FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

PARTIES:

KUEHNE AND NAGEL LTD vs BREATHETEX CORPORATION LTD

- Case Number: **1921/06**
- High Court: **South Eastern Cape Local Division**

DATES HEARD: **26 & 27 SEPTEMBER 2007**

DATE DELIVERED: **15 November 2007**

JUDGE(S): **ERASMUS J**

LEGAL REPRESENTATIVES -
Appearances:

- for the plaintiff(s): **ADV. J. BABANIA**
- for the defendant(s): **ADV. R.G. BUCHANAN SC**

Instructing attorneys:

- for the plaintiff(s): **STUART HARRIS ATTORNEYS c/o BURMAN KATZ ATTORNEYS**
- for the defendant(s): **RUSHMERE NOACH INC**

CASE INFORMATION -

- *Nature of proceedings* : **Trial**
- *Topic:* **Action for services rendered i.t.o. contract**
- *Keywords:* **Contract – Interpretation of – Extrinsic evidence – Parol evidence rule – *Quasi-*mutual consent – *Caveat subcriptor* – Reasonable steps to bring conditions to attention of party signing contract.**

IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH EASTERN CAPE LOCAL DIVISION)

Case no: 1921/06
Date delivered: 15.11.2007

In the matter between:
KUEHNE AND NAGEL (PROPRIETARY) LTD **Plaintiff**

vs

BREATHETEX CORPORATION (PROPRIETARY) LTD **Respondent**

JUDGMENT

A.R. ERASMUS, J:

[1] On 20 March 2001 the parties entered into an agreement contained in a document titled 'CREDIT APPLICATION FORM' a copy of which is attached to the plaintiff's particulars of claim as 'annexure A'. In terms of the agreement the plaintiff would act as freight forwarder for the defendant. This relationship appears from a single provision therein. That provision, which is of central importance in the adjudication of the case, reads:

'I/We, understand that all business is undertaken in terms of the Trading Conditions of the South African Association of Freight Forwarders, a copy of which has been left with me/us. I/We confirm that I/we have read and understood the contents thereof.'

(A copy of the trading conditions referred to in the provision is attached to the particulars of claim as 'annexure B').

[2] The plaintiff sues the defendant for the amount of R204 682.26 for services rendered to the defendant under the agreement. In its plea the defendant admits being indebted to the plaintiff in that amount, but pleads that the plaintiff is liable to it in the sum of R196 809.86 in respect of damages arising from breach of contract. The defendant counterclaims for that amount and tenders payment of the balance being R7 872.40 (which amount – so I am informed – has since been paid by the defendant). On the pleadings it is common cause that the parties entered into the written agreement. The defendant however denies that the Trading Conditions of South African Association of Freight Forwarders ('SAAFF') was of application to their agreement. The significance of the defendant's denial lies therein that those 'conditions' apparently afford the plaintiff a defence to the counterclaim.

[3] At the pre-trial conference in terms of rule 37, the parties reached the following agreement:

> '1. The parties agree that, subject to the leave of the above Honourable Court, the issues in respect of this matter be separated as envisaged by rule 33(4) of the Uniform Rules of Court.
>
> 2. In this regard, the above Honourable Court is required to determine, separately from the remaining issues in this matter, whether the agreement concluded between the plaintiff and the defendant on or about 20 March 2001 includes annexure "B" to the plaintiff's particulars of claim ("the issue').

3. The plaintiff contends that the agreement concluded between the parties on or about 20 March 2001 includes annexure "B" to its particulars of claim. The defendant contends that it does not.

4. Should the above Honourable Court determine the issue in favour of the plaintiff, the parties agree that such determination would be dispositive of the action under the above case number, pursuant to which, judgment should be granted in favour of the plaintiff as prayed for by the plaintiff in its particulars of claim.

5. Should the above Honourable Court determine the issues in favour of the defendant, the remaining issues under the above case number, as formulated by the defendant in its counterclaim, shall be postponed *sine die*, with the costs in the cause.'

[4] At the commencement of the trial, the court ordered the separation of issues in accordance with the agreement, whereafter both parties adduced evidence. On that evidence it is common cause, or not in dispute, that the plaintiff delivered the blank credit application form (annexure A) to the business premises of the defendant, where it was completed by an employee of the defendant and then signed by the defendant's financial manager and its operations director on 20 March 2001. The factual dispute turns on the question whether a copy of annexure B had accompanied annexure A when that document was left at the defendant's business premises. That question relates to the nub of the defendant plea:

'2.4.1 The attention of the representatives of the defendant were (sic) never drawn to the aforesaid trading conditions and/or a copy of such trading conditions was never left with the defendant nor were they read to or read by the representatives of the defendant.

2.4.2 Accordingly such trading conditions do not form part of the contractual relationship between the parties.'

[5] This averment of the defendant is in direct contradiction of the provision in the written agreement set out above (para [1]). If the object of the evidence presented by the defendant were to redefine the terms of the written agreement, it would be inadmissible in the absence of allegation of fraud or *justus error*. '(T)he integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered' (per Corbett JA in *Johnston vs Leal* 1980 (3) SA 927 (A) 943B). I do not understand counsel for the defendant to argue otherwise.

[6] Mr. Buchanan submits however that on a proper interpretation of the relevant provision, the parol evidence rule does not apply to the extrinsic evidence adduced by the defendant. He submits that the applicability of the SAAFF trading terms and conditions is premised on the extrinsic fact that a copy thereof had actually been left with the defendant prior to the defendant's representatives signing the credit application on 20 March 2001. Therefore, so he contends, for the provision to become operative the plaintiff must prove that fact, and the defendant may therefore present evidence in disproof thereof.

[7] Counsel reinforces his argument with reference to the comment in

Union Spinning Mills (Pty) Ltd vs Paltex Dye House (Pty) Ltd 2002 (4) 408 (SCA) para [6]:

> 'The legal principles applicable to the imposition of standard terms of contract are well known. They are clearly stated in Christie *The Law of Contract*. Furthermore, where a party alleges an agreement, that party bears the *onus* of proving the terms of the agreement, even if this involves proving a limitation of liability or that exclusion clauses did not form part of the agreement. It is also necessary for a party relying upon special terms and conditions to prove that the document in which such terms and conditions appear is the type of document where the recipient would expect to find such conditions and in addition that reasonable steps were taken to bring the conditions to the attention of the recipient.'

[8] The provision that the business (between the parties) is to be undertaken in terms of the 'Trading Conditions of the SAAFF' determines the nature of the agreement, namely freight forwarding. As such it is a necessary and integral term of the agreement. In the context of the agreement no reason presents itself for making its operation subject to the precondition that a copy of annexure B had been left with the defendant prior to the defendant's representatives signing the agreement. There is however good reason for the opposite to be the case.

[9] The document constituting the agreement is contained in a credit application form consisting of a single page. The top half of the document allows for details of the applicant. There then follow four terms relating to credit facilities, interest and jurisdiction. The term making the trading conditions of the SAAFF applicable to the agreement comes thereafter, immediately above the signatures of the defendant's representatives. The term is not surreptitiously introduced into the agreement. It is in the same print as the rest of the document, prominently placed where one could expect to find such a term. *Ex facie* the document the plaintiff took reasonable steps to bring the term to the attention of the defendant. The defendant cannot

blame the plaintiff for the nonchalance or negligence of its representatives in not reading the document before signing it. On the doctrine of *quasi*-mutual consent, the defendant is bound by the provision irrespective of whether the defendant's signatories were aware of the provision. The defendant, its representatives having signed the document, cannot now be heard to deny that the provision is valid and operative. *Caveat subcriptor.* That then really is the end of the matter.

[10] The plaintiff went one step further. It required each signatory to the agreement to acknowledge that a copy of the trading conditions of the SAAFF had been left with him or her, and confirmation that he or she had read and understood the contents thereof. Counsel's contention that this provision somehow placed an obligation on the plaintiff to prove that the document had actually been left with the defendant, flies in the face of the clear wording of the provision. On counsel's interpretation, words such as 'provided that' or 'only if' have to be read into the provision qualifying the words 'a copy of which has been left with me/us'. This runs counter to the principles governing the interpretation of contracts. Such interpretation, moreover, cannot be reconciled with the sentence that follows: 'I/we confirm that I/we have read and understood the contents thereof'.

[11] The purpose of the provision is clear. It was to establish certainty as to whether a copy of the trading conditions had been left with the defendant's signatories and whether they had read and understood the contents thereof; in other words, to avoid a factual dispute such as has arisen in this court. On counsel's interpretation, the provision will achieve the very opposite of what was intended thereby.

[12] For these reasons, I find that the agreement concluded between the plaintiff and the defendant on 20 March 2001 includes annexure B to the plaintiff's particulars of claim. In terms of the parties' agreement, judgment is granted in favour of the plaintiff for the following:

1. Payment of the amount of R196 809,86 together with interest thereon at the maximum permissible rate allowed in terms of the

Usury Act, 1968.

2. Costs of suit on the attorney and own client scale.

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A.R. ERASMUS
JUDGE OF THE HIGH COURT

DATE: