IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 31/10/06 /

NOT REPORTABLE **CASE NO: 2006/8054**

In the matter between:

ANVIL FINANCIAL SERVICES (PTY) LTD	**First plaintiff**
REGENT INSURANCE COMPANY LTD	**Second plaintiff**
and	
NETSTAR (PTY) LTD	**Excipient/Defendant**

JUDGMENT

RABIE J:

[1] In this matter the defendant filed an exception to the plaintiffs' particulars of claim on the basis that it is vague and embarrassing. The defendant filed a notice in terms of rule 23(1) of the uniform rules of court and in the notice based its attack on four paragraphs of the particulars of claim. The exception to paragraph 5.8 of the particulars of claim was, however, subsequently abandoned. The defendant persisted with the attack on paragraph 8.2, 10 and 13 of the particulars of claim.

[2] A brief overview of the particulars of claim and the salient facts of the case is necessary. The plaintiffs claimed damages from the defendant in the amount of R3 809 723.00 and R3 189 363.00 respectively, which the plaintiffs allegedly suffered

as a result of a breach of contract on the part of the defendant. Both the applicants relied in their causes of action on the same written finance agreement entered into between themselves and the defendant.

[3] The defendant is a company which provides a service to the public for, *inter alia,* the tracing and recovery of stolen or hijacked vehicles. In order to supply the service, the defendant installs a so-called Netstar unit in the motor vehicle of a subscriber. The subscriber then enters into a standard service agreement for a period of three years. The monthly subscription fee is aimed at covering the initial capital outlay in respect of the Netstar unit itself as well as the so-called monthly airtime charges, which pertains to the service rendered by the plaintiff in respect of the tracing and recovery of the vehicle concerned.

[4] In order to supply a subscription package to the consumer without the consumer having to pay for the initial capital outlay upfront, the two plaintiffs and the defendant entered into the aforesaid financial agreement. In terms of the agreement, the first plaintiff would provide the financing for the capital amount pertaining to every installation in the vehicle of a consumer, and will also be responsible to bill the subscriber and to collect the monthly subscriptions during the duration of the contract. The role of the second plaintiff was to collect from the first plaintiff that portion of the monthly subscription received from the subscribers which relate to the monthly airtime charges supplied by the defendant, and to pay such amount over to the defendant. The monthly airtime charges related to the service supplied by the defendant to the consumer namely the tracking and recovery of stolen vehicles. For this service the second plaintiff would receive a collection fee.

[5] In paragraph 6.1.1 of the finance agreement, the parties further agreed as follows:

"Netstar world market the products in accordance with the particular subscription price set out in annexure C from time to time, including free fitment, and shall also procure that all potential subscribers are made aware of the existence and availability of the subscription package as a method of financing the products".

[6] There seems to be a dispute between the parties regarding the exact meaning and extent of paragraph 6.1.1 of the agreement, but, broadly speaking, it would appear that according to this paragraph and the rest of paragraph 6, the defendant's initial obligation was to make a potential subscriber aware of the availability of the finance facility supplied by the first plaintiff. Thereafter, if the potential subscriber indicates to the defendant that he is interested in the finance facility supplied by the first plaintiff, the defendant would be obliged to require such a subscriber to sign the prescribed agreement with the first plaintiff. It does not appear that every potential user of the defendant's product is obliged to make use of the finance facility supplied by the first plaintiff and in such an event, the aforesaid agreement between the parties would not apply to such a user.

[7] In paragraph 6 of the particulars of claim the plaintiff alleged that:

"On a proper interpretation of clauses 4 and 6 of the agreement, alternatively as an implied, alternatively, tacit term of such agreement, the parties were obliged not to do anything to frustrate one another's contractual rights or the proper performance of one another's contractual obligations."

[8] It was common cause between the parties that the aforesaid agreement was

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lawfully terminated with effect of from 9 September 2004. The plaintiffs' claims resulted from an alleged breach of the agreement during the eight-month period prior to the termination of the agreement.

[9] In paragraph 8 of the particulars of claim the plaintiffs described these breaches. According to the plaintiff's these breaches were material and in paragraph 8.2 of the particulars of claim the breaches relevant to this matter was set out as follows:

"It (the defendant) fitted hardware to subscribers' vehicles and concluded standard service agreements with subscribers to render the services defined in the agreement, but prevented the first plaintiff from financing any of the transactions, by failing to advise it that such hardware had been fitted to subscribers' vehicles and/or that such standard service agreements had been concluded with subscribers and/or that any such subscribers required financing of the transactions concerned, alternatively itself financed such transactions".

[10] As will more fully appear below, the defendant's exception largely related to the last of the aforesaid alleged breaches, namely that the defendant breached the agreement by itself financing transactions with subscribers instead of causing such potential subscribers to be financed by the first plaintiff.

[11] In paragraph 10 of the particulars of claim the loss allegedly suffered by the first plaintiff is set out. The calculation of the loss is based on the number of service agreements with subscribers which the plaintiffs allege they would have concluded had it not been for the defendant's aforesaid breach of contract. In paragraph 12 of the particulars of claim the loss allegedly suffered by the second plaintiff is set out and this was calculated on the same basis as that of the first plaintiff.

[12] It is now necessary to turn to the notice of exception filed by the defendant. The first ground of exception to be considered appears in the second paragraph of the exception and relates to paragraph 8.2 of the particulars of claim. The following is said in respect of paragraph 8.2 of the particulars of claim:

"To the extent that the plaintiffs in paragraph 8.2 of the particulars of claim read with paragraph 9 thereof alleged that the defendant breached the provisions of the agreement, annexure X1 to the particulars of claim (read with the addendum thereto), by itself financing the transactions referred to in paragraph 8.2 of the particulars of claim during the period February 2004 until of November 2004, such alleged conduct on the part of the defendant could, having regard to the provisions of clause 10.1 of the agreement, annexure X1 to the particulars of claim, not have constituted a breach by the defendant."

[13] The second and third grounds of the exception were directed at paragraphs 10 and 13 of the particulars of claim, which paragraphs both relate to the calculation of the loss allegedly suffered by each of the plaintiffs. Regarding both these paragraphs the defendant alleged that, having regard to clause 10.1 of the agreement, the conduct of the defendant in concluding financial transactions itself, as set out in the last part paragraph 8.2 of the particulars of claim, could not have and did not constitute breaches of the agreement. In the result, so it was submitted by the defendant, the quantification by the plaintiffs of their loss, as set out in paragraphs 10 and 13 respectively, is incorrect for the reason that it is based on the allegation that the plaintiffs breached the provisions of the agreement, while, in terms of the provisions of clause 10.1 of the agreement, the defendant was in fact entitled to provide finance to subscribers itself.

[14] It would appear, therefore, that all the grounds on which the exception by the defendant is based, relate to only one question namely whether the defendant was entitled to conclude financial transactions itself with new subscribers, or whether it was not so entitled.

[15] On behalf of defendant it was submitted that clause 10.1 of the agreement provided expressly that the defendant would not during a period of 12 months after the signature of the agreement, i.e. until 13 May 2000, enter into a similar financing agreement with persons other than the first or the second plaintiffs. Furthermore, that after this embargo ceased to exist after the 12 month period, the defendant was free to enter into similar financing agreements with persons other than the plaintiffs. According to the defendant this catered for the type of case where a particular subscriber required financing in respect of the defendant's product, but was not prepared to conclude a finance agreement with the plaintiffs and required the defendant itself to finance both the installation of the product and the supply of the air time service.

[16] It was accordingly submitted on behalf of the defendant that the agreement allowed the defendant to conclude such finance agreements itself subsequent to 13 May 2000 (i.e. after the 12 month period) and that, consequently, the allegation in paragraph 8.2 of the particulars of claim that such financing by the defendant itself constituted a breach of the agreement, is irreconcilable with the terms of the agreement. It was further submitted that the plaintiff's reliance on the alleged breach of contract, as well as the quantification of the claims which relied on the same allegations, was thus fatally flawed and unsustainable, thereby rendering the

particulars of claim excipiable.

[17] It is well established that a pleading is "vague and embarrassing" if by reason of the imprecise manner in which the facts are pleaded, the pleading lacks particularity or the other party is "embarrassed" by being unable to plead issuably to the allegations made. In Harms, Civil Procedure in the Superior Courts, paragraph B23.4, it is stated that:

"An exception may be taken only when the vagueness and embarrassment strike at the root of the cause of action pleaded, i.e., if the other party will be seriously prejudiced if the allegations remain."

[18] A few further general comments may be made. Firstly, the court should not look too critically at a pleading. Unless the excipient can satisfy the court that there is a real point of law or a real embarrassment, the exception should be dismissed. Furthermore, exceptions are not generally the appropriate procedure to settle questions of interpretation. The same applies to the pleading of implied and tacit terms. In that regard, the test on exception is whether the trial court could (not "should") reasonably imply the term alleged.

[19] According to the defendant's notice of the exception, the main thrust of the exception is that having regard to the provisions of clause 10.1 of the agreement, the defendant's conduct by itself financing the transactions, could not have constituted a breach of contract by the defendant. During argument on behalf of the defendant reference was also made to the whole of the written agreement which was annexed to the particulars of claim and it was submitted that it does not contain a term which prohibits the defendant, from itself financing subscribers. Consequently, so it was

submitted, the allegation in the particulars of claim is irreconcilable with the terms of the agreement to which it referred. In these circumstances, so it was further submitted, the particulars of claim are vague and embarrassing. It was further submitted that the plaintiffs did not plead a tacit or implied term of the agreement which prohibited the defendant from financing subscribers.

[20] In regard to this last-mentioned submission it was submitted on behalf of the plaintiffs that paragraph 6 of the particulars of claim in fact states that, on a proper interpretation of the clauses 4 and 6 of the agreement, alternatively, as an implied, alternatively, tacit term of such agreement, the parties were obliged not to do any thing to frustrate one another's contractual rights or the proper performance of one another's contractual obligations. I agree with this submission. Paragraph 6 opens the door for an interpretation of the agreement as a whole in order to establish whether the defendant was entitled to finance subscribers itself or not.

[21] As far as clause 10.1 of the agreement is concerned, it is clear from both the heading of this clause as well as the contents thereof, that it pertains to exclusivity and a restraint of trade. In my view, this clause has no direct relevance to deciding the issue at hand. Furthermore, there does not appear to be any clause in the contract which specifically provides for the right of the defendant to finance subscribers itself or, for that matter, a clause which prohibits it from doing so. There is also, in my view, no clause in the agreement which is on the face of it irreconcilable with the notion that the defendant was not entitled to finance subscribers itself. Consequently I cannot agree with the submission on behalf of the defendant that the plaintiffs' particulars of claim assume an obligation on the part of the plaintiffs

which cannot be found in the agreement itself or, to put it differently, that the particulars of claim is formulated in such a way that it contradicts, or is irreconcilable with, the agreement which was annexed thereto.

[22] The question whether such a term, (tacit or implied), which prohibits the defendant from financing subscribers itself, should be read into the written agreement, or not, can only be answered by interpreting the agreement as a whole. It is trite that the interpretation of a contract for such a purpose would entail a consideration of background circumstances and, in some instances, of surrounding circumstances.

[23] Consequently, a proper interpretation of the agreement between the parties *in casu,* would only be possible after a consideration of the evidence to be presented at the trial. For this reason an exception is not the manner in which this particular dispute between the parties should be decided. As pointed out above, an exception is generally not the appropriate procedure to settle questions of interpretation. This is so, also as pointed out above, because in cases of doubt, or in cases where the existence or otherwise of implied or tacit terms have to be decided, evidence relating to the background and/or surrounding circumstances may be permissible to assist with the interpretation of the agreement.

[24] Having regard to the contents of the agreement and the particulars of claim I am furthermore satisfied that, having regard to the test on exception, the trial court could reasonably imply the term alleged by the plaintiffs namely that the defendant was prohibited from financing subscribers itself.

allegedly suffered by the plaintiffs, fall to be rejected for the same reasons.

[25] For all these reasons I am of the view that the exception to paragraph 8.2 of the particulars of claim should not succeed. There can, in any event, be no prejudice to the defendant if these allegations remain in the particulars of claim. The allegations are neither vague, nor is the defendant embarrassed in its ability to plead to the allegations.

[28] **In** the result the following order is made:

1. The defendant's exception is dismissed with costs.

[26] Lastly I may mention the argument on behalf of the defendant in respect of a prospective subscriber who requires financing but who does not want to be financed by the first plaintiff. It was submitted that the parties could never have intended that such a person should be compelled to be financed by the first plaintiff. Accordingly, so it was submitted, the implied or tacit term proposed by the plaintiffs is irreconcilable with the agreement as a whole. I do not agree with this submission. On the face of the contract as it stands, nothing appears to stand in the way of such a person obtaining finance from any other institution. Furthermore, and depending on the evidence, a court might very well find that the intention of the parties was never to prevent such "outside" financing but that it was contrary to spirit of the agreement and the intention of the parties to allow the defendant to offer such financing itself and that an implied or tacit term should therefore be read into the agreement to prevent the defendant from undermining the whole purpose of the agreement by financing subscribers itself. Consequently I am of the view that it cannot be excluded, as a reasonable probability, that a trial court might on the evidence find that a tacit or implied term in that regard can and should be read into the agreement.

[27] The further grounds of exception which relate more particularly to the paragraphs in the particulars of claim dealing with the calculation of the damages