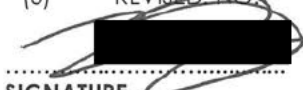




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

CASE NUMBER: 20296/2020

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
	
SIGNATURE	DATE

12 July 24

In the matter between:

CEVA LOGISTICS SOUTH AFRICA (PTY) LTD

Applicant

and

MMS MOBILE CRANES CC

Respondent

This judgement was handed down electronically by circulation to the parties and/or their representatives by email and being uploaded to Caselines. The date and time of the handing down is deemed to be 14h00 on 12 July 2024.

JUDGMENT

OSBORNE AJ:

1. In this application for summary judgment, the Applicant (plaintiff in the

underlying action) has sued the Respondent (defendant in the underlying action) for R957,878.08, together with interest and costs of suit, to recover disbursements it allegedly made to a third party on the Respondent's behalf.

2. Ceva Logistics South Africa (Pty) Ltd (the "Applicant") is a logistics company registered and incorporated in South Africa. The Respondent is MMS Mobile Cranes CC (the "Respondent"), a close corporation registered in South Africa. It is the sole distributor of cranes and related equipment for Terex Machinery and Parts Corporation ("Terex"), a company registered in the State of Delaware. The claim is based on an agreement in terms of which the Respondent retained the Applicant to facilitate the importing of certain components from the United States.
3. That agreement was entered into on 28 June 2019. A year later, pursuant to that agreement, the Respondent engaged the Applicant to facilitate the importation of crane components ordered by the Respondent from Terex. It is common cause that the goods were duly delivered to the Respondent in South Africa.

PROCEDURAL HISTORY

4. The Applicant filed a combined summons on 12 August 2020, seeking payment of R957,878.08, plus interest and cost of suit, on an attorney-client scale.
5. The Respondent filed its plea on 22 February 2023. On 23 October 2020, it

delivered a notice in terms of Rule 23(1), which was opposed. The Respondent withdrew its exception on 13 January 2023.

6. The Applicant launched the present application on 15 March 2023. In its affidavit opposing summary judgment filed on 18 April 2023, the Respondent raised a fresh defence and amended its plea consequentially. Thereafter, the Applicant filed a further affidavit to elaborate on the affidavit filed in support of the application for summary judgment.

FACTUAL BACKGROUND

7. As noted, the Agreement was entered into on 28 June 2019. On the face of it, this committed the Respondent to be bound to the Applicant's Standard Terms and Conditions ("STCs") - although the Respondent strenuously contests this, noting that the document was not attached to the two-page application to do business signed by the Respondent.
8. The Applicant transmitted an acceptance letter on 28 June 2018 confirming that a credit facility had been granted. (The letter again drew the Respondent's attention to the STCs.) According to the Applicant, this constituted a framework agreement, rendering the Applicant the mandatee for the Respondent for purposes of future transactions under the Agreement's aegis.
9. In April 2019, the Respondent approached the Applicant to effect the shipment of crane parts. On 25 April 2019, correspondence was exchanged

between the Plaintiff, CEVA Freight LLC (the Applicant's American associate) and Terex pertaining to the carriage of the goods. It was specified that the goods, as packaged, were not "stackable". (*Stackability* refers to the capacity of goods to be transported in crates "stacked" to reduce volume and save on carrier costs.) It appears - although this is not entirely clear on the papers - that the Respondent's case is that the "non-stackability" of the goods is attributable gave rise to elevated carrier costs, which the Respondent complains it never bargained for.

10. In any event, the Applicant, under cover of its e-mail of 2 May 2019, furnished the Respondent with an Air Waybill dated 30 April 2019, reflecting an aggregate charge of \$63,990.93. (The waybill bears the reference WZ643 004.) The Applicant contends that the basis for the quoted carrier charge is ascertainable from the specified chargeable weight (2,000kg) multiplied by the stipulated charge per kilogram (\$4.83) on the face of the Air Waybill. The 2 May 2019 e-mail to which the Air Waybill was attached requested that the Respondent furnish clearing instructions.
11. Central to its case is the Applicant's allegation (at para 8 of its particulars of claim) that the Respondent agreed to the carrier and repackaging costs reflected in the Air Waybill by furnishing the Applicant with a signed Clearing and Delivery Instruction form on 6 May 2029, likewise, bearing reference WZ643004 (0001-33). Almost none of the text boxes in the document are completed, and one finds no itemised reflection of either the carrier or

repackaging charges on the face of the document; these are aggregated in a globular number.

12. A signature (alleged by the Applicant to be that of one of the Respondent's representatives) is partially obscured. However, the Respondent does not dispute that the signature is indeed that of the Respondent's authorised representative and that the document is what it appears to be.
13. In its amended plea, the Respondent answers paragraph 8 of the Particulars of Claim with a general denial (at para 6.1). But the Respondent then adds that, contrary to what the Applicant alleges, it did not accept the carriage cost as stipulated. It is said that the Applicant sought such "acceptance" only after the services had already been rendered, i.e., in September of that year. The Respondent insists that had the cost been disclosed, it would not have used the services of the Applicant.
14. Regarding the repackaging costs, the Applicant asserts that it informed the Respondent via e-mail on 3 May 2019. It was reported that the shipping crate had collapsed because Terex did not pack the goods properly. The following language appears in the email: *"As this will require repacking, we have obtained the quotes below. Please confirm if we can go ahead or how you want to handle this."* Below is a quote for \$1,975.00, along with a "disposal" charge of \$350.
15. The Respondent, having signed the clearance instruction already referred to on 6 May, took delivery. The next day, the Applicant issued its first invoice

in the amount of R121,693.72. It was duly paid. Counsel for the Applicant explained from the bar that the amount reflected costs incurred by the Applicant in South Africa and had nothing to do with the “carrier and repackaging” charges at issue in the present litigation. Respondent's counsel did not take issue with that claim.

16. On or about 13 May 2019, the carrier issued the Applicant an invoice for \$65,965, which it duly paid. But it was not until September 2019 that the Applicant issued its invoice to the Respondent to recover its disbursement to the carrier. In an e-mail, the Respondent was requested to "confirm acceptance of [the] charges". Attached to the e-mail was invoice no. 527290 for the repackaging and carrier costs paid, according to Applicant, on Respondent's behalf.

APPLICABLE LAW

17. The remedy provided by Rule 32 has been described as “extraordinary” and “drastic”.¹ It closes the doors of the Court to one of the parties to a suit, allowing a civil judgment without a trial. However, the Supreme Court of Appeal suggested as long ago as 2009 that these adjectives should be left behind-

"The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant of a triable issue or a sustainable defence of her/his day in court. After almost a century of

¹ Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) p. 423.

successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at the appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out."²

18. One might add that the pragmatic rationale for the remedy has become all the more compelling in light of the deluge of litigation that threatens to overwhelm our understaffed and under-resourced court system - particularly in this division. Section 32 envisages, in effect, a screening procedure to expeditiously remove from the roll matters which are not triable because there is no defence. The dismissal of such cases at the outset is to the advantage of both parties – it saves the extraordinary costs of trial - and serves the interests of justice by opening up the spot for other matters which do warrant trial.
19. I turn to consider the argument presented under two headings: first, whether the Applicant's deponent fulfilled the requirements of Rule 32, and second, whether the Respondent has set forth a *bona fide* defence.

OVERVIEW OF THE APPLICANT'S ARGUMENT

20. As the Applicant sees it, the Respondent seeks to leverage its payment of the 9 May 2019 invoice (No. 516657), in the amount of R121,693.72 in order to evade its liability to pay the 5 September 2021 invoice (no. 527290), in the

² Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA) ([2009] 3 All SA 407 (SCA); [2009] ZASCA 23) paras 32 – 33.

amount of R957,878.08.

21. The Applicant's main argument is, at the end of the day, quite uncomplicated - although one would not know that from the muddled founding affidavit, which does not articulate the Applicant's submissions very clearly. It is simply that an agreement existed under which the Applicant would provide logistical services to assist the Respondent in importing goods from the United States; that the Applicant furnished the Respondent with a quote for the necessary disbursements, which the Respondent accepted; and that the latter is bound under the principles of offer and acceptance to reimburse the Applicant at the quoted rate. The Respondent settled the Applicant's first invoice (for in-country expenses) but disputes a second invoice (for carrier costs.)

OVERVIEW OF THE RESPONDENT'S ARGUMENT

22. The Respondent alleges that-

- 22.1 The Applicant was not properly before the Court because the Applicant stated an incorrect registration number in the particulars of claim. The Respondent did not pursue this argument. I need say no more of it.
- 22.2 The deponent to the founding affidavit lacked the personal knowledge to make it.
- 22.3 The Respondent did not consent to the charges reflected in the

second invoice. Had the charge been duly disclosed, the Respondent would not have consented; it complains that the carriage costs ended up exceeding the capital value of the goods conveyed.

22.4 The Respondent's representative, who signed the application for credit under a reference to the STCs document, did not sign that document itself. The *caveat subscriptor* rule does not come into play, because the STCs do not bind the Respondent.

22.5 Certain provisions of the STCs are unenforceable because they are *contra bonos mores*.

22.6 The Applicant owed a "duty of care" because it marketed itself as an "expert" in the relevant market. It is said to have breached that duty by agreeing to an increase in the carrier charges without consulting the Respondent.

IS THE APPLICANT'S DEPONENT QUALIFIED TO DEPOSE UNDER RULE 32(2)?

23. An affidavit in support of the summary judgment application is made by the plaintiff or by "any other person who can swear positively to the facts". A deponent can swear positively to facts only if she or he has "sufficient direct

knowledge" thereof.³

24. Unless it appears from a consideration of the papers as a whole that the deponent to the supporting affidavit probably did have sufficient direct knowledge of the salient facts to be able to swear positively to them and verify the cause of action, the application for summary judgment is fatally defective.⁴ The court will not even reach the question of whether the defendant has made out a *bona fide* defence.⁵

25. In recent years, the trend has been away from a formalist approach, which is focused on the deponent's status and the language of her affidavit, to a more holistic stance. The Court must now consider whether the deponent has the requisite knowledge of facts from the contents of the *papers as a whole*, not from the content of the affidavit read in isolation.

26. Turning to the affidavit in support of the application with which we are here concerned, the deponent, Ms. Devachander avers:

26.1. She is an executive legal director of the Applicant and is duly authorised to make the affidavit.

26.2. The contents of the affidavit are within her personal knowledge.

³ Absa Bank Ltd v Le Roux 2014 (1) SA 475 (WC) at para 15.

⁴ Maharaj, supra, para 423.

⁵ Absa Bank Ltd, supra.

- 26.3. She has read all of the documents referred to in the affidavits and confirms that they are all correct.
27. The Applicant contends that, where an applicant for summary judgment is a corporate entity, a deponent may legitimately rely on records in the company's possession for their personal knowledge of at least certain of the relevant facts and the ability to swear positively to such facts. That entails that the deponent need not necessarily have been directly involved in the underlying transactions to be deemed to have the requisite knowledge.
28. Further, the Applicant contends that the e-mails relied upon by Ms. Devachander in her affidavit are verifiable in terms of the Electronic Communications and Transactions Act, 25 of 2002 ("ECTA"). It is said that her evidence does not constitute hearsay to the extent that it is based upon material that is subject to the hearsay exception created under the ECTA.
29. I find that this affidavit falls short. Ms Devachander does not allege that she has possession of, control over, or custody of the salient documents in the Applicant's possession. Nothing intrinsic in her position as the Applicant's "Executive Legal Director" (a phrase which may indicate she supervises in-house lawyers) indicates otherwise. She alleges that "to the best of [her] knowledge," the allegations in her affidavit are true and correct. This formulation may suffice for an affidavit in support of an ordinary Rule 6 application. But it is not good enough for an affidavit in support of summary judgment.

30. Had the Applicant's summary judgment application been founded on the first affidavit, it would have been doomed at the outset. However, on 2 August 2023, Ms Devachander made a second affidavit, supplementing the thin narrative of her first affidavit by alleging that:

30.1. She was "involved" in the Applicant's claims against the Respondent.

30.2. She had material files, documents, and statements of account relating to the action in her possession and under her control.

30.3. She examined for herself all of the annexures to the particulars of claim.

30.4. She examined "contemporaneous notes" of staff, together with "system-generated" remarks concerning the Respondent's accounts with the Applicant.

30.5. Relevant documents were stored in the Applicant's computer system and constituted data messages as defined in ECTA, which were generated, stored, and reproduced in the ordinary course of business.

30.6. She can swear positively as to the issues "from [her] own personal knowledge of the matter and the Plaintiff's operation of the business."

31. Now, this affidavit, too, is far from perfect. Ms. Devachander's averral that she was *involved* in the Applicant's claim against the Respondent is not particularised. We are not told what the *system-generated remarks* are. Nor do we know anything of the "*contemporaneous notes*" to which she refers.

32. Nevertheless, I think the affidavit suffices under the pragmatic, businesslike approach adopted by our courts in such matters. Given the familiar realities of modern commerce, it is too much to demand that a deponent of an affidavit for summary judgment have been personally involved in the underlying agreement with the Respondent."⁶

33. The above is fortified by Ms. Devachander's exposition of the manner of storage of material relevant to the Applicant's case in digital form. There can be no objection to that, given the aforementioned Electronic Transactions Act. As Binns-Ward J asked rhetorically:

"If the hearsay evidence [referred to in the Applicant's affidavit] would be admissible to prove the facts at the trial, why should a deponent who is qualified to produce the hearsay evidence not be able to depose to an affidavit in support of summary judgment on the basis of such evidence? Provided that he is appropriately qualified to give the evidence, why should he be regarded as disabled from swearing positively to the facts?"⁷

34. I am satisfied that, eschewing a formalistic approach and reading the affidavit

⁶ Absa Bank Limited v Whitehead 2016 JDR 0580 (GP) at para 15.

⁷ Le Roux at para 20.

with the papers as a whole, the Applicant's second affidavit, while far from perfect, satisfies the requirements of Rule 32. I must take into account that the Respondent has not called into question the authenticity of material documents attached to the Particulars of Claim.

HAS THE RESPONDENT MADE OUT A *BONA FIDE* DEFENCE?

35. A defendant may avoid summary judgment by satisfying the Court that it has a *bona fide* defence. Under Rule 32(3)(b), the affidavit must "disclose fully the nature and grounds of the defence and the material facts relied upon therefor".

The Applicant's Arguments on the Merits

36. The Applicant's version, albeit not clearly set out in its founding affidavit, is simple. The Respondent agreed to the carrier and repackaging disbursements quoted in a waybill sent by the Applicant on 3 May 2019 by furnishing a duly signed clearing Instruction form on 6 May 2019.
37. The Applicant adds (apparently in the alternative) that under the terms of the STCs, the Respondent is *ipso facto* liable for payment of the additional charges. It contends that, even if it does not win the day on ordinary contractual principles, its case is rendered impregnable by the STCs.

The Respondent's Argument on the Merits

38. As one would expect, the Respondent rejects the above account. It says

that the Applicant received information that the goods were not stackable but failed to pass this information on to the Respondent, resulting in carriage costs higher than the Respondent had bargained for.

39. This does not amount to a *bona fide* defence to the Applicant's claim. Nowhere does the Respondent deny that the signed clearance instruction of 6 May came in response to the Air Waybill, which had been sent three days prior and reflected both the amount the Respondent could expect to be charged and the basis of the calculation. (Defendant did note *en passant* that the clearance instructions signed by its representative did not expressly refer to the Waybill; This was wisely not pursued at the hearing.)
40. At that point, the Respondent could simply have refused to sign the clearance document and advised the Applicant that the amount quoted was unacceptable. (This may have paved the way for renegotiation or cancellation of the putative or inchoate contract, and potentially to litigation.) In the circumstances, I think that the Applicant reasonably relied upon the Respondent's signature to make the disbursement to the carrier, anticipating passing that expense on to the Respondent.

THE STANDARD TERMS AND CONDITIONS

41. I have found that the Applicant is entitled to summary judgment on its offer and acceptance argument based on the Air Waybill and clearing instructions alone. But if I am wrong on this score, I would nevertheless find in favour of the Applicant on the basis of my finding (for the reasons set out below) that

the STCs are incorporated by reference into the agreement, a conclusion that vindicates the Applicant's *caveat subscriptor* point.

42. In my view, the most important provision for these purposes is clause 45.3, which bars the Respondent from withholding payment by reason of any dispute arising with the Applicant.

43. In arriving at this finding, I have considered three arguments propounded by the Respondent to negate the Applicant's reliance upon the STCs. They are that:

43.1. The STCs form no part of the contract between the parties because they were not signed on behalf of the Respondent.

43.2. Particular provisions of the STCs upon which the Applicant relies are *contra bonos mores* and hence unenforceable.

43.3. The Applicant's reliance upon the STCs is incompatible with the duty of care inherent in the agreement between the parties.

44. I turn to assess each of these arguments in turn.

Caveat Subscriptor and Incorporation by Reference

45. The Respondent's application to do business with the Applicant was, as we have seen, signed on 20 June 2018. The Respondent's representative, Mr. Boogard, having stated that he was duly authorised, appended his signature beneath the following words:

“We agree to the terms of conditions stated therein and acknowledge that all business will be conducted in terms of the trading conditions, which have been specifically brought to my attention and by which we agree hereby agreed to be bound. I acknowledge having received a copy of the standard trading conditions.”

46. The acceptance letter of 26 June 2018 from the Applicant also specifically refers to the STCs. The Applicant does not, in so many words, allege that the STCs were incorporated by reference in the underlying agreement, but that is clearly what it contends.
47. The Respondent faces formidable obstacles in resisting this argument. The doctrine of incorporation by reference to an extrinsic document in an agreement is well established.⁸ The facts in Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another 2011 (1) SA 8 (SCA) bear similarity to those presented to this Court. The appellant was a freight forwarding and clearing agent. The first respondent was a furniture importer and retailer. The parties entered into an agreement along broadly similar lines to the agreement at issue in this matter. When the first respondent defaulted on payment for clearing and forwarding services rendered, the appellant invoked its standard terms and conditions, which were referred to – but not reproduced on - the reverse of each clearance instruction sheet, as well as on all invoices. Clause 6 of the standard terms and conditions provided that all disbursements made by the corporation on behalf of the customer were “payable on presentation of the account without deduction or

⁸ See e.g. Gerber v Stanlib Asset Management (Pty) Ltd (2022) 43 ILJ 1080 (LAC), para 19.

set off.” Affirming that the standard terms were incorporated by reference and were enforceable, the Court held that the appellant was entitled to exercise a lien pursuant to such terms (para 21).

48. In an effort to escape the *caveat subscriptor* doctrine, the Respondent calls in aid a Full Bench decision from Kwa-Zulu Natal, Eskom Holdings Ltd v Grundy 2018 (4) SA 242 (KZP), reported some seven years after the SCA decision in *Crestleigh*. Eskom here invoked relied on a clause in its standard conditions, which it maintained were incorporated in a written agreement with the respondent, Mr Grundy. A farmer, he contested the terms of Eskom's right to run power lines across his property. He denied that he had received the standard conditions and said he had no recollection of them being discussed or signed.
49. The Respondent understandably highlights the fact that the Full Bench rejected Eskom's argument that, by virtue of the *caveat subscriptor* maxim, Mr Grundy was bound by Eskom's standard terms and conditions. Whether the document was attached to the signed agreement was, so the Court held, a question of fact. If it were found that the standard terms were not so attached, the printed acknowledgement above the respondent's signature on the written agreement was without value.
50. Notably, the Full Bench in Grundy did not refer to the Crestleigh decision of the SCA of a few years prior. In any event, the facts in the Grundy case are materially different from those *in casu*. Unlike Mr Grundy, Respondent

herein has not alleged that the STCs were not available to it. It contented itself with alleging that the STCs *were* not signed on behalf of the defendant – meaning, it seems, that the Applicant did not come forward with a manuscript version of the STCs bearing the signature of Mr Boogard, the Respondent's duly authorised representative.

51. I pause to note that it may be relevant to the outcome of the Eskom decision that counsel for Eskom conceded, for reasons that are not clear, that if the standard conditions were not physically attached to the manuscript agreement document signed by Mr Grundy, they could not be deemed to have been incorporated by reference.

52. I note in passing that Crestleigh (at para 4) lends support to the Applicant on a peripheral question that appears from the papers – whether a service provider effectively waives its right to reimbursement if it fails to reflect same in its initial invoice. The Court required the first respondent to pay, over and above the amount initially invoiced, an additional sum to cover a disbursement that the appellant had inadvertently omitted from its initial invoice. I see no reason the same should not apply in the present matter.

Are the Applicant's STCs *Contra Bonos Mores*?

53. The Respondent has a second string to its bow. It argues that clauses 27.1 and 45 of the STCs are null and void to the extent that they frustrate a contracting party's right to defend proceedings without first paying the Applicant's claim. Clause 45.3, in particular, provides that a customer shall

not be entitled to: “*withhold payment of any amount, by reason of any dispute with the company, in relation to the company performance in terms of any agreement, or lack of performance or otherwise*”.

54. The Respondent said little about the *contra bonos mores* doctrine in its written or oral argument. It simply alleges, without citing authority, that the STCs are against public policy.

55. That is not a sustainable position. Contractual autonomy remains important in our jurisprudence. Indeed, there is nothing to prevent parties from defining (at least in private consensual disputes) what is fair for purposes of their dispute. This is consonant with the approach in Napier v Barkhuizen 2006 (4) SA 1 (SCA), wherein Cameron JA (as he then was) held:

“[T]he Constitution prizes dignity and autonomy, and in appropriate circumstances, these standards find expression in the liberty to regulate one's life by freely engaged contractual arrangements. (At para 12).

56. The upshot was that:

“[T]he Constitution requires us to employ its values to achieve a balance that strikes down the unacceptable excesses of ‘freedom of contract’ while seeking to permit individuals the dignity and autonomy of regulating their own lives. This is not to envisage an implausible contractual nirvana. It is to respect the complexity of the value system the Constitution creates. It is also to recognise that intruding on an apparently voluntarily-concluded arrangements is a step that judges should countenance with care, particularly when it requires them to impose their conceptions of fairness and justice on parties' individual arrangements.” (At para 13).

57. As noted by Cameron JA, common law principles of contract, which are premised upon contractual autonomy as an independent value, are nevertheless not immune from constitutional scrutiny. One may identify two considerations courts have invoked to limit the application of the *contra bonos mores* doctrine.
58. The first is that contractual provisions commonly found in comparable agreements are unlikely to be deemed against public policy. Courts have not hesitated to enforce non-withholding clauses in lease agreements.⁹ And, as we have seen, the SCA enforced what amounted to a non-withholding clause in the Crestleigh case.
59. Second, Courts have been loath to treat contractual terms as *contra bonos mores* where the party resisting enforcement has not met its burden of showing an unequal bargaining position. In a matter in this division in which the respondent based its *bona fide* defence upon allegedly one-sided terms in an agreement,¹⁰ the Court granted summary judgment because the respondent had presented no facts demonstrating such lop-sided bargaining power.¹¹
60. Here, the Respondent has not even gone so far as to allege an unequal

⁹ See Platinum Mile Inv. 513 (Pty Ltd v Midrand Gold & Diamond Exchange (Pty) Ltd [2020] ZAGPJHC 184 at para 40; Growthpoint Properties Limited v Africa Master Blockchain Company (Pty) Ltd (2020/43806) [2022] ZAGPJHC 836 at para 34.

¹⁰ Nedbank Limited v Van Der Berg 2014 JDR 0600 (GNP) at para 40.4.

¹¹ *Id.*

bargaining position *vis-à-vis* the Applicant. This is no David and Goliath struggle. One gleans from the papers that the Respondent, registered some 25 years ago, is a significant player in the South African market. There is no reason not to treat the contract otherwise on the basis that it was concluded by equals, each of which was capable of negotiating terms to serve their respective commercial interests.¹²

61. I conclude that the Respondent failed in its attempt to establish a *bona fide* defence on the basis of the Applicant's STCs are *contra bonos mores* and hence unenforceable. It follows that clauses 27.1 and 45.3 must be treated as fully part of the agreement between the parties. The Respondent is obliged to pay the disputed amount in full before advancing its claim. The Respondent is not without remedy; it is free to pursue whatever legitimate claim it may have by paying over the amount claimed (without prejudice) and thereafter bringing suit to recover it.

Duty of Care: Was the Applicant obliged to specifically draw the Respondent's attention to the revision to the Cost Structure?

62. The Respondent's third argument with respect to the STCs is that the Applicant, acting as its agent or mandatee, owed it a legal duty of care, which it breached by failing to keep it apprised in real time about circumstances

¹² Bredenkamp And Others v Standard Bank of South Africa Ltd and Another 2009 (6) SA 277 (GSJ) at para 26 & 27.

that might result in variation of the transaction's cost.

63. This is premised on the allegation that the Applicant held itself out as an expert in the logistics services industry. This duty required the Applicant, so it is said, to keep the Respondent informed of all costs relating to the carriage, as they might vary from time to time. Respondent alleges that, had it been aware of the charges captured in the Applicant's September invoice, it would not have given the green light for shipment.
64. The Respondent says little about the derivation of the alleged duty of care beyond asserting that the Applicant held itself out as an "expert" in logistics. How and when the Applicant thus held itself out as such is not explained. The alternative proposal that a duty of care is to be implied in all contracts of this nature is without merit. The existence of a duty to prevent loss is a conclusion of law which depends on the circumstances of the case.¹³
65. We have seen that the Applicant contends that the aggregated charge for the repackaging and carrier costs was disclosed to the Respondent via e-mail on 3 May 2019 and that the Respondent assented thereto by furnishing a duly signed clearing and delivery instruction on 6 May 2019.
66. In its supplementary heads of argument, the Respondent suggests the duty of care entails that it was not in order for the Applicant to draw the attention of the Respondent to changes in the cost structure *only* by way of an email

¹³ Knop v Johannesburg City Council 1995 (2) SA 1 (A) 27.

trail.

67. But it is difficult to understand how a special duty of care – even if it exists here – can be interpreted formalistically to import what seems almost quaint given contemporary commercial reality. One wonders what form of notification would have satisfied the Respondent. Was the Applicant obliged to advise the Respondent in real time of every change in the price structure by way of a stand-alone letter - and to take no further steps pending receipt of a green light in the form of express assent? As the undisputed facts suggest, an unwieldy protocol would not be businesslike in an industry in which prices are highly variable on short notice, and holding goods in transit may incur high warehousing costs.¹⁴
68. The Court takes judicial notice of the fact that it is a commonplace for complex commercial contracts to be embodied in email communication. Documents evidencing contractual terms may be attached in PDF form or captured in what are variously termed *trails*, *threads*, and *strings*.¹⁵ This is, of course, subject to the circumstances in which an *electronic signature* will

¹⁴ Genesis Medical Scheme v Registrar of Medical Schemes and Another 2015 (4) SA 91 (WCC) at para 37 (an “unworkable and unjustifiable interpretation ... ought to give way to one that promotes a practical and businesslike outcome”); Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 18 (“A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.”)

¹⁵ Venter and Another v Astfin (SA) (Pty) Limited and others 2023 JDR 3412 (GJ) at para 21-22; Edery N.O v Brands 2 Africa Proprietary Limited and Others (2021/58016) [2023] ZAGPJHC 85 (3 February 2023) at para 32-22; Mobile Complete (PTY) Limited v RAM Transport (South Africa) (PTY) Limited (1746/2021) [2022] ZAGPJHC 744 (6 October 2022) at para 17-18.

be recognised under the Electronic Transactions Act (No. 4 of 2019), in which that term is defined to mean “data including a sound, symbol or process, executed or adopted to identify a person and to indicate that person's approval or intention in respect of the information contained in a data message and which is attached to or logically associated with that data message.”

69. Notably, the Court of Appeals for England and Wales found that text contained in email “threads” may constitute a written agreement. A guarantee embodied in such a thread was treated as an agreement in writing, such that it complied with the governing statute.¹⁶
70. The Respondent, in its supplemental heads, cites the case of David Trust and Another v Aegis Insurance Company Limited and Another 2000 (3) SA 289 (SCA). The appellant had entrusted its affairs to a firm of chartered accountants, one of whose partners had siphoned funds from the account. The issue was whether there had been a breach of the duty of care principles inherent in the practice of the profession. The Court answered this question in the affirmative, it being one of the *naturalia* of the contract between a chartered accountant and its client that the former perform its mandate with care and diligence.
71. I do not see this authority as pertinent here. David involved a qualitatively

¹⁶ Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd & Anor [2012] EWCA Civ 265 (9 March 2012) at para 22 (<https://www.bailii.org/ew/cases/EWCA/Civ/2012/265.html>).

distinct arrangement between an investor and a financial intermediary. One cannot compare the fiduciary duty imposed upon a professional to take all steps to protect a client's funds with an ostensible duty to advise a counterparty to a logistics agreement of changes in the calculation base and quantum of a disbursement in a rigidly formalised fashion. The Crestleigh case, *supra*, suggests as much.

72. Even where there may be an in-principle duty to speak, the scope of that duty falls to be interpreted in a context-sensitive fashion. Schreiner JA, in a matter in which the injured party alleged that the respondent had breached its duty to speak, quoted the following language from the New York Court of Appeals:

"Liability in such cases arises only where there is a duty, if one speaks at all, to give the correct information. That involves many considerations. There must be knowledge, or its equivalent, that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that, if false or erroneous, he will, because of it, be injured in person or property."¹⁷

73. The lesson is that a duty of care, in the form of a duty not to remain silent, does not arise in the abstract. It entails not only that the Applicant foresaw harm as a result of its omission to speak, but that the foreseen injury comes

¹⁷ Herschel v Mrupe 1954 (3) SA 464 (A) (quoting International Products Company v Erie Railway Company 56 ALR 1377 at 1381.)

to pass.¹⁸ On the facts pleaded in this case, there was no harm, foreseen or otherwise. The Respondent has been charged not a penny more than the amount it agreed upon.

Conclusion and Costs

74. In the premises, the application for summary judgment is granted.
75. Seeing no basis to deviate from the ordinary rule, I order that the Respondent pay costs on a party-and-party scale. In light of the size of the record, coupled with the fact that the issues presented were of some complexity, I am of the view that Scale B in Rule 69(7) of the Uniform Rules with respect to costs of counsel should apply with respect to cost incurred from 12 April 2024 onwards.

ORDER

76. In the premises the following order issues:
- 76.1. The application for summary judgment is granted for payment in the amount of R 957,878.08 plus interest at the rate of 10% per annum from 30 October 2019 to date of payment.
- 76.2. The Respondent shall pay the party-and-party costs of the Applicant's at the scale prescribed in Scale B of Rule 69(7) of

¹⁸ Mukheiber v Raath and Others 1999 (3) SA 1065 (SCA) (a legal duty exists in relation to the consequences of conduct.)

the Rules with respect to costs incurred from 12 April 2024 onwards, and under the costs regime prevailing prior to 12 April 2024 with respect to costs incurred before that date.

SO ORDERED


OSBORNE AJ 12 July 2024

**Acting Judge of the High Court
Gauteng Division, Johannesburg**

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