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CONTENTS

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In this issue

Contract - consequential damages - interpretation of - tacit term Insurance limitation of liability Municipality zoning rules Tender award of Town planning commercial use Words and phrases hardware shop - shop

ORIGIN GLOBAL HOLDINGS LTD v ACORN AGRI (PTY) LTD

A tacit term which cannot be imported into an agreement where it is clear that the agreement is clear and unambiguous

Judgment given in the Western Cape Division, Cape Town, on 3 June 2021 by Bozalek J

Origin Global Holdings Ltd brought an action against Acorn Agri (Pty) Ltd and the second defendant, Afrifresh Group (Pty) Ltd, claiming against them jointly, alternatively, jointly and severally, payment of US$796 617.72 by reason of their alleged breach of their obligations in terms of a share purchase agreement ('the SPA').

The SPA was concluded in writing on 3 September 2016, the parties thereto being Standard Chartered Private Equity (Mauritius) III Limited ('SCPE') the first and second defendants, Afrifresh Holdings (Pty) Ltd, represented by a Mr C. Conradie, and Mr Conradie himself.

In terms of the agreement SCPE sold 93% of the shares in Afrifresh to Acorn. Clause 9.1 of the SPA provided that Acorn undertook to procure that Afrifresh would enter into negotiations with Conradie with a view to concluding an agreement between Afrifresh and Conradie in terms of which Afrifresh would supply produce to Conradie or his nominee. Clause 9.4 provided that if a Supply Agreement, on terms and conditions acceptable to Afrifresh and Conradie, was not concluded within 6 months after the Effective Date:

9.4.1 the Purchaser (Acorn) undertook in favour of Origin Holdings that a loan of USD1 950 000 which the Purchaser would hold against Origin Holdings pursuant to the terms of the agreement would not be enforced by the Purchaser and/or Afrifresh and the rights of the Purchaser and/or Afrifresh in respect thereof would be ceded outright and irrevocably to Origin Holdings, provided that Conradie had complied with his obligations in terms of clause 9.3); and

9.4.2 Afrifresh would supply a minimum of 500 000 units of fruit per year for 2 years from the Signature Date to Origin Holdings on market related terms and conditions. For the avoidance of doubt, the terms and conditions of the supply of fruit by Afrifresh to Origin Holdings would be consistent with past practice and at market related prices and on market related service provisions not materially different from industry norms.

In its claim, Origin pleaded that a Supply Agreement could not be concluded within the six-month period as result of which clause 9.4 became operative, and in particular clause 9.4.2, in terms of which, it alleged, Acorn and Afrifresh were obliged to supply a minimum of 500 000 units of fruit per year for two years for the benefit of Origin at market related prices.

The allegation that Acorn was subject to this obligation formed the basis of its exception to the claim. Acorn contended that clause 9.4.2 imposed no obligation on it to supply or procure the supply of fruit by Afrifresh. In consequence, the allegation that Acorn was in breach of any obligations in terms of clause 9.4.2 of the SPA was not supported by the provision of the SPA on which Origin relied, and the Particulars of Claim failed to disclose any cause of action against it.

Origin contended that the SPA, in particular, clause 9.4, could be interpreted as imposing an obligation on Acorn to procure that Afrifresh supply a minimum of 500 000 units of fruit per year for two years for its benefit collectively on market related terms and conditions. This obligation arose by interpreting the clause as having a tacit term to this effect.

Held—

Clause 9.4 of the SPA provided comprehensively for the consequences of a Supply Agreement not being concluded within the six-month period. Clause 9.4.1 provided that in such event, Acorn forfeited its right to recover a loan of US$1 950 000.00 from Origin and ceded its rights in that regard irrevocably to Origin. Clause 9.4.2 provided a further negative consequence for the defendants in that the company whose shareholding it purchases in terms of the SPA, Afrifresh, undertook in that event, as a fall back for the lack of a negotiated Supply Agreement, to supply fruit at a minimum amount of 500 000 units over two years, for the benefit of Origin. It was a breach of that latter fall back provision, clause 9.4.2, upon which Origin's claim against Acorn was based. What it sought, by way of the importation of the tacit term, was to add Acorn as a party co-liable with Afrifresh for the consequences of a breach of subclause 9.4.2.

The essential averment relied on upon by Origin in support of the possibility of the tacit term being established was that in terms of the SPA, Acorn became the exclusive 'corporate controller' of Afrifresh, coupled with the submission that any liability arising from clause 9.4.2 should equally rest upon Acorn. Neither the averment nor the linked submission advanced Origin's case for the tacit term sought to be imported into the SPA. The mere fact that Acorn was the corporate controller of Afrifresh did not justify any imputation of co-liability to Acorn in terms of clause 9.4.2, particularly against the background of clause 9.4.1 already providing a substantial financial penalty for Acorn in the event that the negotiations for a Supply Agreement were unsuccessful. Nor was there any suggestion in either the pleadings or from the SPA, that Origin's contractual remedies for breach of the provisions of clause

9.4.2 would be ineffectual inasmuch as they lay against Afrifresh alone.

Having regard to all these factors, including the lack of any ambiguity in clause 9.4, the dearth of any indications of surrounding circumstances in the pleaded allegations read with the SPA, or elsewhere, which would militate in favour of the implied term contended for, and the fact that clause 9.4.2 was reconsidered and amended by way of an addendum which left the crucial provisions untouched, there was no room for the importation of the tacit term for which Origin contended.

The wording of clause 9.4 was clear and unambiguous, and did not produce a result which was unreasonable, lacking in sense or unbusinesslike. There was no room for interpretation of the SPA which imposed any obligation on Acorn in terms of clause 9.4.2.

Advocate J Butler SC instructed by Hayes Inc, Cape Town, appeared for the plaintiff

Advocate J Muller SC and Advocate W Jonker instructed by Van Der Spuy Inc, Cape Town, appeared for the defendant

Bozalek J:

[1] The first defendant raises an exception to the plaintiff's particulars of claim on the basis that it fails to disclose a cause of action against the first defendant, alternatively, that the particulars of claim are vague and the first defendant is embarrassed in pleading thereto.

[2] The plaintiff ('Origin Global'), a Mauritian company, instituted action against the first and second defendants ('Acorn' and 'Afrifresh') claiming against them jointly, alternatively, jointly and severally, payment of US$796 617.72 by reason of the defendants' alleged breach of their obligations in terms of a share purchase agreement (hereinafter 'the SPA').

[3] The plaintiff amended its Particulars of claim ('the Particulars') on two occasions and on 17 March 2020 the first defendant delivered the notice of exception which is the subject of the present proceedings.

[4] The SPA was concluded in writing on 3 September 2016, the parties thereto being Standard Chartered Private Equity (Mauritius) III Limited ('SCPE') the first and second defendants, Afrifresh Holdings (Pty) Ltd, represented by Mr Chris Conradie, and Mr Conradie himself.

[5] Very simply, in terms of the agreement SCPE sold 93% of the

shares in the second defendant (Afrifresh) to the first defendant (Acorn). The key clause in the SPA for the purposes of the exception is clause 9. In reading this clause it must be borne in mind that 'the Purchaser' is Acorn (first defendant), 'the Company' is Afrifresh (second defendant,) 'Origin Holdings' is the plaintiff and 'Holdings' is Afrifresh Holdings (Proprietary) Limited. Clause 9 reads follows:

'9. SUPPLY AGREEMENT

9.1 The Purchaser undertakes in favour of Conradie that it will procure that the Company enters into negotiations with Conradie as soon as reasonably possible after the Effective Date, with a view to concluding an agreement between the Company and Conradie or his nominee in terms of which the Company agrees to supply produce to Conradie or his nominee (the Supply Agreement). (For purposes of this clause 9, Conradie hereby irrevocably nominates OFD and ODA as his nominees.)

9.2 Pending the outcome of the negotiations referred to in clause 9.1, (but subject to clause 9.4) the Purchaser and the Company may not cede, alienate or encumber the loan claim of USD1 950 000 which the Purchaser will hold against Origin Holdings pursuant to the terms of this Agreement.

9.3 The Company and Conradie undertake to negotiate in good faith with each other with a view to concluding a Supply Agreement.

9.4 If a Supply Agreement, on terms and conditions acceptable to the Company and Conradie, is not concluded within 6 months after the Effective Date:

9.4.1 the Purchaser undertakes in favour of Origin Holdings and Holdings that the loan of USD1 950 000 which the Purchaser will hold against Origin Holdings pursuant to the terms of this Agreement will not be enforced by the Purchaser and/or the Company and the rights of the Purchaser and/or the Company in respect thereof will be ceded outright and irrevocably to Origin Holdings (provided that Conradie has complied with his obligations in terms of clause 9.3); and

9.4.2. the company will supply a minimum of 500 000 units of fruit per year for 2 years from the Signature Date (for the benefit of) to Origin Holdings (to OFD and ODA collectively) on market related terms and conditions. For the avoidance of doubt, the terms and

conditions of the supply of fruit by the Company to Origin Holdings (OFD and ODA) will be consistent with past practice and at market related prices and on market related service provisions that do not materially differ from industry norms.

9.5 The Parties agree that this clause 9 constitutes a stipulatio alteri for the benefit of Origin Holdings and shall be open for acceptance by Origin Holdings which shall be capable of acceptance at any time by Origin Holdings by delivering written notice to that effect to the Parties. Prior acceptance, the benefit of this stipulatio alteri may not be withdrawn by the Parties without the prior written consent of Origin Holdings'.

[6] The bracketed words in subclauses 9.1 and 9.4.2 reflect insertions/amendments to the SPA subsequent to the original date of signature on 3 September 2016, whilst the words with a line through them reflect words deleted pursuant to such amendments. Three addendums to the SPA were executed: on 9 September 2016, 15 November 2016 and again on 15 November 2016. The amendments to clause 9 were effected by the second addendum.

[7] The focus of the exception is clause 9.4 of the SPA in which the defendants give various undertakings in favour of Mr Conradie, the plaintiff and Holdings. In clause 9.1 the first defendant undertook to procure that the second defendant entered into negotiations with Conradie with a view to concluding an agreement between them (the Supply Agreement) in terms of which the second defendant would supply fruit to Conradie or his nominees, namely, OFD and ODA. This was to take place within a period of six months after signature of the SPA.

[8] In its Particulars the plaintiff pleads further that a Supply Agreement could not be concluded within the six-month period as result of which clause 9.4 became operative, and in particular clause 9.4.2, in terms of which, it alleged, the first and second defendants were obliged to supply a minimum of 500 000 units of fruit per year for two years for the benefit of the plaintiff at market related prices. The allegation that the first defendant too was subject to this obligation forms the core of its exception.

[9] The first defendant's exception highlights paragraph 9 of the Particulars, the introduction to which reads as follows:

'9. The following were the material express, alternatively implied, alternatively tacit terms of the SPA as amended, alternatively such terms arise upon a proper interpretation of the SPA as amended.'

[10] Also material is paragraph 9.7 which reads as follows:

'9.7 In terms of clause 9.4, it was agreed that if a Supply Agreement, on terms and conditionals (sic) acceptable to the Second Defendant and to Conradie, was not concluded within 6 months after the Effective Date:

9.7.1 The First Defendant undertook in favour of the Plaintiff and Afrifresh Holdings Proprietary Limited that the loan claim of US$1,950,000.00 would not be enforced by the First Defendant and/or the Second Defendant and the rights of the First Defendant and/or the Second Defendant in respect thereof would be ceded outright and irrevocably to the Plaintiff (provided that Conradie complied with his obligations in terms of clause 9.3); and

9.7.2 The Second Defendant undertook to supply a minimum of 500 000 units of fruit per year for 2 years from the Signature Date for the benefit of the Plaintiff to OFD and ODA collectively on market related terms. For the avoidance of doubt, the terms and conditions of the supply of fruit by the Second Defendant to OFD and ODA would be consistent with past practice and at market related prices and on market related service provisions that do not materially differ from industry norms;

9.7.3 The First Defendant undertook that the Second Defendant comply with its obligations pleaded above.'

[11] The following paragraphs in the Particulars are also relevant:

'10. It was within the contemplation of the parties at the time of the conclusion of the SPA, and the addenda thereto, and the SPA and the addenda thereto were concluded on the basis that:

10.1 The first defendant would become the de facto corporate controller of the second defendant, upon implementation of the terms of the SPA;

10.2 The plaintiff or Conradie had made commitments, or was in the process of making commitments, to a purchaser or intended purchaser of OFD and ODA, being Mahindra Agri Solutions Limited ('Mahindra') in terms whereof, inter alia

10.2.1 OFD and ODA would be able to secure the supply of 500 000 units of fruit per year for 2 years on market related terms and conditions;

102.2 The plaintiff would earn commission on the supply of fruit, via OFD and ODA;

10.2.3 Clause 9, and specifically 9.1, and 9.4.2, were intended to enable OFD and ODA to continue to reserve fruit for their European clients.

10A It was within the contemplation of the parties at the time of the conclusion of second and third addenda to the SPA and such addenda were concluded on the basis that the Plaintiff or Conradie was or would be exposed to Mahindra or to OFD, in the sum of US$1 000 000.00, as a forfeiture or a penalty, were they not to secure supply in accordance with the commitments in paragraph 10.2. above.'

[12] The Particulars allege further that, despite demand, and although they made part performance of their obligations, the first and second defendants failed to effect, supply or procure the full supply of fruit and failed to tender to perform their obligations under clause 9.4.2 of the SPA and thereby breached the SPA, as amended. As a consequence of the aforesaid breach, the plaintiff suffered loss in the form of the penalty or forfeiture pleaded in paragraph 10A, being an amount of US$1mil, alternatively suffered a loss of commission in the sum of US$796 617.71.

[13] The first defendant's exception is directed at paragraph 9.7.3 of the Particulars in which the plaintiff alleges that the first defendant 'undertook to procure that the second defendant comply with its obligations' (to supply a minimum of 1mil units of fruit over a two-year period). That allegation was in turn based upon clause 9.4.2 of the SPA.

[14] The basis of the first defendant's exception is captured in paragraphs 4 and 5 of its notice of exception as follows:

'4. Clause 9.4.2 imposes no obligation on the first defendant to supply or procure the supply of fruit by the second defendant.

5. In the premises:

5.1 the allegation that first defendant was in breach of any obligations in terms of clause 9.4.2 of the Master SPA, as is alleged by the plaintiff in paragraphs 17, 19, 20 and 21 of the POC, is not supported by the provision of the Master SPA on which the plaintiff relies; and

5.2 the POC fails to disclose any cause of action against the first defendant jointly with the second defendant or jointly and severally with the second defendant, for payment of the sum of US$796 617,72'.

[15] In advancing its exception the first defendant eventually ultimately relied only on the ground that the Particulars did not disclose a cause of action. In argument it noted that the plaintiff pleaded that the obligation was imposed on the first defendant on four separate bases, namely: expressly, tacitly, impliedly or on a proper interpretation of the SPA. It dealt with each of these bases and submitted that the allegation was not supported by the provisions of the SPA on any basis and that the Particulars accordingly failed to disclose any cause of action against the first defendant.

[16] In argument the plaintiff relied only on the term having arisen tacitly or, alternatively, on a proper interpretation of the agreement. It contended that since a tacit term is one that arises from the facts and is thus 'fact sensitive', its existence could not be determined on exception. For much the same reason, it contended, the SPA could not be properly interpreted at the exception stage since the exercise could only be done in the context of all the facts which were as yet not before the Court. In regard to both bases the plaintiff relied inter alia on Rule 18(7) which provides that there is no obligation to plead the facts that are relied on for the imputation of an implied term. Finally, the plaintiff contended that there was sufficient contextual material pleaded in the particulars of claim to demonstrate that the term upon which the plaintiff relied could be relatively easily imputed or so interpreted.

The principles to be applied in deciding an exception

[17] It is trite that in deciding an exception the Court must take the facts alleged in the pleadings as correct. A further uncontentious principle is that an excipient has the duty to persuade the Court that upon every interpretation which the facts alleged in the particulars of claim can reasonably bear, no cause of action is disclosed. In *Francis v Sharp and Others*[1] it was held that an excipient should make out a

[1] 2004 (3) SA 230 (C).

very clear, strong case before he should be allowed to succeed. It reaffirmed that the Courts are reluctant to decide upon exception questions concerning the interpretation of a contract.

[18] The principle that Courts are reluctant to decide issues concerning the interpretation of contracts upon exception is however, not an all-encompassing principle. As was stated by Nestadt JA in Sun Packaging (Pty) Ltd Vreulink[2], this approach does not apply where the meaning of the contract is certain.

> 'Difficulty in interpreting a document does not necessarily imply that it is ambiguous … Contracts are not rendered uncertain because parties disagree as to their meaning … Counsel was probably right in saying that the letter is not a lawyer's contract. But this is no reason for interpreting it differently. For the reasons given, I do not find the meaning of clause 3 doubtful. Properly interpreted, it has only one meaning.'.

[19] I turn now to the various bases upon which it is contended by the plaintiff that the SPA, and more particularly, clause 9.4, can be interpreted as imposing an obligation on the first defendant to procure that the second defendant supply a minimum of 500 000 units of fruit per year for two years for the benefit of the plaintiff, to OFD and ODA collectively on market related terms and conditions.

Express term

[20] The first such basis was that this was what the clause expressly provided. As was pointed out by the first defendant, it is clear that the SPA does not contain any such express provision and nor did the plaintiff contend otherwise in argument.

Implied term

[21] The second basis upon which the obligation was said to arise was as an implied term. In *South African Forestry Co Ltd v York Timbers Ltd*[3], Brand JA dealt at some length with the concept of an implied term explaining that, unlike tacit terms, which are based on the inferred intention of the party, implied terms are 'imported into contracts by law

[2] 1996 (4) SA 176 (A).

[3] 2005 (3) SA 323 (SCA).

from without'. He pointed out that the Courts have the inherent power to develop new implied terms stating as follows:

> 'Once an implied term has been recognised, however, it is incorporated into all contracts, if it is of general application, or into contracts of a specific class, unless it is specifically excluded by the parties … It follows, in my view, that a term cannot be implied merely because it is reasonable or to promote fairness and justice between the parties in a particular case. It can be implied only if it is considered to be good law in general. The particular parties and set of facts can serve only as catalysts in the process of legal development.'

[22] From this extract it is clear that the interpretation contended for by the plaintiff could hardly arise from an implied term. Again the plaintiff did not pursue this line in argument, restricting itself to reliance on a tacit term or on the alternative basis of the term arising on a proper interpretation of the agreement.

Tacit Term

[23] I turn then to the argument that the term contended for arose tacitly between the parties. In *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration*[4], Corbett AJA (as he then was), in the minority judgment, discussed at some length the concept of an 'implied term' pointing out that in legal parlance the expression 'implied term' is an ambiguous one in that it can be used to denote two or three distinct concepts. For present purposes I need concern myself only with the second category or concept which was described by Corbett AJA as follows:

> 'In the second place, "implied term" is used to denote an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term the Court, in truth, declares the whole contract entered into by the parties. In this connection the concept, common intention of the parties, comprehends, it would seem, not only the actual intention but also an imputed intention. In other words, the Court

[4] 1974 (3) SA 506 (A).

implies not only terms which the parties must actually have had in mind but did not trouble to express but also terms which the parties, whether or not they actually had them in mind, would have expressed if the question, or the situation requiring the term, had been drawn to their attention.'

The learned judge elected to refer to such a term as a tacit term and went on to state:

'The tacit term, on the other hand, is a provision which must be found, if it is to be found at all, in the unexpressed intention of the parties. … The Court does not readily import a tacit a term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term.'

[24] The latter sentiments were endorsed and expanded upon by Brand JA in Bourbon-Leftley[5]. Referring to the principle that a tacit term is not easily inferred by the Court, he stated as follows:

'The reason for this reluctance is closely linked to the postulate that the Courts can neither make contracts for people nor supplement their agreements merely because it appears reasonable or convenient to do so. … It follows that a term cannot be inferred because it would, on the application of the well-known "officious bystander" test, have been unreasonable of one of the parties not to agree to it upon the bystander's suggestion. Nor can it be inferred because it would be convenient and might therefore very well have been incorporated in the contract if the parties had thought about it at the time. A proposed tacit term can only be imported into a contract if the Court is satisfied that the parties would necessarily have agreed upon such a term if it had been suggested to them at the time. ... If the inference is that the response by one of the parties to the bystander's question might have been that he would first like to discuss and consider the suggested

[5] City of Cape Town (CMC Administration) v Bourbon-Leftley and Another NNO 2006 (3) SA 488 (SCA) at para 9, 494 H – 495 A.

term, the importation of the term would not be justified.

20. In deciding whether the suggested term can be inferred the Court will have regard primarily to the express terms of the contract and to the surrounding circumstances under which it was entered into.'[6]

[25] Recently, in the matter of *Adhu Investments CC and others v Padayachee*[7], the Supreme Court of Appeal referred with approval to the approach to tacit terms expressed in Alfred McAlpine and stated:

'Whether a contract contains such a term is a question of interpretation. Generally, a court would be very slow to import a tacit term in a contract particularly where, as in the instant case, the parties have concluded a comprehensive written agreement that deals in great detail with the subject matter of the contract, and it is not necessary to give the contract business efficacy.

15. The first step in the enquiry as to the existence of such a term is whether, regard being had to the express terms of the agreement, there is any room for importing the alleged tacit term.'

[26] The Court noted clauses in the contract in question providing that the written agreement was the whole agreement and for no variation thereto unless recorded in writing and signed on behalf of the parties. It stated in this regard:

'A sole testimonial clause or non-variation clause does not necessarily, of itself, exclude the existence of a tacit term. These clauses, however, contained as they are in a comprehensive contract dealing in the greatest detail with the subject matter, militate against the inclusion of the tacit term contended for. In my view, (the relevant clauses) give a strong indication that in the present matter the parties intended the written document to reflect the full agreement between them leaving little room, if any, for the incorporation of such a tacit term.'

[27] In advancing its exception the first defendant similarly relies on an 'entire agreement' and a 'non-variation' clause which read respectively as follows:

[6] At page 494/495 H – C.

[7] [2019] ZASCA 63 (24 May 2019).

'21.3 Entire agreement

21.3.1 This agreement constitutes the entire agreement between the Parties in regard to its subject matter.

21.3.2 Neither of the Parties shall have any claim or right of action arising from any undertaking, representation or warranty not included in this Agreement.

21.4 Variation

No agreement to vary, add to or cancel this Agreement shall be of any force or effect unless recorded in writing and signed by or on behalf of the Parties.'

[28] I accept, however, as was contended on behalf of the plaintiff, that the mere existence of a non-variation or an entire agreement clause does not preclude finding a tacit term in the agreement since, as was held in *Wilkins v Voges*[8], a tacit term once found to exist is read into the contract and as such is 'contained in the written contract'.

[29] On behalf of the first defendant it was contended that no surrounding circumstances were pleaded by the plaintiff in support of the inclusion of the tacit term contended for. In response the plaintiff argued that in terms of Rule 18(7) it was not incumbent on it to plead any facts upon which the claim for the importation of a tacit term relied and, secondly, that in any event such factors as are apparent from the particulars of claim read together with the SPA were 'more than sufficient' to support the possibility of the importation of that term.

[30] In regard to Rule 18(7), the plaintiff relied on the commentary in Erasmus Superior Court Practice[9] and on *Roberts Construction Co (Ltd) v Dominion Earthworks (Pty) Ltd*[10]. It is correct that Rule 18(7) provides that it shall not be necessary in any pleadings to state the circumstances from which an alleged implied term can be inferred. However, this clearly cannot mean that any pleading containing a cause of action or defence based on the existence of a tacit term cannot be the subject of a successful exception and must invariably go to trial, since

[8] 1994 (3) SA 130 (AD).

[9] (2nd Ed) at D1-224

[10] 1968 (3) SA 255 (A) at 261 E.

this would render obviously specious claims or defences in contractual disputes, exception-proof. Of relevance in this regard is the following statement by Harms JA in *Telematrix (Pty) Ltd v Advertising Standards Authority SA*[11]:

'Exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility. To borrow the imagery employed by Miller J, the response to an exception should be like a sword that "cuts through the tissue of which the exception is compounded and exposes its vulnerability." Dealing with an interpretation issue, he added:

"Nor do I think that the mere notional possibility that evidence of surrounding circumstances may influence the issue should necessarily operate to debar the Court from deciding such issue on exception. There must, I think, be something more than a notional or remote possibility. Usually that something more can be gathered from the pleadings and the facts alleged or admitted therein. There may be a specific allegation in the pleadings showing the relevance of extraneous facts, or there may be allegations from which it may be inferred that further facts affecting interpretation may reasonably possibly exist. A measure of conjecture is undoubtedly both permissible and proper, but the shield should not be allowed to protect the respondent where it is composed entirely of conjectural and speculative hypotheses, lacking any real foundation in the pleadings or in the obvious facts."'[12]

[31] This brings me to the plaintiff's contentions that such facts as are apparent from the pleadings, read with the SPA, are more than sufficient to support the possibility of the tacit term's existence. These facts or allegations comprise, as I understand the plaintiff's argument, first, the averment in paragraph 9.7.3 that the first defendant 'undertook to procure that the second defendant comply with its obligations pleaded above'. However, this averment, apart from reflecting the first

[11] 2006 (1) SA 461 (SCA).

[12] Quoting from Davenport Corner Tea Room (Pty) Ltd v Joubert 1962 (2) SA 709 (D) 715H and 716C-E.

defendant's undisputed obligation in terms of clause 9.1 of the SPA to procure that the second defendant negotiate with the plaintiff for a Supply Agreement, takes the issue of the first defendant's co-liability in terms of clause 9.4.2 no further. The same difficulty arises in relation to the next averment relied on, namely, the preamble to paragraph 9 which broadly alleges that 'The following were the material express, alternatively implied, alternatively tacit terms of the SPA as amended …'. Accordingly, neither of these averments take the plaintiff's case for a tacit term any further since they are merely general and unsubstantiated assertions of its existence.

[32] The plaintiff then relies on allegations of matters that were 'within the contemplation of the parties', referred to paragraphs 10 and 10A of the Particulars, and on the basis of which the SPA and the addenda were concluded. In these paragraphs reference is made to the plaintiff or Conradie having made commitments or being in the process of making commitments to a purchaser or intended purchaser of OFD and ODA and securing a supply of fruit to OFD and ODA for two years in respect of which the plaintiff would earn commission or, failing the conclusion of such a Supply Agreement, would be exposed to a penalty or forfeiture.

[33] Accepting these allegations as facts, I do not consider that **the plaintiff's case for the tacit term contended for is in any way advanced thereby for the simple reason that clause 9.4 of the SPA, as it stands, provides comprehensively for the consequences of a Supply Agreement not being concluded within the six-month period.** Clause 9.4.1 provides that in such event, the first defendant forfeits its right to recover a loan of US$1 950 000.00 from the plaintiff and cedes its rights in that regard irrevocably to the plaintiff. Clause 9.4.2 provides a further negative consequence for the first (and second) defendant in that the company whose shareholding it purchases in terms of the SPA, the second defendant, undertakes in that event, as a fall back for the lack of a negotiated Supply Agreement, to supply fruit at a minimum amount of 500 000 units over two years, for the benefit of the plaintiff, to OFD and OFA. **It is a breach of that latter fall back provision, clause 9.4.2, upon which the plaintiff's claim against the first defendant is based. What it seeks, by way of the importation of the tacit term, is to add the first defendant as a party co-liable with the second defendant for the consequences of a breach of subclause 9.4.2.**

[34] The final averment relied on upon by the plaintiff in support of the possibility of the tacit term being established on trial, is that in terms of the SPA, the first defendant became the exclusive 'corporate controller' of the second defendant, coupled with the submission that any liability arising from clause 9.4.2 should equally rest upon the first defendant. In my view, neither the averment (which must be accepted as a fact) nor the linked submission advance the plaintiff's case for the tacit term sought to be imported into the SPA. The mere fact that the first defendant is the corporate controller of the second defendant does not justify any imputation of co-liability to the first defendant in terms of clause 9.4.2, particularly against the background of clause 9.4.1 already providing a substantial financial penalty for the first defendant in the event that the negotiations for a Supply Agreement were unsuccessful. Nor is there any suggestion to be gleaned, either from the pleadings or from the SPA, that the plaintiff's contractual remedies for breach of the provisions of clause 9.4.2 would be ineffectual inasmuch as they lie against the second defendant alone.

[35] As was referred to earlier and as stated in Sun Packaging, as a rule the Courts are reluctant to decide upon exception questions concerning the interpretation of a contract but this is only where its meaning is uncertain. Furthermore, regard must be had to the test for the existence of tacit term, namely, that the Court does not readily import a tacit term since it does not make contracts for people.

[36] Before proceeding onto the issue of 'admissible evidence of surrounding circumstances', it is appropriate to mention another factor which must be brought into the balance when considering whether the tacit term relied upon by the plaintiff could possibly be imported into clause 9.4. That is the issue of the amendments to clause 9 of the SPA. As noted earlier, the SPA was the subject of three addenda over a period of little more than two months. The second addendum focussed inter alia on the amendment of clause 9, the Supply Agreement clause, and made detailed changes to clause 9.4.2. This is the very subclause which in effect the plaintiff wishes to amend by the importation of the tacit term for which it contends. On a plain reading clause 9.4.2 provides that it is the second defendant alone which would supply the minimum of 500 000 units of fruit per year for two years in the event

that the negotiations for a Supply Agreement were unsuccessful. Accordingly, it is clear from the SPA, the addenda and the Particulars, that the plaintiff had three further opportunities after the conclusion of the SPA to reconsider the terms of subclause 9.4.2 and, if it felt they were lacking, inaccurate or did not fully express the intention of the parties, to amend them to include the first defendant as a co-responsible party in terms of clause 9.4.2. The fact that the parties did not do so is in my view a strong indication that its terms were seen at all material times as comprehensive and accurate as far as the obligations and rights of the parties were concerned.

[37] There remains the notional possibility of surrounding circumstances coming to light in the trial which support the existence of the tacit term and the linked submission that this possibility militates against deciding the issue by way of exception. It seems widely accepted that a measure of conjecture or speculation is permissible as to the nature of such evidence and its materiality. There is understandably, however, a limit to the extent of such conjecture or speculation. This was well stated by Miller J (as he then was) in Davenport Corner Tea Room[13] in the passage quoted with approval by Harms JA in Telematrix[14]. That dictum was also quoted with approval in *Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd*[15], where Marcus AJ stated as follows:

> 'The possibility that evidence of surrounding circumstances may clarify any ambiguity in the contract must not be fanciful or remote'.

[38] What must also be taken into account are the strictures on the plaintiff as regards the adducing of evidence at the trial in seeking to establish the tacit term contended for, and which evidence might establish an intention of the parties at variance with the clear provisions of clause 9.4.2. The growing trend in our courts is to reassert the parol evidence rule which largely precludes such evidence. The following extract from the judgment of Harms JA in *KPMG Chartered*

[13] See footnote 12

[14] Para 30 above.

[15] 1999 (1) SA 624 (W) at 632H – 633D.

Accountants SA v Securefin Ltd[16] is relevant:

> '[39] First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses … Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent … Fourth, to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, "one must use it as conservatively as possible" (*Delmas Milling Co Ltd v du Plessis* 1955 (3) SA 447 (A) at 455B-C).'

[39] These sentiments were recently confirmed and endorsed in *The City of Tshwane Metropolitan Municipality v Blair Athol Homeowners Association*[17] where the Court, per Navsa ADP and Mothle AJA, stated as follows:

> '[63] This court has consistently stated that in the interpretation exercise the point of departure is the language of the document in question. Without the written text there would be no interpretive exercise. In cases of this nature, the written text is what is presented as the basis for a justiciable issue. No practical purpose is served by further debate about whether evidence by the parties about what they intended or understood the words to mean serves the purpose of properly arriving at a decision on what the parties intended as contended for by those who favour a subjective approach, nor is it in juxtaposition helpful to continue to debate the correctness of the assertion that it will only lead to self-serving statements by the contesting parties. Courts are called upon to adjudicate in cases where there is dissénsus. As a matter of policy, courts have chosen to keep

[16] 2009 (4) SA 399 (SCA) at para 39.

[17] 2019 (3) SA 398 (SCA).

the admission of evidence within manageable bounds. This court has seen too many cases of extensive, inconclusive and inadmissible evidence being led. That trend, disturbingly, is on the rise.'

[40] **Having regard to all these factors, including the lack of any ambiguity in clause 9.4 (and specifically clause 9.4.2), the dearth of any indications of surrounding circumstances in the pleaded allegations read with the SPA, or elsewhere, which would militate in favour of the implied term contended for, and the fact that clause 9.4.2 was reconsidered and amended by way of an addendum which left the crucial provisions untouched, I consider that there is no room for the importation of the tacit term for which the plaintiff contends.**

The proper interpretation

[41] This leaves the final basis upon which the applicant sought to defeat the exception, namely, that on a 'proper interpretation' of the SPA, clause 9.4 tacitly imposes the contended for obligation upon the first defendant.

[42] The statements in KPMG and Tshwane City quoted above are also relevant to this leg of the plaintiff's argument to the effect that the first defendant's co-liability in terms of clause 9.4.2 of the SPA emerges on its 'proper interpretation'. Also relevant to this issue is the well-known quotation from *Natal Joint Municipal Pension Fund v Endumeni Municipality*[18] regarding the interpretation of documents:

> 'The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[18] 2012 (4) SA 593 (SCA) at 603F – 604A and 604E-F.

[43] **The wording of clause 9.4 is, to my mind, clear and unambiguous, inter alia for the reasons furnished earlier, and does not produce a result which is unreasonable, lacking in sense or unbusinesslike. In the circumstances I see no room for interpretation of the SPA which imposes any obligation on the first defendant in terms of clause 9.4.2.**

[44] For these reasons I find that the allegation that the first defendant was in breach of any obligations in terms of clause 9.4.2 of the SPA is untenable on the pleadings in their present form and accordingly that they fail to disclose any cause of action against the first defendant.

[45] In the result the following order is made:

1. The first defendant's application to amend paragraph 5.2 of its notice of exception by the insertion of the words 'US$1mil alternatively' between the words 'sum of' and 'US$796 617.72', is granted;
2. The exception is upheld with costs, including the costs of two counsel and, by agreement between the parties, the costs occasioned by the earlier postponement of the hearing of the exception;
3. The allegations in paragraph 17, 19, 20 and 21 of the Particulars, to the extent that they allege that the first defendant was in breach of any obligations in terms of clause 9.4.2 of the SPA, are struck out;
4. The plaintiff is granted leave to amend its combined summons by the procedure prescribed in Rule 28, the notice of amendment to be served within 21 days of date hereof.

KWADUKUZA MUNICIPALITY v BUILD-RITE PROPERTIES (PTY) LTD

A hardware shop which supplies building materials from a builder's supply yard may permissibly operate within the rules of a zoning scheme

Judgment given in the Kwazulu-Natal Local Division, Durban, on 12 August 2021 by Olsen J

In May 2019 Kwadukuza Municipality approved building plans for a 'warehouse type building' on Erf 220. The plans depicted a steel frame mode of construction. However the resolution of Build-rite Properties (Pty) Ltd which had to be submitted with the plans, referred to an intention for the property to be used as a hardware store. This was confirmed by a sign board erected by Build-rite on the boundary of the property indicating its intended use as a hardware store. This sign would have been visible to municipal officials throughout the building period.

The parties were in dispute concerning a zoning issue which they defined as whether a 'builder's hardware shop' alternatively a 'tile and décor' store as proposed by Build-rite was permitted or prohibited by the provisions of the KwaDukuza Land Management Scheme. The municipality contended that the building on Erf 220 could never be employed for its intended purpose.

Erf 220 was zoned 'Mixed Core Use 3 (MUC3)'. The zoning scheme listed (a) freely permitted uses for Zone MUC3 under the headings 'Environment and Recreation', 'Commercial', and 'Industrial'; (b) uses in the zone which may be sanctioned by municipal consent. The building and land uses not appearing in either part of the table of uses were prohibited.

A 'shop' was listed under the 'Commercial' heading in the table of freely permitted uses. A warehouse and a wholesale shop were the two entries in the table of freely permitted uses under the heading 'Industrial'.

Build-rite intended the building on Erf 220 to be used as a hardware shop. However, Build-rite sought to avoid this characterisation by referring to the use 'builders supply yard' which featured in the scheme. That use was defined as 'premises which is used for the storage or sale of building material and equipment'. Build-rite did not claim the right to use any of the vacant land around its building on Erf 220 for the storage or sale of building material and equipment.

The municipality contended that the word 'premises' includes buildings, and accordingly that a hardware shop fell within the definition of a builder's yard because such a shop inevitably stocks and sells material and goods and equipment which can and are used in the building industry. Accordingly, although a hardware shop may be a shop, it is of a specific type which falls within the prohibited use 'builder's supply yard'.

The municipality brought an application against Build-rite in which it sought inter alia, an order restraining the use of Erf 220 as a hardware store, a builder's supply yard, or in any other way in conflict with the zoning of the property under the KwaDukuza Land Use Management Scheme.

Held—

The parties defined the zoning issue as 'whether a 'builder's hardware shop' alternatively a 'tile and décor' store as proposed by the respondents is permitted or prohibited by the provisions of the KwaDukuza Land Management Scheme and whether the interdict sought by the applicant or the relief sought by the respondent should accordingly be granted, and associated costs.'

It did not appear to matter, when considering the dispute, whether one regarded the hardware shop as a 'builder's hardware shop' or a 'wholesale hardware shop'. Describing the proposed enterprise as a 'wholesale' enterprise simply put it under the industrial heading in the list of permitted uses, whereas it would fall under the commercial heading 'shop' in the list of permitted uses if described as a hardware shop for builders.

Build-rite intended the building on Erf 220 to be used as a hardware shop. A hardware shop is a shop. A shop is a permitted use. It did not appear to matter, when considering the dispute, whether one regarded the hardware shop as a 'builder's hardware shop' or a 'wholesale hardware shop'. Describing the proposed enterprise as a 'wholesale' enterprise simply put it under the industrial heading in the list of permitted uses, whereas it would fall under the commercial heading 'shop' in the list of permitted uses if described as a hardware shop for builders.

The municipality sought to avoid this analysis by referring to the use of the words 'builders supply yard' which featured in the scheme. That use was defined. It meant 'premises which is used for the storage or sale of building material and equipment'. Build-rite claimed no right to use any of the vacant land around its building on Erf 220 for the storage or sale of building material and equipment. The municipality argued that the word 'premises' included buildings, and accordingly that a hardware shop fell within the definition of a builder's yard because such a shop inevitably stocks and sells material and goods and equipment which can and are used in the building industry. Accordingly, although a hardware shop may be a shop, it is of a specific type which falls within the prohibited use 'builder's supply yard'.

It was obvious that the word 'premises' was being used with respect to what might be called 'open land' – land not built upon in the ordinary sense of that

word (ie enclosed by walls and covered by a roof). The question was whether or not it could be said that the use of the word 'premises' brings about that for the purpose of the provision in question, a building must be regarded as 'open land'? The answer had to be in the negative.

The definition upon which the municipality relied was a definition of a 'yard'. A building cannot be regarded as a 'yard'. The purpose of the definition is not to define what a yard is. It is to establish what the term 'builder's supply yard' means, as opposed to any other yard. The definition is aimed at the use of the yard 'for the storage or sale of building material and equipment'. The use of the word 'premises' in the definition is merely incidental, and it makes no sense to regard the word as meaning that a 'builder's supply yard' may not be a yard at all.

A hardware shop is all about the business of selling of goods. Some of them will undoubtedly be building material and equipment. Bearing in mind the wide range of goods which are to be found in any ordinary hardware shop, much of which could be regarded as items or material used in or in the course of building work (from, for instance, nails and hammers through to a pocket of cement), and given the self-evident popularity of, and the need of ordinary people (non-builders) to access, the materials and tools and the like sold in a hardware shop, it is wrong to give the excluded use (builder's supply yard) so broad a meaning as to exclude the operation of a hardware shop inside a building on a property governed by a zoning such as that attributed to Erf 220.

Builder's supply yards, being open land and normally quite large pieces of land, can accommodate the storage and sale of industrial scale quantities of such items as sand, stones, bricks and so on, and therefore attract a significant flow of industrial type traffic in the way of heavy vehicles both delivering materials to the yard and picking material up from the yard for delivery to building sites. That sort of traffic generation and activity would be a considerable obstacle to the enjoyment of the public amenities which are supposed to be available in an area zoned MUC3. The level of storage and trade - generated interference with public amenities by a facility such as a hardware shop contained within a building cannot be compared to that generated by a builder's yard.

It followed that the municipality's contention with regard to whether the proposed use of Erf 220 was permissible under the scheme was wrong.

Advocate G D Goddard SC instructed by: Shepstone & Wylie Attorneys, Durban, appeared for the applicant

Advocate TN Aboobaker SC and Advocate B Houston instructed by: Amod's Attorneys, Durban, appeared for the respondent

Olsen J:

[1] This application was launched by the KwaDukuza Municipality on 13 December 2019, accompanied by a certificate of urgency recording a contention that a hearing of the application on 18 December 2019 was justified. The papers cited the first respondent, Build-Rite Properties (Pty) Limited, as the owner of Erf 220, CBD Stanger ('Erf 220'). The second respondent, Marlin Naidoo, was cited as a person 'who conducts business from or is employed at Erf 220'. The third respondent, Mohsin Gani, was similarly cited.

[2] The application is all about the construction of a building by the first respondent on Erf 220. It should have been perfectly clear to the applicant that the party responsible for the construction was the owner of Erf 220, the first respondent. The second respondent is employed as the project manager for the works in question. The third respondent is a director of the first respondent. Although the relief sought by the applicant in its notice of motion was expressed to be against each of the respondents, no case has been made out for the proposition that it was justified, or might be justified, to seek such relief against the second and third respondents. Erf 220 belongs to the first respondent. The construction works were undertaken at the instance of the first respondent. Any deviation from lawful conduct in connection with the construction was the responsibility of the first respondent.

[3] Counsel for the applicant advanced its argument on the footing that there are no material disputes of fact evident on the papers. Counsel for the respondents correctly challenged that notion. The respondents' papers challenge and contradict a number of the facts stated in the founding papers. I have concluded that some of these disputed facts have a material bearing on one aspect of this case, and in those instances I must accept the respondents' version where the challenge is bona fide and real.

[4] In summary the notice of motion sought the following relief.

(a) Firstly an order directing the respondents to vacate Erf 220, and interdicting the respondents from causing or allowing occupation thereof before a certificate of occupancy is issued.

(b) An order interdicting and restraining the respondents from carrying out any further building work on the property other than the construction of a retaining wall

(i) under the direct supervision of a 'certified and licenced civil engineer', and in accordance with the design of such an engineer for the retaining wall; or

(ii) strictly in accordance with approved building plans for the retaining wall.

(c) An order restraining the use of Erf 220 as a hardware store, a builder's supply yard, or in any other way in conflict with the zoning of the property under the KwaDukuza Land Use Management Scheme. (The founding papers specify no such alternative use.)

[5] The relief sought in this case is of two types. The interdicts concerning occupancy and construction works seek to restrain the respondents (and of course in particular the first respondent) from proceeding with either occupation or construction without certain conditions being met. The relief sought is conditional and does not seek to interfere with the respondents rights on a permanent basis. The second type is in the nature of a permanent interdict against particular uses of Erf 220. It is not sought conditionally. The relief is final in nature and whether it should be granted or refused turns upon the proper construction of the provisions of the KwaDukuza Land Use Management Scheme (the 'Scheme').

The Facts

[6] In giving an account of the facts I will as far as possible confine myself to the essentials.

[7] In May 2019 the applicant approved building plans for what it describes as a 'warehouse type building' on Erf 220. The applicant's papers do not disclose what features of the building or the plans cause it to describe the building as of a 'warehouse type'. It seems likely that the label flows from the fact that the plans depict a steel frame mode of construction. However the respondents point out that the resolution of the first respondent which was required to be submitted with the plans referred to an intention for the property to be used as a hardware store, a fact which was confirmed by a sign board erected by the first respondent on the boundary of the property indicating its intended use as a hardware store, which sign would have been visible to municipal officials throughout the building period.

[8] In September 2019 a building inspector employed by the applicant, Mr Nkwakhwa was passing Erf 220 and noticed that earthworks were

underway. He saw that they had reduced the ground level of Erf 220 to 'considerably below' the level of adjacent properties. But he did not regard it at that stage as unusually dangerous.

[9] On 15 October 2019 Mr Nkwakhwa conducted an inspection and claims to have established that the earthworks on Erf 220 had undermined the property and a building on the adjacent Erf 221. He claimed to have seen a collapsed wall, but the respondents deny that any wall had collapsed.

[10] The applicant's Manager : Building Control, Mr Vilakazi, inspected the site on 15 October 2019. The approved plans make no provision for retaining walls, but that physical inspection made it clear that such would be necessary. Mr Vilakazi prepared a report for submission to the applicant's Economic Development Planning Portfolio Committee which would apparently be considered on 30 October. The concerns he noted regarding the site were of two types, one concerning work place safety and the other the unretained excavated embankment which had been created towards the rear of Erf 220. Mr Vilakazi met with Mr T Singh of JVT Consulting Engineers (Pty) Limited later on 15 October 2019 when the former requested the latter to produce a remedial action report and the proposed design of the retaining wall. It was noticed that on 21 October 2019 construction work had resumed on the site but that at that stage the required designs had not been received. The respondents' account of the meeting of 15 October 2019 is somewhat different. It is to the effect that the applicant's officials placed the blame for the conditions then prevailing in a rainy season on the owners of the neighbouring properties who had consistently failed properly to control storm water run-off from their properties. According to the respondents the wall which the applicant's officials regarded as having collapsed had in fact been taken down in a controlled manner on the instruction of the first respondent's engineer, because of the excessive flow of storm water from the higher properties onto Erf 220. As I understand the explanation, the engineer's view would have been that the wall would have collapsed, perhaps in a dangerous fashion, if it was not removed, as it could not withstand the pressure from the water emanating from the higher neighbouring properties. According to the respondents it was agreed at the meeting of 15 October 2019 that the first respondent could construct a wall to

retain its rear boundary.

[11] According to the principal founding affidavit (attested to by the applicant's Director: Development Enforcement, Mr F R Naidoo), the applicant's approach to the matter following the inspection of 15 October 2019 was as follows.

> 'The unstable excavation required urgent or emergency intervention. In part because the second respondent represented that an engineer has been appointed, the applicant did not issue a 'stop work' notice, nor did it insist on building plans for a retaining wall being approved before further work, but rather issued a notice of violation which was meant to compel the respondents to remedy the situation.'

[12] Jumping ahead a little in time, the founding affidavit (attested to on 13 December 2019) states in part explicitly, and in part by implication, that the claim by the respondents that the required retaining structures were to be dealt with by an engineer were too vague to be relied upon, and that no engineer's drawings had been received. That assertion has been shown to be false beyond doubt. The engineer's drawings for the retaining structures were sent to Mr Vilakazi on 22 October 2019. They did not feature in his report to the council's committee, despite the fact that when he asked for them he did so because he was preparing the report. Mr Vilakazi signed a confirmatory affidavit which was delivered with the founding papers. Copies of the engineer's drawings were put up with the replying affidavit. It is not suggested that there is anything wrong with the design. Neither is there any explanation why the designs were not dealt with in the founding affidavit. The drawings were sent electronically, and Mr Vilakazi acknowledged receipt of them.

[13] According to the founding papers further visits to Erf 220 were undertaken by representatives of the applicant on 13 November 2019, 6 December 2019 and 10 December 2019. The allegation is made that at these times the retaining structures had not yet been built. The site is said to have been in a condition 'essentially as it was previously'. This characterisation of the state of affairs upon Erf 220 in late November 2019 and early December 2019 elicited what amounts to a bare denial by the respondents. There are however photographs of the situation which obtained on the property at the time, and it is fair to say that what they reveal is that little if anything had been done to execute the

works which had been depicted in the design drawings by the engineer. A notice of violation delivered by the applicant to the first respondent drew attention to the dangerous site conditions. There was a further one on 6 December 2019 drawing attention to occupation without a certificate (I will revert to this), and the absence of approved plans and of adequate protection for the public. On the same day (6 December 2019) the applicant gave notice of an intended prosecution for 'operating a hardware (Build-Rite Hardware)' on a site at which such use was prohibited.

[14] According to the respondents the first time that the issue of plans for the retaining structures was raised was on 6 December 2019 when the second respondent advised the applicant that plans could be submitted on 7 December 2019. According to the respondents this proposal was in effect rejected because the applicant had already closed 'for plan submissions' until 13 January 2020.

[15] According to the respondents the principal issue at and around 6 December 2019 was the applicant's contention that the use of Erf 220 for a hardware store was not in accordance with the scheme. The second respondent pointed out that similarly zoned properties in the town accommodated hardware stores, but it does not seem that at that stage the particular provisions of the scheme relied upon by the applicant were considered or debated.

[16] The founding papers assert that on 6 December 2019, with the building itself on Erf 220 still incomplete, and no occupation certificate having been issued, the building was being 'stocked with building materials and supplies, and to this extent the respondents have taken partial occupation by using the building. It was apparent that they were intent on taking full occupancy.' In the answering affidavit it was contended that the first respondent was not in occupation of the property and certainly not trading there. I do not understand the latter contention to be disputed. Neither party has provided any particularity regarding the extent to which any items which might be regarded as the stock of a hardware store had been placed in the building on Erf 220 as at 6 December 2019.

[17] The founding papers reveal that on 11 December 2019 the second respondent visited Mr F R Naidoo and orally undertook that the first respondent would not take further steps with regard to occupying the

building without a certificate of occupancy; and that the hardware store would not be opened. Mr Naidoo asked for this undertaking to be given in writing, but it was not. Later on the same day Mr Naidoo saw an advertisement in the local newspaper for the 'grand opening' of the hardware store on 16 December 2019. The respondents explain in answer that the advertisement was placed about a month prior to it appearing, it having been anticipated at that time that the business would open on 16 December 2019, and that the third respondent simply forgot to cancel the advertisement.

[18] The next day (12 December 2019) at 13h03 a letter from the applicant's attorney's (erroneously dated 20 November 2019) was delivered by hand to the second respondent. It drew attention to the proposed opening on 16 December 2019 of an illicit hardware store, and the construction of a retaining wall without building plans. The letter continued.

> 'In the circumstances we are instructed to give you notice, as we hereby do, not to allow occupation of the building or to commence the operation of a hardware store on the property. Unless you give us a written undertaking to that effect by 4pm today (12 December 2019), our instructions are to proceed to launch an urgent application in the High Court on Tuesday, 17 December 2019 for an order interdicting you from doing so.'

The first respondent replied by letter of 13 December 2019 delivered at 08h32.

> 'Having sought advice, we will not be opening the store on 16 December 2019 as advertised. There is accordingly no need for any unnecessary urgent court application to be launched.'

[19] Notwithstanding that, this application was launched on a founding affidavit dated 13 December 2019, and was set down for 18 December 2019. Concerning the undertaking which preceded the signature of the founding affidavit, the deponent to that document said that the 'undertaking does not mean that occupancy won't be taken or that the store won't be opened after 16 December 2019 and does nothing to resolve the problems of the dangerous excavation.'

[20] On 18 December 2019 the matter was adjourned to the unopposed roll of 27 January 2020 with directions as to the delivery of further affidavits. The respondents made certain undertakings, the ones which

remain material being the following.

> (a) An affidavit from the engineer, Mr K Govender would be delivered disclosing his qualifications and confirming that he would supervise the construction of the retaining structures. That was to be done by Monday, 23 December 2019.
>
> (b) Except for completing the building works and for the continued storage of building materials on site, there would be no further occupation of Erf 220 without a certificate authorising occupation.
>
> (c) There would be no building work conducted on Erf 220 besides the construction of the retaining wall either under the direct supervision of a certificated and licenced civil engineer in accordance with the drawing which had been issued and supplied to the applicant, or in accordance with approved plans for those structures.

[21] Matters took a turn for the worse with the delivery of the applicant's replying affidavit dated 20 January 2020. Mr F R Naidoo, speaking for the applicant, asserted that the required affidavit from the engineer had not been delivered. He asserted that the respondents' case was 'entirely undermined by their failure to comply with the undertaking recorded to court to provide the affidavit from the engineers.' That central premise was false. In turns out that the affidavit required had been delivered on 23 December 2019 by email. It had gone to the central email of the applicant's attorneys and unfortunately had not reached the attorney dealing with the case.

[22] A new case was sought to be made, or certainly new material was sought to be placed before the court, in that replying affidavit. It was asserted that as a matter of fact the work was not being done in accordance with the engineer's drawings which were now acknowledged to have been received in October 2019. It was asserted that the deviations from the construction drawings signified a danger to the public. Accordingly the applicant claimed a right to interim relief on 27 January 2020 when the case was to feature on the unopposed motion roll. On 27 January 2020 the third respondent attested to a short affidavit opposing the grant of any urgent relief. Besides confirming the applicant's error in believing that the first respondent had not complied with the undertaking to deliver the engineer's affidavit by 23 December 2019, the affidavit objected to the short notice given of the intention to seek such relief, asserting that the matter was not urgent. The

respondents also relied on another affidavit by the engineer, Mr K Govender, who attested to the fact that he was overseeing the activities on Erf 220, that the construction of the retaining wall was being supervised by him, and that what was there did not pose any danger to members of the public or construction personnel on site. He gave an undertaking irrevocably and unconditionally to comply with the first respondent's undertaking by continuing to supervise the construction of the retaining wall, and to copy written instructions and drawings issued by him to the applicant.

[23] In the event interim relief essentially in accordance with the undertaking originally recorded was granted on 27 January 2020. I do not know in what circumstances the order was made.

SUBSEQUENT EVENTS

[24] Later on the first respondent delivered an affidavit to support a counterclaim that it should be entitled to run a 'wholesale hardware shop' on Erf 220. The affidavit set out the argument for the proposition, and again made reference to the fact that similar businesses are conducted under the same zoning controls elsewhere in the town. Accordingly the issue of the proper construction of the scheme is the subject of both a request for a permanent interdict by the applicant, and a favourable declaratory order by the first respondent. I will turn to that issue as the final one.

[25] The applicant otherwise asks that the interim relief granted on 27 January 2020 be made final. The respondents argue that no such relief should be granted to the applicant, essentially on the basis that the papers reveal that the application should never have been launched, and that there was no need for the interim relief granted on 27 January.

[26] I assume that the delay in what followed is largely attributable to the breakdown in administrative and court performance as a result of the pandemic which swept through our country after 27 January 2020. The first respondent complains that when it asserted that its works were complete, the applicant failed to conduct the requisite inspection in order to determine whether an occupation certificate could be granted. The first respondent launched a separate application to compel compliance with those obligations of the applicant. I am told that there was subsequently such an inspection and that the applicant declined to certify the building ready for occupation. The issue as to why that was

done, and whether it was lawfully done, is not before me. The result, however, is that the apparently complete building (and completed retaining structures) are in place, but the building remains unoccupied.

THE CONDITIONAL INTERDICTS REFERRED TO IN PARAGRAPH 4 (a) and (b) ABOVE

[27] These interdicts are in essence the subject of the interim orders made on 27 January 2020. Although counsel for the applicant, Mr Goddard SC, asked that final orders should be made along the lines of the interim ones of January 2020, I did not understand him to contradict the proposition that as matters stand, there is little or no reason to suppose that the interdictory relief would now have any purpose. Matters concerning Erf 220 are presently being dealt with as the law requires, and there is no evidence of the first respondent having extended or threatened to extend the level of so-called 'occupation' of the building which the applicant sought to interdict in the original founding papers in December 2019.

[28] In my view the position is that the factual analysis I have been compelled to set out in this judgment is relevant only to the questions of costs which the parties have asked me to decide. I approach that issue upon the footing that there is certainly no need now for any final relief along the lines of the interim relief granted in January 2020.

[29] Some of my views which have a bearing on costs have already been dealt with or expressed in the course of furnishing an account of what has transpired in this matter. I think particularly of the applicant's initial attempt to present a case for the proposition that whilst it was satisfied that it was in order for the retaining structures to be built in accordance with a design and under the supervision of an engineer, the first respondent was proceeding otherwise than with such supervision without submitting engineering designs to the applicant. Mr Aboobaker SC, who appeared for the respondents, has argued that what this evidences is an unnecessary rush to court.

[30] On the other hand, the photographs of the site put up in the papers illustrate that there was indeed a dangerous situation which, it is common cause, required remedial work in the way of retaining structures. I am unimpressed with the first respondent's more or less bare denial of the fact that little if anything had been done to implement the engineering designs by mid-December. Such dangerous

circumstances justifiably induce a sense of anxiety in municipal officials who are responsible for seeing to it that there is compliance with the laws which require that construction work be carried out safely.

[31] Whilst the applicant's missteps (failing to disclose the submission of engineering drawings and asserting the non-delivery of an engineer's affidavit by 23 December 2019) were material, so too is the fact that it is clear on these papers that the first respondent did not take the unsafe conditions on its site as seriously as it ought to have done. I find that the first respondent's contention in its papers, that in fact the unsafe conditions must be laid at the door of the owners of the adjacent properties, is contradicted by the first respondent's acceptance of its own responsibility to build retaining structures. The photographs in the papers illustrate that the excavations undertaken on Erf 220 had the effect of undermining whatever lateral support was previously in place on Erf 220 for the benefit of adjacent properties.

[32] I do not think that the fact that matters have subsequently been brought into conformity with the law relating to such works (eg the subsequent approval of plans for the retaining works which have actually been constructed) establishes that the first respondent was 'in the right', and I did not understand Mr Aboobaker SC to argue otherwise.

[33] I conclude that it is possible, but not necessarily so, that if this litigation had not been instituted the first respondent would have brought its works into conformity with the law in much the same way as matters turned out during the course of litigation. However it strikes me that the applicant litigated in performance of its public duty, even if one can see that more determined efforts on the part of the applicant to engage with the first respondent might have avoided the need for litigation.

[34] Both parties were at fault in connection with their conduct 'on the ground' and this litigation. I conclude that there should be a more nuanced costs order than is customary, a subject I will deal with at the end of this judgment.

THE ZONING ISSUE

[35] The parties prepared a joint statement of issues in dispute and to be dealt with at the hearing. They define the zoning issue as follows.

> 'Whether a 'builder's hardware shop' alternatively a 'tile and décor' store as proposed by the respondents is permitted or prohibited by the provisions of the KwaDukuza Land Management Scheme and whether the interdict sought by the applicant or the relief sought by the respondent should accordingly be granted, and associated costs.'

Both parties prepared more detailed heads of argument on the zoning issue for the purpose of the hearing. Whilst their argument over the material already discussed above took a little time as it involved an analysis of the facts and how the litigation unfolded, the zoning issue was ultimately the most important one as, if the applicant was correct in its contentions, the building on Erf 220 could never be employed for its intended purpose.

[36] Erf 220 is zoned 'Mixed Core Use 3 (MUC3)'. The scheme lists

(a) freely permitted uses for Zone MUC3 under the headings 'Environment and Recreation', 'Commercial', and 'Industrial';

(b) uses in the zone which may be sanctioned by municipal consent.

The building and land uses not appearing in either part of the table of uses are prohibited.

[37] A 'shop' is listed under the 'Commercial' heading in the table of freely permitted uses. A warehouse and a wholesale shop are the two entries in the table of freely permitted uses under the heading 'Industrial'.

[38] The first respondent intends the building on Erf 220 to be used as a hardware shop. A hardware shop is a shop. A shop is a permitted use. It does not appear to me to matter, when considering the dispute, whether one regards the hardware shop as a 'builder's hardware shop' or a 'wholesale hardware shop' (a term also used by the first respondent to identify the intended use). Describing the proposed enterprise as a 'wholesale' enterprise simply puts it under the industrial heading in the list of permitted uses, whereas it would fall under the commercial heading 'shop' in the list of permitted uses if described as a hardware shop for builders.

[39] The applicant seeks to avoid this analysis of matters by referring to the use 'builders supply yard' which features in the scheme. That use is defined. It means 'premises which is used for the storage or sale of building material and equipment'. The first respondent claims no right to use any of the vacant land around its building on Erf 220 for the

storage or sale of building material and equipment. The applicant argues that the word 'premises' includes buildings, and accordingly that a hardware shop falls within the definition of a builder's yard because such a shop inevitably stocks and sells material and goods and equipment which can and are used in the building industry. Accordingly, argues the applicant, although a hardware shop may be a shop, it is of a specific type which falls within the prohibited use 'builder's supply yard'. The applicant seems quite insensitive to the question as to whether this is a sensible construction or an insensible misconstruction of the relevant provisions of the scheme.

[40] Counsel for the applicant has argued with reference to *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 SCA at paragraph [18] that any contrary interpretation of the scheme must be one which fails to attribute meaning to the words of the scheme, fails to identify the mischief the scheme is aimed to prevent and which involves impermissibly ignoring the duty to interpret all the words in the scheme relevant to the enquiry. In my view there is no merit in these arguments.

[41] The word 'premises' can, depending on context, mean land or buildings or both land and buildings. The applicant argues that the word 'premises' in the present context must mean land and buildings, primarily, as I understand the argument, because use zones and the like apply to both the use of land and of buildings on the land. I think that as a generalisation this argument is correct.

[42] However if it is obvious that the word 'premises' is being used with respect to what might be called 'open land' – land not built upon in the ordinary sense of that word (ie enclosed by walls and covered by a roof) - can one say that the use of the word 'premises' brings about that for the purpose of the provision in question, a building must be regarded as 'open land'? I think not.

[43] The definition upon which the applicant relies is a definition of a 'yard'. I know of no use of the word 'yard', certainly in the ordinary language I have come across, which conveys that a building (properly so-called) can be regarded as a 'yard'.

[44] The Oxford South African Concise Dictionary gives the primary meaning of the word 'yard' as 'a piece of uncultivated ground adjoining a building, typically one enclosed by walls ? an area of land

used for a particular purpose or business: a builder's yard.'

When one speaks of one's 'back yard', the term denotes a piece of undeveloped land to the rear of a dwelling – that is to say on the opposite side of the house to the road frontage. It is ordinarily delineated by the property boundaries and, in South Africa in any event, also by a fence or wall. It is a common term. It always denotes land uncovered by roofing, although not necessarily enclosed by walls as suggested in the dictionary definition.

[45] Counsel for the applicant argues that these observations regarding the ordinary use of the word 'yard' cannot affect the meaning of the word 'premises' where it appears in the definition of a 'builder's yard'. As I understand the argument it is that the word 'premises' appears as part of the defining element. It determines what 'yard' means. The use of the word 'yard' does not determine what the word 'premises' means. I appreciate the logic of that argument, but it cannot be carried so far as to bring about that the thing which is the subject of the definition ceases to be what we all know it is. To give an example: if a drafter is silly enough in the rules of a sectional title scheme to define the word 'cat' as a four-legged domesticated animal, and then records that cats are not allowed within the boundaries of the scheme, is it logical to then conclude that dogs are also not allowed because they are four-legged domesticated animals, despite the fact that they are not cats?

[46] **In my view the answer lies in appreciating the purpose of the defining words in the definition relied upon by the applicant. The purpose of the definition is not to define what a yard is. It is to establish what the term 'builder's supply yard' means, as opposed to any other yard. The definition is aimed at the use of the yard 'for the storage or sale of building material and equipment'. The use of the word 'premises' in the definition is merely incidental, and it makes no sense to regard the word as bringing about that a 'builder's supply yard' may not be a yard at all.**

[47] A hardware shop is all about the business of selling of goods. Some of them will undoubtedly be building material and equipment. Bearing in mind the wide range of goods which are to be found in any ordinary hardware shop, much of which could be regarded as items or material used in or in the course of building work (from, for instance,

nails and hammers through to a pocket of cement), and given the self-evident popularity of, and the need of ordinary people (non-builders) to access, the materials and tools and the like sold in a hardware shop, it is wrong to give the excluded use (builder's supply yard) so broad a meaning as to exclude the operation of a hardware shop inside a building on a property governed by a zoning such as that attributed to Erf 220.

[48] Builder's supply yards, being open land and normally quite large pieces of land, can accommodate the storage and sale of industrial scale quantities of such items as sand, stones, bricks and so on, and therefore attract a significant flow of industrial type traffic in the way of heavy vehicles both delivering materials to the yard and picking material up from the yard for delivery to building sites. That sort of traffic generation and activity would be a considerable obstacle to the enjoyment of the public amenities which are supposed to be available in an area zoned MUC3. The level of storage and trade - generated interference with public amenities by a facility such as a hardware shop contained within a building cannot be compared to that generated by a builder's yard.

[49] I accordingly conclude that the applicant's contention with regard to whether the proposed use of Erf 220 is permissible under the scheme is wrong, and that the counter application must succeed.

[50] In *KwaDukuza Municipality v Stangvest Investments (Pty) Limited and Others*, case number 1006/2019 in this Division, Kruger J reached the same conclusion as I have on the zoning issue raised in this case. The applicant argued that I should not regard myself as bound to follow that decision as it was clearly wrong and not supported by the reasons given for it by the learned Judge. I have, on the contrary, decided that the conclusion reached in Stangvest Investments was correct.

COSTS

[51] In dealing with the issue of costs I will not repeat the considerations I have already identified as relevant to the enquiry. The general rule that costs follow the result is sometimes a blunt instrument. In this case the employment of that general rule is difficult with regard to the relief summarised in paragraphs 4 (a) and (b) of this judgment. No final order has been made in favour of the applicant. It is arguably so that this outcome is the product of the passage of time, and the

events on the ground during that passage of time, between when the interim order was made in January 2020 and the presentation of the case to court for a final decision.

[52] The basic principle which underlines all orders for costs, even when the order simply follows the result or outcome of the case, is that the court has a discretion which must be exercised judicially upon a consideration of all the facts. As between the parties 'in essence it is a matter of fairness to both sides'. (See *Ward v Sulzer* 1973 (3) SA 701 (A) at 706.)

[53] In my view it is fair to say that the order granted on 27 January 2020 evidences substantial success on the part of the applicant up to that date in its pursuit of the relief set out in paragraphs 4 (a) and (b) of this judgment. Although some costs were incurred in respect of those two issues after January 2020, the central issue since then has been the zoning issue on which the applicant has not achieved success. Just as costs were incurred before and after January 2020 on the issues set out in paragraphs 4 (a) and (b) of this judgment, so too were costs incurred before and after January 2020 in connection with the zoning issue.

[54] I take the view that in considering what is fair in circumstances like the present a court should be aware and take account of the complications which may arise in the taxation of costs. Mr Aboobaker SC has asked that the first respondent should be allowed all costs incurred in respect of the zoning issue. That would entail extracting drafting and perusal costs from the founding and answering papers and an argument over how much of the costs which post-dated January 2020, especially those incurred in connection with the preparation for and presentation of argument before me, is attributable to the zoning issue. In my view fairness to the parties, and between the parties, dictates that such debates should be avoided as far as possible. It is better simply to fix a date up to which the costs in the main application will be paid by the first respondent; after which date the costs in the main application must be borne by the applicant.

[55] The same problems do not seem to me to arise in connection with the counter application, as it post-dated January 2020.

[56] I accordingly formulate the order for costs as fairly as I can manage applying the above principles.

I make the following order.

1. (a) The application against the second and third respondents is dismissed.

(b) The applicant shall pay such additional costs as may have been incurred by the inclusion of the second and third respondents as parties to the litigation.

2. The order of 27 January 2020 is discharged.

3. (a) The application for the interdict set out in paragraph 2 (c) of the order

prayed in the notice of motion is dismissed.

(b) The counter application is granted in the following terms.

'It is declared that the Core Mixed Use (MUC 3) zoning currently applied to Erf 220, CBD Stanger situate at 63 Balcomb Street, KwaDukuza permits the operation of a wholesale hardware shop or hardware shop within a shop building situate on the said Erf 220.'

(c) The costs of the counter application shall be paid by the applicant.

4. As to the costs of the main application not already dealt with in paragraph 1 of this order,

(a) those incurred up to and including 27 January 2020 shall be paid by the first respondent; and

(b) those incurred after 27 January 2020 shall be paid by the applicant.

NORDICBAU MASTER BUILDER & RENOVATOR CC v STAPELBERG VERVOER

A party to a carriage contract which does not contain a limitation on damages claims against the carrier may recover damages other than those compensating it for physical damage to the goods carried.

Judgment given in the Eastern Cape Local Division - Port Elizabeth on 13 July 2021 by Revelas J

Nordicbau Master Builder & Renovator CC was the owner of two tele-handlers. Stapelberg Vervoer undertook to transport the tele-handlers from Port Elizabeth harbour to Cape Town. It was a term of their agreement that Stapelberg would carry out the transporting of the tele- handlers in such a way as to prevent them from being damaged and to deliver them to Nordicbau in Cape Town in the same good and/or undamaged condition as it was when Stapelberg took delivery thereof.

The two tele-handlers were damaged, allegedly as a result of Stapelberg or its employees while acting in the scope and course of their agreement. Nordicbau's uncontested allegation was that the agreement was concluded upon the parties' mutual understanding that Nordicbau intended to use the two tele-handlers for purposes of generating an income and should the tele-handlers be damaged in the execution of the transport agreement or if delivery be delayed due to a breach of that agreement, Nordicbau would suffer damages due to a loss of income.

Stapelberg alleged that a certain Corinna Wild, as agent purporting to act on the behalf of her principal, Liftup Teleport and Crane Hire, alternatively Ulrich Plotz, and so authorized, accepted a quotation provided by Stapelberg to transport goods for the amount of R15 200 per vehicle and for a maximum insurance cover of Rlm per vehicle, for goods in transit, and that the balance of the risk would be borne by Wild C's principal or client.

The client was at all times Nordicbau. Liftup transport was merely the receiver at the destination given in the carriage contract.

Stapelberg defended an action for damages on the grounds that the tele-handlers were not Nordicbau's property and that it was not a party to the agreement. It also pleaded that '(t)he Defendant was provided with claims documentations and reported the insurable risk event to its insurers who then transferred the proceeds of the claim into Stapelberg's bank account for forward payment into attorney Welgemoed's account'. Welgemoed attorneys were the attorneys of record of Nordicbau.

Stapelberg paid Nordicbau the amounts of R970 000.00 and R744 692.67 respectively. Stapelberg was the insured or beneficiary in terms of an insurance

policy concluded with Santam Insurance for a maximum amount of R1m per tele-handler and it was in terms of this goods in transit policy that Stapelberg was paid out these amounts arising from the damage to the tele-handlers. The Santam policy specifically excluded cover for consequential damages. Under the heading 'Exceptions to Subsection A' it provided that the company would not be liable to pay for consequential financial loss as a result of any cause whatsoever.

Stapelberg pleaded that Nordicbau was not entitled to claim beyond the aforesaid maximum amount. Stapelberg relied on a letter from Nordicbau to Ms Wild prior to the conclusion of the carriage contract wherein he asked her to arrange cover for the tele-handlers up to a maximum R1m and added that he would cover any loss beyond that himself.

Held—

The main issue for determination was whether Nordicbau was entitled to additional damages, ie consequential damages over and above those of the replacement costs and repairs to the two tele-handlers and beyond the amount of R1m, which Stapleberg set as the maximum amount that could be claimed.

The fact that Stapelberg was only insured for damages arising from damage to the tele-handlers to a maximum of R1m and that it was noted in the agreement, did not preclude Nordicbau from claiming for a loss of income arising from Stapelberg's breach of the carriage contract. The insurance contract was between Stapelberg and Santam and did not affect Nordicbau's claim against Stapelberg, irrespective of what it had instructed Ms Wild regarding cover. It was also significant that there was a substantial difference of almost R250 000,00 between and R1m and the actual amount paid to Nordicbau in respect of one of the telehandlers. Stapelbergor its insurer intended only to compensate for repairs and replacement costs and no other damages. If there was such a limitation to Stapelberg's liability, there should have been a clause in the agreement that effect. The carriage contract did not contain any such an exclusion or limitation clause.

The claim succeeded.

Advocate A De Villiers instructed by Welgemoed Attorneys, Port Elizabeth, appeared for the plaintiff

Advocate P Jooste instructed by Greyvensteins, Port Elizabeth, appeared for the defendant

Revelas J:

1. This matter concerns the question whether the plaintiff is entitled to claim contractual damages for its loss of earnings suffered as a result of damage to its two maniscooic machines ('tele-handlers') sustained in transit when transported by the defendant, a carrier for reward.

2. The plaintiff, who conducts business, inter alia, in the rental of support equipment to the film industry, instituted an action for consequential damages against the defendant, a transport contractor, who was to transport the plaintiff's two tele-handlers from Port Elizabeth to Cape Town on 15 November 2015. During their transportation both tele-handlers were damaged. The total amount of damages claimed is R 2 120 426.00.

3. At the behest of the defendant the issues relating to quantum and liability were separated and the trial proceeded on the question of liability only. The plaintiff called one witness, Mr Louis Le Roux, its financial manager and the defendant, who placed several issues in dispute, called no witnesses.

4. The plaintiff pleaded that it was the owner of two Manitou MRT2150 tele-handlers with serial 175 821 820978 and 750984 respectively, purchased from Moyersoen NV/SA and Johann Bruggs who were based in Belgium. The telehandles were shipped from the harbour of Zeebrugge in Belgium to Port Elizabeth by World Freight aboard the vessel *Tiger*. The defendant undertook to transport the tele-handlers from Port Elizabeth harbour to Cape Town.

5. The plaintiff pleaded further that it was a term of their agreement that the defendant would carry out the transporting of the tele- handlers in such a way as to prevent them from being damaged and to deliver them to the plaintiff in Cape Town in the same good and/or undamaged condition as it was when the defendant took delivery thereof.

6. According to the plaintiff's particulars of claim the tele-handlers arrived in Port Elizabeth in good and operationally fit condition, so that they were capable of being utilised in the plaintiff's business earning R15 720.00 per day in rental fees.

7. Unfortunately, the two tele-handlers were damaged, allegedly as a result of the defendant or its employees while acting in the scope and course of their agreement. The one tele-handler ('the first tele-handler') fell from the ramp by which it was moved onto the load bed of the

defendant's vehicle while being loaded. The other ('the second tele-handler') was damaged when the defendant's vehicle, on which it was being transported left the road, due to the alleged negligent driving of the driver of the vehicle and the tele-handler fell from the vehicle.

8. The plaintiff pleaded that the agreement was concluded upon the parties' mutual understanding that the plaintiff intends to use the two tele-handlers for purposes of generating an income and should the tele-handlers be damaged in the execution of the transport agreement or if delivery be delayed due to a breach of that agreement, the plaintiff would suffer damages due to a loss of income. The defendant failed to respond to this assertion by the plaintiff and it stand uncontested on the pleadings.

9. The plaintiff further pleaded that the reasonable period for the repairs to the first tele-handler was 144 days and for the second one 137 days that the first tele-handler was damaged beyond repair. The amount of the damages claimed by the plaintiff consisted of two claims. In respect of the first tele-handler the plaintiff pleaded that it usually rented a tele-handler for 15 days per month (half of the 144 days, i.e. 72 days) at R15 720.00 per day, amounting to R1 131 840.00. From that the cost of an operator paid R680.00 per day had to be deducted. Thus R45 216.00 over 72 days was subtracted from the aforesaid total sum, amounting to R1 086 624.00.

10. The second claim was for the damages suffered in respect of the second tele-handler and was for the amount of R1 033 802.00, calculated by using the same formula used in the first claim but based on half of the period for repairs which plaintiff alleged was 137 days.

11. It was common cause that when the transport agreement was concluded on 23 October 2015, the defendant was represented by one Otto Krause and the plaintiff by an agent, Corinna Wild of Wild C's, a transport consultant. The written agreement (one page long in the form of an acceptance of a quote for transportation) reflected that the two tele-handlers, described as Maniscopic MRT2150 Machines, (weight 16,180 kilograms) would be transported by the defendant with two vehicles at the cost of R15 200.00 each. The place of departure (Port Elizabeth Harbour) and destination (Liftup Teleporter and Crane Hire - Culemborg Container Depot, Christiaan Barnard Road, Cape Town) were also reflected. Since the document contained all the aforesaid

information, it met the requirements of a proper contract for carriage by land for reward[19]. The contact person for the plaintiff was given as Ulrich Plotz. He is the main member of the plaintiff. The carriage contract also contained a term that the" [q]uotation includes R1,0 million 'goods in transit insurance' of full capacity of the vehicle" The copy of the aforesaid contract was attached to the defendant's plea.

12. The defendant pleaded that Corinna Wild of Wild C, as agent "purporting to act on the behalf of her principal to wit Liftup Teleport and Crane Hire, alternatively Ulrich Plotz, and so authorized, alternatively ostensibly authorised, accepted a quotation provided by the Defendant to transport goods for the amount of R15 200 per vehicle" and for a maximum insurance cover of Rl 000 000.00 per vehicle, for goods in transit, and that the balance of the risk would be borne by Wild C's principal or client.

13. According to Mr Le Roux the client was at all times the plaintiff. It is clear from the contract itself that Liftup transport was merely the receiver at the destination given in the carriage contract.

14. The defendant further pleaded its persistence that the tele- handlers were not the plaintiff's property and that it was not a party to the agreement. However, it also pleaded that "(t)he Defendant was provided with claims documentations and reported the insurable risk event to its insurers who then transferred the proceeds of the claim into the Defendant's bank account for forward payment into attorney Welgemoed's account."

15. Welgemoed attorneys have at all relevant time been the attorneys of record of the plaintiff.

16. It is common cause that the defendant paid the plaintiff the amounts of R970 000.00 and R744 692.67 respectively on 15 February 2016 and during April 2016. The defendant was the insured or beneficiary in terms of an insurance policy concluded with Santam Insurance for a maximum amount of R1 000 000,00 per tele-handler and it was in terms of this goods in transit ('GIT") policy that the defendant was paid out the aforementioned amounts arising from the damage to the tele-handlers. The aforesaid Santam GIT policy specifically excludes

[19] Wille Principles of South African Law, 9th Ed at 971

cover for consequential damages. Under the heading "EXCEPTIONS TO SUBSECTION A" it provides:

"The company shall not be liable to pay for:

(a) consequential financial loss as a result of any cause whatsoever "

17. The defendant pleaded that the plaintiff was not entitled to claim beyond the aforesaid maximum amount. In this regard the defendant relied on a letter from Mr Plotz to Ms Wild prior to the conclusion of the carriage contract wherein he asked her to arrange cover for the tele-handlers up to a maximum R1 000 000.00 and added that he would cover any loss beyond that himself.

18. The defendant pleaded further that no claim was made for additional damages (i.e. for loss of income) and that the aforesaid payments referred to above were paid to the plaintiff in full and final settlement of all claims "and accordingly neither the plaintiff or any other party purporting to bear the risk will be prevented from claiming such damages as a result of the ne bis in idem rule". However, it is clear from the correspondence between the parties on 4 December 2015 that there was no such agreement. Before the payments were made the following year, the plaintiff indicated in clear terms to the defendant that it would not accept the payment in full and final settlement of all its claims and in particular its claim for loss of income. This was conveyed to the defendant's attorneys in an e-mail dated 4 December 2015. On the same day the defendant responded through its attorneys that the plaintiff is not entitled to claim for loss of income and raised the defence of "force major" and referred to the fact that the plaintiff did not "ask for R2 million insurance" per tele-handler On 14 December 2015 the plaintiff through its attorney warned the defendant that "the longer it takes to resolve the matter, the larger our client's claim will be for loss of income."

19. In paragraph 7 of the pre-trial minute signed by the respective attorneys of the parties, the following issues were listed as issues to be decided by the court:

"a. That the Plaintiff has the necessary locus standi to issue summons and what the plaintiff's status is. The defendant has denied the name and the status of the plaintiff being a close corporation;

b. that the plaintiff trades in the rental of support equipment to the film industry, such equipment to include telehandler machines;

c. that the plaintiff was the owner of two Manitou MRT2150 telehandlers with serial numbers 175821820978 and 750984;

d. that the plaintiff bore the risk in respect of the said telehandlers;

e. the allegations in respect of the agreement between the plaintiff and the defendant as set out in paragraph 9, 9.1 - 9.8 of the plaintiff's particulars of claim;

f. that the telehandlers were in a good and operational condition;

g. that the telehandlers could be utilized by the plaintiff in his business by renting same out at a rental of R13,445. 00 per day and that the telehandlers were delivered to the defendant to be transported from Port Elizabeth to Cape Town;

h. that the defendant paid out costs to repair the telehandler which was damaged on the 7th of April 2016;

i. that the plaintiff has suffered damages and what the amount of damages were in respect of the telehandlers which were respectively repaired and or replaced and which could not be utilized during certain periods;

j. that the one telehandler was transported and damaged when it fell off the defendant's vehicle during transportation thereof and the other telehandler was damaged during the process of loading same onto the defendant's vehicle and that these incidents were caused by the negligence of the defendant and or his employees;

k. that the aforesaid telehandlers could not be used and that the plaintiff was deprived of the use thereof for certain periods before a replacement telehandler could be delivered the plaintiff and that the plaintiff suffered loss of income for that period and what the extent of the damages so suffered were;

l. that the damages suffered by the plaintiff were in accordance with the expert's report as set out in the Notice in terms of Rule 36(9)(b);

m. whether the plaintiff is prevented for claiming damages as a result of the ne bis idem rule;

n. whether the insurance cover of R1,000,000 per vehicle/telehandlers for goods in transit excludes the plaintiff from issuing claims in respect of loss of income."

20. Despite the aforesaid list, many of which items pertain to the quantum of damages, the main issue left for determination in this trial

is whether the plaintiff is entitled to additional damages, i.e. consequential damages over and above those of the replacement costs and repairs to the two tele-handlers and beyond the amount of R1 000 000.00, which the defendant set as the maximum amount that could be claimed by the plaintiff.

21. Mr Pieter Le Roux, the plaintiff's financial manager explained, with reference to several documents, such as the purchase contracts, applications for foreign currency and tax clearance were contained in the plaintiff's trial bundle, that the plaintiff had indeed purchased the two tele-handlers from the entities or persons referred to in the particulars of claim and established that it was the owner. Mr Plotz, the main member of the plaintiff, a close corporation, had negotiated the terms of the agreement with Corinna Wild. Mr Le Roux also explained that it was cheaper to buy the tele-handlers on auction overseas rather than purchase them locally.

22. The defendant disputed that the plaintiff was the owner of the tele-handlers and thus had no locus standi to bring the present action. As stated, Mr Le Roux provided all the necessary documentation to prove the ownership. Mr Plotz of the plaintiff negotiated the terms of the contract with Ms Wild who was the plaintiff's agent. Mr Le Roux had ample knowledge of the financial affairs of the plaintiff, sufficient to give evidence in this regard and his testimony was supported by the evidence such as correspondence between Mr Plotz and Ms Wild pertaining to the agreement with the defendant. According to Mr Le Roux he processed all documents including the terms and conditions of the contract. The plaintiff accordingly had the necessary locus standi to institute the present proceedings.

Legal Principles

23. If the owner of the goods can prove that the carrier was negligent in exposing the goods to risk, the carrier will not escape liability. The standard of care demanded from a carrier depends on whether the carriage was gratuitous of for read. In the latter case the carrier is liable for ordinary negligence. The onus is on the carrier to prove the absence of fault[1] .

[1] Wille at 974-5 and the cases cited by the authors

24. The Court held as follows in *Hall-Thermotank Africa Ltd v Prinsloo*[2] :

> 'Once the carriage is for reward, there is an absolute liability on the part of the carrier to ensure that the goods which he receives are delivered undamaged. If they are delivered in a damaged condition, he must compensate therefor, as an absolute liability, unless he can show (and the onus in this regard is on him) that the damage occurred through damnum fatale or vis major, in other words, that there was a superior force over which he had no control, which cause the loss, or the loss inevitable and unavoidable from the point of view of a reasonable man.'

25. A defaulting party's liability is limited to (a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract are ordinarily in law regarded as too remote to be recoverable unless in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from the breach[3].

26. In the present matter the defendant is not in a position to dispute that it was a carrier for goods for reward by land and that through its negligence or the negligence of its employees the two tele- handlers were substantially damaged. The fact that both tele- handlers were damaged when carried by different vehicles and both fell off the load beds onto which they were loaded, strongly suggests that neither were properly affixed to the vehicles that had to transport them to their destination. Clearly the defendant had breached the carriage contract. As a result of the aforesaid breach of contract the tele-handlers could not be used for the purpose for which they were purchased and it follows logically, that the plaintiff was deprived of income during the time they were either repaired or replaced, whichever the case may be.

[2] 1979 (4) SA 91 at 93H

[3] Shatz Investments (Pty) Ltd v Kalovyrnas 1976 (2) SA 545 (AD) at 550 followed in Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A)

Mr Le Roux confirmed that at the time the tele-handlers were in demand in the film industry and rented out by the plaintiff to earn income. This type of loss must have been contemplated and reasonably foreseen when the carriage contract was concluded by the parties.

27. In *Shatz,* the respondent successfully sued the appellant for loss of profit (or income) and goodwill raising from the appellant's breach of a lease agreement. The respondent conducted a bakery business on premises leased from the appellant who undertook in the lease agreement between the parties, not to lease premises in the same building to any other purveyor of food stuffs. In breach of the lease, the appellant concluded a lease agreement with another tenant who indeed sold food stuffs. The Court found that the respondent had suffered a loss of profits and goodwill as a result of the appellant's breach of the lease and that loss was not too remote to have been contemplated by the parties when the lease agreement was concluded between them. In my view, if similar reasoning is applied to the present case, it cannot be said that the plaintiff's loss of income was too remote to have been contemplated by the parties when they concluded the agreement. The defendant did not plead remoteness in any event. It also did not present evidence to the effect that there was no causal connection between the defendant's negligence and the plaintiff's loss of income or revenue, whereas the plaintiff did.

28. **The fact that the defendant was only insured for damages arising from damage to the tele-handlers to a maximum of R1 million and that it was noted in the agreement, does not preclude the plaintiff from claiming for a loss of income arising from the defendant's breach of the carriage contract. The insurance contract was between the defendant and Santam and does not affect the plaintiff's claim against the defendant, irrespective of what Mr Plotz had instructed Ms Wild regarding cover. It is also significant that there is a substantial difference of almost R250 000,00 between R1 million and the actual amount paid to the plaintiff in respect of one of the telehandlers. The defendant and /or its insurer intended only to compensate for repairs and replacement costs and no other damages. If there was such a limitation to the defendant's liability, there ought to have been a clause in the agreement that effect. The carriage contract does not contain any such an exclusion or limitation clause.**

29. According to Mr Le Roux, the first tele-handler that had to be replaced was purchased for €105 000,00 (before shipping, clearance and transport costs), which is in excess of R1 million, which excess was absorbed by the plaintiff in accordance with the GIT policy. This policy, according to Mr Le Roux, only provides cover in respect of actual damage to the goods transported, and not consequential damages. This evidence was not controverted by any evidence from the defendant and as referred to above, the policy specifically excluded such damages. It follows that the defendant is precluded from relying on its agreement with its own insurer to escape liability from damages caused by it to the plaintiff where such damages are not covered by the insurance policy in question.

30. In the circumstances and for the reasons set out above, it is concluded that the plaintiff has succeeded in proving that the defendant is liable for the plaintiff's consequential damages, in the form of a loss of income, sustained as a result of the defendant's breach of the carriage contract concluded between the parties.

31. In the circumstances the following order issue:

1. It is declared that the defendant is liable to the plaintiff for consequential losses suffered by it arising from the two machines on 15 November 2015, when the plaintiff's tele- handlers were damaged, whilst being transported from Port Elizabeth to Cape Town.

2. The quantification of the Plaintiff's damages stand over.

3. The defendant is to pay the Plaintiff's cost of suit.

SIEMENS (PTY) LTD v ESKOM HOLDINGS (SOC) LTD

Non-compliance with a material condition in an invitation to tender is an irregularity in the tender process itself.

Judgment given in the Gauteng Local Division, Johannesburg, on 16 August 2021 by Wilson AJ

Siemens (Pty) Ltd competed, unsuccessfully, for a 36-month contract to perform control and instrumentation maintenance at Camden Power Station in Mpumalanga. The work was put out to tender by Eskom Holdings (Soc) Ltd. Eskom chose to award the work to Senta Square (Pty) Ltd.

The tender process commenced on 18 September 2018, when Eskom issued an invitation to tender to undertake the work for the 36 months between 1 March 2019 and 28 February 2022. At that time, Siemens had been carrying the work out on Eskom's behalf for at least 12 years, having itself successfully tendered for the work on four previous occasions.

At the first stage of the tender process initiated on 18 September 2018, Siemens, together with everyone else who responded to that tender, was disqualified after failing to achieve an adequate technical evaluation score. The reason for Siemens' low technical evaluation score was that the majority of the documents presented to certify Siemens' technical capacity were not themselves certified as true copies of the originals.

On the basis that no-one was able to meet its technical evaluation criteria, Eskom cancelled the first tender process. On 9 November 2018, it started the process afresh by reissuing an invitation to tender in substantially the same terms as the invitation that initiated the first tender process.

Siemens tendered again. This time, it attained a high score at the technical evaluation stage, but was disqualified again, because it failed to demonstrate that it had met the 'prequalification criteria' specified in the invitation to tender.

The work was eventually awarded to Senta Square. Senta Square commenced the work on 1 March 2019.

Siemens sought to review its disqualification from the second tender process. Siemens based its review inter alia, on the grounds that the prequalification criteria which Eskom said Siemens had failed to meet were not, in fact, prequalification criteria at all, or had, at the very least, been wrongly applied if they were.

Held—

Section 6 (2) (b) of the Promotion of Administrative Justice Act (no 3 of 2000) empowers a court to set aside administrative action taken despite non-compliance with a 'mandatory and material procedure or condition' specified in an empowering provision. In *Allpay consolidated Investments v Chief Executive Officer, SASA* 2014 (1) SA 604 (CC), it was held that an invitation to tender forms a critical part of the empowering framework within which tender awards are made. Non-compliance with a material condition in an invitation to tender is accordingly an irregularity in the tender process itself.

In the present case, the non-compliance was clear. The invitation to tender required that only one out of the three B-BBEE prequalification criteria had to be met. Siemens met one out of three of those criteria, but was disqualified for failing to meet at least one of the other two. This was at odds with the conditions set in the invitation to tender itself. For that reason, the decision to disqualify Siemens lacked, in addition, the necessary rational connection to the purpose for which it was taken. This was contrary to 6(2)(f)(ii)(aa) of PAJA. The decision to disqualify Siemens was ostensibly taken to conform to the prequalification criteria. But, on their face, those criteria did not bear the meaning that Eskom ascribed to them. There was accordingly no basis on which the criteria could rationally justify Siemens' disqualification from the tender process.

There could be no doubt that these irregularities were material to the second tender process. They involved the proper application of critically important social transformation goals. When Eskom invites a tender, it does so not on its own behalf, but on behalf of the public at large. The public has a right to expect that public procurement social transformation goals embodied in B-BBEE criteria are clearly stated, and rationally and lawfully applied. In this case, that did not happen.

Eskom's award of the tender to the second respondent was therefore unlawful.

Advocate J Wasserman SC instructed by Pinsent Masons Inc, Johannesburg, appeared for the applicant

Advocate T Govender instructed by FY Renqe Inc, Johannesburg, appeared for the respondent

Wilson AJ:

1 The applicant ('Siemens') competed, unsuccessfully, for a 36-month contract to perform control and instrumentation maintenance ('the work') at Camden Power Station in Mpumalanga. The work was put out to tender by the first respondent ('Eskom'). In the end, Eskom

chose to award the work to the second respondent ('Senta Square').

2 The issue in this application is whether Eskom did so pursuant to a lawful tender process. That tender process commenced on 18 September 2018, when Eskom issued an invitation to tender to undertake the work for the 36 months between 1 March 2019 and 28 February 2022. At that time, Siemens had been carrying the work out on Eskom's behalf for at least 12 years, having itself successfully tendered for the work on four previous occasions.

3 However, at the first stage of the tender process initiated on 18 September 2018 ('the first tender process'), Siemens, together with everyone else who responded to that tender, was disqualified after failing to achieve an adequate technical evaluation score. The reason for Siemens' low technical evaluation score was apparently that the majority of the documents presented to certify Siemens' technical capacity were not themselves certified as true copies of the originals.

4 Ostensibly on the basis that no-one was able to meet its technical evaluation criteria, Eskom cancelled the first tender process. On 9 November 2018, it started the process afresh by reissuing an invitation to tender in substantially the same terms as the invitation that initiated the first tender process.

5 Siemens tendered again. This time, it attained a high score at the technical evaluation stage, but was nonetheless disqualified again, apparently because it failed to demonstrate that it had met the 'prequalification criteria' specified in the invitation to tender. It is the nature, meaning, and application of these criteria that lie at the centre of this case.

6 Siemens having been disqualified, the work was eventually awarded to Senta Square. Senta Square commenced the work on 1 March 2019. Its contract for the work expires on 28 February 2022.

7 In its founding affidavit, Siemens launched a wide-ranging attack on every stage of the tender process. It sought to review its disqualification from the first tender process ('decision one'), the cancelation of the first tender process ('decision two'), and its disqualification from the second tender process ('decision three').

8 By the time the matter came before me, however, Siemens had abandoned its attack on decisions one and two. Mr. Wasserman, who appeared for Siemens, instead focussed his fire on decision three.

9 Decision three was assailed on essentially two grounds. The first was that the prequalification criteria which Eskom said Siemens had failed to meet were not, in fact, prequalification criteria at all, or had, at the very least, been wrongly applied if they were. The second ground was that Senta Square had been unfairly advantaged in the second tender process, because its technical score (which was initially very low, and, in any event, much lower than Siemens' score) was irrationally adjusted upwards after it emerged as the strongest performer on various Broad-Based Black Economic Empowerment ('B-BBEE') criteria, against which the parties' bids were also evaluated.

10 On the view I take of this case, it is only necessary for me to address Siemens' first ground. It is, accordingly, to the nature and application of the prequalification criteria in the second tender process that I now turn.

The prequalification criteria

11 The invitation to tender in the second tender process specified that tenderers would be required to meet a series of prequalification criteria. Tenderers were required to have a 'stipulated minimum B-BBEE status level'; to be an 'exempt micro enterprise' or 'EME'; to be a qualifying small enterprise or 'QSE'; or to undertake to subcontract at least 30% of the work to EMEs or QSEs in various categories.

12 These prequalification criteria are identical, in all material respects, to the criteria specified in section 4 of the Preferential Procurement Regulations, 2017 ('the Regulations') made in terms of the Preferential Procurement Policy Framework Act 5 of 2000 ('the Procurement Act'). Section 4 of the Regulations requires Eskom, if it intends 'to apply pre-qualifying criteria to advance certain designated groups' to specify this in its invitation to tender, setting out which prequalification criteria will govern the types of tenderers who will be permitted to respond to the tender.

13 In other words, if it seeks to impose prequalification criteria, Eskom must say what those criteria are. It must specify whether it will consider proposals from tenderers possessed of a B-BBEE status level, or from QSEs and EMEs, or from tenderers who undertake to subcontract at least 30% of the work to QSEs or EMEs, or, indeed, some rational combination of these categories of potential tenderers.

14 There was some debate during argument about whether Eskom

could rationally require a tenderer to meet all of these criteria cumulatively. Ms. Govender, who appeared for Eskom, submitted that the Regulations could appropriately be read to allow Eskom to require a tenderer to have an acceptable B-BBEE status level, and to be an EME or a QSE, and to undertake to subcontract at least 30% of the work to other EMEs or QSEs.

15 I am not convinced that this is the correct interpretation of the Regulations, but that is not, ultimately, an issue that I have to decide.

16 This is because Eskom itself expressed the prequalification criteria disjunctively in its invitation to tender. It stated that tenderers would only have to meet one of the three prequalification criteria in order for their bids to be considered. This is plain from the insertion of the words 'and/or' between each of the prequalification criteria specified at paragraph 3.11 of the invitation to tender.

17 Mr. Wasserman spent some time trying to persuade me that the prequalification criteria were never really applicable at all. His argument was not without merit. Eskom's invitation to tender is far from a model of clarity.

Page 3 of the invitation states that tenders would be evaluated by reference to the prequalification criteria 'if applicable'. Clause 3.11 at page 8 of the invitation sets out the prequalification criteria, but the words 'not applicable' appear in square brackets alongside them.

18 At page 13 of the document, however, the prequalification criteria reappear.

Confirmation that they have been met is classified as a 'mandatory returnable'. If evidence that they have been met is not submitted, it is declared, in boldface red ink, that 'the tenderer will be disqualified'. Page 55 of the invitation states that Eskom may cancel any contract flowing from the tender process if it turns out that a tenderer's 'B-BBEE status level' has been 'claimed or obtained fraudulently'. Page 5 of the invitation declares that a 'tender that fails to meet any prequalifying criteria stipulated in the tender documents is an unacceptable tender'. That statement refers back to section 4 (2) of the Regulations. Furthermore, a 'Target Setting Report', which accompanied the invitation, requires the submission of a letter of intent that demonstrates a commitment to subcontracting 30% of the work to an EME or QSE which is 'at least 51% owned by black people living

in rural or under developed areas or townships'.

19 Notwithstanding the sometimes confusing nature of the tender documents, when evaluated as a whole, they appear to me to evidence Eskom's intention to apply the prequalification criteria set out in clause 3.13. The words 'not applicable' in square brackets are best explained as a formatting error, and the words 'if applicable' at page three of the invitation do not specifically preclude the inference that the prequalification criteria are, in fact, applicable.

20 Although it was open to Mr. Wasserman to argue that the tender process should be set aside for vagueness (*Allpay consolidated Investments v Chief Executive Officer, SASA* 2014 (1) SA 604 (CC) ('*Allpay*'), para 87), he did not do so. I think that was wise. On a fair reading of the documents as a whole, the fact that Eskom intended the prequalification criteria to apply to the tender is clear enough.

21 Accordingly, Siemens had to meet the prequalification criteria, as they appeared on the invitation to tender. It follows that, on Eskom's own disjunctive construction of how those criteria would apply, if Siemens can demonstrate that it met any one of the three pre-qualification criteria, then it was incorrectly disqualified from the second tender process.

Did Siemens meet the prequalification criteria?

22 There is no dispute on the papers that Siemans met at least one of the three prequalification criteria – the requirement to commit to subcontract 30% of the work to qualifying QSEs and EMEs. This is recorded in Eskom's Supplier Development and Localisation Evaluation Report, which was compiled as part of the tender evaluation process. The relevant part of this report is quoted at paragraph 6.8.4 of Siemens' supplementary founding affidavit, to which the report is itself attached. There, Eskom accepts that Siemens 'does commit to subcontracting' at least 30% of the work to qualifying QSEs and EMEs. Nonetheless, the report concludes, Siemens' 'B-BBE status and level' does not 'allow them to tender for this work'.

23 At paragraph 242 of its answering affidavit, Eskom baldly admits these allegations.

24 It follows that Eskom accepted that Siemens had met at least one of the three prequalification criteria.

25 Eskom nonetheless concluded that this was insufficient to meet the

criteria as they were set out in the invitation to tender. But that was erroneous.

26 There was some debate in argument about whether the subcontracting commitment had to be embodied in a special letter of intent, which, it was contended, Siemens had not submitted. It is true, as Ms. Govender argued, both that a letter of intent was referred to in the tender documents, and that Siemens did not submit a document that styled itself as a letter of intent. But this could hardly be material, given that the purpose of the letter of intent was to satisfy Eskom that Siemens really had committed to the requisite level of subcontracting. Eskom flatly admits on the papers that it was satisfied of this fact. It is in any event far from clear on the invitation to tender that the letter had to follow a specific format, or be submitted separately and independently from other tender documents, much less that the failure to do so could reasonably have been treated as fatal to an otherwise compliant tender.

Review under the Promotion of Administrative Justice Act 3 of 2000 ('PAJA')

27 Siemens assailed its disqualification from the second tender process on a wide range of grounds specified in section 6 of PAJA. However, it is only necessary for me to mention two of these grounds.

28 Section 6 (2) (b) of PAJA empowers a court to set aside administrative action taken despite non-compliance with a 'mandatory and material procedure or condition' specified in an empowering provision. It is clear, because the Constitutional Court tells us so, that an invitation to tender forms a critical part of the empowering framework within which tender awards are made (*Allpay*, para 58). Non-compliance with a material condition in an invitation to tender is accordingly an irregularity in the tender process itself.

29 **Here the non-compliance is clear. The invitation to tender required that only one out of the three B-BBEE prequalification criteria had to be met. Siemens met one out of three of those criteria, but was disqualified for failing to meet at least one of the other two. This is at odds with the conditions set in the invitation to tender itself.**

30 For that reason, the decision to disqualify Siemens lacked, in addition, the necessary rational connection to the purpose for which it was taken. This is contrary to 6 (2) (f) (ii) (aa) of PAJA. The decision

to disqualify Siemens was ostensibly taken to conform to the prequalification criteria. But, on their face, those criteria did not bear the meaning that Eskom ascribed to them. There was accordingly no basis on which the criteria could rationally justify Siemens' disqualification from the tender process.

31 There can be no doubt that these irregularities were material to the second tender process. They involve the proper application of critically important social transformation goals. When Eskom invites a tender, it does so not on its own behalf, but on behalf of the public at large (Allpay, para 56). The public has a right to expect that public procurement social transformation goals embodied in B-BBEE criteria are clearly stated, and rationally and lawfully applied. In this case, that did not happen.

Remedy

32 Siemens' disqualification from the second tender process was accordingly unlawful. That tainted the tender process as a whole, and rendered Senta Square's appointment unlawful and invalid.

33 However, that is not the end of the matter. There is a fairly sharp separation in law between the legality of the decision to award the contract to Senta Square, and the remedy that ought to be granted for that illegality.

34 Given the present fragility of South Africa's power distribution system, I am loath to simply set aside the tender process without some sense of what effect, if any, that would have on Camden Power Station and its productive capacity. I am alive to the fact that the contract awarded to Senta Square pursuant to the tender has only just over six months left to run. I need to know how, on the facts, that might affect any order I make to require the tender process to be rerun.

35 I also am sensitive to the fact that Senta Square has not, to date, participated in these proceedings. This is no doubt because of the identity of its interests with those of Eskom, and the fact that Eskom was clearly better placed than Senta Square to defend the tender process. However, now that the tender process has been found to have been unlawful, Senta may well have a renewed interest in participating in these proceedings. It should clearly be given an opportunity to be heard at the remedy stage.

36 Both Mr. Wasserman and Ms. Govender accepted that there is very

little on the papers as they stand that would assist me in crafting a just and equitable remedy. They accepted that, if I were to find for Siemens on any of its grounds of review, further argument and evidence would be necessary to determine a such a remedy.

37 Accordingly, I will issue an order declaring the award of the tender to Senta Square to have been unlawful. However, I will suspend that declaration pending the determination of a just and equitable remedy under section 8 of PAJA. The effect of this order is accordingly that, pending the determination of that remedy, Senta Square and Eskom must continue to perform on the terms of their agreement to carry out the work. How, if at all, that will change before the expiry of the agreement must await my judgment on the remedy to be granted.

38 For all of these reasons, I make the following order –

1. It is declared that the first respondent's award of the tender for control and instrumentation maintenance at Camden Power Station in Mpumalanga between 1 March 2019 and 28 February 2022 to the second respondent was unlawful.

2. The declaration made in paragraph 1 of this order is suspended, pending the determination of a just and equitable remedy.

3. The parties are directed to furnish factual information on affidavit, and further written submissions, on the just and equitable remedy to be granted in light of this judgment, by no later than 3 September 2021.

4. The application is set down on 13 September 2021 for a further hearing on the determination of a just and equitable remedy.

5. The first respondent is directed to pay the applicant's costs to date.