REPUBLIC OF SOUTH AFRICA

DELETE WHICHEVER IS NOT APPLICABL
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
29/01/16
DATE SIGNATURE

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 81325/14

29/1/16

In the matter between ~

UNIONTECH COMMERCIAL AND GRAPHICS CC	**FIRST EXCIPIENT**
LEZMIN 2768 CC	**SECOND EXCIPIENT**
and	
LOGISTICS TRANSPORT GLOBALLY (PTY) LTD	**RESPONDENT**
In re	
LOGISTICS TRANSPORT GLOBALLY (PTY) LTD	**PLAINTIFF**
and	
UNIONTECH COMMMERCIAL AND GRAPHICS CC	**FIRST DEFENDANT**
LEZMIN 2768 CC	**SECOND DEFENDANT**

JUDGMENT

VILAKAZI, AJ

[1] The Defendants (Excipients) have excepted to the Plaintiff's (Respondent) particulars of claim in terms of Rule 23(1) on the grounds

that the same are vague and embarrassing. For the sake of convenience, I shall refer to the parties as Plaintiff and Defendants. It appears from an overview of the Particulars of Claim as a whole that the Plaintiff avers that it provided certain services to the Defendants, allocated freight, bridging financing account numbers, rendered freight and bridging finance to the Defendants. The First Defendant was allocated a freight account number UNICOMPRY1 and a bridging financing account number UNICOMPRY. The Second Defendant was allocated freight account number LEZ276PRY1 and bridging financing account number LEZ267PRY.

[2] The Particulars of Claim avers separate claims. These claims are based on a partly written partly oral agreement, concluded on or about 20 March 2013 at Pretoria. The Plaintiff was represented by Uhland Muller and the First Defendant was represented by Ockert Smit. On the aforesaid date at Pretoria, the Plaintiff, concluded a partly written partly oral agreement (collectively hereinafter "the agreements"). Copies are annexed to the Particulars of Claim as Annexure "A", "B", "C", "D" and "E". Pursuant to these collective agreements, the Plaintiff commenced rendering freight forwarding services and bridging finance to the Defendants.

[3] The Plaintiff further avers that on 20 August 2013 at Pretoria, the terms of the agreement were amended in respect of the First defendant. These

amendments were partly written, partly oral and increased the bridging finance interest from 4% to 5.5% per month or part thereof ("the amendments"), copies annexed as Annexure "F" and "G" respectively. In respect of the Second Defendant it alleges that on 31 May 2013, it concluded partly written and partly oral amendments, increasing the bridging finance interest from 4% to 5.5% per month or part thereof. Likewise it annexed Annexure "F" and "G" respectively to its Particulars of Claim.

[4] The exceptions raised are that the unsigned written agreement annexed thereto does not constitute the agreement entered into by the parties. Further as regards the oral agreement the written agreement attached thereto ("Annexure B") at clause 33 provides as follows: "Variation of these trading term and condition. No variation of these trading terms and condition shall be binding on the company unless embodied in a written document signed by a duly authorised director of a company. Any purported variation or alteration of these trading terms and conditions otherwise than as set out above shall be of no force and effect whether such purported variation or alteration is written or oral or takes place before or after receipt of these standard trading terms and conditions by the customer." The Defendants aver that no written agreement was attached, which the Plaintiff seeks to amend its terms and conditions. The Defendants allege that Annexure F which purports to be a written portion of the new agreement is not

signed by both parties instead, it is a letter dated 20 August 2013 addressed to First Defendant and signed by Bertu Pienaar, whose designation is a Business Developer. The Defendants aver that the written portion of new agreement cannot be considered valid and binding between the parties unless signed by a duly authorised director on behalf of the plaintiff and the Defendant.

[5] Annexure "A" annexed to the Particulars of Claim is an email sent on 17 January 2013 (unsigned) by Bertu Pienaar, addressed to Chantelle. The import of this email is a request by the Plaintiff of the Defendant's company registration documents, historical financial information and audited financials.

[6] Annexure "B" is an application for credit facilities with the Plaintiff, however. It refers to freight agreements and the interest rates payable. The Defendants allege that the aforesaid Annexure does not indicate whether this credit facility incorporate bridging finances and the applicable terms and conditions. The Defendants submit that the Particulars of Claim is vague and embarrassing and therefore they are unable to plead, thereby causing prejudice.

[7] Annexure "C" is a letter dated 20 March 2013 by the Plaintiff addressed to the First Defendant which indicates that its freight account with the Plaintiff was approved with a credit facility of R200, 000.00 terms are

strictly 30 days from end statement. Further its bridge finance account was approved with a credit facility of R1 800,000.00 and the terms are strictly a maximum finance term of 90 days after payment date to supplier. Annexure "E" is a letter by the Plaintiff addressed on the same date to Second Defendant which confirms approval of the freight credit facility and the bridge finance credit facility in the amount of R200, 000.000 and R1 800,000.00 respectively.

[8] Annexure "F" and "G" issued on 20 August 2013 signed by Bertu Pienaar on behalf of the Plaintiff addressed to the Defendants respectively in essence increases the interest rate payable from 4% to 5.5% in respect of the bridge finance account. The Defendants aver that the aforesaid Annexures are invalid and wanting in that they were not signed by the director of the Plaintiff and the Defendants.

[9] At the commencement of the hearing Counsel for the Defendants informed the court that the Defendants are abandoning their contention that the agreement allegedly entered into between the Plaintiff and Defendants are unlawful as they contravene Section 89 of National Credit Act in that the Plaintiff was not registered as a credit provider.

[10] The Defendants contend that the Plaintiff's letter dated 20 August 2013, is repugnant to the non-variation clause (clause 33) referred to in

Annexure "B" and "D" and "E" attached to the Plaintiff's Particulars of Claim collectively regarded as written portion of the agreement. It was submitted on behalf of the Defendant's that the aforesaid clause prescribes that the variation must be in writing and signed by both parties.

[11] Counsel for the Defendant in argument relied on the ***Shalk v Others and Pillay 2008 (3) SA 59(N)*** judgment. In that case the court said reference to a written contract by the parties intends the document to be the very agreement between the parties then that document must be signed.

I am of the view that reliance on Shalk's case is a case on point. There is merit in this submission.

[12] It was contended on behalf of the Plaintiff that it did not plead a written contract. In its Particulars of Claim the Plaintiff avers the conclusion of the material terms and conditions concluded with the Defendant's on 20 March 2013, as contained in the Annexures, namely:

[13] The Plaintiff in its particulars avers that the material terms and conditions are as follows:

12.1 The Plaintiff is to render freight forwarding services to the Defendants respectively as set out in the terms and conditions of the respective credit applications.

12.2 The Defendant's freight account is payable 30 days from month end statement, falling which the Defendants agreed to pay interest on the overdue amount at the prime interest plus 2% per month.

12.3 The Plaintiff is to provide bridging finance to the Defendants respectively.

12.4 The plaintiff should provide bridging finance by disbursing monies on behalf of the Defendants to the Defendant's creditors in order to enable the Defendants to import land and release goods in South Africa.

12.5 The Plaintiff is further to provide bridging finance at an interest rate at 4% per month or a part thereof and the goods forming the subject matter thereof would be warehoused at the Plaintiff Rosslyn warehouse and would only be released once payment was made to the plaintiff.

12.6 All the costs and disbursement, including legal costs on an attorney and client scale incurred by the Plaintiff in exercising its rights in terms of the agreements would be payable by the Defendants to the Plaintiff on demand.

[14] Counsel for the Plaintiff submits that the Plaintiff has every fact in this regard which would be necessary to prove, if traversed in order to support its right to judgment of the court.

[15] In deciding this matter, I rely in the case of ***Trope v South African Reserve Bank and Another 1992 (2) SA 208 T.*** in this case Mccreath J :

i. Stated that the test is whether the pleading complies with the general rule enunciated in Rule 18.4, i.e. every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading as the case maybe, with sufficient particularity to enable the opposite party to reply thereto.

ii. An exception to a pleading on the ground that it is vague and embarrassing involves a twofold consideration. The first is whether the pleading is vague. The second is whether the vagueness causes embarrassment in the sense that the excipient is prejudiced.

iii. As to whether there is prejudice, the learned Judge adopted the remarks of Conradie J in ***Levitan v Newhaven Holiday Enterprises 1991(2) SA 297 (CPD)*** at 298 G-H that whether the excipient can produce an exception, proof-plea is not the only test nor the most important test. If that were, then the object of pleading which is to enable parties to come to trial prepared to meet the other party's case and not be taken by surprise would be defeated.

iv. If the pleading leaves one guessing as to its actual meaning, it is vague and embarrassing.

[16] As regard the contention by the Defendant that the amendments of the agreement referred to in Annexure "B" and "D" which are not signed and consequently do not constitute written contract, Counsel for the Plaintiff concedes that they are not written contract and are not averred to in the Particulars of Claim. It was submitted on behalf of the Plaintiff that the contents of Annnexures "B" and "D" are not entrenched in writing and are capable of an oral variation.

[17] This submission by counsel for the Plaintiff is without merit. The terms of the so called "partly written and partly oral amendments" of the two agreements ("the amendments") pleaded by the Plaintiff conflict with clause 33. There is ample authority that where such conflict arises, the pleading can be considered vague.It is evident from the Particulars of Claim that the Plaintiff seeks to rely on oral agreements whilst simultaneously referring to written portions. The question is: Are these stand-alone contracts separate from the written agreements? Is the Plaintiff alleging oral agreements which have some connection to the written agreements?

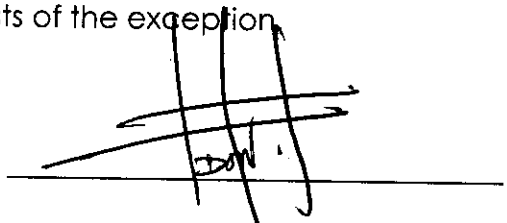
[18] It is my view that if the exceptions were not upheld, the Defendant would be prejudiced.

[19] In the circumstances I make the following order:

a. The exception is upheld.

b. The Plaintiff is given 15 days to amend the Particulars of Claim.

c. The Plaintiff is ordered to pay the costs of the exception.



T.D. VILAKAZI
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

FOR PLAINTIFF	:	C J BRESLER
INSTRUCTED BY	:	VAN ZYL LE ROUX IN
FOR DEFENDANT	:	E JANSE VAN RENSBURG
INSTRUCTED BY	:	KRUGER & OAKS ATTORNEYS
DATE HEARD	:	27 OCOTBER 2015