THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 149/07

In the matter between:

MERCURIUS MOTORS Appellant

and

PAUL ALEXANDER PAVIA LOPEZ Respondent

Coram: *Streicher, Navsa, Ponnan, Maya JJA et Mhlantla AJA*

Date of hearing: **7 March 2008**

Date of delivery: **27 March 2008**

Summary: Loss of vehicle delivered to service depot – failure to safeguard keys – reliance on exemption clause – held that clause not part of contract of deposit – the service depot held liable.

Neutral citation: *Mercurius Motors v Lopez* (149/2007) [2008] ZASCA 22 (27 March 2008).

JUDGMENT

NAVSA JA

NAVSA JA:

[1] During the morning of 23 July 2003 the respondent, Mr Paul Lopez, delivered a Jeep Cherokee motor vehicle (the Jeep), which he was then leasing from Daimler Chrysler Services South Africa (Pty) Ltd, to Mercurius Motors at its East Rand Mall depot in Boksburg. Mercurius Motors (Mercurius) trades as a motor dealer and service centre and is a division of the Imperial group of companies. The vehicle was delivered to Mercurius to be serviced, for minor repairs to be effected and for the installation of spotlights. The vehicle was still under warranty and the costs of repairs and the service were to be borne by the Daimler Chrysler company (hereafter Daimler Chrysler). The cost of the installation of spotlights was to be borne by Mr Lopez.

[2] At the relevant time Daimler Chrysler was the manufacturer of Jeep and other vehicles and Mercurius was the franchise dealer which sold vehicles to the public.

[3] In terms of his lease agreement with Daimler Chrysler Mr Lopez bore the risk of loss of the value of the vehicle.

[4] According to Mercurius, the East Rand Mall depot was broken into by robbers during the night of 23 July 2003 ─ a lock on a gate was broken. It was alleged that security guards employed by Colt Security, an entity contracted by Mercurius to safeguard its property, were overpowered and abducted.[1]

[5] The next morning, at approximately 08h15, Mr Lopez was informed about the theft of the Jeep. He had leased it for use by his wife. It was relatively new (approximately six months old) and Mr Lopez and his wife were understandably

[1] This information was conveyed to Mercurius by a representative of Colt Security and is contained in statements by two security guards who did not testify. The admissibility of the statements were in issue in the trial court. For reasons that will become apparent the present appeal can be decided without reference to these statements. See para 34 below. I shall assume in favour of Mercurius that the Jeep went missing in consequence of that robbery.

upset. The Jeep was fitted with a satellite tracking device and Mr Lopez informed Netstar, the company that provided the tracking service, that the vehicle had gone missing from Mercurius and instructed them to take steps to trace and recover it. Unfortunately it could not be traced and has not been recovered.

[6] It is common cause that the Jeep was the only vehicle missing from the depot. The keys to the Jeep that had been handed to Mercurius when the vehicle was delivered could not be found. The established procedure was that the keys to all the vehicles that had been brought in for service had to be safely locked away at the end of a working day.

[7] The respondent's wife insisted that, whilst steps were being taken to recover the vehicle and until the question of liability for its loss was determined, she should be provided with a 'loan' vehicle. Mercurius provided such a vehicle for use by Mrs Lopez for a period of six months. This notwithstanding, Mercurius denied liability for the loss of the Jeep, relying on exemption of liability clauses contained in the documents Mr Lopez signed at the Mercurius workshop on the morning on which he delivered the vehicle to the workshop.

[8] The plaintiff instituted action in the Johannesburg High Court against Mercurius based on the contract of deposit, claiming damages for the loss of the Jeep, the value of which was agreed in an amount of R245 000.

[9] In its plea Mercurius repeated its reliance on the exemption clauses and denied that the loss of the Jeep was due to any negligence on its part.

[10] The Johannesburg High Court found in favour of Mr Lopez, ordering Mercurius to pay him R245 000 with interest a *tempore morae* at the rate of 15.5 per cent per annum from 13 January 2004 to date of payment. Mercurius was ordered to pay Mr Lopez's costs. The present appeal is with the leave of this court.

The exemption clauses

[11] The first exemption clause is contained in a document entitled 'Warranty Repair Order'. Instead of the expected Mercurius Motors appellation at the head of the document, the name Daimler Chrysler appears. Immediately above the space for a customer's signature the following appears in fine print:

'I hereby authorize the repair work to be done along with the necessary material, and hereby grant you and/or your employees permission to operate the car or truck herein described on streets, highways or elsewhere for the purpose of testing and/or inspection. An express mechanic's lien is hereby acknowledged on this car or truck to secure the amount of any charges for work not covered by Daimler Chrysler's warranty.'

[12] Immediately below the space for the customer's signature the following appears in capitals:

'NOT RESPONSIBLE FOR LOSS OR DAMAGE TO CARS OR ARTICLES LEFT IN CARS IN CASE OF FIRE, THEFT OR ANY OTHER CAUSE BEYOND OUR CONTROL.'

This exemption clause is clearly visible and can hardly be missed by a person signing the form.

[13] The other exemption clause on which Mercurius relied is contained in a second document described as a repair order form. On the left-hand side at the top of the document, the words 'MERCURIUS MOTORS' are set out in large and bold letters. Between a heading that reads 'JOB INSTRUCTION / WERKOPDRAG' and a position indicating a signature by a customer is a space approximately 13 cm x 13 cm, to be completed by the Mercurius employee receiving instructions from the customer regarding the work to be done.

[14] On the repair order form, immediately above the space indicated for a customer's signature, the following appears in capital letters:

'PLEASE REMOVE PULL-OUT RADIOS AND VALUABLES FROM YOUR VEHICLE.
WE WILL NOT BE HELD RESPONSIBLE FOR ANY THEFT WHATSOEVER.'

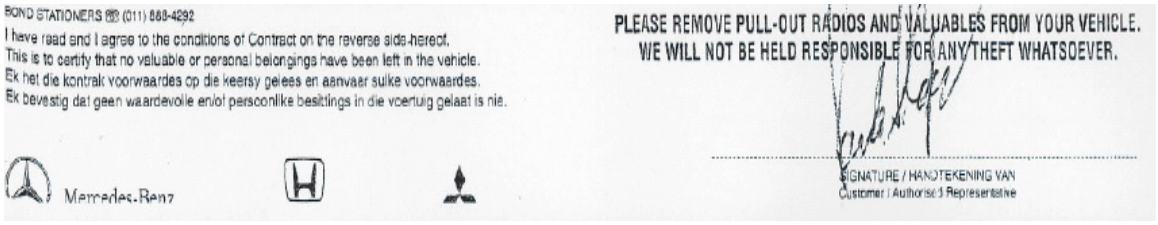
This caption is prominent and should easily be noticed by anyone signing the document.

[15] To the left of the caption referred to in the preceding paragraph, the following appears in fine print:

'I have read and agree to the conditions of Contract on the reverse side hereof. This is to certify that no valuable or personal belongings have been left in the vehicle. Ek het die kontrak voorwaardes op die keersy gelees en aanvaar sulke voorwaardes. Ek bevestig dat geen waardevolle en/of persoonlike besittings in die voertuig gelaat is nie.'

It is necessary to record that this print is much smaller than appears hereinabove, is starkly less prominent than the caption referred to in the previous paragraph and does not attract one's attention.

[16] The relevant part of the document is reproduced in this paragraph to enable a better appreciation of how it appeared to Mr Lopez:


BOND STATIONERS (011) 888-4292
I have read and I agree to the conditions of Contract on the reverse side hereof.
This is to certify that no valuable or personal belongings have been left in the vehicle.
Ek het die kontrak voorwaardes op die keersy gelees en aanvaar sulke voorwaardes.
Ek bevestig dat geen waardevolle en/of persoonlike besittings in die voertuig gelaat is nie.
Mercedes-Benz
PLEASE REMOVE PULL-OUT RADIOS AND VALUABLES FROM YOUR VEHICLE.
WE WILL NOT BE HELD RESPONSIBLE FOR ANY THEFT WHATSOEVER.
SIGNATURE / HANDTEKENING VAN
Customer / Authorised Representative

This reproduction is condensed ─ the original page on which the writing appears is four centimetres wider than appears above. Consequently, in reality, the space between what appears on the right and left-hand side of the document is wider.

[17] It is also necessary to note that the repair order form has a carbon copy underneath and has to be detached in order to reveal the conditions on the reverse side. The relevant condition on which Mercurius relied is in clause 5, which reads:

'I/we acknowledge that MERCURIUS shall not be liable in any way whatsoever or be responsible for any loss or damages sustained from fire and/or burglary and/or unlawful acts (including gross negligence) of their representatives, agents or employees.'

It is evident that the ambit of this exemption clause is wide.

[18] The evidence of Mr Lopez to the effect that his attention was not drawn to the writing referred to in para 15, nor to the conditions themselves, by the

workshop manager who received the Jeep and who took down the instructions, is uncontested.

The court below

[19] Tshiqi J, having regard to Mr Lopez's reliance on a contract of deposit and considering that Mercurius had pleaded that the contract was subject to exemption clauses, correctly held that Mr Lopez as plaintiff bore the onus to prove that the exemption clauses were not part of the contract.[2]

[20] The court below took into account the general principle in our law that, when a person signs a contractual document, he or she agrees to be bound by the contents of the document ─ otherwise referred to as the *caveat subscriptor* rule.[3] Tshiqi J weighed up this rule against Mr Lopez's contention that he was misled as to the nature, purport and contents of the document.

[21] Tshiqi J examined the warranty claim form and concluded that, viewed objectively, the document was misleading and confusing and could be read to be exempting Daimler Chrysler and not Mercurius.

[22] Interpreting the caption immediately above the space for the customer's signature in the repair order form, the court below held that the exemption could only relate to theft from the vehicle of items such as radios and other valuables and that the wording does not include an exemption in relation to the theft of the vehicle itself.

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[2] In the case of the dispute as to the existence of such a clause as part of the contract of deposit, it will be for the plaintiff depositor to prove that the clause was not a term of the contract. See *Stocks & Stocks (Pty) Ltd v T J Daly & Sons (Pty) Ltd* 1979 (3) SA 754 (A) and Harms *Amler's Precedents of Pleadings* 6 ed (2003) p 145.

[3] See R H Christie *The Law of Contract in South Africa* 5 ed (2006) pp 174-179 and the authorities there cited.

[23] The trial judge considered that the reference on the left-hand side of the repair order form to the conditions of contract was printed and located in such a manner so as not to draw the reader's attention. She held that Mr Lopez's contention, that he was misled by the form because it was unclear and confusing, was justified.

[24] Having reached these conclusions in relation to the exemption clauses, the high court then considered the liability of a depository for reward in regard to the loss of items entrusted to him or her. The court rightly pointed out that a depository could, of course, escape liability if there was no *dolus* or *culpa* on his or her part.[4]

[25] In relation to negligence, Tshiqi J had regard to the instances of negligence on which Mr Lopez relied. First, the failure by Mercurius to safeguard the Jeep's keys. Second, the failure immediately to determine which vehicle was missing, and then to communicate the loss to Mr Lopez to enable him to instruct the company responsible for the tracking device in the Jeep to take steps to recover it.

[26] In respect of the loss of the key, the court below recorded that Mercurius was unable to explain where the keys to the Jeep had been kept and how they had got lost. Mercurius had tendered evidence to show that it was the duty of apprentice mechanics to ensure, at the end of a working day, that no keys were left in vehicles. Furthermore, employees of the security company, when they came on duty, were themselves required to do a check to ensure the same. In the event of keys being found they were obliged to remove the keys and hand them to a patrol vehicle for safe custody. No evidence was tendered of such steps having been taken.

[4] See *Stocks & Stocks* supra at 762A-D.

[27] As stated earlier, no explanation was offered for the absence of the keys from the bag containing the keys to all the other vehicles that had been in safekeeping. The court below held that the probabilities indicated that the keys to the Jeep were either left in the vehicle or in a place where they were easily accessible. It noted that there was no evidence that the keys had been in the possession of the guards or were kept safely. No reason was proffered by Mercurius as to why the Jeep's keys would have been kept separate from the other sets of keys which were locked away safely.

[28] In respect of the second ground of negligence on which Mr Lopez relied, the court below held that it had not been shown that, even if Mercurius had identified the missing vehicle sooner and had informed Mr Lopez earlier, the tracking company would have been able to locate the vehicle.

[29] Finally, Tshiqi J held that the conduct of Mercurius in relation to the keys amounted to negligence and she consequently made the orders referred to in para 10 above.

Conclusions

[30] In respect of the warranty claim form, the court below, in my view, placed too much store on the fact that the Daimler Chrysler name appeared at the top of the document. It can hardly be gainsaid that the authorisation referred to in para 11 above was an authorisation directed at Mercurius and that Mercurius was the entity that would effect the repairs in accordance with the Daimler Chrysler warranty.

[31] In any event, counsel for Mercurius did not place any reliance on the clause in the warranty claim form. He accepted that the exemption relates to loss or damage occasioned by causes beyond the control of Mercurius and that the theft of the Jeep was not beyond its control.

[32] In relation to the caption in the repair order form referred to in para 14 above, Tshiqi J rightly held that the theft to which the exemption relates is of valuables out of the vehicle, rather than of the vehicle itself.

[33] A person delivering a motor vehicle to be serviced or repaired would ordinarily rightly expect that the depository would take reasonable care in relation to the safekeeping of the 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.[5] 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.

[34] The test for negligence is as follows:

'*(a)* would a reasonable person, in the same circumstances as the defendant, have foreseen the possibility of harm to the plaintiff;

(b) would a reasonable person have taken steps to guard against that possibility;

(c) did the defendant fail to take the steps which he or she should reasonably have taken to guard against it?

[5] See *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) at 318C; *Kempston Hire (Pty) Ltd v Snyman* 1988 (4) SA 465 (T) at 467B-C and 468G-H; *Keens Group Co (Pty) Ltd v Lötter* 1989 (1) SA 585 (C) at 590B-592C; *Ndlovu v Brian Porter Motors Ltd* 1994 (2) SA 518 (C) at 526F; *Diners Club SA (Pty) Ltd v Livingstone* 1995 (4) SA 493 (W) at 495I-496A; *Fourie NO v Hansen* 2001 (2) SA 823 (W) at 833F-834C. See also the very interesting article by Tjakie Naudé and Professor Gerhard Lubbe *Exemption Clauses – A Rethink Occasioned by Afrox Healthcare BPK v Strydom* (2005) 122 *SALJ* 441.

If all three parts of this test receive an affirmative answer, then the defendant has failed to measure up to the standard of the reasonable person and will be adjudged negligent.'[6]

[35] By not safeguarding the keys to the Jeep, the employees of Mercurius did not act as a reasonable person in their circumstances would have acted. It was clearly foreseeable that theft of the vehicle would be facilitated by the availability of the keys and no discernable steps were taken to guard against this.

[36] It was common cause that the theft of the Jeep took place. The precise circumstances under which it occurred were not agreed upon. Counsel on behalf of Mercurius did not seek, before us, to rely on the statements of the security guards which had been ruled inadmissible by Tshiqi J. It is significant that the only vehicle missing was the vehicle in respect of which the keys had not been properly safeguarded. All the indications are that it is the negligence of the employees of Mercurius which facilitated the theft of the Jeep. In any event, Mercurius failed to discharge the onus of disproving *dolus* or *culpa* on its part.

[37] It is not necessary to deal with the delay in relation to the notification by Mercurius to Mr Lopez of the loss of the vehicle. The material conclusions reached by the court below cannot be faulted.

[38] The following order is made:
The appeal is dismissed with costs.

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M S NAVSA
JUDGE OF APPEAL

CONCUR:

STREICHER JA
PONNAN JA
MAYA JA
MHLANTLA AJA

[6] See Jonathan Burchell *Principles of Delict* (1993) p 86 and *Kruger v Coetzee* 1966 (2) 428 (A) at 430.