IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

CASE NO: 3327/2006
DATE HEARD: 25-01-2011
DATE DELIVERED: 27-01-2011

In the matter between

ANITA JOY DUFFIELD	**Plaintiff**
vs	
LILYFONTEIN SCHOOL	**1st Defendant**
GOVERNING BODY OF LILYFONTEIN SCHOOL	**2nd Defendant**
ONTRACK ADVENTURE	**3rd Defendant**
MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION OF THE EASTERN CAPE	**4th Defendant**
RAVENSCO TRADING 020 CC	**Third Party**

JUDGMENT

PICKERING J:

On 17 September 2005 and at Glen Eden, East London, plaintiff was participating in an activity known as the Kempston Corporate Adventure Race when she fell from a so-called zip-wire (colloquially known as a "*foefie slide*") affixed to the top of a scaffold platform and sustained certain bodily injuries.

In consequence thereof plaintiff instituted action against four defendants. The first defendant is Lilyfontein School which organised the adventure race. The second defendant is the governing body of Lilyfontein School. The third defendant, Ontrack Adventure, was originally cited as a firm. At some stage Revensco Trading 020 CC, a close corporation trading as Ontrack Club, was joined as a third party. Despite this, Ontrack Adventure remains cited as the third defendant. The fourth defendant is the MEC for Education, Eastern Cape.

Plaintiff alleged in her particulars of claim that the sole cause of her falling was due to the negligence of the personnel operating the platform to which the zip-wire was affixed in that such personnel failed to secure the safety harness around plaintiff's torso correctly, alternatively, failed to ensure that plaintiff herself had correctly secured the harness prior to her jumping off the platform.

The negligence of the aforesaid personnel as well as the nature and extent of the injuries sustained by plaintiff and the quantum of her claim were placed in issue in their respective pleas by the defendants and the third party.

The defendants and the third party further averred that by virtue of a written indemnity signed by plaintiff on 16 September 2005, prior to her participation in the adventure race, they were in any event indemnified against a claim of this nature.

The plaintiff and the first, second and fourth defendants have agreed that the issue relating to the alleged indemnification of the defendants and the third party be first determined by way of a stated case in terms of Rule 33 of the Uniform Rules of Court. There was no appearance for the third defendant/third party.

The indemnity form signed by plaintiff (Annexure A to plaintiff's Particulars of Claim) reads as follows:

> "*I, Joy Duffield, acknowledge that I am aware that the Kempston Adventure Race involves a number of potentially hazardous activities (eg. abseiling, swimming/paddling, obstacle courses, kloofing etc.), will take place over rugged terrain and although stringent safety measures will be in place, the risk of personal accident or injury cannot be completely excluded. I further confirm that I am aware that the Kempston Adventure Race is of a very physically challenging nature and will involve a minimum of 6 – 8 hours of intense activity. I confirm that I am physically well and fit and am able to participate in exercise of*

this nature without undue risk to my health. Should I be unwell shortly before or on the day of the Kempston Adventure Race I undertake to take responsibility for ensuring that I will not participate.

I further confirm that I am able to swim and if not will be in possession of a life jacket on the day of the event.

I accordingly hereby undertake and agree to indemnify the organisers, sponsors, Lilyfontein School and any individual involved in assisting with the organisation against any liability and against any/all proceedings, claims, damages, interests, costs and/or expenses which may result from any accident or injury to myself or my sports equipment."

The terms of the stated case are as follows:

"*Agreed statement of facts*

1. *The First Defendant was the organiser of an activity known as the Kempston Adventure Race ('the Adventure Race') which took place in East London on the 17th September 2005.*
2. *Arrangements for the supply and operation of the specialised equipment during the course of the Adventure Race were made between individuals acting jointly on behalf of the first and second defendants and individuals acting on behalf of the third defendant.*
3. *The Plaintiff was a participant in the Adventure Race.*
4. *Prior to participating in the Adventure Race, and on the 16th September 2005, the plaintiff signed the indemnity form, Annexure 'A' to the Particulars of Claim.*
5. *Whilst participating in the Adventure Race as aforesaid, the plaintiff fell from a 'zip-wire' affixed to the top of a scaffold platform which formed part of the specialised equipment being utilised during the course of the Adventure Race.*
6. *The plaintiff sustained bodily injuries as a consequence of her*

fall as aforesaid.

7. *Issue to be determined by the Court*

The issue to be determined by the Court is whether the defendants are indemnified from liability to the plaintiff per se *by virtue of her having signed the indemnity document, which now forms Annexure 'A' to the Particulars of Claim, prior to her participation in the Adventure Race, or whether the defendants are indemnified from liability to the plaintiff only in the event of it being found that stringent safety measures had in fact been put in place by them during the course of the Adventure Race.*"

It was contended by Mr. Topping, who appeared on behalf of the plaintiff, that, upon a proper interpretation thereof, the indemnity provided by plaintiff is conditional upon it being established that the defendants did all things reasonably necessary to ensure that stringent safety measures were put in place during the course of the Adventure Race so as to limit the risk of personal accident or injury to the participants thereof, and, in particular, the plaintiff. For his part, Mr. Cole, who appeared for the defendants, submitted that the phraseology of the indemnity form is such as to indemnify the defendants from liability to the plaintiff *per se* by virtue of her signature thereon.

The proper approach to be adopted in a matter such as this is set out in Drifters Adventure Tours CC v Hircock 2007 (2) SA 83 (SCA) where the following was stated at 87E – G [para 9]:

"*[9] It is common cause that the appellant bears the onus of establishing, on a balance of probabilities, that the indemnity clause is enforceable against the respondent. It is also so that indemnity provisions, in general, should be construed restrictively. The proper approach to the interpretation of indemnity clauses is succinctly set out by Scott JA in these terms in* Durban's Water Wonderland (Pty) Ltd v Botha [1999 (1) SA 982 (SCA) at 989H – I]:

'The correct approach is well established. If the language of a

> disclaimer or exemption clause is such that it exempts the *proferens* from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity the language must be construed against the *proferens*. (See Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd 1978 (2) SA 794 (A) at 804C.) But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be "*fanciful*" or "*remote*" (cf Canada
> Steamship Lines Ltd v Regem [1952] 1 All ER 305 (PC) (1952 AC 192) at 310C - D)'."

Mr. Topping submitted that the indemnity in the present matter is akin to that which was under consideration in Minister of Education and Culture (House of Delegates) v Azel and Another 1995 (1) SA 30 (A). The relevant part of that indemnity reads as follows:

> "*I fully understand and accept that all tours and excursions shall be undertaken at my child's own risk and I undertake, on behalf of myself, my executors and my child aforesaid to indemnify, hold harmless and absolve the Department, the principal and his staff against and from any or all claims whatsoever that may arise in connection with any loss of or damage to the property or injury to the person of my child aforesaid in the course of any such tour or excursion*, in the knowledge that the principal and his staff will, nevertheless, take all reasonable precautions for the safety and welfare of my child."

At 33F – H Kumleben JA stated:

> "*The exemption unambiguously absolves the appellant from liability in the circumstances of this case. It is the interpretation of the additional phrase that is decisive of this appeal. If it is an integral part of the preceding exemption and qualifies it, the indemnity cannot avail the*

appellant as a defence to the claim. If, on the other hand, this was intended to be no more than a recital of a fact known to the signatory at the time the indemnity was granted, the immunity from liability afforded by the exemption is unaffected by it. In short, the question is whether it is a proviso or a postscript.

I have no doubt that the latter interpretation is not the correct one. The words 'in the knowledge that' *are to my mind the equivalent of* 'on the understanding that' *or* 'provided that'*. They thus introduce a precondition for the undertaking to grant the exemption from liability and therefore a precondition for its operation."*

At 33J – 34A the learned Judge continued:

"*The additional phrase self-evidently cannot be regarded as a preamble or equated with one: it is not an introductory statement or prologue. The fact that it features after the exempting provision - with the inclusion of the word* 'nevertheless' *meaning* 'by no means less' *or* 'not in any way less' *is a distinction of significance. This is perhaps best illustrated by inverting the sequence of the two parts. Had the indemnity read:* 'In the knowledge etc, I nevertheless . . . undertake to indemnify . . .'*, the argument of the appellant would have had substance."*

Mr. Cole, with reference to Elgin Brown and Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd 1993 (3) SA 424 (A) submitted, however, that the indemnity in the present case was in fact the converse of that in Azel's case and was on all fours with that which was considered in Elgin's case.

In Elgin Brown's case the relevant part of the indemnity read as follows:

"*Whilst reasonable care will be taken to ensure that first class materials and workmanship will be used in the execution of the contract IMS will not be liable for any loss or damages whatsoever, direct or indirect … due to late or defective delivery, defective, faulty or negligent*

workmanship or material …"

It was submitted on behalf of the plaintiff in that matter that the words "*whilst reasonable care will be taken to ensure that first class materials and workmanship will be used in execution of the contract …*" meant "*on condition that reasonable care will be taken to ensure …*". In the course of his judgment Hoexter JA made reference to the principle cited by Halsbury's Laws of England vol 10 para 352 (Hailsham ed) at 428H-I, namely:

> "*In the construction of an instrument the recitals are subordinate to the operative part, and consequently, where the operative part is clear, this is treated as expressing the intention of the parties, and it prevails over any suggestion of a contrary intention afforded by the recitals.*"

At 428J – 429C the learned Judge continued:

> "*In the instant case the operative part of clause 8 appears to me to be clear and unambiguous. It is unnecessary to enlarge upon this topic because in any event it seems to me that in the present case the recitals do not in fact reflect any intention contrary to the operative part. The recitals are ushered in by the word* 'whilst'. *It seems to me that it would involve a strange and unnatural interpretation to read the recitals as:*
>
> 'On condition that reasonable care will be taken to ensure …'
>
> *I agree with Mr .Wallis, who appeared for the defendant, that the recitals are properly to be construed as signifying as no more than*
>
> 'Notwithstanding the fact that reasonable care will be taken to ensure …'"

In my view the indemnity in the present matter is indeed akin to that considered in Azel's case *supra.*

I am not persuaded that the phrase "*although stringent safety measures will be in place*" is no more than a recital of a fact known to the plaintiff at the time

the indemnity was granted and that, as such, it is subordinate to the operative part of the indemnity and not part thereof. In determining whether the phrase is part of the recitals or is instead a condition or proviso of the indemnity regard must obviously be had to the wording of the indemnity as a whole. It is, in my view, too simplistic to categorise the phrase as being a part of the recitals merely by virtue of it having been expressed in the opening paragraph of the indemnity. It is clear, in my view, as stressed by Mr. Topping, that the plaintiff's acknowledgement that the risk of personal injury or accident cannot be excluded is qualified by the preceding phrase to the effect that "*stringent safety measures will be in place.*" In other words, plaintiff's acknowledgement of the possibility of personal injury or accident is expressed subject to the understanding that defendants would, for their part, take all necessary measures in order to reduce such risk by ensuring that stringent safety measures would be in place.

Having made such an acknowledgement plaintiff continues to state in the final paragraph of the indemnity:

> "*I accordingly hereby undertake and agree to indemnify the organisers …*"

The word "*accordingly*" cannot be ignored. It qualifies what has preceded it. It is defined in the Concise Oxford Dictionary as meaning, *inter alia,* "*consequently*". The word "*consequently*" is itself defined, *inter alia*, as meaning "*as a result; therefore.*"

Applying the approach to the interpretation of indemnity clauses as set out in the authorities cited above it is clear, in my view, that the only interpretation which can be placed upon the indemnity is that it was conditional upon stringent safety measures being in place. In effect the plaintiff has stated that because stringent safety measures would be in place she therefore indemnifies the defendants against any claims in the event of personal accident or injury. As in Azel's case *supra* at 34F there are no grounds for concluding that the plaintiff would have signed the indemnity had the phrase

not been included in it.

If the phrase is not intended to relate to the exemption and to qualify it there would, in my view, have been no reason to record plaintiff's knowledge of the fact that stringent safety measures would be in place. Compare Azel's case *supra* at 34G.

Mr. Cole submitted further, however, that should the phrase be interpreted in the manner contended for by plaintiff it would entirely deprive the indemnity of contractual force. In this regard he relied upon the following passage in the Elgin Brown case *supra* at 429C:

> "*There is, I consider, a compelling reason which militates against the interpretation supported by counsel for the plaintiff. That interpretation would create an antithesis between the recitals and the operative part which would entirely deprive the exclusionary provisions of contractual force.*"

In Azel's case *supra*, Kumleben JA, with reference to the above dictum, stated at 34C, that "*the fact that an interpretation warranted by the language used and by the manner in which the indemnity was set out results in an extensive curtailment of its operation cannot justify a contrary interpretation*" and held, further, at 34F, that the phrase in issue, if construed as a qualification or proviso, did not deprive the indemnity of all contractual efficacy.

Similarly, in the present matter, the phrase, if construed as a qualification or proviso does not deprive the indemnity of all contractual efficacy. Provided that stringent safety measures were in place the defendants would be fully indemnified against any claims by any participant in the race. It would only be in the event of the defendants having failed to ensure that such safety measures were in place that the indemnity would not be operative.

In my view therefore the stated case must be decided in favour of plaintiff.

The parties were agreed that in such case the costs of the hearing should be reserved for decision at the trial.

The following order will issue:

1. It is declared that the indemnity provided by the plaintiff is conditional upon it being established that the defendants did all things reasonably necessary to ensure that stringent safety measures were put in place during the course of the Kempston Corporate Adventure Race so as to limit the risk of personal accident or injury to the participants thereof, and in particular, the plaintiff.
2. The matter is adjourned to a date to be arranged with the Registrar for a determination of the remaining issues in the action.
3. The costs of this hearing are reserved for decision at the trial.

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J.D. PICKERING
JUDGE OF THE HIGH COURT

Appearing for Plaintiff: Adv. I. Topping
Instructed by Whitesides Attorneys, Mr. Nunn

Appearing for Defendant: Adv. S. Cole
Instructed by Netteltons Attorneys, Mr. Mvulana