IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 4111/2014

Date Heard: 18 August 2016

Date Delivered: 27 September 2016

In the matter between:

ADEL FRESH FRUIT CC Applicant

And

PRODUCER ALLY (PTY) LTD Respondent

JUDGMENT

EKSTEEN J:

[1] The applicant (defendant) seeks leave to amend its plea to the respondent's (plaintiff's) Particulars of Claim in an action instituted by the respondent. The respondent opposes the application and has raised numerous objections to the proposed amendment.

[2] The respondent, which operates as freight forwarding agent, sued the applicant, an exporter of fresh fruit, for monies allegedly due owing and payable in respect of services rendered to the applicant during 2014 and for certain disbursements and expenses incurred on the applicant's behalf. The respondent's claim is based on a written contract comprised of an application for credit, which incorporated the respondent's standard terms and conditions of business, submitted by the applicant which was accepted by the respondent.

[3] The applicant entered an appearance to defend the action and duly filed a plea and a claim in reconvention. Both the plea and the claim in reconvention were met by an exception which was upheld (in both respects) by Goosen J on 11 November 2015. Goosen J granted the applicant leave to file a notice of intention to amend and a new claim in reconvention, if so advised. The applicant chose to file a notice of intention to amend its plea which now forms the subject of the present application.

Original pleadings

[4] It is necessary to record first the material portions of the original pleading to which exception was taken. The contract relied upon by the respondent is pleaded thus in paragraph 4, 5 and 6 of the respondent's Particulars of Claim:

> "4. On or about **22 February 2009** and at or near Johannesburg, the Defendant represented by Nadir Zaptia, submitted an application for credit facilities to the Plaintiff, which document incorporates the Plaintiff's Standard Terms and Conditions of business, a copy of which is annexed hereto marked Annexure **"POC2"**.
>
> 5. The Plaintiff subsequently accepted the application for credit facilities, and the parties accordingly agreed to conduct their business subject to such Standard Terms and Conditions of business of the Plaintiff (herein referred to as "the Standard Terms and Conditions").
>
> 6. The Standard Terms and Conditions included *inter alia* the following terms: …"

[5] In paragraph 6.1 to 6.9 of the respondent's Particulars of Claim the respondent sets out paraphrases of a number of the express terms contained in the standard terms and conditions, contained in annexure "POC2" to the Particulars of Claim, upon which reliance is placed for purposes of the action. I shall revert to these specific terms, to the extent necessary, later herein.

[6] The applicant originally pleaded as follows to paragraphs 4, 5 and 6 of the respondent's Particulars of Claim:

> 'AD PARAGRAPH 4
>
> 4.1 Insofar as annexure "POC2" constitutes a true and correct copy of the Application for Credit Facilities, the contents of this paragraph are admitted.
>
> 4.2 Save as aforesaid, each and every allegation contained in this paragraph is denied as if specifically traversed.
>
> 5. AD PARAGRAPH 5
>
> The contents of this paragraph are admitted.
>
> 6. AD PARAGRAPH 6 (6.1 to 6.9)
>
> 6.1 Insofar as the Plaintiff has correctly set out and/or described the Standard Terms and Conditions, the contents of these paragraphs are admitted.
>
> 6.2 Save as aforesaid, each and every allegation contained in these paragraphs is denied as if specifically traversed.'

[7] I pause to record that the application for credit annexed to the Particulars of Claim and to which reference is made in paragraph 4 of the Particulars of Claim is a

ten page document numbered consecutively as “1 of 10” to “10 of 10”. Pages 1 and 2 constitutes a pro forma application for credit which was completed under the hand of one Nadir Zaptia (Zaptia) who described himself as the “managing director” of applicant. The standard terms and conditions (herein referred to as “the Standard terms”) are printed on pages 3 to 10, however, each page of the ten page bundle bares the heading “credit application and standard terms and conditions” in large bold print. In the ultimate paragraph of page 2 of the document, immediately above the signature of Zaptia the document records:

> “… The customer acknowledges having read and understood the Standard Terms and Conditions in this document and agrees that such terms and conditions shall be valid and are deemed to be binding in respect of all transactions entered into between the customer and the company …”

[8] Each page of the ten page document also bares the handwritten initials “NZ” at the foot of the page.

[9] As recorded earlier the applicant also entered a claim in reconvention to which the respondent has successfully excepted. I think that the formulation of the original claim is nevertheless material to the respondent’s first objection (against the withdrawal of an admission). I shall revert later to the significance thereof. Suffice it for present purposes to record that the original claim in reconvention was founded on an alleged breach of contract. In paragraph 2 of the claim in reconvention the applicant pleaded the contract upon which reliance was placed for purposes of the claim in reconvention thus:

'2. During or about February 2009, the Plaintiff and Defendant entered into a written agreement, a copy of which is annexed hereto marked **"CC1"** ("the agreements").'

[10] It is common cause that annexure "CC1" was the self-same "application for credit and standard terms of conditions", comprised of ten pages which was annexed to the Particulars of Claim as annexure "POC2".

[11] Against this background the applicant filed its notice of intention to amend after the said exception had been upheld.

Proposed amendment to paragraph 5 of the applicant's plea

[12] In respect of paragraph 5 the applicant seeks to delete the express admission relating to the terms of the contract and to replace the entire paragraph 5 with the following:

'5.

5.1 Save for admitting that the Plaintiff accepted the application for credit facilities, the remaining contents of this paragraph are denied for the following reasons, *inter alia*:-

5.1.1 Prior to receipt of the application for credit facilities ("the credit application"), the Defendant had decided to try utilising the freight forwarding services offered by the Plaintiff;

5.1.2 In furtherance of this the Defendant sought and was given the credit application in blank format by the Plaintiff to complete and send back to the Plaintiff;

5.1.3 The Defendant's representative, being Nadir Zaptia ("Zaptia"), filled in the information sought by the Plaintiff on the credit application and submitted same to the Plaintiff;

5.1.4 Zaptia did not read pages 3 to 10 of the credit application and only read and completed pages 1 and 2 thereof which he believed to be relevant and material;

5.1.5 Zaptia did not comprehend or understand the contents of pages 3 to 10 which he believed to be irrelevant as he intended only to apply to the Plaintiff for credit facilities and in so doing to open an account for the Defendant;

5.1.6 The Plaintiff did nothing to alert Zaptia and/or the Defendant to the existence or alleged importance of the contents of pages 3 to 10 of the credit application;

5.1.7 As such, the Defendant pleads that no consensus was reached on the standard terms and conditions between the parties and the Plaintiff cannot enforce same against the Defendant;

5.1.8 Once advised that the Plaintiff had opened an account and extended credit facilities to the Defendant, trading relations commenced between the parties and endured until mid 2011;

5.1.9 At this time the Defendant became unhappy with the Plaintiff's lack of proper service and due to losses and reputational damage suffered by the Defendant in respect of its customers due to the Plaintiff's shortcomings, the Defendant stopped using the Plaintiff's services;

5.1.10 Approximately 3 to 4 years passed before the Defendant, during or about mid 2013, decided to try the Plaintiff's services once more;

5.1.11 The Defendant, represented again by Zaptia, approached the Plaintiff to quote on shipping a consignment of fresh produce which the Plaintiff did and the Defendant duly accepted;

5.1.12 Trading relations then commenced once more between the parties *de novo*;

5.1.13 At this point at or during about mid 2013 the Plaintiff did not ask the Defendant to sign a credit application;

5.1.14 Instead, in furtherance of its day to day business the Defendant obtained orders from its customers overseas in Europe and the Arab States for fresh produce to be sold to them;

5.1.15 The Defendant procured supplies of such fresh produce from suppliers in South Africa and when same was ready for despatch the Defendant contacted the Plaintiff to handle the forwarding and logistics of moving the fruit satisfactorily from the Defendant's supplier to its customer;

5.1.16 Prior to engaging the Plaintiff's services for any given consignment of produce the Defendant obtained a quotation from the Plaintiff for its charges in respect thereof;

5.1.17 If acceptable to the Defendant the Plaintiff provided its freight forwarding service and rendered an invoice followed by a monthly statement to the Defendant which the Defendant paid if the produce arrived satisfactorily within 30 days of statement;

5.1.18 It was an express, alternatively tacit alternatively implied term of the commercial relationship between the Plaintiff and the Defendant that should any consignment of fresh produce handled by the Plaintiff not arrive at its destination timeously or in satisfactory condition, the Defendant would not effect payment of the costs levied in shipping such container by the Plaintiff;

5.1.19 The commercial relationship between the Plaintiff and the Defendant proceeded on the above basis continuously from mid 2013 until late in 2014 when it broke down due once more to the Plaintiff's failure to provide a satisfactory service to the Defendant.

5.2 As such, the Defendant pleads that the standard terms and conditions, insofar as this Honourable Court might find that they were agreed to between the parties during 2009, such standard terms and conditions only governed dealings between the parties up until mid 2011 whereupon they ceased to be of any force and effect once the Defendant stopped utilising the Plaintiff's services.

5.3 The standard terms and conditions were novated and replaced by the aforesaid oral terms and conditions referred to in paragraph 5.1.15 to 5.1.18 above when the parties began dealing with each other once again after the lapse of a period fo approximately 3-4 years.'

First objection

[13] The respondent objects to the proposed amendment of the plea to paragraph 5 of the Particulars of Claim in that the applicant seeks to withdraw an admission already made. The respondent records that it does not consent to the withdrawal of the admission and accordingly objects to the proposed withdrawal which it contends is irregular. In the circumstances the applicant is required to apply on oath for the amendment. Whist the objection is directed at the entire paragraph 5, it strikes in essence at paragraph 5.1.1 to 5.1.7 only.

[14] The general approach to applications to amend was set out in **Whittaker v Roos; Morent v Roos** 1911 TPD 1092 at 1102-1103 where Wessels J remarked:

> "This court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the court is to do justice between the parties. It is not a game that we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when

> there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of a paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the court will not look to technicalities, but we'll see what the real position is between the parties."

(See also **South African Steel Equipment Co (Pty) Ltd & Ors v Lurelk (Pty) Ltd** 1951 (4) SA 167 (T); and **Zarug v Parvathie NO** 1962 (3) SA 872 (D) at 876H-877A.) It is apparent from the reasoning in these cases that amendments would generally be granted in order to ventilate the real issue between the parties.

[15] The present matter, however, involves the withdrawal of an admission explicitly made in the pleadings. An admission made in pleadings ordinarily operates to eliminate the admitted fact from the issues to be tried. Its effect is to bind the party making it and he or she is bound to the extent of its inevitable consequences or necessary implications unless these are specifically stated to be denied. (Compare for example *Beck's Theory and Principles of Pleading in Civil Actions* (6th ed) page 79.) The withdrawal of an admission therefore involves a change of stance on the part of the party seeking to amend, and in the present instance a very significant change of stance. It is for this reason that an amendment to a pleading involving the withdrawal of an admission is generally more difficult to achieve and therefore requires a full explanation to convince the court of the *bona fide*s of the party seeking the amendment. (Compare *Herbstein and Van Winsen: The Civil Practice of the High Court of South Africa* (5th ed) vol 1 page 683.) The Appellate Division of the

Supreme Court (now the Supreme Court of Appeal) explained the approach in **Bellairs v Hodnett and Another** 1978 (1) SA 1109 (A) at 1150F-G:

> "The Court's power, in its discretion to allow amendment of pleadings at any stage of the proceedings, even on appeal, is undoubted. … But, as it has frequently been stated, an amendment cannot be had merely for the asking. This is equally, if not especially, true of a proposed amendment which involves the withdrawal of an admission in such cases the Court will generally require to have before it a satisfactory explanation of the circumstances in which the admission was made and the reasons for now seeking to withdraw it."

(See also **Frenkel, Wise & Co Ltd v Cuthbert, Cuthbert v Frenkel, Wise & Co Ltd** 1946 CPD 735; **Jennings v Parag** 1955 (1) SA 290 (T); **Fleet Motors (Pty) Ltd v Epsom Motors (Pty) Ltd** 1960 (3) SA 401 (D); **Watersmeet (Pty) Ltd v De Kock** 1960 (4) SA 734 (E); **Zarug v Parvathie NO** *supra***; South British Insurance Co Ltd v Gibson** 1963 (1) SA 289 (D) at 293-294A and **JR Janisch (Pty) Ltd v WM Spilhaus and Co (WP)(Pty) Ltd** 1992 (1) SA 167 (C) at 170D-171H.) It seems to me therefore that where it is contended that the admission was made in error, which would usually be the case, the applicant will be required to make out a case, on affidavit, sufficient for the court to understand the circumstances that gave rise to the erroneous admission and the reason for now wanting to withdraw it so as to satisfy itself of the *bona fides* of the application.

[16] Prior to the filing of the notice of intention to amend it always was common cause that the parties contracted on the basis and in terms of the standard terms as set out in annexure "POC2" to the Particulars of Claim. That much was expressly

admitted in the original pleading and indeed the applicant itself relied upon a contract in those terms for purposes of the original claim in reconvention.

[17] At paragraph 23 of the founding papers Mahfud Zaptia (herein referred to as "Mahfud") who describes himself as the "managing member" of the applicant purports to explain the allegedly erroneous admission in paragraph 5 of the Particulars of Claim. He states:

> "23. This admission was regrettably a simple mistake on the part of the Defendant. It arose because the Defendant noted that the company had signed page 2 of the credit application document. Seeing this Defendant conceded that the Plaintiff had accepted the application for credit facilities."

[18] It is immediately apparent that Mahfud is somewhat coy in his explanation. The applicant is a close corporation. He does not take the court into his confidence as to who, on behalf of the applicant, is alleged to have made the concession or who made the simple mistake. It is, however, apparent, that the applicant's case in its founding papers is that it was the applicant who had made the mistake.

[19] In opposing the application for an amendment the respondent challenged the *bona fides* of the explanation and alluded *inter alia* to the counter claim instituted by the defendant reliant on the same contract. Faced with this challenge the applicant contends in reply that it was in fact not the applicant who had made the mistake, but its erstwhile attorneys who had done so in pleading the admission. Leaving aside the fact that the explanation in the replying papers is wholly destructive of the

explanation given in the founding affidavit, the applicant makes no attempt to explain the circumstances under which the error on the part of the attorneys occurred. Mahfud does not take the court into his confidence as to who instructed the applicant's erstwhile attorneys and what the instructions were so as to enable the court to understand how the error came about. In respect of the claim in reconvention Mahfud contends that neither Zaptia nor himself instructed their erstwhile attorneys to base the defendant's counter claim on the standard terms. The reasons as to why this occurred, he states, are within the knowledge of the applicant's previous attorneys. Again, no explanation is given as to who instructed the previous attorneys in respect of the claim in reconvention nor what the instructions to the attorneys were in respect of the claim in reconvention. No supporting affidavit from a representative of the erstwhile attorneys is attached and Mahfud declares that he has not sought to obtain an affidavit from them as the applicant is in dispute with its erstwhile attorneys in respect of various matters. If indeed the admission occurred due to a *bona fide* error or an innocent misunderstanding it is difficult to understand why Mahfud should assume, without more, that the applicant's erstwhile attorneys, who are officers of the court, would refuse to explain how the error occurred simply because they are in dispute about other matters.

[20] Rather than to explain the circumstances under which the admission came to be made Mahfud seeks to argue, with reference to the unamended pleadings that it is obvious that the applicant did not intend to admit that the standard terms and conditions became binding on the parties. The argument is set out in the founding affidavit thus:

‘24. The Defendant certainly did not intend to admit that all of the standard terms and conditions became binding upon the parties.

25. This is clear from paragraph 6 of the Defendant’s plea (as unamended) and in particular clause 6.2 where the Defendant specifically denies as if specifically traversed each and every allegation in paragraph 6. It needs to be noted that all of the allegations pleaded by the Plaintiff in paragraph 6 of its particulars of claim are those terms and conditions the Plaintiff has selected from the so-called “standard terms and conditions” it seeks to rely on. These terms and conditions are emphatically denied by the Defendant in the very next paragraph of its plea (as unamended). The contradiction is self-evident. All the Defendant is seeking to do with its amendment is resolve the contradiction and plead the true position.’

[21] Upon careful scrutiny of the explanation I think that the argument is spurious. It is necessary to consider the unambiguous import of the material portion of the unamended plea which I have set out earlier herein. In paragraph 5 of the unamended plea the applicant unequivocally admitted that the Plaintiff accepted the application for credit facilities, annexure “POC2” to the Particulars of Claim, and that the parties accordingly agreed to conduct their business subject to the standard terms.

[22] In paragraph 6 of the particulars of the plaintiff’s claim the plaintiff contends that the standard terms and conditions, which the applicant had admitted to be part of their agreement, “included *inter alia* the following terms”. In paragraphs 6.1 to 6.9, as Mahfud correctly points out, the respondent pleaded paraphrases of those terms and conditions contained in its standard terms as set out in annexure “POC2” to the Particulars of Claim. In response the applicant pleaded at paragraph 6.1:

> "Insofar as the Plaintiff has correctly set out and/or described the Standard Terms and Conditions, the contents of these paragraphs are admitted."

[23] The applicant accordingly expressly admitted that to the extent that the respondent's paraphrasing of the specific clauses referred to in paragraph 6.1 to 6.9 of the Particulars of Claim accord with the written formulation contained in the standard terms those clauses formed part of the contract which the applicant admitted in paragraph 5 of its plea. The denial contained in paragraph 6.2 strikes only at the extent to which the paraphrasing of the clauses set out in paragraph 6.1 to 6.9 of the Particulars of Claim may differ in their meaning from the actual wording utilised in annexure "POC2". The contention by Mahfud that the terms and conditions set out in paragraph 6.1 to 6.9 of the Particulars of Claim were emphatically denied in the original plea is simply fallacious. In my view the admission contained in paragraph 6.1 of the applicant's plea makes it abundantly clear that it was indeed the applicant's intention to admit that these clauses formed part of the contract which it had admitted in paragraph 5 of its plea.

[24] In the replying affidavit Mahfud sets out a further explanation for the error. He states:

> '9. The Defendant's explanation for the mistake is by no means illogical. All that the Defendant admits is having signed page 2 of the credit application document. The act of signing one page does not magically create a meeting of the minds on the fine print contained in some 48 paragraphs enshrined in a separate document entitled "Standard Terms and Conditions".

10. It will be noted at the top of page 3 of annexure "POC2" that the heading "*Credit Application and Standard Terms and Conditions*" appears.

11. Pages 1 and 2 consist of the credit application. That is what the Defendant admits having signed. The Defendant wanted to apply for credit, nothing more.

12. There is then an entirely separate document entitled "Standard Terms and Conditions". The terms of that document are contained in pages 3 to 10. Importantly there is a place for the name and signature at the top of page 3 of the party who submits itself and agrees to be bound by the standard terms and conditions. There is no such name or signature on page 3 of the standard terms and conditions. The absence of a signature on the standard terms and conditions themselves (as opposed to the separate credit application) demonstrates categorically that the Defendant did not agree to the standard terms and conditions and its unfortunate admission of having done so in paragraph 5 of the unamended plea is nothing more than a simple mistake.'

[25] Again I think that the explanation is spurious. I have set out earlier herein the description of the ten page document headed "credit application and standard terms and conditions". It clearly is not a separate document. Mahfud is correct in his assertion that page 3 of annexure "POC2" bares the heading "credit application and standard terms and conditions". What he does not, however, acknowledge is that the remaining nine pages also bare such heading in large bold letters. Mahfud is also correct that on page 3 of the document there is provision for a name and signature which is uncompleted. It does not, in my view, however, follow that the absence of a signature on page 3 categorically demonstrates that the defendant did not agree to the standard terms and conditions. On the contrary, the proposed amendment proceeds on the express allegation at paragraph 5.1.4, which is set out earlier herein, that Zaptia in fact read and completed pages 1 and 2 of annexure

"POC2" prior to signing the application for credit. As recorded earlier herein he acknowledged on page 2, which, on the case which the applicant now seeks to advance, he had in fact read prior to attaching his signature to it, not only that he had read and understood the standard terms contained in the document but also that he agreed that such terms and conditions shall be valid and deemed to be binding in respect of all transactions entered into between the applicant and the respondent. There are no "terms and conditions" set out in pages 1 and 2 of the document and the acknowledgement can only refer to the standard terms set out in pages 3 to 10 of the document. Mahfud has failed to engage at all with this issue save to state in the replying affidavit:

> "The Plaintiff's laborious reliance upon the paragraph dictating that the signatory of the credit application automatically acknowledges having read and understood the terms and conditions fails to take account of the fact that the standard terms and conditions are not only a separate document from the credit application but also constitute a separate contract. More importantly the standard terms and conditions needed to have been signed at the top of page 3 to become binding on the Defendant."

[26] For the reasons set out earlier herein the protestation that the standard terms and conditions constitute a separate document is simply fallacious. It is difficult to comprehend on what basis it is contended that the standard terms and conditions needed to have been signed at the top of page 3 to become binding. Zaptia had, after all, in signing page 2 of the document expressly agreed in writing that such terms and conditions would be binding upon all future transactions. The contention that pages 3 to 10 of the document constitute a separate contract is therefore in my view equally fallacious.

[27] On a careful consideration of the papers before me I am constrained to conclude that the application to withdraw the admission as to the terms upon which the parties contracted is not *bona fide*. I do not think that any satisfactory explanation is provided of the circumstances under which the admission came to be made. Accordingly this part of the intended amendment cannot be allowed.

Second objection

[28] The second objection too relates to paragraph 5.1.1 to 5.1.7 of the notice of intention to amend. The defence relied upon in these paragraphs is one of unilateral error leading to a lack of consensus between the parties. The essence of the objection is that the introduction of these paragraphs would be excipible in that the error is neither alleged to be nor could it be a justus error by virtue of the express provisions accepted by Zaptia.

[29] By virtue of the conclusion to which I have come in respect of the first objection, namely that the earlier admission that the parties expressly contracted on the basis of the standard terms must stand, it is neither necessary nor desirable to consider this objection further.

Third objection

[30] The third objection relates to the defence raised in paragraph 5.1.8 to 5.3 and more in particular to paragraph 5.1.15 to 5.1.19 as read with paragraph 5.2 and 5.3 of the notice of intention to amend.

[31] I pause to record at the outset that the notice of intention to amend is certainly not a model of clarity. Whilst paragraphs 5.1.8 to 5.3 are not pleaded in the alternative to paragraphs 1.1.1 to 1.1.7 it seems to me on a proper construction of the notice of intention to amend that these paragraphs seek to set up a self-contained defence. Paragraphs 5.1.1 to 5.1.7 attempts to set out a case for a unilateral error giving rise to a lack of consensus whilst paragraph 5.1.8 to 5.3 proceeds on an acceptance that the parties in fact contracted initially on the express terms set out in the standard terms. Paragraph 5.1.8 to 5.3 purports to set out a subsequent novation of the agreement as recorded in paragraph 5.3 of the notice of intention to amend.

[32] Novation is a contract involving an agreement between the parties that an existing valid and binding obligation be extinguished and that it be substituted with a fresh obligation. Paragraph 5.1.8 to 5.3 sets out various interactions between the parties relating to their business dealings. It does not allege any agreement concluded between the parties, however, at paragraph 5.1.18 certain express, alternatively tacit, alternatively implied terms of the commercial relationship between the plaintiff and the defendant are contended for.

[33] The intended pleading does not remotely comply with the provisions of Rule 18(6) of the Uniform Rules of Court. I have recorded that it does not allege any particular agreement. To the extent that an agreement may be contended for it does not record whether it is oral, in writing or tacit, however, at paragraph 5.3 it is alleged that the “aforesaid oral terms and conditions” governed the dealings between the parties in concluding the agreement. For the purposes of this judgment I shall

therefore accept that the applicant seeks to reply on an oral agreement. Even accepting that the agreement was for an oral novation there is no allegation as to when and where the agreement was concluded nor does it contain any allegation as to who represented the parties in concluding the agreement. In the circumstances, it appears to me that the pleading may well be vague and embarrassing and it may have been attacked as an irregular step. The respondent, however, has not relied on these grounds. In the circumstances I shall make no finding relating thereto and this judgment is limited to the objection raised.

[34] The respondent objects to the amendment raised in these paragraphs on the basis that it would render the plea excipiable as the oral agreement contended for in paragraph 5.3 is precluded by the express terms of the written contract.

[35] I have recorded earlier that Zaptia acknowledged in signing annexure "POC2" that he had read and understood the standard terms and that he agreed that such terms and conditions would be valid and binding in respect of all transactions entered into between the parties. The standard terms and conditions commence with an introductory paragraph recording:

> 'These Standard Trading Terms and Conditions shall govern all present and future transactions and commercial dealings to be concluded between the parties herein …. These Standard Trading Terms and Conditions shall prevail over any "standard terms of order of the customer", which may be incorporated as part of the customer's order or request for services and the acceptance by the company of the customer's order … shall not override the Standard Trading Terms and Conditions save to the extent expressly agreed to in writing … These Standard Trading Terms and Conditions will be read together with any

> express terms agreed to in writing between the customer and the company and only to the extent of a conflict between the express terms and the terms hereof shall the former prevail.'

[36] Clause 33 of the standard terms stipulates that no variation of such terms shall be binding on the respondent unless it is embodied in the written document signed by a duly authorised director of the respondent. Any other purported variation, whether in writing or oral would be of no force and effect. Clause 33 does not expressly preclude any consensual cancellation or novation which is not in writing.

[37] Mr **Gess**, who appeared on behalf of the respondent, submitted that the "novation" alleged by the defendant is, in reality, nothing other than a variation or an alteration of the standard terms which, as recorded earlier, provides that such terms shall apply to all future business between the parties.

[38] It is well-established that a non-variation clause of the kind contained in annexure "POC2" is enforceable between the parties. (See for example **SA Sentrale Ko-op Graanmaatskappy Beperk v Shifren en andere** 1964 (4) SA 760 (A); **Brisley v Drotsky** 2002 (4) SA 1 (SCA).) The reason for enforcing clauses of this nature is that it provides for commercial certainty and avoids disputes of fact regarding the terms of an oral agreement, which may sometimes be difficult to resolve. (See **Yarram Trading CC t/a Tijuana Spur v Absa Bank Limited** 2007 (2) SA 570 (SCA) at 581C-D.)

[39] Mr **van Rooyen**, who appeared on behalf of the applicant, does not dispute that the clauses of this nature are ordinarily enforceable. He argues, however, that the clause does not find application to the present facts.

[40] Novation, as set out earlier, is a contract whereby an existing obligation is extinguished and at the same time a new obligation is incurred in its place. It may be argued that it involves the termination of the original agreement as opposed to the variation thereof. In this regard it has been held that a non-variation clause such as is relied upon by the respondent serves to curtail the common law freedom of contract of the parties and must therefore be restrictively interpreted (see **Randcoal Services Limited and Others v Randgold and Exploration Company Limited** 1998 (4) SA 825 (SCA) at 841F.) In the absence of a clause precluding an oral or tacit termination or novation a subsequent agreement which has the effect of novating the entire existing agreement does not seem to me to be necessarily precluded by the non-variation clause. (Compare **Klub Lekkerrus/Liebertas v Troye Villa (Pty) Ltd** [2011] 3 All SA 597 (SCA) para [28] p. 606h-607a; and *Van der Merwe, Van Huyssteen, Reinecke and Lubbe*: *Contract: General Principles* (4th ed) p. 133.) Whether or not it does so in a particular case is a matter of interpretation.

[41] It is not necessary at this stage to resolve this issue. The respondent's objection to the amendment is that it would render the pleadings excipiable. Exception is generally not an appropriate procedure to settle questions of interpretation because, in cases of doubt, evidence may be admissible at the hearing relating to surrounding circumstances and other matters which serve to place the

agreement in context (see **Murray & Roberts Construction v Finat Properties (Pty) Ltd** [1991] 1 All SA 382 (A); 1991 (1) SA 508 (A)) and **Sun Packaging (Pty) Ltd v Vreulink** 1996 (4) SA 176 (SCA).) In the result I conclude that the fourth objection should not be upheld.

[42] In these circumstances evidence which seeks to establish a novation of the agreement would be admissible at the trial and the amendment should be granted in respect of these paragraphs.

Proposed amendment to paragraph 6 of applicant's plea

[43] The respondent's fourth objection to the proposed amendment strikes at the intended amendment to paragraph 6 of the plea which I have quoted above. In the application of intention to amend the applicant seeks to insert after the existing paragraph 6.2 the following:

> '6.3 Specifically the Defendant pleads in response to the Plaintiff's reliance on clause 27 as set out in paragraph 6.3 of its Particulars of Claim as follows:-
>
> 6.3.1 In purporting to carry out the services the Defendant required from the Plaintiff, the Plaintiff used and relied upon its agent, Somerset Cold Store ("SCS");
>
> 6.3.2 As set out in paragraph 8 hereof SCS and hence the Plaintiff as its principal failed to perform as agreed, causing the Defendant to suffer damages;
>
> 6.3.3 The Plaintiff specifically acknowledged this and agreed to release the Defendant from liability to pay SCS's charges;

6.3.4 Instead the Plaintiff agreed to pursue SCS itself for the recovery of the sum of R224 601,85 already paid by the Plaintiff to SCS in respect of their defective performance thereby releasing the Defendant from any obligation to pay the Plaintiff the sum of R224 601,85;

6.3.5 The Plaintiff specifically agreed in writing that the Defendant as its customer was not liable to pay to it the sum of R224 601,85 in respect of SCS in the letter dated 17 March 2014, a copy of which is annexed marked "**P1**".'

(The annexure was not annexed to the notice of intention to amend. The parties are agreed that the objection should be assessed on that basis.)

[44] The respondent objects to the proposed amendment as it alleges that the proposed amendment is excipiable because the applicant contends for a variation of the provisions of clause 27 of the standard terms. It is argued that the applicant does not allege that the document, annexure "P1", complied with the requirements for the variation of the agreement as provided for in the standard terms in that it is not alleged that the written document was signed by a duly authorised director of the applicant.

[45] On a proper reading of the intended amendment I am not persuaded that the applicant necessarily contends for a variation of the provisions of clause 27. It seems to me that the amendment, which is not a model of clarity, is equally susceptible to an interpretation that annexure "P1" constituted "express terms agreed to in writing between the customer and the company which are in conflict with the standard terms" (as intended in the introductory paragraph to the standard terms which I have quoted above and which prevail over the standard terms). Similarly it

may be argued that the amendment strikes at a unilateral waiver in writing of a right which accrues exclusively to the respondent. Waiver in those circumstances does not constitute a variation of the contract. (Compare **Impala Distributors v Taunus Chemical Manufacturing Company (Pty) Ltd** 1975 (3) SA 273 (T) at 278B; and **Van As v Du Preez** 1981 (3) SA 760 (T).) In each case the argument is dependent on evidence which would be admissible.

[46] I pause to record that although the fourth objection did not rely on the "non-waiver clause" Mr **Gess** argues that the non-waiver clause read in conjunction with the non-variation clause precludes reliance on any such waiver. I am not persuaded by the cogency of this argument.

[47] The alleged non-waiver clause (clause 34) provides:

> "No extension of time or waiver or relaxation of any of the trading terms and conditions shall operate as an estoppel against any party in respect of its rights under these trading terms and conditions, nor shall it operate so as to preclude such party thereafter from exercising its rights strictly in accordance with these trading terms and conditions."

[48] The clause is, at best, ambiguous. It is not a provision which requires a waiver to be in writing in order to be binding nor does it preclude an effective unilateral waiver of accrued rights by either party. The applicant contends for an express waiver in writing by the respondent of its exclusive right to claim a particular sum of money. I do not consider that the said clause necessarily finds any application to the proposed amendment. The clause does not seem to me to authorise the respondent to proceed against the applicant for the recovery of the

amount which has already been expressly waived. The effect of a waiver is to extinguish the right in issue, it cannot then be resurrected. At best for respondent the argument is dependent on the interpretation of the said clause. I have recorded earlier that exception is generally an inappropriate procedure to resolve issues of interpretation.

Proposed amendment to paragraph 8 of applicant's plea

[49] In paragraph 3 of the notice of intention to amend the applicant seeks to plead that clauses 33, 40, 41, 42 and 45.3 of the standard terms are void *ab initio* and therefore unenforceable as they are contrary to public policy in the circumstances relevant to this matter and constitute clauses which are *contra bono mores*. The respondent has objected to each of these proposed amendments and I shall deal with these clauses separately.

[50] It is necessary at the outset to consider the general approach to an attack upon contractual terms on the grounds raised by the applicant herein. In the **Shifren** matter *supra* Steyn CJ pointed to what he considered to be an elementary and fundamental general principle that contracts freely concluded in all sincerity by competent parties should be enforced in the public interest. Similarly, Rabie CJ remarked in **Magna Alloys and Research (SA)(Pty) Ltd v Ellis** 1984 (4) SA 874 (A) at 893I-894A that it is in the public interest that persons should be held to contracts which they have concluded. This must be the point of departure.

[51] More recently in **Brisely v Drotsky** *supra* the Supreme Court of Appeal cautioned that to afford a general discretion to judges to ignore contractual principles whenever they consider them to be unreasonable or unfair would serve to undermine

the principle of *pacta servanda sunt* because the enforceability of contractual terms would depend upon what a particular judge considered to be reasonable and fair. The measure then would no longer be the law but the view of the particular judge. The consequence hereof would be that the contracting parties would no longer be in a position to regulate their interaction in the expectation that their contract would be enforced in accordance with the terms thereof in the event of a dispute. They would have to wait on each occasion to see what the particular judge might consider to be reasonable and fair.

[52] The sentiments expressed in **Brisley v Drotsky** *supra* were reinforced two years later in **South African Forestry Co Ltd v York Timbers** 2005 (3) SA 323 (SCA) para [27] where the Supreme Court of Appeal held:

> "[A]lthough abstract values such as good faith, reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts can employ to intervene in contractual relationships. These abstract values perform creative, informative and controlling functions through established rules of the law of contract. They cannot be acted upon by the courts directly. Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty. "

(See also **Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd** 2011 (5) SA 19 (SCA) at para [22] and [23].)

[53] Finally it should be borne in mind that the mere fact that exclusionary clauses as a specie are in principle enforceable does not mean that any particular

exclusionary clause may not be held by a court of law to be contrary to public policy. (See **Afrox Healthcare v Strydom** 2002 (6) SA 21 (SCA) at p. 35 para [10].)

[54] I turn to consider the particular clauses which are attacked in the notice of intention to amend. In each case the applicant contends that any reliance which the respondent may seek to place on the said clauses will constitute conduct which is sufficiently oppressive, unconscionable and immoral to constitute a breach of public policy which in turn the applicant contends justifies a refusal to enforce such provisions.

Clause 33 non-variation clause

[55] The applicant contends that the effect of this clause is to preclude the defendant from relying on *bona fide* and factually existent agreements entered into between the parties orally, tacitly or impliedly. To this extent the applicant is of course correct, however, it is difficult to conceive of any objection thereto based on public policy. In **Impala Distributors** *supra* Hiemstra J set out the background to the **Shifren** decision. He observed that there were two schools of thought, each reliant upon the principle of *pacta servanda sunt.* The one school held the view that the original agreement, containing the non-variation clause, was binding while the other school contended that a later agreement concluded orally and which sets aside the initial agreement should be honoured. In **Shifren** these two schools of thought were weighed up carefully, one against the other, and the Supreme Court of Appeal (then the Appellate Division of the Supreme Court) opted for the former.

[56] In **Brisley v Drotsky** *supra* the Supreme Court of Appeal were invited to reconsider the **Shifren** decision. They unanimously declined to do so. Cameron JA stated at p. 34 paragraph [90]:

> "The appellant's attack invites us to reconsider that decision. We are obliged to do so in the light of the Constitution and of our 'general obligation', which is not purely discretionary, to develop the common law in the light of fundamental constitutional values. For the reasons the joint judgment gives, I do not consider that the attack can or should succeed. The *Shifren* decision represented a doctrinal and policy choice which, on balance, was sound. Apart from the fact of precedent and weighty considerations of commercial reliance and social certainty, that choice in itself remains sound four decades later. Constitutional considerations of equality do not detract from it. On the contrary, they seem to me to enhance it."

[57] The proposed amendment proceeds further to record that by enforcing the non-variation clause against the applicant it places the respondent in a position whereby it can elect to enforce either the standard terms and conditions on the one hand or the aforesaid agreements on the other, which ever suits the respondent best at the time, thereby putting the applicant in an oppressive, unconscionable and immoral situation.

[58] The contention is simply fallacious. On the unequivocal terms of clause 33 any purported variation or alteration to the terms of the original agreement which does not accord with the procedural requirements set out in the clause itself will be "of no force and effect". Neither party can chose to rely upon such an amendment. This is precisely the consequence of the **Shifren** decision. (See **Brisley v Drotsky** *supra* at p. 11 para [7].)

[59] In these circumstances I consider the proposed amendment is bad in law and therefore excipiable. In the result, this amendment cannot succeed.

Clause 40

[60] Clause 40 of the standard terms provides for the limitation of the respondent's liability. It excludes any liability arising from a number of circumstances unless such claim arises from a "grossly negligent act or omission on the part of the company or its servants".

[61] The enforceability of clause 40 is attacked in the proposed plea on the basis that the effect of this clause is to allow the plaintiff to unfairly and unlawfully escape liability for its own negligent acts to the undue prejudice of the defendant. No particular facts peculiar to the conclusion of the agreement in issue are pleaded in support of this contention nor does Mahfud address this issue at all in the founding affidavit.

[62] It is, of course, correct that a clause of this nature will always permit the plaintiff to escape liability for its own negligence to the prejudice of the defendant. It does not follow, however, that it is therefore contrary to public policy. In **Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd** 1978 (2) SA 794 (AD) the court considered a clause which provided:

> " … you are hereby absolved from all responsibility for loss or damage however arising in respect of the bailor's property."

[63] The parties accepted that the clause served to exclude liability for negligence, however, it was argued on behalf of the plaintiff that the clause should so be construed as not to apply to the responsibility for loss or damage caused by the bailee's "gross negligence". The Appeal Court (now the Supreme Court of Appeal) held that there is no justification for so restricting the plain meaning of the words of the exemption clause and proceeded to hold that there was also no reason, founded on public policy, why it should be held that, insofar as the clause refers to loss or damage caused by the defendant's gross negligence, it is not enforceable. (See **Fibre Spinners** at p. 807D.) The decision in **Fibre Spinners** was referred to with approval in the Supreme Court of Appeal in **First National Bank of SA Ltd v Rosenblum and Another** 2001 (4) SA 189 (SCA) where a similar clause was upheld. (See also **Afrox Healthcare Ltd** *supra* where a clause excluding liability for gross negligence was upheld.)

[64] The exclusionary clause in the present contract is far less intrusive and by parity of reasoning I consider that no basis is advanced in the proposed amendment, founded on public policy, why the clause could not be enforced. In the circumstances the proposed plea relating to clause 40 is bad in law, therefore excipiable and cannot be allowed.

Clauses 41 and 42

[65] Clauses 41 and 42 of the standard terms provides:

"**41. MONETARY LIMITATION OF LIABILITY OF THE COMPANY**

41.1 In those cases where the company is liable to the customer in terms of clause 40.1, in no such case whatsoever shall any liability of the company, howsoever arising, exceed whichever is the least of the following respective amounts:

41.1.1 the value of the goods evidenced by the relevant documentation or declared by the customer for customs purposes or for any purpose connected with their transportation;

41.1.2 the value of the goods declared for insurance purposes;

41.1.3 double the amount of the fees raised by the company for its services in connection with the goods, but excluding any amount payable to sub-contractors, agents and third parties.

41.2 If it is desired that the liability of the company in those cases where it is liable to the customer in terms of clause 40.1 should not be governed by the limits referred to in clause 40.1 *(sic)* written notice thereof must be received by the company before any goods or documents are entrusted to or delivered to or into the control of the company (or its agents or sub-contractors), together with a statement of the value of the goods. Upon receipt of such notice the company may in the exercise of its absolute discretion agree in writing to its liability being increased to a maximum amount equivalent to the amount stated in the notice, in which case it will be entitled to effect special insurance to cover its maximum liability and the party giving the notice shall be deemed, by so doing, to have agreed and undertaken to pay the company the amount of the premium payable by the company for such insurance. If the company does not so agree the limits referred to in clause 41.1 shall apply.

42. GENERAL AVERAGE

The customer indemnifies and holds harmless the company in respect of any claims of a general average nature which may be made against the

> company and the customer shall provide such security as may be required by the company in this connection."

[66] In the proposed amendment the applicant seeks to allege that these clauses are null and void *ab initio* as they are contrary to public policy because they have the effect that they unfairly limit liability thereby depriving the defendant of its right to recover the true quantum of the loss suffered by the defendant. That they have this effect is of course true, however, where the parties have in all sincerity contracted on these terms public interest demands that they be held to the contracts which they concluded. (See **Shifren** *supra* and **Magna Alloys** *supra*.)

[67] Clause 41 seeks to limit the extent of the respondent's liability for damages which flow from its gross negligence. As set out earlier it has repeatedly been held that an exclusion clause which exempts a party from liability arising from his gross negligence or that of his employees is not contrary to public policy. It seems to me to follow that there can be no room to conclude that a lesser clause which seeks merely to limit the liability for damage arising from gross negligence could be unenforceable for being contrary to public policy. The desired amendment in respect of these clauses would accordingly also be excipiable and cannot be granted.

Clause 45.3

[68] Clause 45.3 relates to the procedure to be followed in the case of disputes between the parties. Clause 45.3 provides:

> "Without affecting the generality of clause 45.1 and 45.2 the customer shall not be entitled to withhold payment of any amounts, by reason of any dispute with the company, whether in relation to the company's performance in terms of any

> agreement, or lack of performance or otherwise, after which payment the customer's rights of action against the company in terms of this clause can be enforced. Until such pay is made, any rights that the customer may have, shall be deemed not yet to have arisen and it is only the payment to the company which releases such rights and makes them available to the customer in respect of any claim that he may have against the company."

[69] The intended amendment seeks to attack this clause as the effect thereof is to compel the defendant to pay the plaintiff monies for its own shortcomings and failures which, it is alleged, is innocuous.

[70] Neither party has referred me to any case law directly relevant to clauses of this nature. The effect of this clause can only be properly assessed in the context of the relationship between the parties and the interpretation of the agreement as a whole. In my view evidence which may cast light on the effect and impact of this clause is permissible. In these circumstances the applicant should be granted leave to introduce this paragraph in its plea.

Costs

[71] I turn to consider the question of costs. By virtue of the conclusion to which I have come each party has achieved a measure of success in the application. The applicant was however obliged to approach the court in order to achieve the amendments to its plea. In the circumstances I consider that it would be appropriate that the applicant pay the costs of the application on an unopposed basis.

[72] In the result, it is ordered:

1. That the application to amend the defendant's plea by:

   (i) Deleting paragraph 5 of the existing plea;

   (ii) introducing paragraphs 5.1 and 5.1.1 to 5.1.7 as set out in the Notice of Intention to Amend; and

   (iii) introducing paragraph 8.4 (to the extent that it relates to clauses 33, 40, 41 and 42), paragraphs 8.4.1, 8.4.2 and 8.4.3 as set out in the Notice of Intention to Amend

   is dismissed.

2. The defendant is granted leave to amend its plea by the introduction of:

   (i) Paragraphs 5.1.8 to 5.3;

   (ii) paragraphs 6.3 to 6.3.5; and

   (iii) paragraphs 8.4 (only to the extent that it refers to clause 43.5), 8.4.4 and 8.5 (to the extent that it refers to paragraph 8.4.4)

   as set out in the Notice of Intention to Amend.

3. The applicant is ordered to pay the costs occasioned by the application on an unopposed basis.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv C van Rooyen instructed by Dewey Hertzberg Levy Inc c/o Jacques Du Preez Attorneys, Port Elizabeth

For Respondent: Adv D W Gess instructed by Springer Nel Attorneys c/o Goldberg & De Villiers Inc, Port Elizabeth