IN THE HIGH COURT OF SOUTH AFRICA

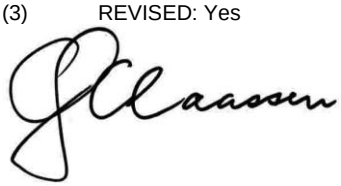
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 27626/13

DATE: 2014-03-10

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED: Yes



SIGNATURE

18 June 2014
DATE

In the matter between

AIRPORTS COMPANY OF SA LTD	Plaintiff
And	
BP SOUTHERN AFRICA (PTY) LTD	1st Defendant
CHEVRON SA (PTY) LTD	2nd Defendant
ENGEN PETROLEUM LTD	3rd Defendant
EXEL PETROLEUM (PTY) LTD	4th Defendant
SHELL SA MARKETING (PTY) LTD	5th Defendant
TOTAL SA (PTY) LTD	6th Defendant

J U D G M E N T

C. J. CLAASSEN J:

[1] This is an exception to the plaintiff's particulars of claim. The exception is taken by the first, third, fourth, fifth and sixth defendants. I shall refer to the excipients as the defendants for ease of reference.

[2] The respondent of course is the plaintiff but I shall also refer to that party as the plaintiff.

[3] The plaintiff issued summons against the defendants arising from a written contract concluded between the parties. The plaintiff relies on the provisions of the contract and in fact attaches the entire contract as annexure to the particulars of claim.

[4] In short, the plaintiff claims a penalty of R15 million arising from what it alleges to be a shortfall in the fuel supply by the defendants at the Oliver Tambo International Airport. It relies basically on two clauses namely clause 15 dealing with minimum volumes and clause 21 dealing with *force majeure*.

[5] The relevant provisions of clause 15 state that the defendants are to maintain a minimum amount of aviation fuel each day. The minimum amount is described in the clause as being three times the daily average and then states that if it falls below two days' supply then a penalty threshold is reached causing certain consequences.

[6] It is necessary to refer to the particular clauses in some detail. Clause 15.3.3 of the contract reads as follows:

> "Without prejudice to any of ACSA' rights under this agreement and/or at law, should the useable aviation fuels stored at the bulk fuel site be less than two times the daily average (as calculated in terms of 15.3.1.2) for useable aviation fuels at the airport ("the penalty threshold"), then the managing participant shall forthwith give written notice thereof to ACSA and the participants shall (to the extent that such shortfall in useable aviation fuels does not result from any act of *force majeure* as defined in 21) pay ACSA on demand an amount of R5 million per day from the day that such useable aviation fuels are less than the penalty threshold for as long as the participants fail to comply with 15.3.1.2. It is expressly recorded that any amount payable under this 15.3.2 constitutes the penalty and that ACSA will, notwithstanding anything to the contrary in the agreement be entitled to recover its direct damages only (and not its indirect or consequential damages) in lieu of such penalty."

[7] Clause 21 reads as follows:

> "21.1 Subject to 20 and the terms of this agreement, if any party is prevented from performing all or any of its obligations under this agreement as a result of an act of God, fire, riot, warning (whether declared or not) embargos, export control, its national restrictions, shortage of transport facilities not caused by such party, any oral or any international authority, any court order, any requirements of any governmental authority or other competent authority, any theft, interruption of electrical power or destruction of equipment due to any cause beyond the reasonable control of such party or any other circumstances whatever which are not within the reasonable control of such party (collectively "acts of *force majeure*") (but specifically excluding any matters and/or occurrences referred to in 20.1 and 20.2 and the failure to obtain or renew any governmental approval, consent, licence or the like), such party will be deemed to have been released from such obligations (but only to the extent and for so long as it is so prevented from performing such obligations). If any such act of *force majeure* continues for more than 180 consecutive days then either ACSA or the participant concerned shall be entitled, by written notice to the other, to forthwith terminate this agreement as between them.
>
> 21.2 As soon as a party becomes aware that an act of *force majeure* is likely to occur, it shall give notice in writing to the other parties estimating the approximate duration of such act of *force majeure*. The estimate shall not be binding and the party claiming *force majeure* shall forthwith give written notice to the other parties as soon as the act of *force majeure* ceases to operate.
>
> 21.3 Notwithstanding anything to the contrary contained herein, the party relying on an act of *force majeure* shall use its best endeavours to mitigate and remedy its non performance due to such act of *force majeure*."

[8] The plaintiff pleaded the contents of clause 21 of the agreement in paragraphs 10.7, 10.8 and 10.9 of the particulars of claim. It then

continues as follows:

> "11. The managing participant pursuant to the agreement notified the plaintiff on 15 November 2012 that Ortia was below the penalty threshold of useable aviation fuels as set out in the agreement.
> 12. The plaintiff identified the specific days when the useable aviation fuels were below the penalty threshold as being the three days of 16, 17 and 18 November 2012.
> 13. The plaintiff demanded payment from the defendants in the amount of R15 million calculated as R5 million for each of 16, 17 and 18 November 2012 in penalties as contemplated in the agreement.
> 14. The defendants' claim that the shortfall below the penalty threshold was reached as a result of an alleged *force majeure* which the plaintiff disputes.
> 15. Notwithstanding demand the defendants have refused and/or failed to pay the aforesaid sum of R15 million or any portion thereof to the plaintiff."

[9] The exception is framed in the following terms in the notice filed by the first, fourth, fifth and sixth defendants, in paragraph 4 which reads as follows:

> "4. The plaintiff does not allege (a) the fulfilment of the aforesaid condition; (b) any other facts to sustain the conclusions that the shortfall in respect of any of the three days in question arose under circumstances falling within the reasonable control of the defendants or (c) that clause 21 of the agreement does not otherwise preclude its claims for a penalty under clause 15.3.3."

[10] In effect what the defendants are saying is that the plaintiffs should have alleged a negative saying or pleading that the reasons for a shortfall did not fall within the provisions of clause 21. In effect their interpretation of the contract amounts to the contents of clause 21 establishing a precondition to the plaintiffs' claim for the penalty.

[11] The plaintiffs however alleged that a proper construction of the contract does not allow of clause 21 to be regarded as a precondition but rather as a clause establishing and exemption or an exception or a specific defence to the liability of the defendants under the

contract. It alleges that such proper construction would then perforce oblige the defendants to plead the necessary facts which would bring the defence within in the four corners of the exemption contained in clause 3.2.1.

[12] I have some difficulty in agreeing with the interpretation advanced by the defendants at this stage of the proceedings i.e. at the exception stage.

[13] It would seem to me that it is possible to interpret clause 21 as read with clause 15.3.3 as allowing a defence available to the defendants explaining why there was a shortfall. Simply looking at clause 21.3 of the contract it would appear that an *onus* is placed on the party relying on an act of *force majeure* to use its best endeavours to mitigate and remedy its non performance. That sub clause forms part of clause 21.

[14] Before me, neither party argued that the plaintiff is obliged to plead a negative by alleging that the defendants did not use their best endeavours to mitigate and remedy the non performance. Such non performance seems to be common cause on the pleadings.

[15] If that is so, I have difficulty in understanding why clause 21.1 should be interpreted any differently. It would seem to me that the pleadings of the plaintiff are sufficiently clear to enable the defendants to plead to the allegations setting out what *force majeure* or other causes prevented them from maintaining the required levels of aviation fuel

at the airport.

[16] I am also of the view that it could very well be that 21.1 can be regarded as a deeming clause, supplying the defendants with an excuse which if so construed would oblige them to plead and prove the *force majeure* upon which they rely.

[17] However I wish to stress the fact that I do not wish to be understood as making a determinative interpretation of this clause at this stage. Suffice to say that the different interpretations of the contract would preclude me from upholding the exception at this stage.

[18] It is trite law that different interpretations of a contract may lead the court to refuse an exception although that is not a hard and fast rule. However I cannot at this stage say that on any reasonable interpretation the interpretation called for by the defendants is the only possible meaning of the contract. Once I have come to that conclusion, the exception cannot succeed.

[19] For those reasons I am therefore of the view that I should make the following order:

The exceptions of the first, third, fourth and sixth defendants are dismissed with costs which include the costs occasioned by the employment of two counsel.

DATED THE 18th DAY OF June 2014 AT JOHANNESBURG

C. J. CLAASSEN
JUDGE OF THE HIGH COURT

Hearing Date: 10 March 2014

Judgment given: 10 March 2014

Judgment edited and signed: 18 June 2014

Counsel for the 1st, 4th, 5th and 6th Defendants/Excipients: Adv M. Kriegler SC with Adv N. van der Walt
Counsel for the 3rd Defendant/Excipient: Adv J. C. Dickerson SC

Counsel for the Respondent: Adv N. H. Maenetje SC with Adv J. A. Babamia