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

Case No: 50477/2015

REPORTABLE
OF INTEREST TO OTHER JUDGES
DATE: 26/8/2016

In the matter between:

Plaintiff/Applicant

RIGHT GOLD MACHINERY (PTY) LTD
(Registration No: 20..)

and

TSHOLOFETSO MINING SUPPLIERS (PTY) LTD 1st Defendant/1st Respondent

WIEKUS DU TOIT ATTORNEYS 2nd Defendant/2"d Respondent

JUDGMENT

HF JACOBS, AJ:

INTRODUCTION:

[1] The first and second excipients noted an exception against the plaintiff's particulars of claim on the basis that the particulars of claim fails to sustain a cause of action and that it is vague and embarrassing. The legal tie

between the plaintiff and the first defendant is a written contract in terms of which the first defendant secured from a company known as Lanxess Chrome Mining (Pty) Ltd ("Lanxess") the right to sell chrome waste material located in the vicinity of Rustenburg to the plaintiff at a price of R60.00 per ton (excluding VAT) and at a delivery charge of R31.50 per ton (excluding VAT). The plaintiff committed itself to purchasing specified quantities of the chrome waste material and payment thereof had to be made by the plaintiff in advance to the second defendant who is a practising attorney by depositing the purchase price of the chrome waste material into the second defendant's trust account whereupon payment would be made directly by the second defendant to Lanxess from the funds received from the plaintiff.

[2] Many of the grounds of exception stated by the excipients are stated *in the alternative* and some of the grounds of exception are repeated in later paragraphs under a separate ground of exception. Under some of the grounds of exception it is stated that the plaintiff's particulars of claim is *"nonsensical"* and *"does not make linguistic sense".* Instead of dealing with each of the eleven grounds of exception separately I intend referring to the four claims formulated by the plaintiff in its particulars of claim (Claims A, B, C and D) and by measuring those claims against the complaints distilled from the eleven grounds of exception.

[3] The plaintiff's particulars of claim comprise Claim A (based on misrepresentation against the first defendant only) and Claim B which is an *alternative* to Claim A (also against the first defendant only but based on a

claim for breach of warranty). Claim C is a claim against the first defendant for breach of contract. Claim D is a claim against the second defendant only and instituted as an *alternative* claim to Claim D.

THE LEGAL PRINCIPLES: EXCEPTIONS

[4] An exception that a pleading is vague and embarrassing is a challenge of the whole cause of action and not only the particular paragraph or part of the pleading. An exception that the pleading is vague and embarrassing strikes at the formulation of the pleading and not at the legal validity thereof.[1] It is for an excipient to convince the court that he or she will be seriously prejudiced if the offending allegations are not struck from the pleading. An exception taken on this ground is decided by applying the test conveniently summarised in *Erasmus*[2] which include the following:

> [4.1J The first step is to consider whether the pleading lacks particularity to such an extent that it can be said that it is vague in the sense that it is meaningless or capable of more than one meaning or, put differently, leave the reader unable to distil therefrom a clear, single meaning;
>
> [4.2] If there is found to be vagueness in the sense aforementioned then the court is obliged to undertake a quantitative analysis of the

[1] Trope v South African Reserve Bank 1993 (3) SA 264 (A) at 269.
[2] Erasmus, Superior Court Practice (2"" Ed) p D1-303.

embarrassment relied upon by an excipient caused by the vagueness found to exist. In each case an *ad hoc* ruling must be made by the court as to whether the embarrassment is of such a serious nature to cause prejudice to the excipient if he or she is compelled to plead to the pleading in the form it exists.

[4.3] The ultimate test in this context is whether the excipient is prejudiced.

[4.4] The onus to convince a court is on the excipient to show both the vagueness and the embarrassment and the prejudice resulting therefrom and the alleged embarrassment of the excipient must be assessed by reference to the pleadings alone.

[5] During a challenge of a pleading at exception stage on the ground that the pleading does not sustain a cause of action an excipient has the onus to persuade the court that upon every possible interpretation the pleading in question and the document on which its claim is based can reasonably bear no cause of action (or defence) is disclosed.[3] A *"cause of action"* in this context means "... *every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of*

[3] Theunissen v Transvaa/se Lewende Hawe Koop Beperk 1988 (2) SA 493 (A).

the court. It does not comprise every piece of evidence which is necessary to prove its fact, but every fact which is necessary to prove".[4]

[6] At exception stage a court should, in the event of uncertainty existing about the meaning of the contract or of its terms, be slow to decide questions concerning the interpretation of a contract.[5] When an exception is based upon the interpretation of a contract an excipient must show that the contract is unambiguous. [6] A court's reluctance to decide upon questions concerning the interpretation of a contract applies only where its meaning is uncertain.[7] Those circumstances are, first, where the entire contract is not before the court; and secondly where it appears from the contract or the pleadings that *"there may be admissible evidence which, if placed before the court, could influence the court's decision* as *to the meaning of the contract, provided that this possibility is something more than* a *notional or remote one."* [8] Judgments such as *Vreulink* [9] should be interpreted subject to the principles applicable to interpretation of written instruments set out in *Endumeni.* [10] Difficulty in interpreting a document does not necessarily imply

[4] McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16 at 23.
[5] Sun Packaging (Ply) Ltd v Vreulink 1996 (4) SA 176 (A) at 184-187.
[6] Michael v Caroline's Frozen Yoghurt Parlour (Ply) Ltd 1999 (1) SA 624 (W).
[7] Dettmann v Goldfain & Another 1975 (3) SA 385 (A) at 400A.
[8] Picbel Groep Voorsorgfonds (in liquidation) v Somerville, and related matters 2013 (5) SA 496 SCA at [39].
[9] See footnote 5 supra.
[10] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA).

that it is ambiguous. [11] Contracts are not considered uncertain because parties thereto disagree as to their meaning.

[7] Much of the defendants' complaint against the particulars of claim turn on the interpretation and general import of clause 6 of the written agreement. Clause 6 of the contract reads as follows:

> *"6.* ***Material quality***
>
> *Although the expected quality of the Product ranges from 11% to 25% Cr203, the Right Gold agrees to purchase the material voetstoots (as is)."*

[8] In its particulars of claim the plaintiff contends for specific interpretation of the contract (clause 6 thereof in particular). The interpretation the plaintiff alleges appears from paragraph 5.11 and 7 of the particulars of claim. Clause 6 commences with the conjunction *"Although".* It might be, as part of a coordinating conjunction used in English, to connect two equally important sentences, clauses, phrases or other words. A conjunction might also be used as a sub-coordinating conjunction intended to link a main clause of a sentence to a subordinate one (a subordinate clause does not mean anything on its own – it needs a main clause to complete the meaning). Applying that basic rule of English grammar and syntax as I am obliged to do on authority of *Endumeni,*[12] one must conclude that clause 6 has interpretational difficulties. The contract contains no clause defining

[11] Standard Building Society v Cartoulis 1939 AD 510 at 516.
[12] See footnote 10 above.

specific words. Clause 1.1.1 seems to refer to *"the chrome waste material"* as (the *"Material")* and reference is also made in the contract to *"waste material"* and to *"Product".* The inconsistency in words used in the contract does not contribute to its interpretation and also not to the interpretation of clause 6. What clause 6 of the contract does not record is what its meaning (and that of the *voetstoots* provision) would be if the *"quality of the Product"* ranges below 11%. That immediately begs the question namely, would that clause (and its *voetstoots* provision) apply to *"Product"* with a quality or content below 11%? I find myself unable to resolve this aspect in the manner required and have to conclude that the contract and, in particular clause 6 thereof, is ambiguous and should only be interpreted by having regard to its admissible context *"in the light of the document as a whole and the circumstances attended upon its coming into existence"* ... *"its apparent purpose"* and *"the material known to those responsible for its production",* viewed objectively and performed as one unitary exercise.[13] Under the circumstances that part of the exception turning on an interpretation of the written contract and clause 6 thereof in particular should be deferred for adjudication by the Trial Court. I will however proceed to deal with the other complaints to the pleading.

[9] Some of the grounds of exception are based on the submission that the presence of a non-variation clause in a contract has the result of excluding any evidence in support of tacit or implied terms, evidence relevant

[13] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18] - [20].

as admissible context and to exclude any evidence of misrepresentations. These contentions are without substance and cannot be upheld.

THE PARTICULARS OF CLAIM: THE INTRODUCTORY PARAGRAPHS 4 - 8:

[10] After citation of the parties the particulars of claim[14] contain the following averments as part of the introductory paragraphs before the rubric under which Claim A is pleaded. In the introductory paragraphs of the pleading the written agreement is alleged, its terms and the names of the individuals who represented the parties at its conclusion. At the end of every averment in subparagraphs 5.1 to 5.16 where the material express, implied or tacit terms of the agreement are alleged the applicable clause of the written agreement pleaded in paragraph 4 is referred to. Each of the averments tally with the clause in colocation. Paragraphs 4 – 8 read as follows:

> ***"4.*** *On or about 25 February 2015, and at Rustenburg, alternatively Nigel, the Plaintiff (duly represented by Mr Justin de Villiers) and the First Defendant (duly represented by Mr Jaco de Jager) entered into* a *written agreement,* a *copy whereof is annexure* ***'PoC1"*** *hereto ('the agreement').*
>
> 5. *The material express, implied or tacit terms of the agreement were* as *follows:*

[14] Paragraphs 4 - 8.

5.1 *the First Defendant undertook to secure chrome waste material ('material') from* a *company styled Lanxess Chrome Mining (Pty) Limited ('Lanxess') in accordance with the agreement, to sell the material to the Plaintiff, to procure the loading of the material onto transport and to deliver the material to the Plaintiff (clause 1.1);*

5.2 *the First Defendant warranted that the premises on which the material was to be collected was owned and/or controlled by* a *supplier who was contractually bound to make available the material, following the receipt of payment by the First Defendant from the Plaintiff (clause 3. 1);*

5.3 *the First Defendant further warranted that it had concluded an agreement with* a *supplier and/or its agents, entitling the First Defendant to procure the material for delivery to the Plaintiff and to access and use the premises for the duration of the agreement for the purposes contemplated therein, including other related activities (clause 3.2);*

5.4 *the parties agreed to* a *purchase price of R60 per tonne (excluding VAT) for the material, and further agreed to* a *price for the delivery of the material to* a *location specified by the Plaintiff at R31,50 per tonne (excluding VAT) (clause 4.1);*

5.5 *the Plaintiff would secure its supply by making an advance payment, equal to the value of the material which it wishes to acquire, into the trust account of the*

Second Defendant, particulars of which were provided in the agreement (clause 4.2);

5.6 *the First Defendant undertook to provide an invoice to the Plaintiff for the amount of material ordered (clause 4.3);*

5.7 *upon receipt of written confirmation from the Second Defendant that sufficient funds are held on its trust account for payment of the volume of material to be loaded, the First Defendant would provide the Plaintiff with* a *document authorising collection of the material reflected on the invoice (clause* ***4.4);***

5.8 *payment for the material would be made directly to Lanxess by the Second Defendant from the funds received from the Plaintiff (clause 4.5);*

5.9 *the Plaintiff committed itself to purchasing the following quantities of material:*

5.9.1 *for the month of March 2015: 15 000 tonnes, which would be acquired in four separate weekly transactions of 3 750 tonnes each, delivery of the material by the First Defendant to commence on 9 March 2015;*

5.9.2 *for the period April to June 2015: between 15 000 and 25 000 tonnes, which would be acquired in four separate weekly transactions of 3 750 to 6 250 tonnes each;*

5.9.3 *from July 2015, and until 1 million tonnes of material had been delivered: 50 000 to* 75 *000 tonnes, which would be acquired in four separate weekly transactions of 12 500 to 18 715 tonnes each (clause 4.6);*

5.10 *it was recorded that the invoices on which payment would be based for the quantity of the material collected relied on an estimation provided by the supplier to the First Defendant. Therefore:*

5.10.1 *all material loaded onto the Plaintiff's vehicles would be weighed on both the Plaintiff's and the First Defendant's weigh bridges;*

5.10.2 a *representative of the Plaintiff would sign* a *delivery/collection voucher, setting out the weight of the material and the date of collection;*

5.10.3 *save for manifest errors, the signed delivery/ collection vouchers would constitute prima facie proof of the weight of the material supplied;*

5.10.4 *the Plaintiff would deliver* a *tally of weigh bridge receipts to the Defendant on Friday of each week;*

5.10.5 *the difference between the quantity of material invoiced for and the quantity collected, if any,*

would be adjusted accordingly to reflect the debit or credit in the following week's invoice (clause 5);

5.11 *although the expected quality of material was recorded to range from 11% to* 25% *chromium (Ill) oxide ($CR_20_{3)}$ content, the Plaintiff agreed to purchase the material 'voetstoots (as is)' (clause 6);*

5.12 *in the event that either party to the agreement breached any provisions of the agreement, the other of them ('the aggrieved party)* was *entitled to give the defaulting party seven days' written notice (or such longer period of time* as *the aggrieved party may specify in the notice) to remedy the breach. If the defaulting party failed to comply with the notice, the aggrieved party was entitled to:*

5.12.1 *claim immediate payment and/or performance by the defaulting party of all the defaulting party's obligations that are due for performance; or*

5.12.2 *cancel the agreement upon written notice to the defaulting party where the breach constitutes* a *material breach;*

in either event, without prejudice to the aggrieved party's right to claim damages or to exercise any other rights that the aggrieved party may have under the agreement or in law;

5.13 *any cancellation would be without prejudice to any claim that* a *party may have in respect of any breach of the terms and conditions of the agreement by the other party arising prior to the date of cancellation (clause 7.3);*

5.14 notwithstanding any of the terms agreed upon in the agreement, either party would be entitled to cancel the agreement by giving one month's written notification;

5.15 *the parties undertook to do everything reasonable in their power necessary for, or incidental to, the effectiveness and performance of the agreement (clause 8.4);*

5.16 *the parties unconditionally consented and submitted to the non-exclusive jurisdiction of the above Honourable Court in regard to all matters arising from the agreement (clause 11).*

6. It was a *tacit or implied term of the agreement, alternatively it was at all relevant times agreed and understood by the Plaintiff and the First Defendant, and the agreement was entered into between them on the basis and common understanding and assumption that:*

6.1 1 the Plaintiff purchased the material for the purpose of producing a *chromium (Ill) concentrate, in order to enhance the chromium (Ill) oxide content thereof,·*

6.2 the material would therefore at least have to contain 11% chromium (III) oxide to render it financially viable for the Plaintiff to produce a chromium (III) concentrate.

7. Upon a proper construction of clause 6 of the agreement (paragraph 5.11 above), whilst both parties intended a sale and purchase of material containing generally between 11% and 25% chromium (III) oxide, the Plaintiff was prepared to accept material even if it did not strictly fall within the said range, provided that the material was still generally fit for the purpose for which it was purchased and intended, namely as set out in paragraph 6 above.

8. Upon a proper construction of clause 4.2 of the agreement (paragraph 5.5 above), the advance payment to be made by the Plaintiff to secure its supply would equate to the value of the material which the Plaintiff wished to acquire during a particular month, as set out in clause 4.6 of the agreement (paragraph 5.9 above)."

(11] I find nothing vague about the quoted paragraphs. They do not comprise a cause of action (or claim) on their own and have to be read with the balance of the allegations of the particulars of claim.

(12] The introductory paragraphs are followed by Claim A of which the rubric indicates to the reader that it is a claim against the first defendant and suggests that what follows refer to a misrepresentation. The paragraphs read as follows:

" ***CLAIM A : Against the First Defendant: Misrepresentation***

9. *At all relevant times prior to and during the negotiation and conclusion of the agreement, the First Defendant (represented by Mr Jaco de Jager and/or Mr Nardus van den Berg) represented to the Plaintiff (represented by Mr Francesco lndiveri, Mr Guo Yu Min and/or Mr Vernon Newman) orally and/or in writing that:*

9.1 1 the material to be loaded for delivery to the Plaintiff would be taken from the waste dumps on the Lanxess site which were reasonably expected to contain a chromium (Ill) oxide content of between 11% and 25%;

9.2 the First Defendant was entitled to freely access and use the premises of Lanxess, inter alia to select those dumps on the Lanxess premises from which material which could reasonably be expected to contain between 11% and 25% chromium (Ill) oxide would be loaded for delivery to the Plaintiff;

9.3 Lanxess was directly or indirectly contractually bound to make material available to the First Defendant which could reasonably be expected to contain between 11% and 25% chromium (Ill) oxide.

10. *The written parts of the representations are contained in the following documents:*

10.1 *an 'exclusive off-take agreement' concluded between* a *company styled Aamtude (Pty) Limited and the First Defendant dated 5 February 2015 (which was exhibited to the Plaintiff) in which the material to be sourced from the Lanxess site was described* as *'chrome waste material containing LG6 and LGs (lower group) chrome ore typically ranging from* a *CR_20_3 content of 11% to 25%'. A copy of the said agreement is annexure **'PoC2'** hereto;*

10.2 a *further 'exclusivity off-take agreement' concluded between* a *company styled Idada Mining and Civil Construction, Aamtude (Pfy) Limited and the First Defendant dated 5 December 2014 (which was similarly exhibited to the Plaintiff) in which the material was described in similar terms. A copy of the said agreement is annexure **'PoC3'** hereto;*

10.3 *an email from the First Defendant represented by Mr De Jager (a copy whereof is annexure **'PoC4'** hereto) dated 10 February 2015, in which he inter a/ia advised the Second Defendant, whilst copying the Plaintiff:*

10.3.1 *with reference to testing of the material that had allegedly been done, that if the material constantly contained more than 25% chromium (III) oxide, the price for the material would have to be increased;*

10.3.2 *that Lanxess had agreed that the First Defendant could use its roads and weigh*

bridges whilst the First Defendant established itself on site;

10.3.3 that the First Defendant had already paid Lanxess for the material.

11. The said representations were however false, in that:

11.1 the waste dumps on the Lanxess site which were designated to the First Defendant, from which material would be loaded for delivery to the Plaintiff, contained an insignificant percentage of chromium (III) oxide (not even approximating 11%) being substantially below the percentage required in order to render it financially viable for the Plaintiff to produce a chromium (III) concentrate;

11.2 the First Defendant was not entitled to freely access and use the premises of Lanxess, in that the First Defendant was designated particular dumps on the Lanxess premises which contained such insignificant percentage of chromium (III) oxide content as described in paragraph 11.1 above;

11.3 Lanxess was not, either directly or indirectly, contractually bound to make material available to the First Defendant which could reasonably be expected to contain between 11% and 25% chromium (III) oxide;

11.4 accordingly, to the knowledge of the First Defendant, the material which would be supplied to the Plaintiff were to be taken from waste dumps on the Lanxess site which:

11.4.1 was not generally expected to contain a *sufficient percentage of chromium (III) oxide to render it financially viable for the Plaintiff to produce* a *chromium (III) concentrate;*

11.4.2 comprised of material which was completely unsuitable for the Plaintiff's purposes, namely to produce a *chromium (III) concentrate.*

12. The First Defendant, represented as aforesaid, made the said misrepresentations intentionally, whilst being aware of the falsity thereof, alternativel y negligently.

13. The said representations were material, and were intended to induce the Plaintiff to enter into the agreement. The said representations did, in fact, induce the conclusion of the agreement.

14. As a *result of the First Defendant's misrepresentations, the Plaintiff has cancelled the agreement, alternatively cancels the same herewith.*

15. As a *further result of the said misrepresentations, the Plaintiff has suffered damages, calculated as set out in paragraph 28 below."*

[13] Paragraph 9 sets out the names of who allegedly represented the parties during negotiations preceding the conclusion of the written contract and those the plaintiff alleges made certain representations to it and that the representations were made orally and in writing. Subparagraphs 9.1 to 9.3 record the misrepresentations followed by paragraph 10 which records where the plaintiff alleges the written representations are contained.

[14] In paragraphs 12 and 13 of the pleading the plaintiff informs its adversary of its intention to rely at trial on an intentional misrepresentation *alternatively,* a negligent one and that the misrepresentation induced the plaintiff to conclude the contract. The defendants' challenge of Claim **A is** based on the *"voetstoots clause"* contained in clause 6 of the written contract to which I have referred above on two grounds namely (1) that the plaintiff failed to allege fraud or conduct *dolo malo* on the part of the first defendant and (2) that the *voetstoots* clause protect the first defendant from any negligent misrepresentation on authority of Meads.[15] The first ground of objection can be dealt with as follows: In civil law context and in particular in the law of contract misrepresentation can take place innocently, negligently and intentionally {fraudulently). The averments in paragraphs 12 and 13 of the pleading, in my view, indicate with the required measure of clarity that it is the plaintiff's case that those who represented the first defendant acted fraudulently (with the required intention *"whilst being aware of the falsity"* of the misrepresentations). In my opinion there can be no doubt in the mind of

[15] Van der Merwe v Meads 1991 (2) SA 1 (A).

the reader of Claim A that the plaintiff intends relying on a fraudulent misrepresentation which would, if proven at trial, deny the first defendant immunity that might be afforded by the *voetstoots* clause. The complaint against the negligent misrepresentation should at exception stage, be judged as follows: the *voetstoots* clause is not altogether clear and certainly not exemplary and in my view capable of more than one possible interpretation. I have mentioned its grammatical shortcomings. Clause 6 may be interpreted by the trial Judge, as suggested by the defendants, that it is a *voetstoots* clause protecting the first defendant from all possible non-fraudulent misrepresentations (including negligent misrepresentation). However, the clause may also be capable of another interpretation limiting its effect and import to waste material of which the chromium (Ill} content did not dwindle below the 11% - 25% window stipulated by the written contract. It may, therefore, be held by the trial Judge that the *voetstoots* clause did not apply in respect of material with chromium (Ill) content below 11% in which event the first defendant might be held liable for the negligent misrepresentation alleged by the plaintiff as an alternative to the intentional misrepresentation referred to earlier. I am not convinced that clause 6 (and therefore the contract) is unambiguous. [16] That aspect of the dispute should, as mentioned above, at best for the defendants, be deferred for adjudication by the trial Judge.

[16] See paragraphs [5] and [6] above.

[15] The defendants complain that paragraph 6 – 21 of the particulars of claim are at variance with the written contract and further that the terms pleaded by the plaintiff in those paragraphs are alleged to exist *"in addition"* to what is contained in the contract. Paragraph 6 of the particulars of claim contains the firm allegation that the terms pleaded there are *"tacit or implied terms"* of the contract. An implied term arises by operation of law whilst the tacit term is an unexpressed provision of the contract, derived from the common intention of the parties which is inferred from the express terms of the contract and from the surrounding circumstances. [17] At the exception stage the test is whether the tacit term could reasonably be implied.[18] The question, therefore, is at this stage of the proceedings whether the implied and tacit terms relied on by the plaintiff can *"reasonably be implied".* In my view they can.

[16] There is nothing that, objectively speaking, exclude that possibility. In my opinion the complaint against Claim A cannot be upheld.

[17] Claim B is formulated as follows:

"Alternativel y to Claim A:

Claim B : Against the First Defendant : Breach of Warranty

[17] Alfred McA/pine & Son (Ply) Ltd v Transvaal Provincial Administration 1977 (4) SA 310 (T).
[18] Lanificio Varam SA v Masure/ Fils (Ply) Ltd 1952 (40 SA 655 (A) at 660; Pete's Warehousing and Sale CC v Bowsink Investments CC 2000 (3) SA 833 (E).

16. *The First Defendant furnished the warranties in the agreement as set out in paragraphs 5.2 and 5.3 above.*

17. *The said warranties were, however, false and without substance, for reasons set out in paragraphs 11.1 to 11.4 above.*

18. *The Plaintiff entered into the agreement on the strength and basis of the said warranties having been furnished by the First Defendant. Had the First Defendant not furnished the said warranties, the Plaintiff would not have entered into the agreement with it.*

19. *As* a *direct result of the said warranties being false and without substance:*

    19.1 *the First Defendant and/or its supplier was only allowed by Lanxess to take material from those waste dumps which:*

        19.1.1 *did not contain* a *sufficient percentage of chromium (III) oxide to render it financially viable for the Plaintiff to produce* a *chromium (III) concentrate;*

        19.1.2 *comprised material which was completely unsuitable for the Plaintiff's purposes;*

    19.2 *Lanxess was not contractually bound to the First Defendant's supplier to make available material from waste dumps which contained* a *sufficient percentage*

of chromium (III) oxide, nor had the First Defendant concluded an agreement with a *supplier or its agents, entitling the First Defendant to procure such material for delivery to the Plaintiff;*

19.3 *the First Defendant did not have* access *to, or the use of, Lanxess' premises for the duration of the agreement for the purposes contemplated therein, nor for other related activities,* as a *result whereof it was precluded from:*

19.3.1 *establishing itself on the Lanxess site or having proper* access *thereto by means of* a *road;*

19.3.2 *exercising any control over the selection of the waste dumps from which the material would be taken for delivery to the Plaintiff.*

20. *As* a *further result of the said warranties having been breached, and being false and without substance, the Plaintiff has cancelled the agreement, alternativel y cancels* same *herewith.*

21. *As* a *further result of the warranties having been thus breached, the Plaintiff has suffered damages, calculated* as *set out more fully in paragraph 28 below."*

[18] Claim B is that the first defendant warranted certain contractual rights it acquired from Lanxess to exist. It alleges that those contractual rights, which had been guaranteed, did not exist and that its non-existence

constitutes a breach of the warranties under discussion. At exception stage the factual averments must be assumed as correct. The breach pleaded constitutes a claim for breach of warranty and the complaints against it cannot be upheld.

[19] Claim C is formulated as follows:

> ***"CLAIM C. Against the First Defendant : Breach of Contract***
>
> *In the event of it being found that a valid agreement had been entered into, and further that such agreement had not been validly cancelled (which is denied), the Plaintiff avers as set out herein below.*
>
> *22. In anticipation of the conclusion of the agreement, the First Defendant rendered an invoice to the Plaintiff on 17 February 2015 for payment in advance of the sum of Rt 026 000 (VAT inclusive), being in respect of the first 15 000 tonnes of material for the month of March 2015, which was to be delivered to the Plaintiff as from the beginning of March 2015.*
>
> *23. The Plaintiff paid the amount of the said invoice in full on 26 February 2015, by making payment thereof into the trust account of the Second Defendant.*
>
> *24. Subsequent to the conclusion of the agreement on 25 February 2015:*

24.1 1 the Plaintiff further paid (in addition to the abovementioned payment of R1 026 000) the following sums in respect of the removal and delivery costs for the material:

24.1.1 on 20 March 2015, a *payment of R35 910, relating to the first 1 000 tonnes of material to be delivered;*

24.1.2 a *further payment in the amount of R31 318,08, which was paid on 21 April 2014, relating to the further approximately 1 000 tonnes of material to be delivered;*

24.2 the Second Defendant confirmed to the First Defendant and to the Plaintiff that he had received the said amount in his trust account, and that, therefore:

24.2.1 1 the First Defendant could proceed to issue the invoice for the purchase of the material by the Plaintiff; and

24.2.2 the First Defendant was authorised to collect the material, which was stated to take place as from 9 March 2015 onwards;

24.2.3 the material was available for collection, and that he would proceed to make payment of the amount owed directly to Lanxess;

24.3 *the(sic), however, failed to commence delivering the 15 000 tonnes of material from the beginning of March 2015, or from 9 March 2015;*

24.4 *despite the First Defendant having breached its obligations under the agreement, the Second Defendant nevertheless paid the amount of R1 026 000 from its trust account over to the First Defendant, alternatively to Lanxess or to* a *supplier on the First Defendant's behalf in order to secure the supply of material from the month of March 2015;*

24.5 *commencing from 9 April 2015 and during May 2015, the First Defendant delivered* a *total of 13 loads of waste, comprising approximately 260 to 390 tonnes, to the Plaintiff;*

24.6 *the First Defendant remained in default of delivery of 3 750 tonnes of material per week, or 15 000 tonnes of material for the month of March 2015, which it was obliged to deliver;*

24.7 7 *the waste that was delivered to the First Defendant did not comprise the material as contemplated in the agreement, in that it failed to contain between 11% and 25% chromium (III) oxide or any percentage even approximating 11%, nor did it have* a *chromium (III) oxide content which was suitable for the purpose for which it was purchased and intended, namely to produce* a *chromium (III) concentrate. In particular, samples of the waste which was received by the Plaintiff were tested and found only to contain* a

chromium (III) oxide content ranging between 5.11% and 5.95%;

24.8 *by reason of the wholly defective nature of the waste delivered to it, the Plaintiff refused to accept further deliveries thereof, and insisted on material of a proper quality to be delivered to it, as the Plaintiff was in the circumstances entitled to do;*

24.9 *on 13 May 2015, the First Defendant (represented by the Second Defendant) repudiated the agreement in writing by means of a letter (a copy of which is annexure **'PoC5'** hereto). In this letter:*

24.9.1 *the dates for delivery of the material, and the various tonnages as set out in the agreement, were in conflict with the express terms of the agreement;*

24.9.2 *the First Defendant demanded payment for the months of March, April and May 2015 (up to the date of the letter) of R3 420 000:*

24.9.2.1 *which, similarly, was in conflict with the terms of the agreement;*

24.9.2.2 *despite no material as contemplated in the agreement had been delivered to the Plaintiff, and a total of approximately 260 to 390 tonnes of valueless waste had*

been delivered during April and May 2015;

24.9.3 *the First Defendant falsely alleged that the Plaintiff had refused or neglected to remove the 'material';*

24.9.4 *the Plaintiff was granted seven days within which to pay the aforementioned amount of R3 420 000, coupled with* a *threat that, failing such payment, the Plaintiff would be liable for immediate payment and/or performance of all its obligations under the agreement, that the agreement might be cancelled and/or that damages might be claimed, in addition to which legal costs on the scale as between attorney and client and consequential damages would be claimed from the Plaintiff.*

25. *The First Defendant's conduct, as set out in paragraphs 24.3, 24.5, 24.6, 24.7 and 24.9 above constitute* a *repudiation of the agreement, alternativel y* a *material breach of the agreement, going to the root thereof.*

26. *The First Defendant, represented by the Second Defendant, further purported to cancel the agreement by means of* a *letter dated 28 May 2015,* a *copy whereof is annexure* ***'PoC6'*** *hereto. Whilst the said letter fails to constitute* a *valid cancellation of the agreement, it does constitute* a *repudiation thereof, which the Plaintiff became entitled to accept.*

*27. As a result of the First Defendant's aforesaid repudiation, alternatively breach, the Plaintiff cancelled the agreement by means of a letter dated 25 June 2015, (a copy of which is annexure **'PoC7'** hereto), alternatively cancels the same herewith, as it was and is entitled to do in the circumstances.*

28. As a further result of the First Defendant's said repudiation, alternatively breach, and the resultant cancellation thereof, the Plaintiff has suffered damages. The Plaintiff's damages, which were foreseeable and within the contemplation of the parties, comprise:

28.1 1 the amount of R1 026 000 which the Plaintiff paid to the First Defendant (by making payment thereof into the Second Defendant's trust account) in respect of material which was not delivered to it;

28.2 the amount of R35 910 which was paid on 20 March 2015 and the amount of R31 318,08 which was paid on 21 April 2015 in respect of the removal and delivery costs for material, which was wasted in that no material as contemplated in the agreement was delivered to the Plaintiff.

29. The Plaintiff is excused from tendering the return of the valueless waste which the First Defendant had delivered to it, by reason thereof that it has no value, and the costs of return would exceed any value which it might have."

[20] In paragraphs 23 to 24.3 – 24.9 of the particulars of claim the plaintiff alleges a repudiation of the written contract *alternatively* a material

breach thereof which justified cancellation. The breach alleged relate to failure to perform (by only delivering 420 tonnes) and by delivering *"material"* other than what was contemplated by the agreement. As I understand the first defendant's complaint in this regard it expected from the plaintiff to plead further grounds or particulars or breaches of the contract. Part of the breach was that no material was delivered at all during March 2015 and it was suggested on behalf of the first defendant that the balance of the material was not delivered because the plaintiff failed to instruct and/or nominate transport for the loading of the material. Those aspects can, in my view, not be raised at exception stage and should be raised in a plea at the appropriate time.

[21] A further complaint was that the plaintiff was obliged to give the first defendant notice to remedy its breach before lawful cancellation of the contract could take place. Clause 7 of the agreement provided that an aggrieved party *"may"* give notice to the defaulting party. The contract did not make notice a prerequisite for cancellation of the agreement. Notice was discretionary. In the event of anticipatory breach of a contract notice is not a requirement for cancellation based on repudiation. I am of the view that the first defendant's complaint in this regard cannot be upheld.

[22] Claim D is an *alternative* claim against the second defendant only. It reads as follows:

"Alternatively to Claim C above:

Claim D : Against the Second Defendant

30. *During the course of negotiations regarding the conclusion of the agreement, the Second Defendant, represented by Mr Leon Doyer, by means of an email dated 10 February 2015 (a copy of which is annexure **'PoCB'** hereto), informed the First Defendant and the Plaintiff that:*

30.1 1 the Plaintiff and the First Defendant were protected against the provisions of the agreement through the protection offered by the Second Defendant's trust account;

30.2 the Second Defendant would be involved in the agreement by monitoring compliance by the Plaintiff and the First Defendant with their respective contractual obligations;

30.3 payment by the Plaintiff would 'trigger activities on the part of the Supplier';

30.4 the Second Defendant would only release the funds paid into its trust account by the Plaintiff once the Second Defendant was satisfied that the First Defendant had met its obligations;

30.5 the Second Defendant (and not the First Defendant) would decide when payment was due to the First Defendant;

30.6 *the agreement accordingly contained 'built in checks and balances to mitigate the risk inherent herein'.*

31. *In the result, the Second Defendant* was *in the position of* a *stakeholder, who undertook to hold the funds paid by the Plaintiff in its trust account on behalf of both parties in terms of* a *tacit agreement concluded between the Plaintiff, the First Defendant and the Second Defendant ('the tacit agreement;.*

32. *In terms of the tacit agreement, the Second Defendant would:*

32.1 *1 receive the payments which were received from the Plaintiff in its trust account* as a *stakeholder;*

32.2 *monitor compliance by the Plaintiff and the First Defendant with their respective contractual obligations;*

32.3 *only release the funds paid into its trust account by the Plaintiff once the Second Defendant* was *satisfied that the First Defendant had met its contractual obligations, inter alia to supply material* as *contemplated in the agreement to the Plaintiff in the quantities and on the dates* as *provided for in the agreement.*

33. *In breach of its obligations under the tacit agreement, the Second Defendant paid all the moneys which it received from the Plaintiff prematurely over to the First Defendant (as*

set out in paragraphs 22, 23 and 24. t above, totalling Rt 093 228,08), in circumstances where the Second Defendant:

33. t had failed to monitor compliance by the First Defendant with its contractual obligations;

33.2 had no or insufficient reason to be satisfied that the First Defendant had met its contractual obligations, inter alia to supply material as contemplated in the agreement to the Plaintiff in the quantities and on the dates as provided for in the agreement.

34. As a *result of the Second Defendant's breach of the tacit agreement, the Plaintiff suffered damages in the total sum of Rt 093 228,08 by reason of the Second Defendant having paid the said moneys prematurely over to the First Defendant in circumstances where it should not have done so, and where it should have offered the Plaintiff protection against the mal-performance, or the defective performance, by the First Defendant of its contractual obligations.*

35. Had the Second Defendant complied with its obligations as stakeholder, the said amount would not have been paid over, but would have been retained in the trust account and ultimately returned to the Plaintiff by virtue of the First Defendant's breach, alternativel y repudiation of the agreement.

36. In the result, the Second Defendant is liable towards the Plaintiff for payment of the total amount of Rt 093 228,08, plus interest thereon a *tempore morae."*

[23] The written contract was only concluded between two parties. The second defendant featured in the contractual relationship as recipient of moneys due by the plaintiff to the first defendant (in advance). It is the plaintiff's case that on the facts alleged by it there came into existence a tacit contract between the plaintiff and the second defendant. For a plaintiff to plead a tacit contract it is necessary to allege unequivocal conduct that the parties intended to and did in fact contract on the terms alleged. Consensus must be alleged and proved and factual allegations are aimed at convincing a Court, objectively considered, that the conduct of both parties (in this instance the plaintiff and the second defendant) concluded an agreement. [19]

[24] The unequivocal conduct in this respect must be catalogued and circumstances from which the tacit contract is to be deduced must be pleaded.[20] The allegations made on behalf of the plaintiff in paragraph 30 of the particulars of claim adequately catalogue and allege unequivocal conduct and circumstances on which the trial Judge might find that a tacit contract exists. The terms of the alleged contract are further adequately set out in paragraph 32 of the particulars of claim and so is the breach of the tacit contract alleged with the necessary particularity in the last paragraphs of the pleading. In my view the exception is without any merit.

[19] Northern Estate and Trust Administrators (Pty) Ltd v Agricultural and Rural Development Corporation [2014] 1 All SA 655 SCA.
[20] Roberts Construction Co Ltd v Dominion Earthworks (Pty) Ltd 1968 (3) SA 255 (A).

[25] The exception is dismissed with costs.

H JAC BS
AC I JUDGE OF THE HIGH COURT
PRETORIA

Date: 26 August 2016