IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION) CASE NO.: 10859/01

In the matter between:

ZIMOPLAST INDUSTRIES CC PLAINITFF

And

VANGUARD RIGGING (PTY) LTD DEFENDANT

JUDGMENT

BOTHA. J:

1. In this matter, at the request of the parties, I made an order in terms of Rule 33(4) to the effect that two issues, as formulated by the parties, be determined first and separately. They are the following:

   (i) Did the conditions set out in annexure DP2 to the Defendant's Plea (as amended by notice given on 18 April 2002) form part of the contract between the parties; and

   (ii) Is the Defendant precluded from relying upon the terms set out in Annexure DP2 in order to exclude or limit its liability to the Plaintiff in respect of the machinery transported to the Plaintiff

in Durban on the grounds set out in paragraph 6-8 of the Plaintiff's replication?

The issues can be better understood against the background of a brief outline of the pleadings.

Plaintiff's claim is for damages caused by an alleged breach of contract.

Plaintiff's manufactures plastic bottles at a factory in Queensburgh.

It is common cause that on 25 March 1999 the parties concluded an agreement in terms of which the defendant would transport certain machinery from the premises of Dan's Plastics in Gauteng to Queensburgh, Durban.

Plaintiff's case is that defendant delivered the goods in a damaged condition and it claims damages for the resultant loss.

It is common cause that the defendant furnished the plaintiff with a quotation and that on 25 March 1999 Dr Hassim, plaintiff's chief executive officer, accepted the quotation. At the bottom of the quotation the following sentence appears:

> "All work carried out by Vanguard Rigging is subject to our Standard Terms and Conditions" See exhibit D20.

The said terms and conditions were not annexed to the quotation. They do, however exist and they appear amongst others, on the reverse side of defendant's delivery notes. See exhibit D27 (b). See also exhibit D8 (a) and (b) ..

In its plea defendant relied *inter alia* on clauses 2(a) and (b), 3, 4,7, 9 and 23 of the Standard Terms and Condition (referred to as annexure DP2). These clauses, if applicable, would in different ways, absolve defendant from liability or limit liability.

They provide for haulage at the owner risk (clause 2a), the exclusion of liability for loss (clause 3), a limitation of liability (clause 3) no liability caused by causes beyond the control of the defendant (clause 4), no liability for damage to mechanical or electrical plant (clause 7), no liability for loss caused to or from a public sale (clause 9), and the lodging of claims for damage within 3 days (clause 19).

In paragraph 6 of its replication plaintiff denies that defendant is entitled to rely on annexure DP2.

In paragraph 7 it repeats the allegations set out in paragraphs 4 and 5, which are the to effect that the Standard Terms and Condition were not transmitted to plaintiff, that the consensus between the parties did not include the Standard Terms and Conditions, that defendant had taken no steps to bring those terms and conditions under plaintiff s notice, and that they are therefore deemed not to have been incorporated into the agreement between the parties.

There is an alternative allegation in the replication that the work was not carried out by defendant, but by TLD Transport (Pty) Ltd (TLD). For that reason it is alleged that annexure DP2 did not apply to the transportation of the machinery.

In a rejoinder the defendant contends that it appointed TLD as its agent for the transportation of the machinery but that its personnel carried out the loading and fastening of the machinery onto the vehicles ofTLD.

It was common cause that the parties were represented at the time of the conclusion of the agreement by dr Hassim acting for the plaintiff and mr Buchan acting for the respondent. They were also the only two witnesses in the case.

Dr Hassim described how the plaintiff, who had been established in 1998, decided to expand in the latter half of 1998.

In April 1998 he went to Dan's Plastics in Johannesburg to see how a machine identical to one the plaintiff had, was operating from a higher level. When in February 1999 he saw in a newspaper that Dan's Plastics was in liquidation, he suggested to the members of the plaintiff that he attend the liquidation auction. He attended the auction which was held at the premises of Dan's Plastics. He bought seven items of machinery as reflected on the invoice of the auctioneer, exhibit D 18. He referred to photographs depicting the machinery, exhibits D150, 152, 155, 156, 157 and 158.

After the auction he returned and arranged the necessary money transfers to effect payment. He had two weeks in which to move the machinery.

The machinery was heavy and plaintiff could not transport it. He approached the defendant because it was a reputable business. He telephoned mr Buchan, who asked him to fax the auctioneer's invoice to him. Mr Buchan told him that he would send someone to Dan's Plastics. He told mr Buchan that defendant was required to load the machinery, to transport it to Durban, to off load it, to put in into the premises of plaintiff and to position it. In a conversation he asked mr Buchan what transit cover defendant had. He said the standard cover was between R30 000-00 and R1 00 000-00 per load. He then said that the machinery should be insured for R1 million. The insurance should be included in the quotation.

On 24 and 25 March 1999 he received the quotation, exhibit D20. He found it high. He nevertheless recommended to plaintiff s members that the quotation be accepted.

Before he signed the quotation he looked at it from top to bottom. He realized that a container was not included. He spoke to mr Buchan, who told him that that would be an extra R800-00. He made a written annotation to that effect on the quotation. He signed the quotation and faxed it back to defendant.

With regard to the last sentence, which referred to the Standard Terms and Conditions, he said that he could not remember whether he had read it or not. He could have read it, he could not have read it. The Standard Terms and Conditions had never been sent to him.

He sent two employees of the plaintiff to Dan's Plastics to disconnect the various items before transportation.

The machinery had to be covered with tarpaulins. That was promised by defendant's mr Pitol.

During the transportation he was informed during the night by his two employees that the defendant's two trucks had no tarpaulins and that they were standing in heavy rain. Expecting trouble he went to the factory with a camera. He gave extensive evidence about the condition in which the machinery arrived in Durban. He referred to photographs that he took. See exhibit B.

He realized that the transportation had been done by TLD.

He refused that the machinery be unstrapped in the absence of a supervisor.

He was asked to sIgn a TLD delivery note, exhibit D34. He signed it without prejudice.

At first a mr Roberts, and eventually a mr Hatting and a mr Witt stock were there on behalf of the defendant.

He was asked to sign a delivery note of defendant's Kwa Zulu Natal sister company, exhibit D27 (a).

He signed it without prejudice and completed a document in which he set out his complaints, exhibit D36 and 37, which was signed by him as well as by messrs Wittstock and Hatting.

If he had known that defendant was going to farm out the work he would not have accepted the quotation.

He confirmed that defendant was not responsible for dismantling the machinery.

He denied that he gave mr Buchan the auction lots separately. He faxed him the invoice on which the lot numbers appear.

Mr Buchan could identify the machinery if he had the lot numbers.

He denied that the original price given was reduced.

He conceded that he had more than one conversation with mr Buchan.

He denied that he was told that the goods would be transported at the owner's risk.

He denied that mr Buchan then told him that defendant could arrange insurance. He asked what defendant's cover was. It was then that he requested cover for **RI** million. He could not see the point of insurance if transportation was to be at the owner's risk.

He denied that he said that he would accept the quotation if defendant threw in Insurance cover.

He was under the impression that insurance would be obtained in plaintiff s name. The defendant gave him one price. Included in that price was the insurance.

According to him mr Buchan left out the container. He was not sure that it had not been ticked off on the invoice, exhibit D 18.

When asked whether he had read the quotation, he answered that it was difficult to say after 6 years. He would not say that he had read it entirely. He would have read it until he realised that the container had been left out. He would have read it till the word "Terms of Payment COD" and would then have realized that the container was not included.

He would not know whether he had read the next line which dealt with dismantling and assembly. It would not have mattered ifhe had read that line.

It was equally possible that he could have read the last line.

He was asked whether it was his practice to read letters before signing them. He seemed to accept that as a general proposition he would. He would not expect devious wording.

He was asked whether he accepted everything that appeared on the page he signed. In the end he answered the question affirmatively. He would have had no objection to the Standard Terms and Conditions if defendant itself did the transportation. He confirmed that he accepted what he had not read.

He could not say whether the jacking up and lifting up if the machinery was done by defendant's employees.

He denied that mr Pitol was told that the machinery should not be covered because it was scrap.

He never saw the conditions on the reverse side of the moving contract, D29. He would have expected them to be faxed to him. He never asked for them.

He confirmed that plaintiff had no contractual relationship with the forklift operators.

The first time he heard of Vanguard Rigging Kwa Zulu Natal was when the machinery was delivered.

He was asked why he found the hiring of forklifts acceptable as opposed to hiring a subcontractor. He said that subcontracting an entire part of the contract was a different thing.

He could not dispute that defendant attended to the loading and fastening of the equipment.

He agreed that plaintiff looked to the defendant, and not to third parties.

When asked if he told defendant that it must do everything, he said no. He did not want it to double its price.

He seemed to agree that he did not tell mr Buchan that he expected every part of the work to be done by defendant.

He denied that the cause of the damage was the state of the machinery.

Mr Buchan testified that he was a director of the defendant in 1999.

He explained what parts of the survey sheet, exhibit D15, he completed. On the reverse side, D 16, he made calculations that formed the basis of the quoted price. He did not receive the quotation, D18, at the time. It was received later. He explained that the figures would not necessarily add up to the result. D 17 was his handwritten instruction to his secretary. D17 did not mention dismantling or the Standard Terms and Conditions. They appeared on the template stored in the computer.

With reference to insurance he said that dr Hassim asked him whether defendant had insurance. When he said that defendant was not insured, dr Hassim asked him to arrange insurance and to include the premium in the final amount. He later explained that he told dr Hassim that defendant's vehicles were insured, but that the customer had to insure his own property. He accepted it.

He referred to the various documents produced in order to appoint TLD (D21, D22, D23) and to have a forklift, (D24). The contract with TLD was also subject to standard conditions Dll - 14.

If the subcontractor caused damage, it was defendant's problem. Defendant regularly used TLD as a subcontractor.

He explained that the anagram LTOLP which describes defendant's work on D29 means "load transport, offload, position".

Defendant did not use subcontractors to lift the machinery. The fastening was done jointly with TLD.

He agreed that defendant had become the biggest rigging company, almost becoming a household name in the trade.

Customers were not told that they had no recourse.

He did about 10 quotations per week.

He did not have the quotation. If he had had it, his job would have been easier.

Dr Hassim wanted the container for free. He then sent the quotation without including the container. It was included after dr Hassim had phoned him.

He gave the figure of the insurance premium to dr Hassim.

The defendant had the obligation to obtain insurance on plaintiff's behalf.

When clients refused to accept the Standard Terms the defendants' board considered the matter.

He could remember the discussion about insurance.

There was a separate document containing the Standard Terms and Conditions.

If a customer required sight of the Special Terms and Conditions, they were sent by courier. The Terms and Conditions were not sent as a matter of course because of the high number of quotations.

In this case he was not aware that dr Hassim had not seen the Terms and Conditions. He explained that defendant had 2 000 customers, 500 of which were regular ones. He confirmed that he had never dealt with dr Hassim.

The Standard Terms and Conditions were not sent to defendant, whether by fax or courier, because they had not been asked.

He believed that dr Hassim had read the last sentence ofD20. He conceded, however, that he did not know what knowledge dr Hassim had.

Mr Pitol was a supervisor who had to ensure that the job was carried out properly.

Defendant had about 14 trucks. In a month defendant would hire 15 to 20 trucks from TLD.

He confirmed that the Standard Terms and conditions, as set out in D8 (a) and (b), were a separate document, and not the reverse side of a moving contract.

Mr Pillemer SC, who, with mr V oormolen, appeared for the plaintiff, accepted that the plaintiff, having signed the quotation, was *prima facie* bound by the terms incorporated, but argued, with reference to cases like Spindrifter (Pty) Itd v Lester Donovan (Pty) Ltd 1986(1) SA 303 at 316 C - C, Aetiology Today CC v Van Aswegen 1992(1) SA 807 W at 810 G, Fourie NO v Hansen and another 2001(2) SA 823 W at 832 and Cape Group Construction (Pty) Ltd t/a Forbes Waterproofing v Government of the United Kingdom 2003(5) SA 180 SCA at 188, that the plaintiff was not bound by the Standard Terms and Conditions. He argued that the defendant had taken no reasonable steps to bring these terms and conditions under the attention of the plaintiff. He argued that the terms were of an unexpected nature, not of the kind to be expected by a reasonable man.

In the second place, in the alternative, he argued that the terms and conditions did not apply because the work was not done by defendant. In this regard he referred to the last sentence of the quotation which seeks to incorporate the Standard Terms and Conditions. It reads "All work carried out by Vanguard Rigging is subject to our Standard Terms and Conditions".

Mr Graves, who appeared for the defendant, pointed out that the plaintiff bore the *onus* to prove the terms of the contract on which it relied, and therefore had to prove that the Standard Terms and Conditions had not been incorporated.

He submitted that where the quotation was signed the principles applying to the socalled ticket cases were not appropriate. He referred to cases like Burger v Central South African Railways 1903 TS 571 at 578 and George v Fairmead (Pty) Ltd

1958(2) SA 465 A at 472 A - B and submitted that the *caveat subscriptor* rule is founded on *quasi* mutual assent, which is a manifestation of the reliance theory. He distinguished the facts of this case from the facts in the case of **Cape Group Construction** *supra*. He submitted that the plaintiff had not proved that the Standard Terms and Conditions did not form part of the contract.

In respect of the issue of whether the work was carried out by the defendant, he referred to portions of dr Hassim's evidence where he conceded that plaintiff was not interested in the logistical details of the performance of the work.

He submitted that there was no term in the contract requiring defendant physically to execute all facets of the work. He pointed out that there was only privity of contract between plaintiff and defendant and that defendant was the guarantor of the work of any subcontractor.

The factual disputes relating to the questions I have to decide fall within a narrow ambit. Some of the factual disputes are of no moment such as whether the quoted price had been reduced and whether the invoice of the auctioneer had been faxed at the beginning.

Dr Hassim denied that he was told that the defendant had to bear the risk of loss. Mr Buchan acknowledged that customers were not told that, but he testified that in the context of insurance, customers were told, and dr Hassim was told, that defendant's insurance only covered its vehicles and that customers had to insure their goods. I find mr Buchan's version in this regard probable. He dealt with all customers on that basis

and there is no reason why he would not have resorted to his simple illustration when insurance came under discussion.

Dr Hassim in evidence conceded that he accepted responsibility for what he signed, even if he had not read it. He could not deny that he had read the last sentence referring to the Standard Terms and Conditions. In my view it is probable that he would have read it. Everything was on one page. The body of the quotation comprised 14 lines. Everything except the words: "Terms of Payment: COD" was in the same type of print. He must have perused the quotation intently to pick up the absence of a reference to the container.

If one looks at the format of the quotation one cannot say that the reference to the Standard Terms and Conditions was hidden or obscured. There is no reference to conditions overleaf which have been omitted. In my view this is clearly a case where the recipient of the quotation was put on his guard. He was referred to terms and conditions which obviously did not appear on the typed quotation. They were stated to be Standard Terms and Conditions. In these circumstances the defendant should have enquired what the terms and conditions were if it had reservations about them. Otherwise, on the principle enunciated in **Burger v Central South African Railways** *supra,* it must be taken to have assented to these conditions.

In view of the format of the quotation the considerations underlying the decision in the **Cape Group Construction** case *supra* do not apply.

I may add that in view of the fact that the machinery was insured, it is all the more probable that mr Hassim would not have been concerned about the contents of the Standard Terms and Conditions.

I am therefore of the view that the defendant is bound by the Standard Terms and Conditions.

The interpretation that the Standard Terms and Conditions only refer to work physically done by the defendant, I find absurd. Dr Hassim at a stage in fact said that he would have had no objection against the Standard Terms and Conditions if they applied to work done by Vanguard Rigging. It makes no sense in the context of his evidence because on his evidence there was no mention of anyone else doing the work. It would also make no sense that the Standard Terms and Conditions should apply in one situation and not in another.

I do not think that the phrase "all word carried out by Vanguard Rigging" refers to work done by subcontractors or agents. If one reads the quotation one sees that it defines the scope of the work. It entails the relocation of the machinery. Item 2 is to assist with the removal of the machinery. Item 4 refers to storage. The second last sentence is to the effect that the quotation does not cover dismantling or assembly of equipment. It is therefore clear that, apart from the work to be performed by the defendant, there would be other parties involved. In my view the last sentence merely says that the work to be performed by the defendant in terms of the quotation shall be subject to the standard Terms and Conditions.

There was no discussion as to whether other parties could or could not be contracted as subcontractors or agents to do defendant's work in terms of the quotation. Even though dr Hassim made much of the fact that he approached defendant because of its reputed expertise, his evidence does not go as far to establish a case of *delectus persona.* That being so I am of the view that there was nothing to prevent defendant from subcontracting any part of the work. It remained liable for performing the work as defined.

It must also be borne in mind that the work is defined under separate heads. It has five components. One need not read more in the last sentence than that all the components of the work shall be subject to the Standard Terms and Conditions.

In my view the plaintiffs alternative argument must also be rejected.

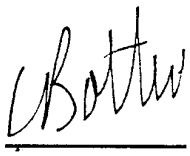
The order I make is as follows:

1. The questions posed in paragraph 1 of the draft consent order are answered as follows:

   (i) yes

   (ii) no

2. The plaintiff is ordered to pay the costs of this part of the case.



C BOTHA JUDGE OF THE HIGH COURT

Zimoplast industries CC

Vs

Vanguard Rigging (Pty) Ltd

CASE NO.: *10859/2001*

Coram: Botha, J

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Date of hearing: 18 and 21 February 2005

Date of Judgment: 24 February 2005