risk notice to resist liability.

[4] The high court (Tsoka J) found that Jacobs was properly authorised to bind the appellant. The court also concluded that the owner's risk notice displayed on notice boards at the respondent's premises where the motor vehicle was stolen, was incorporated into the contract entered into by the parties. That court further concluded that the respondent had done all that was reasonable to bring to Jacobs' attention the contents of the owner's risk notice. The appeal, with leave of this court, is directed at these findings and is premised essentially on the following contentions:

(a) that the applicability of the owner's risk notice had to be determined with reference to the disclaimer contained in clause 5 of the conditions of contract set out on the back of the order form signed by the parties when concluding the contract;

(b) that Jacobs did not have the requisite authority to bind the appellant to the terms of the owner's risk notice.

[5] The appellant's submission regarding the applicability of the owner's risk notice was that there was no reference to this notice in the disclaimer in the conditions of contract (Clause 5). This meant, so the argument went, that the owner's risk notice was excluded from the contract entered into between the parties. The appellant further submitted that the clause 5 disclaimer could not be relied upon to shield the respondent from liability as it did not mention theft specifically. An alternative argument was that we should interpret that notice in the appellant's favour, it being the respondent's document, as the English version which did not mention theft, was inconsistent with the Afrikaans version which did mention it.

[6] The appellant's argument that the conditions of contract formed part of the agreement between the parties is misconceived. In this regard the appellant had specifically pleaded in his particulars of claim and replication that the conditions of contract did not form part of the contract between the parties and were therefore unenforceable. Though the respondent in its plea pleaded that the conditions of contract formed part of the contract, the parties reached consensus at the pre-trial stage that the respondent was not placing any reliance on the conditions of contract, thus effectively excluding them from the ambit of the case. The respondent relied solely on the owner's risk notice to escape liability.

[7] We cannot ignore the pleadings. It is clear that the issue that has always been at the centre of the dispute between the parties was the applicability of the owner's risk notice. And it is also clear that despite the appellant's stance now on appeal, the parties reached consensus in terms of which they limited the factual enquiry that was to feature before the high court and this excluded the conditions of contract. In fact, the high court specifically found that it was common cause

between the parties that the conditions of contract did not form part of the case. This finding, for that matter, is not attacked on appeal.

[8] I now consider the appellant's argument that Jacobs, as his agent, did not have authority to bind him to the owner's risk notice. This brings to the fore the question whether in fact Jacob's authority was limited. There is no evidence from Jacobs or anyone else to suggest that Jacob's authority was limited. In fact, the evidence is clear that, when handing over the motor vehicle, and signing the necessary paperwork, there was nothing circumscribing his authority. The respondent was perfectly justified in relying on Jacobs' conduct, which evinced all the attributes of actual authority. It is trite that 'the law, as a general rule, concerns itself with the external manifestations, and not the workings, of the minds of parties to a contract'.[1] The conclusion of the high court that Jacobs had the necessary authority to conclude the contract is beyond reproach. He properly bound his principal, the appellant, to the terms of the contract which included the owner's risk notice.

[9] This brings me to the question whether the owner's risk notice in this case could be successfully relied upon by the respondent to escape liability for the loss of the motor vehicle given that it was found that Jacobs did not see it. The approach to this question is to enquire whether the respondent acted sufficiently reasonably in bringing to the attention of its customers in general, and to Jacobs in particular, the existence of the owner's risk notice: *Durban's Water Wonderland (Pty) Ltd v Botha*[2]

'The answer depends upon whether in all the circumstances the appellant did what was "reasonably sufficient" to give patrons notice of the terms of the disclaimer.'

See also *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N) at 643H.

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[1] *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A) at 238I-J.

[2] 1999 (1) SA 982 (SCA) at 991H-I.

[10] The evidence is that the owner's risk notice was prominently displayed, in clear and unambiguous terms, on notice boards at the respondent's passenger vehicle office, at the entrance to the reception and at the cashier's window. Clearly, it was displayed in such a manner and at such locations on the respondent's premises to inform any customer leaving a motor vehicle there of its applicability. This, to me, was more than sufficiently reasonable and the fact that Jacobs says he did not see it does not assist the appellant. The respondent was, in my view, entitled to assume, having displayed the notice in this manner, that any of its customers would notice it. This is not a case where the disclaimer was not prominently displayed or is located in a misleading manner as was the case in *Mercurius Motors v Lopez*.[3]

[11] In the result the appeal is dismissed with costs.

D MLAMBO
JUDGE OF APPEAL

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[3] 2008 (3) SA 572 (SCA) para 33.

APPEARANCES:

COUNSEL FOR APPELLANTS: M M Segal
INSTRUCTED BY: Whalley van der Lith, Johannesburg
CORRESPONDENT: Wessels & Smith Inc, Bloemfontein

COUNSEL FOR RESPONDENT: G Kairinos
INSTRUCTED BY: Couzyns Inc, Rosebank
CORRESPONDENT: Hugo & Bruwer Attorneys, Bloemfontein